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WARRANTIES IN MARINE INSURANCE:

A COMPREHENSIVE STUDY

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ABSTRACT

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by BARIS SOYER

The term 'warranty' has different meanings in different areas of contract law. In the law of marine insurance, a warranty is one of the principal undertakings of the assured which has the role of determining the scope of the insurance contract. When breached it provides the underwriter with a valuable defence regardless of the existence of a causal link between the breach and loss. A careful analysis of market practice reveals that breach of warranty defence is quite commonly invoked by marine insurers and consequently both the assured and insurer need to be aware of the law on this point. In view of the significance of the concept of warranties, it is somewhat suprising to find that at present no academic study carried out in the UK has offered any substantial treatment of this aspect of law and this thesis is designed to fill this gap by providing a comprehensive and critical approach to marine insurance warranties.

The purpose of the thesis is to review the law in respect of marine insurance warranties, as concisely as possible, and identify any existing and potential difficulties in this area. At the same time, some proposals will be put forward to resolve these difficult issues which are still inadequately dealt with by the present legal regime by considering general contract law principles and developments in other Commonwealth jurisdictions. It is also intended to examine the need for reform in this area and analyse the nature that any reforms should take.

The thesis is divided into three main parts. Part I evaluates the current law, highlighting the potential problems and offering some solutions. In Part II, adopting a wider perspective to the issue in consideration, the interrelation between breach of a warranty defence and some other main defences afforded to the insurers is examined. Such an approach has not been taken by any academic study previously and it is believed that it will be a valuable contribution to the academic literature. In the final part, the scope and nature of a possible reform in this area is discussed in the light of a comparative study and recent developments in the marine insurance market.

To my family

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PREFACE

(I) WHY A STUDY ON MARINE WARRANTIES? AIMS AND OBJECTS OF THE THESIS

A marine warranty, whether express or implied, is a term of the insurance contract. It has, however, a special position due to the remedy afforded in case of its breach by the Marine Insurance Act (MIA) 1906, namely automatic discharge from liability regardless of the existence of a causal link between the breach and loss. This remedy has occasionally been regarded as 'draconian' from the assured's point of view. A careful analysis of the market practice will reveal that the insurer would not hesitate to rely on this so-called 'draconian' remedy, particularly at times when the market is hit by a financial crisis.[1]

The warranty regime afforded by the MIA 1906 has been subject to numerous criticisms from various authorities and particularly there are pleas to alter the remedy afforded. In fact, some steps have been taken in non-marine insurance[2] and underwriters, with a voluntary code, declared that they would not rely on the breach of warranty defence in cases where there is no causal link between the breach and loss.[3] However, the law remains unchanged so far as marine insurance is concerned and it needs to be evaluated by taking these criticisms into account. At the same time, certain aspects of the concept, eg seaworthiness, have gained a different dimension as a result of the international agreements adopted in the recent years. Furthermore, there are doubts about the wording of some standard contractual terms which have strong connections with the warranty regime, eg held covered clauses, and certain issues in relation to these terms are in need of urgent clarification.

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[1] It is not, for example, just a coincidence that litigation concerning the effect of breach of warranty, *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1991] 2 Lloyd's Rep 191, arose during late 80s and early 90s when the hull market was facing heavy losses.

[2] The warranty regime afforded by the Act, despite the existence of a number of differences, applies also to non-marine insurance.

[3] See, s 2(b)(iii) of the Statement of General Insurance Practice 1986 published by the Association of British Insurers for its members.

However, despite the existence of numerous debates and issues not clarified, when the insurance literature is examined one can find no substantial study carried out in the United Kingdom on insurance warranties.[4] On the other hand, the other main defences of marine insurers have been the topic of some distinctive studies in the past couple of years.[5] The lack of a substantial study in this area was the first and main factor motivating me to carry out research on marine insurance warranties at a PhD level. It is also believed that such a study will be a valuable source not for English law but also for other common law systems which have based their marine insurance legislation on the MIA 1906.[6] Considering that marine insurance rules, especially most of the rules regarding marine warranties, have applicability to non-marine insurance, it can be concluded that the thesis will attract the attention of a wider group of interests.

The principal aim of the study to review the law in respect of marine insurance warranties, as concisely as possible and identify any existing and potential difficulties in this area. At the same time, some viable proposal will be put forward, towards the resolution of such difficult issues which are still inadequately dealt with by the present legal regime.

Any academic study in marine insurance law cannot be regarded as 'complete' unless it takes the realities of market practice into account. Therefore, examining standard insurance clauses, such as London Institute Clauses and highlighting their

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[4] In one part of her PhD thesis, *The Law Relating to Non-Disclosure, Misrepresentation and Breach of Warranty in Contracts of Marine Insurance*, which was submitted to The University of Queensland (Australia), Sarah Catherine Derrington, evaluates the marine warranty regime from an Anglo/Australian perspective.

[5] For example, breach of good faith defence was examined in detail in a book called, *Good Faith and Insurance Contracts*, by Eggers, M & Foss, D (LLP Ltd, 1998) and a detailed examination has been carried out in respect of wilful misconduct defence in a PhD dissertation submitted to Southampton University Faculty of Law in 1991 by Guijun Wang.

[6] For instance, in Australia, New Zealand, Hong Kong, Singapore, Malaysia and India, the MIA 1906 has been a model for the internal legislation. In 1993, the Canadian Parliament enacted the Canadian Marine Insurance Act (Ch 22, 1993 SC 405). This statute largely follows the principles laid down in the MIA 1906 despite the fact that the language has been modernised and the sections have been re-organised.

relationship and interaction with the common law will be one of the main objects of the thesis.

It is amongst the objects of the thesis to evaluate the marine warranty regime in the light of the shipping realities at the turn of the millennium and discuss its justification. Finally, the thesis intends to give a new dimension to the concept by evaluating its relation with other main defences afforded to a marine insurer.

The intention has been to state the law as it stands at 31 May 2000.

Parts of Chapter 2 and 3, along with material not included in this thesis, have been published in October 1998 and 1999 issues *of The International Journal of Insurance Law* and in September and December issues of *Insurance International Magazine*.

(II) METHODOLOGICAL ISSUES

(i) The Study of Statutory/Case Law and Employment of Comparative and Historical Methods of Analysis

Throughout the thesis, the objective is to secure a sensible comprehensiveness in the collection of authoritative sources and materials comprising of legislation in force and judicial decisions in relation to the concept of marine warranties. While the relevant provisions of the MIA 1906 and the case law will be the starting point for the study, an extensive reference to the case law of some common law systems, eg Australia, Canada, New Zealand, will be made. Despite the fact that judgments delivered in those jurisdictions do not form binding precedent for English courts, nevertheless, they could be persuasive and need to be known in order to achieve a richer understanding of particular problems and evaluate the prospective progress of the warranty regime.[7] Furthermore, a comparative analysis of the law of two civil law jurisdictions in relation to warranties, namely Germany and Norway will take place in the later stages of the thesis. The intention of such a comparative analysis of law is to draw conclusions

[7] For a detailed analysis about the basic principles of a comparative study, see, Zweigert, K & Kotz, H, *An Introduction to Comparative Law*, (3rd ed, Clarendon Press, 1998).

about the fairness of the warranty regime under the MIA 1906. Considering the existence of severe criticisms facing the current warranty regime, there is no doubt that such a comparative study will bring an additional dimension to the discussion. Also, throughout the thesis the historical background of certain legal concepts, eg implied warranty of seaworthiness, will be analysed. It is believed that such an analysis has not only a positive role in grasping the role and function of a certain concept, but also gives an idea about its potential progression.

