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Indian Marine Insurance: Insured Duties from Utmost Good Faith to Fair Presentation

Daniel Stein*

**Assistant Professor and Research Fellow, Center for ADR, Jindal Global Law School, OP Jindal Global University (Sonipat Narela Road, Near Jagdishpur Village, Sonipat, Haryana 131001, NCR of Delhi, India) https://orcid.org/0000-0001-6309-1171*

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ABSTRACT

This paper considers how a recent change to English Marine Insurance Law could have impacted recent cases in India. Essentially, all marine insurance contracts in India require utmost good faith in all representations by either party. This was the standard in England until a recent amendment modified the standard to one only requiring a "fair presentation" of all material facts. This paper analyzes four Indian cases where the higher standard was in question and asks if or how those cases would have been decided had this different standard been in place. It uses that analysis to make suggestions about the future of Marine Insurance Law in India.

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KEYWORDS

marine insurance, uberrimae fidae, utmost good faith, fair presentation, British law, Indian law, contracts

Introduction

In order to obtain marine insurance policy, Indian law requires a contract based on the principle of utmost good faith, or *uberrimae fidae*, with the remedy of avoidance by either party if anything less is provided. This standard was based on the British Marine Insurance Act of 1906. Like most modern maritime law, it originated in Great Britain, and was eventually adopted across the world. In 2015, the UK Parliament passed amendments to the Marine Insurance Act. In response to concerns by assureds that insurers could hide behind the failure to disclose unrelated information to void a claim as well as concerns by insurers that they often received too much information from assureds over-disclosing information, this *uberrimae fidae* standard was modified to only require a more streamlined 'duty of fair presentation' of the risk. Assureds also hoped this would remove some insurance company immunity by giving them some burden to research and verify some facts material to the risk if there was reason to believe something was amiss. In addition, remedies were changed from strict avoidance to one where, in some cases, a contract could be rewritten to acknowledge the true risks and allow coverage so long as updated premiums were paid. Since this change only recently came into force, there are few cases to examine its impact or how judges have interpreted these new standards. With India and most other countries still using the *uberrimae fidae* duty, the weight of Britain making such a shift cannot be ignored. This article examines Indian Marine Insurance cases decided under the *uberrimae fidae* standard to determine if they would have had a different outcome under the different standard. It concludes by discussing the potential impact it could have on India's marine insurers and assureds.

1. British Law

For decades prior to the enactment of the Marine Insurance Act, 1906, British common law defined the duty as one where 'the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured' (Bates *v* Hewitt, 1866). Essentially, the underwriter has to rely on information solely within the knowledge of the assured, and without full awareness of the facts, the insurer cannot properly assess the risk that will be assumed. When this common law was codified in 1906, this clause provided that, '[a] contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party' (UK Marine Insurance Act [UKMIA], 1906). Section 18(1) continued with the disclosure duty, adding that "the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him' (UKMIA, 1906). Section 20 added that 'every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true' (UKMIA, 1906).

In order to void a contract for a breach of *uberrimae fidae*, an insurer must show that the misrepresentation was material and also that it induced the insurer to either enter into the contract or write the contract with different terms (Pan Atlantic Insurance Co Ltd *v* Pine Top Insurance Co Ltd, 1994; Assicurazioni Gerali SpA *v* Arab Insurance Group, 2003) Materiality is an objective test (UKMIA, 1906). English common law courts would ask whether the withheld information would have a 'mere influence' over the extending of coverage (North Star Shipping Ltd *v* Sphere Drake Insurance plc, 2006). The second prong of inducement is a subjective test, focused on the actual insurer, requiring the insurer to show that 'but for' the misrepresentation, they personally would not have issued a policy either at all, or on the terms that were actually offered (Assicurazioni Gerali SpA *v* Arab Insurance Group, 2003).

In 2015, passage of the Insurance Act modified this duty of *uberrimae fidae* into one of fair presentation. (UKMIA, 2015) Section 3(3) defines this duty as one:

(a) which makes the disclosure required by subsection (4),

(b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and

(c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith (UKMIA, 2015).