(ii) Theoretical and Jurispudential Considerations and The Inter-Relation Between Various Branches of Law

In some parts of the thesis, legal issues in question and their justification will be analysed from a theoretical point of view. It has been observed that judges are assisted by findings of the theory in order to provide solution to areas which have not been regulated by positive rules or sometimes in order to divert from the legal rules which proved to be unsatisfactory. In this respect, the views of academics on particular concepts will also be taken into account and evaluated. This is an essential practice in the light of the role academics have recently played in terms of influencing the judgment of courts.[8]

The general law, mostly the law of contract, provides a frame of reference from which the judge can draw if a rule of 'insurance law' is not apparent. As was stated by Clarke,[9] this is not a weakness of insurance law but a source of strength. It is not a palliative; it is a standard procedure because, in the words of a leading judge, it is desirable 'that the same legal principles should apply to different branches of that law'.[10] This study will follow the same approach and on certain occasions throughout

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[8] See, for example, the judgment of the Court of Appeal in *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck)* [1989] 3 All ER 628, which was later reversed by the House of Lords [1991] 2 Lloyd's Rep 191, where May, LJ, when interpreting the meaning of s 33(3) of the MIA 1906 quoted from a number of academic books, namely *A Digest of the Law Relating to Marine Insurance; The Marine Insurance Act 1906*; *MacGillivray and Parkington on Insurance Law* and *Chitty on Contracts.*

[9] See, Clarke, M, *Policies and Perceptions of Insurance: An Introduction to Insurance Law*, (Oxford University Press, 1997), at p 318.

[10] *The Hansa Nord* [1976] 1 QB 44, per Roskill, LJ, at p 71.

the thesis contract law principles will be used to fill the gaps that might arise in the area of marine warranties. At the end of the day, as was illustrated by a leading American writer, insurance law is 'not an exotic species that belongs to a legal zoo, but a system that is subject to and part of the same regime of principles and constitutes the rest of the law'.[11]

At the same time, it should be borne in mind that insurance law could not function or develop in isolation. There is an inevitable *symbiotic relation* between various branches of private law and this will be the case when certain concepts of marine warranties are evaluated in the thesis. For instance, due to the fact that almost all insurance institutions and assured are organised as a legal entity and decisions need to be taken by various bodies, principles of certain other branches of private law, namely agency and company law, will be referred to intensively on certain parts of the thesis.

Furthermore, on some occasions reference will be made to the case law regarding non-marine warranties. This approach is practically accurate considering that there is a uniformity in most of the rules which apply to marine and non-marine warranties.

(iii) The Study of Regulatory Practice and Empirical Data

Apart from the theoretical aspect of the issue, the problems which are encountered in commercial practice and the ways they are dealt with will be examined. To this end, standard insurance clauses, such as London Institute Clauses, are evaluated and the relationship and interaction between these clauses and the common law is examined. In some cases, the standard clauses commonly used in other insurance markets, such as American Institute Clauses or Norwegian Institute Clauses, are considered and compared with the London Institute Clauses.

Throughout the thesis, in order to support certain arguments, by evaluating the empirical data available, certain diagrams will be provided. For example, in the final part in order to support the contention that there is a remarkable correlation between legal rules and market share, the market statistics of certain countries will be

[11] Abraham, KS, *Distributing Risk*, (New Haven, Conn, 1986), at p 9.

illustrated through diagrams. Similarly, when discussing the effect of the ISM Code on the rate of the premium certain illustrations are going to be made by scrutinising the empirical data available. It is believed that such an empirical examination will have the role of supplementing the arguments advanced throughout the thesis and increasing overall understanding.

(III) STRUCTURE OF THE THESIS

The study will be divided into 3 parts corresponding to the basic issues under consideration. Each part will include a number of chapters which will follow the same pattern, dictated by the materials which fall for consideration. **Diagram 1** shows the outline of the thesis. This diagram will be followed by an explanatory part which will provide more detailed information about the structure of the study.

Diagram 1

Outline of the Thesis

PART I	**PART II**	**PART III**
CURRENT LEGAL POSITION	**INTER-RELATION RETWEEN MAIN DEFENCES OF A MARINE INSURER**	**COMPARATIVE STUDY AND CONCLUSIONS**
CHAPTER 1 Warranties in General **CHAPTER 2** Express Warranties **CHAPTER 3** Implied Warranty of Seaworthiness **CHAPTER 4** Other Implied Warranties **CHAPTER 5** Certain Legal Features Which Are Common to Both Types of Warranties **CHAPTER 6** Effect of Breach **CHAPTER 7** Waiver of Breach	**CHAPTER 8** Leading Defences of A Marine Insurer **CHAPTER 9** Conjunction Between Leading Positive (Affirmative) Defences of The Underwriter And Breach of Warranty Defence	**CHAPTER 10** Legal Position In Relation to Warranties in Some Other Jurisdictions **CHAPTER 11** The Conclusion: A Case For Reform?

Part I of the thesis intends to outline and evaluate the current legal position in relation to marine warranties. Accordingly, legal rules embodied in the MIA 1906, other statutes, case law, Standard Clauses will all be taken into account and the deficiencies of the present regime will be illustrated. More specifically, it is constituted by seven chapters.

Chapter 1 intends to clarify the place of marine insurance warranties in the rank of contractual terms. In this respect, different meanings of the term 'warranty' under English contract and insurance law will be explained. Then, differences between marine/non-marine insurance warranties and general contract warranties will be evaluated. A detailed analysis of the origins and development of marine insurance warranties will be followed by a part illustrating the present state of marine warranties.

Chapter 2 examines express warranties. A detailed examination of the formation of express warranties will be followed by a discussion of the rules adopted by courts for their construction. Construction of an express warranty may be both essential and crucial, as disputes may arise as to its scope. After clarifying the issues as to formation and construction of express warranties, the standard examples of express warranties which are usually employed in marine policies will be described for the purpose of illustration. At the end of the chapter, differences between express warranties and other terms of a marine insurance contract, such as conditions; exclusion clauses, and the ways they differ from each other will be evaluated. Such an examination is fundamental since different legal consequences are afforded for breach of different express terms.

Determining the scope and nature of the implied warranty of seaworthiness, the most important implied warranty, is the main object of Chapter 3. To this end, after a brief historical introduction, the meaning of seaworthiness in maritime law and the factors which must be taken into account when determining seaworthiness will be discussed in detail. Justification for the concept in marine insurance context will be followed by a detailed analysis of the warranty in voyage, time, mixed policies and P&I cover. At the end of the chapter, the possible legal effect of two instruments adopted by the IMO,

namely the ISM Code 1993 and the 1995 changes to the STCW Convention 1978, on provisions relating seaworthiness will be discussed.

Chapter 4 deals with implied warranties other than the implied warranty of seaworthiness. The implied warranty of portworthiness and cargoworthiness will be briefly examined while a more detailed examination will be undertaken in respect of legality. The implied warranty of cargoworthiness is usually excluded from the cargo policies and the case law suggests that the implied warranty of portworthiness has rarely caused a dispute between the parties. The implied warranty of legality is different in nature from the other implied warranties and plays a crucial role in both voyage and time policies. After a short discussion on the reasons which made the draftsman regulate 'legality of the adventure' as an implied warranty, a detailed examination will be carried out in order to determine the factors which may render a marine adventure illegal.

In Chapter 5, the features which are common to both types of warranties will be evaluated. The nature of a marine warranty is intended to be further clarified as a result of such an examination. First, the doctrine of exact compliance will be discussed and its justification will be questioned in the light of realities of modern insurance law. Then, other characteristic features of a marine warranty, namely that it need not be material to the risk; that there is no remedy for breach and that there is no defence for breach, will be analysed respectively.

Despite the existence of a considerable amount of case law on the point before the enactment of the MIA 1906, it was not until the 1990s that the effect of breach was judicially considered in the light of the Act. The main object of Chapter 6 is to examine the effect of breach of warranty in marine insurance from all angles. The examination will be carried out with reference to case law particularly to the House of Lords decision in *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck).*[12] The reflections of this celebrated case on both the legal position and insurance market will be carefully analysed.

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[12] *Ibid.*

In Chapter 7, forms of waiving breach of warranty will be examined. It is intended to clarify the law on this point and identify the problematic areas. In particular, the practical difficulties that may arise in relation to 'held covered clauses' will be considered. Due to the absence of intensive judicial examination of these clauses, such an examination is believed to be beneficial both from an academic and practical point of view. Towards the end of the chapter, a further concept known as 'estoppel' will be taken into account. Being a contractual concept and one which has been much influenced by equity, estoppel has a strong interrelation with the waiver of breach of warranty. The distinction between these two concepts and the elements of estoppel will be evaluated in the light of the case law.

Part II adopts a new dimension to the examination on marine warranties. So far, no academic study has ever attempted to evaluate the interrelation between breach of warranty defence and other leading defences available to a marine insurer. The purpose of this part is to identify main affirmative (positive) defences and discuss their interrelation. On some occasions, particularly in cases where more than one defence is available to the insurer, relying on a certain one might operate against the insurer. This part includes two chapters.

The object of Chapter 8 is to define the place of the breach of warranty defence amongst the other defences afforded to the insurer. Accordingly, the main defences which are available to insurers, in the event of a breach of the insurance contract, will be examined and classified. Then, aspects of the ones which have been quite commonly used by insurers will be examined.

In Chapter 9, the interrelation between defences which have been highlighted in the previous chapter and breach of warranty defence will be discussed. It is the personal opinion of the author that such an examination will increase understanding of the warranty defence in marine insurance and add a different view point to the current discussion.

Part III intends to clarify whether there is a need for a reform in the area of marine warranties. In this respect, after a comparative analysis, the criticisms directed towards

the regime are evaluated and the shape and extent of a possible reform in this area are discussed. This part of the thesis too includes two chapters.

Having analysed and identified the existing problems in English law relating to marine warranties in the previous chapters, it is intended in Chapter 10 to examine some other jurisdictions' approach to marine warranties. The main object of such a comparative study is to suggest some viable alternatives to the problematic areas in English law in the final chapter of the thesis. Two alternative jurisdictions have been selected against which to compare the English law relating to marine warranties, namely Germany and Norway. The selection of these two systems is not a coincidence. German law represents the traditional continental approach and has influenced many other jurisdictions. Norwegian law is a dynamic law which has been developed dramatically over the years. American law has been excluded from such a comparative analysis due to lack of uniformity in the context of marine warranties in this country

The main object of the concluding chapter, Chapter 11, is to discuss whether the law in relation to warranties, which has been examined throughout the thesis, provides a fair distribution of rights and obligations between assured and insurer. Several criticisms can be made in respect of the present legal regime, but the alternatives in the event of the wholesale abandonment of the warranty concept have not yet been considered. Not only the content of a possible reform but also its form and structure will be discussed.

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It was a misty November morning in 1997 when I first started this project. Many things have changed since then. Now, mid-summer, the sun is shining everywhere and I enjoy the 'result' of long and sleepless nights of the past few years. It was a tiring, stressful, and occasionally annoying journey. But I loved every moment of it.

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Faculty, a couple of words need to be said about the administrative staff. David (Lewin) has been the hero each time I messed the computer up. The members of the Faculty Office, Stephanie, Loraine, Jill, Careen, Marion, Teresa, Kim, Debbie, Aloma and Alison did everything they could to create a nice atmosphere for all the research students. The law librarians, Mr Dick Young and Mrs Joy Caisley, were extremely helpful. It is going to be a shame on my part if I forget to mention the support I received from certain members of the Institute of Maritime Law. The Institute's librarian, Mrs Sara Le Bas, has been the first port of call for me at the beginning of each research period and she also kindly agreed to have a look at the bibliography. The research assistants, Heidi and Lizzie, were great. They were always around whenever I needed to talk about something other than law.

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BARIS SOYER

ABBREVIATIONS

ABI	Association of British Insurers
AC	Appeal Cases
A & E	Adolphus & Ellis' Reports (1834-40)
AMC	American Maritime Cases
ANZ Ins Cas	Australia and New Zealand Insurance Cases
aff'd	Affirmed
All ER	All England Law Reports
App Cas	Appeal Cases
Art	Article
BCLC	Butterworths Company Law Cases
BCLR (3d)	British Columbia Law Reports, Third Series
B & Ad	Barnewall & Adolphus' King's Bench Reports (1830-4)
B & Ald	Barnewall & Alderson's King's Bench Reports (1817-22)
B & C	Barnewall & Cresswell's King's Bench Reports (1822-30)
B & S	Best & Smith's Queen's Bench Reports (1861-5)
bdi	Both Days Included
Beav	Beavan's Rolls Court Reports (1838-66)
Bos & P (BP)	Bosanquet & Puller's Common Pleas Reports (1796-1804)
Br & B	Broderip & Bingam's Common Pleas (1819-22)
Burr	Burrows' King's Bench Reports (1757-71)
CB	Common Bench Reports by Manning, Granger & Scott (1856-65)
CCLI	Canadian Cases on the Law of Insurance
CLC	Commercial Law Cases
CLR	Commonwealth Law Reports
C Rob	Christopher Robinson's Admiralty Reports (1799-1808)
Camp	Camp Reports
Ch	Chapter/Chancery Law Reports
Ch App	Chancery Appeals Law Reports (1865-75)
Ch D	Chancery Division Law Reports (1876-90)
cif	Cost Insurance Freight
Cl & F	Clark & Finnelly's House of Lords Cases (1831-46)
Co	Company
Com Cas	Commercial Cases (1896-1941)
Conn	Connecticut Reports
Corp	Corporation
Cowp	Cowper's King's Bench Reports (1774-8)
Cromp & M	Crompton & Meeson's Exchequer Reports (1832-4)
DGM & M	De Gex, Macnaghten & Gordon's Chancery Reports (1851-7)
DLR (3rd)	Dominion Law Reports (3rd series)
Dod Adm R	Dodson's Admiralty Reports (1811-22)
Doug(l) (KB)	Douglas' King's Bench Reports (1778-85)
Dow	Dow's House of Lords Cases (1812-3)
EB & E	Ellis, Blackburn & Ellis' Queen's Bench Reports (1861-9)