Subsection (4) provides disclosure requirements:

(a) disclosure of every material circumstance which the insured knows or ought to know, or

(b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing thosematerial circumstances (UKMIA, 2015).

Section 4 then "provides for what an insured knows or ought to know for the purposes of section 3(4)(a)" (UKMIA, 2015). As such, "[a]n insured who is an individual knows only – (a) what is known to the individual, and (b) what is known to one or more of the individuals who are responsible for the insured's insurance" (UKMIA, 2015). Section 5 details specifics about what constitutes the knowledge of the insurer, and Section 6 deals with circumstances when an individual specifically avoids knowledge but merely has suspicions (UKMIA, 2015).

The Supplementary provisions in Section 7 provide specifics about fair presentation and 'circumstances:'

(1) A fair presentation need not be contained in only one document or oral presentation.

(2) The term "circumstance" includes any communication made to, or information received by, the insured.

(3) A circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.

(4) Examples of things which may be material circumstances are –

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

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

(c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question." (UKMIA, 2015)

Remedies for the breach are covered in Section 8 by first addressing the inducement question, noting that, "(1) [t]he insurer has a remedy against the insured for a breach of the duty of fair presentation only if the insurer shows that, but for the breach, the insurer – (a) would not have entered into the contract of insurance at all, or (b) would have done so only on different terms" (UKMIA, 2015). While specific remedies are only referred to in a later schedule, the rest of the section explains the "qualifying breach" standard, where insurer can show that a breach was deliberate or reckless when the insured "knew that it was in breach of the duty of fair presentation, or (b) did not care whether or not it was in breach of that duty" (UKMIA, 2015). This is expanded in Part 4, Section 12, which details remedies for fraudulent claims, including the insurer not being liable to pay the claim, recovery of any sums paid in respect of the claim and the option to return premiums due to early termination of the contract at the date of the fraudulent act (UKMIA, 2015). Section 14 then explicitly does away with uberrimae fidae, declaring that "[a]ny rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished" (UKMIA, 2015).

As these changes were enacted only recently, British courts have yet to provide much insight on how the amendments should be interpreted. The first case to be decided under the new law dealt with a director of an insured company not revealing that criminal charges were brought against him in a foreign jurisdiction (Berkshire Assets *v* AXA Insurance, 2021). The court first discussed whether or not the actions or the charges involved "deceit or dishonesty," to determine whether the insurer's awareness of the crime itself would have put the insurer on notice to further investigate the nature of the connection between the allegations and the risk to be insured (Berkshire Assets v AXA Insurance, 2021; North Star Shipping v Sphere Drake Insurance, 2005). The court's ruling, however, was decided primarily by answering the question of materiality: finding that coverage would never have been extended had the crimes been disclosed (Berkshire Assets *v* AXA Insurance, 2021). Thus, there was no opportunity for the court to examine the contract-changing power provided by the 2015 Act.

Early criticism of the impact of the changes has also been limited. In the field of maritime commerce, the legal changes are seen as giving more power to the intention of the parties, with the major benefit coming "if the parties intend to safeguard their contractual relationship, [then] this amendment can be characterised as revolutionary and beneficial to both parties." (Boviatsis, 2023) Outside of Marine Insurance, these changes have also been welcomed by personal injury lawyers as beneficial to both sides due to its legal simplifications, with plaintiff's attorneys also appreciating the removal of the draconian remedy of avoidance, while defense lawyers are hoping that "courts are likely to be more willing to adopt [contract modification] in cases where under the old law they would have strained hard to reject the insurers' claim to avoid." (Medd, 2020).