ER	East's Term Reports, King's Bench (1801-12)
E & B	Ellis & Best Queen's Bench Reports (1861-9)
East	East's Term Reports, King's Bench (1801-12)
Eng Rep	English Reports Full Print (1210-1865)
ed	Edition
Ed	Editor
et al	Et alii (Latin) and others
Ex	Exchequer Reports (1847-56)
Ex D	Exchequer Division Law Reports (1875-80)
Exch	Exchequer Law Reports (1865-75)
F	Federal Reporter
F 2d	Federal Reporter, Second Series
F 3d	Federal Reporter, Third Series
FCA	Federal Court of Australia Reports
FLR	Federal Law Reports (Australia)
FLTR	Financial Times Law Reports
F Supp	Federal Supplement (USA)
F & F	Foster & Finlason's Nisi Prius Reports (1858-67)
Fed Cas	Federal Cases (USA) (1789-1880)
Fed Rep	Federal Reporter (USA)
fob	Free on board
Fn	Foot-note
HL Cas	Clarke's House of Lords Cases (1847-66)
ICC	Institute Cargo Clauses/Institute Container Clauses
ICR	Industrial Court Reports
IJSL	International Journal of Shipping Law
IOB	Insurance Ombudsman Bureau
ILR	Insurance Law Reporter (Canada)
IMF	International Monetary Fund
IMO	International Maritime Organisation (formerly IMCO)
IR	Irish Reports
ISMC	International Safety and Management Code
ITCF	Institute Time Clauses (Freight)
ITCH	Institute Time Clauses (Hull)
ITLQ	International Trade Law Quarterly
ITR	Irish Term Reports (1785-95)
IVCH	Institute Voyage Clauses (Hull)
IYT	Institute Yacht Clauses
Ibid	Ibidem (Latin) in the same place
Inc	Incorporated
Ir Ch R	Irish Chancery Reports (1850-66)
Ir Cl R	Irish Common Law Reports (1866-78)
JCL	Journal of Contract Law
KB	King's Bench Law Reports (1901-52)
LJ QB	Law Journal Reports, New Series Queen's Bench (1831-1946)
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
LR	Law Reports (Canada)
LR CP	Law Reports Common Pleas (1865-75)

LR Ex	Law Reports Exchequer (1865-75)
LR PC	Law Reports Privy Council (1865-75)
LR QB	Law Reports Queen's Bench (1865-75) (1891-)
LRIR	Lloyd's Law Reports Insurance and Reinsurance
LT	Law Times Reports (1859-1947)
Loyola L Rev	Loyola Law Review
L1L Rep	Lloyd's List Law Reports (1919-50)
Lloyd's Rep	Lloyd's List Law Reports (1951-)
Ltd	Limited
MIA	Marine Insurance Act
MSA	Merchant Shipping Act
M & S	Manning & Scott's Common Bench Reports (1845-56)
M & W	Meeson & Welsby's Exchequer Reports (1836-47)
Man & Gr	Manning & Granger's Common Pleas Reports (1840-44)
Mason	United States Circuit Court Reports
Mar L&Com	Maritime Law and Commerce
Moo & M	Moody & Malkin's Nisi Pleas Reports (1826-30)
Moo PC	Moore's Privy Council Cases (1862-73)
NBR	New Brunwick Reports (Canada) (1825-1929)
New J L Rev	New Jersey Law Review
p	Page
pp	Pages
P(D)	Probate, Divorce & Admiralty Division Law Reports (1875-
P & I	90)
Para	Protection & Indemnity Club
Peake's Add Cas	Paragraph Peake's Additional Cases (1795-1812)
plc	Public Limited Company
QB	Queen's Bench Law Reports
QBD	Queen's Bench Division Law Reports (1875-90)
Qd R	Queensland Reports
R	The Reports (1893-5)
RR	Revised Reports (1785-1866)
Re L R	Reinsurance Law Reports
rev'd	Reversed
rl	Rule
SA	South African Law Reports
SC	Quebec Official Reports, Superior Court (Canada)
SCR	Canada Supreme Court Law Reports
SI	Statutory Instrument
SLT	Scots Law Times Reports
SR	New South West State Reports (Australia)
SS	Steam Ship
STCW	International Convention on Standards of Training Certification and Watchkeeping for Seafarers
s	Section
Selw NP	Selwyn, Law of Nisi Prius, 13th ed. 1869.
So 2d	Southern Reporter, Second Series
sub-s	Sub-section

TLR	**Times Law Reports**
TR	**Durnford & East's Term Reports (1775-1800)**
Taunt	**Taunton's Common Pleas Reports (1808-19)**
Tul L Rev	**Tulane Law Review**
UCR	**Upper Canada Reports**
US	**United States Supreme Court Reports**
USF Mar LJ	**University of San Fransisco Maritime Law Journal**
viz	**Videlicet (Latin) namely**
WLR	**Weekly Law Reports**
Wils	**Wilson's King Bench Reports (1742-74)**

INSPIRATIONS OF THE THESIS

The distance is nothing; it is only the first step that is difficult.

Mme Du Deffand

Change is not made without inconvenience, even from worse to better.

Samuel Johnson

No brilliance is needed in the law. Nothing but common sense, and relatively clean finger nails.

John Mortimer

New opinions are always suspected, and usually opposed, without any other reason but because they are not already common.

John Locke

Two roads diverged in a wood, and I-
I took the one less travelled by,
And that has made all the difference.

Robert Frost

PART 1

CHAPTER 1

WARRANTIES IN GENERAL

1.1 MEANING OF THE TERM 'WARRANTY'

1.1.1 The Term 'Warranty' in Contract Law

The term 'warranty' has been described as 'one of the most ill-used expressions in the legal dictionary.'[1] This is particularly the case in the law of contract where it has been used in various senses.

In its most technical sense, it is to be understood as meaning a term of the contract, the breach of which entitles the aggrieved party to damages but not a right to treat the contract as repudiated.[2] Accordingly, the injured party is still under an obligation to perform the contract despite the fact that the contract is breached by the other party. Apart from warranties, contracts might include two other terms, namely conditions and innominate (intermediate) terms. Breach of a term classified as a 'condition' entitles the innocent party either to elect to terminate the contract with the consequence that both parties are discharged from further performance or affirm the contract and claim damages. Whether breach of a term which is classified as an 'innominate term' by the courts would entitle the injured party to elect to terminate the contract depends upon the nature of the event to which the breach gives rise. He can elect to terminate the contract for breach of an innominate term if, but only if, the requirement of substantial failure is satisfied; otherwise he can only claim damages.[3]

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[1] *Finnegan* v. *Allen* [1943] 1 KB 425, per Lord Greene, MR, at p 430.

[2] See, s 11(4) of the Sale of Goods Act 1979 for the definition of the term 'warranty' for contracts which are within its scope.

[3] *Hong Kong Fir Shipping Co Ltd* v. *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. For a detailed analysis on conditions, warranties and innominate terms, see, Treitel, G, *The Law of Contract*, (10th ed, Sweet & Maxwell, 1999), pp 731-46.

Sometimes, the term 'warranty' is used to indicate that the injured party in case of breach of a condition, has chosen to affirm the contract and claim damages. In such a case, the injured party is said to sue on a 'warranty *ex post facto*';[4] although this expression is somewhat misleading since the breach is still that of a condition of the contract.[5]

The term 'warranty' is also used to refer to certain guarantees given by the retailer under a sale contract. For instance, in a contract for sale of a TV set, the seller might agree to supply parts free of charge for a period of one year. This kind of guarantee, is usually, called a 'warranty' and is binding on the part of the seller since they will form part of the sale contract.[6]

It has become common in recent years for retailers to offer their customers, particularly to those who buy technical equipment, the opportunity of buying a so-called 'extended warranty'. This will commonly give the customer, in return for payment, a guarantee that the cost of repairs will be covered for a certain period of time.[7] Although, these type of schemes are often called 'warranties' they are in fact a sort of insurance against mechanical breakdown, and this is the better way of describing them. The way such a scheme generally operates is that the retailer is associated with a company offering mechanical breakdown insurance. If the retailer has a franchise from the manufacturer, it may be with a company with which the manufacturer has an agreement or it may be through the scheme operated by the retailer or it may be through the retailer's own contracts. Whatever the case is, the role of the retailer will generally be as an agent for the company operating the scheme, and

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[4] *Wallis, Son & Wells* v. *Pratt & Haynes* [1911] AC 394.

[5] Note that in many older cases the term 'warranty' has been used in the same sense of the term 'condition' and this has led to a considerable degree of complexity. See, for example, *Behn* v. *Burness* (1863) 3 B & S 751.

[6] It should be remembered that under the Consumer Transaction (Restrictions on Statements) Order SI 1976/1813, as amended by SI 1978/127, such a guarantee offered by a retailer cannot take away or diminish any rights which the consumer would otherwise have under the Sale of Goods Act 1979, and the guarantee document must also include a statement advising the consumer that the warranty is in addition to his statutory or common law rights.

[7] This kind of 'extended warranties' are quite commonly offered by second hand car dealers and stores which sell domestic appliances.

the actual contract of 'insurance' is between the consumer and the operating company. This inevitably means that the retailer is not liable himself and cannot use the scheme to avoid any of his liabilities under the contract of sale.

1.1.2 The Term 'Warranty' in Insurance Law

Unlike general contract law, the use of the term 'warranty' is rather restricted in insurance law. The term is, occasionally, used in some exclusion clauses which intend to limit the liability of the insurer under the contract. For instance, in a clause which is worded as: 'Warranted free from capture and seizure', the term 'warranty' means that the insurer is not liable for the perils of capture and seizure.[8]

However, the word 'warranty' , in a technical sense, is used to refer to a certain term of an insurance contract breach of which has particular legal consequences. With a warranty one party of the insurance contract, the assured, undertakes certain obligations which need to be complied with at a certain period of time and the liability of the insurer under the insurance contract depends on the assured's compliance with these obligations.[9] In this respect, warranties are used by the insurer as a shield against liability.[10]

Warranties are said to serve a very significant function in the law of insurance and that is determining the scope of the cover agreed by the insurer. A contract of insurance is described as 'a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against certain losses in return of a payment known as premium.'[11] Accordingly, from the insurer's point of view, the extent of the

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[8] See, *Morgan* v. *Provincial Insurance Co Ltd* [1932] 2 KB 70, at pp 79-80 where Scrutton LJ, said:

'...; but it must be remembered that in contracts if insurance the word 'warranty' does not necessarily mean a condition or promise the breach of which will avoid the policy. A warranty that a marine policy is free from particular average certainly does not mean that if there is a partial loss to the insured ship the whole policy is avoided. It merely describes the risk, and means that the only risk being insured against is the risk of a total loss and that a partial loss is not the subject of the insurance.'

[9] See, ss 33(1) and (3) of the Marine Insurance Act (MIA) 1906.

[10] In the law of contract/sales, warranties are used as a sword to impose liability on one part of the contract.

[11] See, s 1 of the MIA 1906.

risk is crucial as his liability will largely depend on it. The warranties incorporated into the contract play an essential role in assessing the risk. For example, a warranty to the effect that the insured vessel will not navigate in a certain area, gives an idea to the insurer about the extent of the risk and accordingly the amount of the premium for that particular risk is adjusted by the insurer in the light of these facts. In case of breach of this obligation, the risk initially agreed is altered and that is the reason why the insurer is allowed to discharge himself from further liability in such a case.

Warranties are quite commonly used in marine insurance and the MIA 1906 has provided the legal framework.[12] However, this does not mean that the use of such terms is unique solely to marine insurance contracts. They also appear in all types of non-marine insurance contracts.[13] Generally speaking, the rules laid down by the MIA 1906 for marine warranties could also be applied to non-marine warranties. It has, in fact, been observed on numerous occasions that the judges referred to marine insurance principles or the provisions of the MIA 1906 when a non-marine warranty is involved.[14] Certain differences arising either from the nature of the risk insured against or factors surrounding the contract, on the other hand, exist between marine and non-marine warranties. First, implied warranties which have been incorporated into marine insurance contracts by the MIA 1906, eg implied warranty of legality, do not exist in non-marine insurance.[15] The main reason for this distinction is the lack of an additional

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[12] See, ss 33-41 of the MIA 1906.

[13] For instance, a warranty which requires the insured car to be kept in a roadworthy condition at all times, is quite commonly incorporated into motor policies. Similarly, it is not unusual in life policies to see a warranty which requires the assured to have health-examination with regular intervals.

[14] For example, in *Thomson* v. *Weems*, (1884) 9 App Cas 671 at p 684, Lord Blackburn, *obiter dictum*, said:

'... In my opinion, as regards the effect of breach of warranty, the same principles apply whether the insurance be marine or not.'

Paragraph 2(b) of the Statement of General Insurance Practice 1986, which applies to insurance contracts apart from marine and aviation, provides that unless fraud is involved the insurers will not rely on breach of warranty defence where the circumstances of the loss are unconnected with the breach. The existence of this provision does not mean that a difference between marine and non-marine warranties as to the effect of breach has been created. From a legal point of view, the same rule applies to both; however non-marine insurers with this voluntary code, which has no legal effect, have restricted their right to rely on this defence in certain cases. The nature and effect of this Statement will be discussed later in the final chapter of the thesis.