2. Indian Law

India's Marine Insurance Act, 1963, states explicitly that "[i]nsurance is *uberrimae fidei*. A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party." (India Marine Insurance Act [IMIA], 1963) India has specialized courts for certain matters, and since 1986, cases against insurers have been heard in specific Consumer Protection Redressal fora, with relatively few appeals reaching the High Court (India Consumer Protection Act, 1986). Two 2008 High Court marine insurance cases, Rajaram NS Bandekar v Oriental Insurance (2009) in Bombay and Sea Lark v United India Insurance (2008) in the Supreme Court, were decided on events occurring prior to 1986 and thus were not originally heard as consumer protection cases. More recent cases in 2011 and 2021 did begin in consumer redressal fora.

a. Contship Container Lines Ltd v D.K. Lall and Ors. (2010)

An Indian exporter received two orders from Spain: 121 packages of iron furniture items, and 1 package of miniature paintings (Contship Container Lines Ltd v D.K. Lall and Ors., 2010). The packages were cleared by customs and loaded into one container in Jodhpur then trucked to Bombay and loaded onto the CMBT Himalaya, owned by Contship. Lall purchased a marine cargo/inland transit insurance policy. The package of miniature paintings never arrived and Lall's claims were denied by both Contship and Lall's insurers. Lall's claim began in the National Consumer Disputes Redressal Commission. The insurer argued that because Lall represented the insurance would cover a C.I.F. contract, Lall would maintain ownership of the goods until it is delivered to its final destination. However, the contract of sale was for goods sent on F.O.B. basis. As such, Lall would no longer have an insurance interest in the package and could not make a claim on the policy. The Commission agreed that this was a misrepresentation but said the contract would instead be void because it was a material misrepresentation of fact in violation of the duty of *uberrimae fidae*.

On appeal, the Supreme Court first considered the potential that Lall retains an insurable interest. While they do find the F.O.B. sale ended the buyer's rights when the goods were delivered to Jodhpur, they do at least consider the possibility that a seller could retain a lien on an item if unpaid. The Court affirmed the Commission's ruling "on the ground that the shipper had not observed utmost good faith while obtaining the insurance cover."

Amending the *uberrimae fidae* standard would change the Court's analysis of this case, and potentially the outcome. Under the new rules, the Court would first proceed by asking if the misrepresentations were material. Materiality is a subjective test of whether it could influence a hypothetical insurer, and an objective test of whether it did influence the insurer in the specific case (Assicurazioni Gerali SpA v Arab Insurance Group, 2003). It is certainly possible that the specific owner of cargo or a vessel is immaterial to the risk. It could also be possible that a prudent insurer would weigh a risk differently if they knew the true owner, and certainly in some cases they would choose to not extend any policy at all. Similarly, insurers would provide different coverage for risks extending all the way to the buyer, rather than just to the side of the ship for transit. Insurers in this position would have to testify if they would have still extended an C.I.F. contract and under what terms.

Here, if Lall would still have received insurance for a C.I.F. shipment but only on different terms, it is possible he could have collected what would be owed under such a policy, though the insurer would argue they would not have extended that policy at all. The National Commission found that the carrier misdelivered the package of miniature paintings and held them liable for US $1800 under India's Carriage of Goods by Sea Act, 1925, but the High Court

reduced this to 666.67 special drawing rights (Rs 47,810 in March 2010) as compensation because the value and nature of the goods was undeclared on the bill of lading (Contship Container Lines Ltd v D.K. Lall and Ors., 2010). Considering the full value of the goods was reported to be Rs 39,23,225, this remaining amount could be collected from the insurer by the insured party who maintained an insurable interest – something that Lall did not have with the FOB sale. More testimony and evidence would be necessary to determine whether or not Lall would still receive the C.I.F. coverage, and in this case the insurers seemed to have a good case that such coverage would not be available.

b. Rajaram NS Bandekar v Oriental Insurance (2009)

Bandekar's case began in before the Consumer Protection Act, when, in 1986, when allegedly created a fake sale of his ship, the M.V. Nitin to a colleague for the purpose of renaming and reinsuring a previously uninsurable ship that suffered an additional collision before it mysteriously sank while docked (Rajaram NS Bandekar v Oriental Insurance, 2009). The insurers voided coverage. After dispensing with contractual questions between the buyer of the vessel and the dock where the incident occurred, lower courts determined that misrepresentations related to the true owner of the vessel, its seaworthiness, and its manning as well as nondisclosures related to the starting date of the flooding, that it had started sinking before the premium was paid, and that it had been in fact rescued only a week before officially sinking. The Bombay court first holds that mere nondisclosure of specific ownership of goods is immaterial so long as there is an insurable interest, but that "[w]here there has been a suppression of fact, acceptance of the policy by an officer of the insurance company would not be binding on it. (emphasis supplied)." Suppressing the fact that the vessel was ongoing a major overhaul and that it was not seaworthy was enough to void coverage.