[15] It was expressly stated by the Court of Appeal in *Euro-Diam Ltd* v. *Bathurst* [1988] 2 All ER 23, that there was no implied warranty of legality in non-marine insurance.

element, marine adventure, in non-marine insurance which potentially increases the risk insured against. Accordingly, in non-marine insurance warranties must be created with express wording. Second, in marine insurance it is a statutory rule that an express warranty must be stated in the policy or incorporated into it by words of reference appearing in the policy itself.[16] This does not, however, appear to be the general rule in non-marine insurance, where it is sufficient for an insurer to obtain the signature of the applicant to a declaration saying that, 'This proposal is to serve as the basis of the contract', whereupon the warranty is an effective term of the contract even though not expressly mentioned in the policy when that is issued.[17] The solution adopted by non-marine insurance could be harsh for the assured since, in cases where a copy of the proposal form is not possessed, there is a danger of forgetting what he had warranted in it.[18] Finally, it has been observed that the courts have a tendency of construing non-marine warranties narrowly, so that the scope of the undertaking is restricted.[19] However, in marine insurance despite the potential applicability of similar interpretation rules, the courts are reluctant to interpret warranties in favour of the assured. One possible reason behind this is the fact that marine insurance market is a place where the demand side is made up of professional people, eg shipowners, charterers, cargo-owners, and they are expected to have a certain amount of knowledge about the legal rules.

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[16] See, s 35(2) of the MIA 1906.

[17] See, *Duckett* v. *Williams* (1834) 2 Cromp & M 348; *Joel* v. *Law Union & Crown Insurance Co* [1908] 2 KB 863; *Rozanes* v. *Bowen* (1928) 32 LIL Rep 98 and *Unipac (Scotland) Ltd* v. *Aegon Insurance Co* 1996 SLT 1197.

[18] For a general criticism of the 'basis of the contract' clause, see, the Law Commission Report, *Insurance Law: Non-disclosure and Breach of Warranty*, Law Com No 104, 1980, London: HMSO, paras 7.1-7.11. Partly as a result of this Report, insurers have volunteered not to use such clauses in insurances of private individuals: para 1(b) of the Statement of General Insurance Practice and of the Statement of Long-Term Insurance Practice 1986. It should be remembered that these Practices are voluntary codes agreed by the insurance industry and have no legal force.

[19] See, for example, *Havelock* v. *Hancill* (1789) 3 TR 277; *Dobson* v. *Sotheby* (1827) Moo & M 90; *Sillem* v. *Thornton* (1854) 3 E & B 868; *Australian Agricultural Co* v. *Saunders* (1875) LR 10 CP 668; *Yorke* v. *Yorkshire Insurance* [1918] 1 KB 662; *Winicofsky* v. *Arm & Navy, etc, Insurance Co* (1919) 35 TLR 283; *Simmonds* v. *Cockell* [1920] 1 KB 843; *Glicksman* v. *Lancashire & General* [1927] AC 139; *Provincial Insurance Co* v. *Morgan & Faxon* [1933] AC 240; *Woolfall & RimmerLtd* v. *Moyle* [1942] 1 KB 66; *Sweeney* v. *Kennedy* (1948) 82 LIL Rep 294.

1.1.3 Warranty Need to Be Distinguished from Misrepresentation

Section 20 of the MIA 1906 stipulates as follows:

'Every material misrepresentation made by the assured or his agent to the insurer during negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.'[20]

Accordingly, if during negotiations the assured, in response to a question, states that the majority shareholders of the insured company are German citizens while this is not the case, the insurer might be entitled to avoid the contract for misrepresentation. In some representations, like the one above, the assured affirms the existence of a certain fact. Since with a warranty the assured either undertakes to fulfil an act or affirms/negatives the existence of certain facts,[21] there is a similarity between express warranties and representation. However, the distinction between these two concepts is a fine one and was drawn by Lord Mansfield more than two hundred years ago.[22] The case commonly cited to illustrate one aspect of this distinction is *Pawson* v. *Watson*,[23] where Lord Mansfield emphasised that a warranty 'makes a part of written policy' whereas a representation is made outside the written contract.[24] Eight years after he delivered the above judgement, Lord Mansfield clarified the distinction further in *De Hahn* v. *Hartley*[25] where he said:[26]

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[20] For the definition of the term 'material' and the application of 'actual inducement test' which need to be satisfied in order to avoid the policy, see, the decision of the House of Lords in *Pan Atlantic Insurance Co Ltd* v. *Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427.

[21] See, s 33(3) of the MIA 1906.

[22] Whether a statement is a representation or warranty could be quite crucial due to the different remedies afforded for breach of these concepts. Accordingly, s 20 allows the insurer to avoid the contract *ab initio* in cases where a material misrepresentation is made, while in case of breach of a warranty the insurer is discharged from liability automatically by virtue of s 33(3).

[23] (1778) 2 Cowp 785.

[24] *Ibid*, at pp 787-8. In fact, by virtue of s 35(2), an express warranty must be included in, or written upon the policy or be contained in some document incorporated by reference into the policy.

[25] (1786) 1 TR 343.

[26] *Ibid*, at p 345.

'There is a material distinction between a warranty and a representation. A representation may be equitably or substantially answered; but a warranty must be strictly complied with.'[27]

There is another difference between these concepts which has been highlighted by Lord Eldon, LC, in *Newcastle Fire Insurance Co* v. *Macmorran & Co*[28] in the following manner:[29]

'[I]t is a first principle of the law of insurance, on all occasions, that where a representation is material it must be complied with- if immaterial that immateriality may be inquired into and shown; but that if there is a warranty it is a part of the contract that the matter is such as it is represented to be. Therefore, the materiality or immateriality signifies nothing.'

1.2 WARRANTIES IN MARINE INSURANCE

1.2.1 Historical Development of the Warranty Regime in Marine Insurance

Although it was expressed in certain studies[30] that Babylonians in the 3rd millennium BC had advanced a form of marine insurance,[31] it is generally accepted that the earliest form of marine insurance had been developed in Eastern Mediterranean during the middle ages.[32] The earliest type of marine insurance was *bottomry* and *respondentia* loans. Under a *bottomry* agreement, the owner of a vessel raised funds by pledging his ship for the repayment of the loan on her arrival at destination together with the interest on the bond. If the ship were lost and never reached her destination, there was no liability on the owner to repay the loan. In such a case, the lender would have lost

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[27] Section 20(4)(5) stipulate:

'A representation as to matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

A representation as to a matter of expectation or belief is true if it be made in good faith.'

[28] (1815) 3 Dow 255.

[29] *Ibid*, at p 262.

[30] See, Hare, J, *Shipping Law and Admiralty Jurisdiction in South Africa*, (Juta, 1999), at p 650.

[31] The Code of Hammurabi (2250 BC) is generally quoted as the earliest recorded example of a maritime loan incorporating a risk 'premium', though more in the form of bottomry.

[32] Hurd, HB, *Marine Insurance*, (Effingham Wilson, 1922), at p 10.

the money lent under the bond. The money lent on the security of the cargo was called a *respondentia* loan.

Marine insurance contracts, which intended to provide indemnity against marine risks upon the payment of a price, known as a premium, originated with the Hanseatic merchants and with the Lombard merchants in Northern Italy in the late 12th and early 13th century. Hence, the term 'policy' which is clearly derived from the Italian 'polizza', meaning a promise or undertaking.[33] The law and practice developed were later imported to England when Lombard merchants, who were forced to migrate to England in the 13th century by the Kaiser of Germany, Friedrich II, persuaded Henry IV to grant them a section of the City of London where they could build their homes and carry on their trade in security.[34] The usages of Lombard merchants have crystallised into a universal body of rules, and these rules, as the basis of a long series of interpretations and of judicial decisions, have become a part of English law.[35] It is, therefore, accurate to suggest that English and European marine insurance law have common roots. Early English marine insurers, in other words Italian practitioners operating in England, were practising the marine insurance which had been advanced in Europe. However, starting from the 17th century significant divergences between English and European insurance systems occurred mainly due to different approaches adopted by English judicial authorities.

In the policies drafted by these Italian practitioners, it was quite common to see provisions requiring the assured to do something or refrain from doing something during the currency of the policy. While breach of such a term was treated in the same way as breach of any other contractual term in the European systems: breach was required to go the root of the contract and be causative of the loss for the insurer to avoid liability,[36] English law adopted a different approach to the issue. Such a provision was regarded as a condition on which the insurer's promise of cover was

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[33] Hill, J (Ed), *O'May on Marine Insurance*, (Sweet & Maxwell, 1993), at p 1.

[34] For a detailed analysis on the development of marine insurance in England, see Martin, F, *The History of Lloyd's and of Marine Insurance in Great Britain,* (MacMillan and Co, 1876).

[35] See, *Lohre* v. *Aitchison* (1878) 3 QBD 558.

[36] See, Van Niekerk, JP, *The Development and Principles of Insurance Law in the Netherlands from 1500 to 1800*, (Juta, 1999), at p 957.

dependent. Accordingly, the insurer was given an opportunity to avoid the whole policy in case of breach of such a provision. The first reported case in this area appears late in the 17th century. In *Jeffries* v. *Legandra*,[37] the insurers undertook to insure against perils of sea, pirates, enemies, &c, from London to Venice, and the assured warranted to depart with convoy. It was held that the words to 'depart with convoy' extended to sail with convoy for the whole voyage, but this undertaking would have been satisfied in cases where the ship was forced to separate from the convoy for reasons other than the wilful default of the master. In the judgment, it was acknowledged that compliance with this undertaking was a condition precedent to the liability of the assured but the warranty was held not to be breached since the insured vessel's separation from the convoy was purely accidental. In two further cases which were decided in late 17th and mid 18th century, a similar approach was adopted.[38] The courts in both cases accepted the underwriters' analysis of dependent condition, but construed the warranties involved according to what was customary among merchants, holding that the warranties were not breached by minor discrepancies, and the assureds recovered.[39]

The law on such undertakings were later developed and clarified in the second part of the 18th century by Lord Mansfield, who became Chief Justice of King's Bench in 1756. Lord Mansfield had a profound knowledge of commercial law, and could be regarded as a figure who laid the foundations of the modern English law of marine insurance. His method of dealing with marine insurance cases was to ascertain the customs from merchant men engaged in the business and, with due regard to the Continental Codes especially to the Marine Ordinance of 1681, to assimilate those customs to the general principles of English law.[40] He adopted a similar approach to marine warranties and dictated the rules which still govern the warranty regime in the

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[37] 91 Eng Rep 1171.

[38] *Lethulier's Case* 91 Eng Rep 384 and *Gordon* v. *Morley* 93 Eng Rep 1171.

[39] It should be noted that in *Gordon* v. *Morley*, *ibid*, the jury was composed of merchants and this could be the main reason for such an assured friendly interpretation adopted.

[40] Hurd, HB, *ibid*, at p 15. In a number of occassions Lord Mansfield clearly indicated that he had borrowed rules from continental codes. For example, in *Pawson* v. *Watson*, *ibid*, he said:

But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract.

21st century. Highly influenced by the mercantile practice, he ruled in *Kenyon* v. *Berthon*[41] that materiality of breach to the loss is not relevant in relying on breach of warranty defence. In that case insurance upon a vessel described in the policy as 'in port 20th of July, 1776', was held to be defeated on proof of the fact that she had sailed two days earlier. Lord Mansfield, in deciding this case, declared that 'though the difference of two days may not make any material difference in the risk, yet as the condition has not been complied with, the underwriter is not liable.' Also, considering the significance of such an undertaking for the underwriter in insurance practice, he adopted the rule that breach of warranty cannot be excused in another case.[42] A couple of years after, in *De Hahn* v. *Hartley*,[43] clarifying the scope of this undertaking, he held that the validity of the insurance contract depended on the compliance with the warranty and exact (literal) compliance was required to satisfy this requirement. One of the questions which occupied the law courts most in all early insurance trials, and which, like others, was not definitely settled until the judicial reign of Lord Mansfield, was of seaworthiness. It was acknowledged that the insurers should not be responsible for any loss arising from insufficient or defective quality, or condition, of the insured vessel, but the way to protect the interest of the insurer was not developed. Lord Mansfield, in *Eden* v. *Parkinson*,[44] getting inspiration from the Marine Ordinance 1681,[45] laid down the doctrine of implied warranty of seaworthiness, in the most concise manner, as follows:

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[41] (1779) 1 Dougl 12(n).

[42] See, *Hore* v. *Whitmore* (1778) 2 Cowp 784

[43] *Ibid.* He laid down this rule with the following wording:

'It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with.'

[44] 2 Dougl KB 732.

[45] Section 12 of the Ordinance reads as follows:

'However, if the merchant prove that when the ship put to sea she was unfit for sailing, the master shall lose his freight, and pay the other damages and losses.'

It must be noted that this provision afford the injured party (usually cargo owner) compensation regardless of the negligence on the part of the shipowner. The effect of this Ordinance on the development of the implied warranty of seaworthiness will later examined in Chapter 3.

'By an implied warranty, every ship insured must be tight, staunch, and strong; but it is sufficient if she be so at the time of sailing. She may cease to be in twenty-four hours after departure, and yet the underwriter will continue liable.'