Under the new standard of fair presentation, the ownership issue could allow for changing the contract and updating the premium. Insurers could still argue that if the true owner were known, they would not have extended a policy and thus hiding the true owner would have resulted in avoidance. However, in this case, the change of ownership combined with the circumstances of the loss would certainly have been a denial of coverage under any standard. The duty of fair presentation, like uberrimae fidae, continues beyond the formation stage of the contract. Material misrepresentations about the nature of the loss, as occurred here, would continue to allow insurers to void coverage.

c. Sea Lark v United India Insurance (2008)

In 1979, the vessel *Sea Lark* was hypothecated to Canara Bank, requiring the bank to insure the vessel. (Sea Lark v United India Insurance, 2008) The Bank contacted a representative at United India Insurance who extended coverage but left several blank questions on the policy form, including answers related to the qualifications of the master, his work history, whether he lives aboard the vessel, and who would otherwise be in charge." The fishing vessel received a policy on 12 Apr. 1979, and renewed it the next year. The vessel sunk in July 1980. Insurers argued the material misrepresentations, along with the related unseaworthiness of activities without a licensed captain, allowed them to void coverage. A lower court however found the Bank not responsible for those errors, though an appeal was allowed by the Division Bench of the Madras High Court. The Supreme Court ruled that breach of *uberrimae fidae* voids the contract, though they did note the problem of providing the insurer relief despite the fact that they never should have extended the policy in the first place.

This case would become more interesting if Sea Lark could prove they fairly presented the risk. There is an evidentiary dispute about some oral representations, but no information

as to whether there actually is a master living aboard the vessel even though the form is blank regarding that point. If there was a captain and this was represented orally then there could have been a fair presentation of the risk. Likewise, ship activities without a master would render the vessel unseaworthy and without coverage – regardless of whether this fact was fairly reported. The blank policy application would still be a problem for the bank, but if there was a licensed captain and oral representations, it could allow them to redraw the contract under those new specifics of the captain's identity. It is also possible that the insurance agent's reliance on the oral representations could influence the determination of the materiality of the master's identity.

d. New India Assurance Co. Ltd. v Priya Blue Industries Pvt. Ltd. (2011)

Priya Blue Industries operates India's largest ship-breaking yard in the city of Alang (New India Assurance Co. Ltd. *v* Priya Blue Industries Pvt. Ltd., 2011). As part of their operations, they purchase end-of-life vessels that wait at anchorage until the full moon brings the tides high enough to bring the ship onto the beach for breaking. One such vessel, the *Vloo Arun*, was purchased on 2 June, 1997, insured on 4 June, and suffered a total loss on such a funeral voyage on 9 June. The parties each appointed independent surveyors who both confirmed the loss was suffered because of stranding due to heavy weather, an insured peril, rather than any failures of the vessel which may not have been disclosed or represented to the insurer. The insurers seized on the fact that the vessel only had one working engine and denied coverage, and also disputed whether it was in fact a total loss since it was already slated for breaking. The National Consumer Protection Commission however found that the sole engine fact was disclosed and known to the insurers, and the total loss description was accurate. The only issue on appeal to the Supreme Court was the question of whether or not the ship-breaking yard owner misrepresented the status of the vessel's engines, and the Court followed the clear ruling below that the facts about the engine were disclosed by the assured and known the insurer. This case would not be different under the fair presentation standard, since the information about the vessel provided to the insurers, including the status of the engines, would be enough to satisfy both standards.

e. Elecon Engineering Co. Ltd. vs Rickmers Dubai A Motor Vessel Flying Panamanian Flag Together With Her Hull & Ors (2019)

Elecon placed an order for three windmill blades in April 2004 with Turbowinds NV, based in Belgium, to be shipped on the MV Rickmers Dubai from Antwerp to Mumbai / Nhava Sheva Seaport (Elecon Engineering Co. Ltd. *vs*. Rickmers Dubai A Motor Vessel Flying Panamanian Flag Together With Her Hull & Ors, 2019). During the voyage, the three blades were loaded and carried on the deck of the ship, and following an incident, two of the blades fell overboard and the third sustained serious damage. Elecon sued everyone and settled with all of the parties except for the insurer for an amount representing about half of the cost of their purchase. The insurer, United India Insurance Co. Ltd. maintained that the loss was not covered because "plaintiff did not disclose a material fact before the insurance contract was concluded and that material fact was that the said consignment was carried on deck. The court reviewed Sections 19 and 20 of the Marine Insurance Act and reminded the insurer that they have the burden to prove that "the information regarding loading of the said consignment on the deck was a material fact[, that] if it had been disclosed despite issuing an open cover, defendant would have still refused to cover or cancelled the cover to the said consignment or at least increased the premium payable, and that material fact was known to the assured ... before the contract was concluded." The court then examined the evidence contained in the several bills of lading

and found that the insurer's only witness could not tell the difference between the terms relating to deck storage, and that Elecon never had knowledge their goods were carried on deck. The court ultimately held that the insurers would be liable for the remaining amount due to make Elecon whole, plus interest.

The court here does mention the possibility of an "increased premium payable," so they do appear receptive to the court having a role in rewriting insurance contracts after the fact. This discussion, however, appears related to the open cover policy held by Elecon, which allows them to ship goods under a long term agreement "at fixed rates without limit of sum assured," so that "even if the declaration is missed or loss occurs before advice is given to the insurer, the insured is given protection of the insurance." These policies already allow for modifications in certain circumstances like the facts in this case, where cargo is shipped in a specific way on a vessel that would be a material fact affecting the insurance cover. Modifying the *uberrimae fidae* duty would not change the outcome here with the insurer still being liable, but in a situation where information about the placement on a ship was known and not disclosed, the court would have to power to ask the insurer if the cover would have been cancelled or simply extended with a different premium. It is also possible that a fair presentation standard could have made the information about deck storage more recognizable by the insurer, but since it was not even known to the assured in this case, it also would not have made a difference.

f. Hind Offshore Pvt. Ltd. v IFFCO-Tokio General Insurance Co. Ltd. (2023)

Hind Offshore Chartered the M.V. Sea Panther and received hull insurance from 9 Nov 2005 lasting one year and requiring the vessel to possess a Class Warranty (Hind Offshore Pvt. Ltd. *v* IFFCO-Tokio General Insurance Co. Ltd., 2023). In February 2006, the vessel was damaged while coming to Mumbai, with an investigator finding that "crankshafts and connect rods were [...] beyond repair." Since replacement would take six months, it received a temporary repair which was covered by insurance. In November 2006, it was insured for the next year after it had received a Class Certificate in October that would be good through 2009 but required a representation from the American Bureau of Shipping that the vessel was structurally and mechanically fit. The vessel was struck by a tug boat that December and sank. Surveyors reported that the February damage was not properly reported to the classification society when they carried out their inspection. When the insurer refused to pay, Hind approached the National Consumer Dispute Redressal Commission, who were "satisfied that had the complainant disclosed to [the Classifiers] that the vessel had met with a serious accident on 22 Feb 2006 and only temporary repairs to the port main engine had been carried out, ... the requisite Class Certificate would not have been issued." Without a Class Certificate, the "insurance company therefore is under no contractual or legal obligation to reimburse the complainant." The Supreme Court noted that Hind "failed to establish that the warranty class had not been breached by them," and thus affirmed the judgment of the NCDRC.

Under the fair presentation standard, Hind would still be unable to recover. Their misrepresentations to the Classification Society voided their Class Certificate, meaning they are in breach of an insurer's warranty. The court does mention the duty of *uberrimae fidae* but finds greater assistance from the sections of the marine insurance act requiring strict adherence to all warranties regardless of whether or not they are related to the risk. The new Act also is limited to fair representations with the insurance company, so only Hind not revealing that they had not revealed information to the Classification Society could raise the question, though the underlying misrepresentations are so clearly material that they would result in voiding coverage.

3. Discussion

These few cases show that Indian courts occasionally have some willingness to question the actions of insurers who are quick to hide behind the requirement of *uberrimae fidae* whenever they feel that is enough to deny coverage. The court in the Sea Lark case seems especially skeptical of the insurers version of events and seems to recognize the underlying issue that led the British to reconsider this strict standard: insurers who are on notice that something may be amiss are immunized from having to do deeper research on a vessel's situation, since any material misrepresentations by the assured will void a contract. The Priya Blue case also indicates why the fair representation standard was adopted: it could have been possible that Priya Blue concealed the fact of only one working engine within binders of documents intended to private a complete disclosure. Likewise, Elecon's insurer could have received clearer information about the deck storage had it been known to Elecon, but, like Priya Blue, they did not make any material misrepresentations so their coverage would not have been affected. A fair representation standard would minimize these voluminous findings and streamline the important information so that insurers can immediately recognize what is necessary when deciding whether or not to extend a policy and on what terms. Though there is no discussion in the DK Lall case about what might have happened under the different standard, the court's reasoning does recognize the importance of *uberrimae fidae* in Indian law, perhaps indicating some reluctance to open this topic to additional litigation in front of the Consumer Dispute Resolution commissions.

This change to British Law will also impact shippers and exporters who sign contracts of carriage with English choice-of-law provisions. Even the United States Supreme Court recently held unanimously that choice-of-law provisions in Marine Insurance contracts are presumptively enforceable (Great Lakes Insurance SE *v* Raiders Retreat Realty Co., 2024). Outside of purely domestic situations, shippers can exercise their market choices and seek an insurance contract governed by a standard more favorable to their interests.

Indian courts considering changes to British law can also consider the post-colonial implications of related to the market conditions of insurance companies based largely in London and Zurich. This powerful insurance industry can suffer some additional claims for assureds who fairly represented their risks. The question of the political power of these groups is one that should be considered, regardless of where the specific legal change occurred, especially since the "new" English duties related to disclosures and misrepresentations are already in effect in other places, like the U.S. State of Texas (Albany Ins. Co. *v* Anh Thi Kieu, 1991).

While it is still too early to tell how the contract revisions would be implemented or what specific situations would even allow for such revisions, the entire world is watching English courts. Some have already argued that modern technology like GPS, vessel trackers, and Smart Contracts, has rebalanced the informational asymmetry requiring such stringent representation requirements (Srinivasan, 2023). Other scholars have also noted the pro-Insurer bias relating to strict warranty compliance, rather than the new UK standard requiring the insurer to show the loss had some relation to the breach of warranty (Ahmed, 2020). Indian legislators should likewise consider whether flexibility allowed by such a changing standard would benefit Indian policy holders and insurance companies, or whether it should maintain the strict requirement.

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Стейн Д. Індійське морське страхування: обов'язки страхувальника від максимальної сумлінності до достовірного представлення. – Стаття.

У статті розглядається, яким чином зміни в англійському Законі про морське страхування могли вплинути на вирішення спорів в Індії. По суті, усі договори морського страхування в Індії вимагають максимальної сумлінності в усіх заявах будь-якої зі сторін. Така вимога була стандартною в англійському праві, поки її не було змінено на таку, що передбачає лише «достовірне представлення» усіх суттєвих фактів. Автором проаналізовано чотири справи, що були розглянуті в Індії, і де був поставлений під сумнів вищий стандарт, а також обговорюється питання, чи були би ці справи вирішені, якщо би цей інший стандарт був сприйнято. Проведений аналіз використано для вироблення пропозицій щодо майбутнього Закону про морське страхування в Індії.

Ключові слова: морське страхування, *uberrimae fidae*, максимальна добросовісність, достовірне представлення, англійське право, індійське право, договори.