Lord Mansfield, also, following earlier cases in this regard,[46] equated marine warranties with condition in general contract law and ruled that a breach of warranty entitled the insurer to repudiate the contract *ab initio*.[47]

Almost all the rules adopted by Lord Mansfield regarding marine warranties have been passed into the MIA 1906[48] by Sir Mackenzie Chalmers, the drafter of the first Bill of the Act. This is not an extraordinary situation considering that the intention of the Act was to codify the existing law without making any alteration. The only change adopted by this Act is the remedy available to insurer in case of breach of a warranty. Section 33(3) of the Act stipulates that breach of a warranty discharges the insurer from liability as from the date of breach. It has recently been clarified by the House of Lords in *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)*[49] that this section has the effect of discharging the insurer from further liability automatically and breach of warranty does not entitle the insurer to avoid the policy *ab initio*. There is evidence to suggest that Sir Mackenzie Chalmers intended to follow Lord Mansfield's approach and equate marine warranties to conditions in general contract law.[50] Also, at one stage during its chequered passage to the statute book, which took just over 12 years, the second sentence of s 33(3) of the Bill read: '...if it be not so complied with, the insurer may avoid the contract.' However, the

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[46] See, *Pordage* v. *Cole* 83 Eng Rep 403.

[47] See, *De Hahn* v. *Hartley*, *ibid*, where he said:

'Now, in the present case, the condition was the sailing of the ship with a certain number of men; which not being complied with, the policy is void.'

[48] See, ss 33-41 of the MIA 1906.

[49] [1991] 2 Lloyd's Rep 191.

[50] In all editions of books written by Sir Mackenzie Chalmers, the drafter of the Marine Insurance Act of 1906 , *A Digest of the Law Relating to Marine Insurance* (1st ed 1901; 2nd ed 1903) and *The Marine Insurance Act 1906* (1st ed 1907; with subsequent editions in 1913, 1922 and 1932), the following commentary appears:

'It is often said that breach of a warranty makes the policy void. But this is not so. A void contract cannot be ratified, but a breach of warranty in insurance law appears to stand on the same footing as the breach of a condition in other branches of contract.'

committee of lawyers, shipowners, underwriters and average adjusters appointed by Lord Herschell in 1894 and the second committee which considered the draft Bill by order of the Lord Chancellor, Lord Halsbury, adopted the remedy known as 'automatic discharge' in case of breach of a marine warranty, by changing the sub-section initially drafted, and in this way a new contractual term with a completely new remedy for its breach has been created in marine insurance.

1.2.2 Classification of Marine Warranties

A marine warranty is defined by s 33(1) of the MIA 1906 as:

'... a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.'

It is crystal clear from this definition that the MIA 1906 has regarded all marine warranties as 'promissory'. Put another way, all marine warranties are, in a general sense, 'promissory' since they include a 'promise' of the assured in relation to certain matters. Some authorities, while classifying non-marine warranties, use the term 'promissory' for warranties which relate to a future event.[51] Such an approach is confusing and contradicts the wording of s 33(3). Accordingly, the phrase 'promissory warranty' should be regarded as a collective expression for all warranties, at least as far as marine warranties are concerned, and promissory warranties be categorised according to different criteria.

1.2.2.1 Classification of Promissory Warranties According to the Time of Undertaking

Certain warranties relate in time to the circumstances at the inception of the risk. For instance, a warranty whereby the assured declares that the ship managers have a certain citizenship, is a warranty of this type. In cases where such a warranty is

[51] See, for example, Birds, J, *Modern Insurance Law*, (4th ed, Sweet & Maxwell, 1997), at pp 134-6 and Guest, AG (Ed), *Chitty on Contracts: Specific Contracts Volume 2*, (26th ed, Sweet & Maxwell, 1989), at ch 41.051.

breached, the insurer never comes on risk[52] and, accordingly, the premium is refundable due to total failure of consideration unless the breach of warranty is in fact fraudulent.[53] Some warranties, on the other hand, undertake that a given state of affairs will be satisfied or avoided at some time after the inception of the risk. This kind of warranty could also be referred to as 'warranty as to future events'. A navigation warranty which requires the insured vessel not to navigate in certain areas during the currency of the policy is a warranty of this type. By virtue of s 33(3), the breach of such a warranty does not prevent the risk from running and leaves untouched any right which has already vested in the assured at the time of the breach. Accordingly, the assured may still claim for a partial loss which has occurred before the breach. Whether the assured could recover part of the premium paid depends on the divisibility of the risk insured against.[54] Finally, an assured with a warranty might undertake that a given state of affairs will not only exist at the inception of the risk, but also during its continuation. It is appropriate to refer to warranties of this type as 'continuing warranties'. The implied warranty of legality which requires the insured adventure to be a lawful one and, so far as the assured can control the matter, be carried out in a lawful manner, is a good example of warranties of this type. In cases where the warranted state of affairs does not exist at the inception of the risk, the insurer is not liable for any loss which occurs during the currency of the policy. On the other hand, if the warranted state of affairs ceases to exist at one point during the continuation of the policy the insurer is discharged from further liability from that moment, but any right which has already vested in the assured before the time of breach remains untouched.

1.2.2.2 Classification of Promissory Warranties According to the Nature of Undertaking

Depending on the nature of undertaking, warranties may be divided into (i) affirmative warranties; and (ii) warranties which need to be satisfied by a positive/negative act. The affirmative warranty, to borrow from s 33(1), affirms or negatives the existence of

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[52] *Thomson* v. *Weems, ibid.*

[53] See, s 84(1) of the MIA 1906.

[54] See, s 84(2) of the MIA 1906.

a particular state of facts. For instance, a warranty in which the assured warrants that the flag of the insured vessel has always been British, is a warranty of this type. The warranties of latter type, according to s 33(1), undertakes that some particular thing shall or shall not be done, or that some conditions shall be fulfilled. The implied warranty of seaworthiness which requires the insured vessel to be seaworthy at the commencement of voyage could be given as an example to the warranty of this type. In cases where the assured affirms or negatives the existence of a certain fact with a warranty and they are proven to be inaccurate, the insurer never comes on risk. The reason for this is that affirmative warranties relate to a period before the attachment of the risk. Conversely, in case of breach of a warranty of the latter type the insurer is discharged from liability since the warranted event relates to a period after the attachment of the risk. In this respect, it is clear that there is an overlap between affirmative warranties and warranties examined under the previous heading, warranties which relate in time to the circumstances at the inception of risk. Accordingly, it can be suggested that affirmative warranties are warranties which relate in time to circumstances at the inception of the risk, and *vice versa*. The same is true for warranties which need to be satisfied with a positive/negative act and warranties as to future events.

1.2.2.3 Classification of Promissory Warranties According to Their Structure

According to their structure, warranties could be express or implied. In fact, this is the classification on which the warranties regime in the MIA 1906 is based.[55] Express warranties appear in the policy or are incorporated therein by reference. Under the principle of freedom of contract, the number and extent of express warranties depend on the consensus of the assured and insurer. Implied warranties, on the other hand, are incorporated into certain marine policies by the MIA 1906 and accordingly their number and scope is determined by the Act.[56] Provisions of the MIA 1906 apply equally to express and implied warranties, eg exact (strict) compliance is required for

[55] See, s 33(2) of the MIA 1906.

[56] There are only four implied warranties: implied warranty of seaworthiness; portworthiness, cargoworthiness and legality.

both of them. When examining the legal situation in relation to marine warranties in the following parts of this work, this distinction will be taken into account.

CHAPTER 2

EXPRESS WARRANTIES

INTRODUCTION

All commercial contracts, whether oral or written, contain express terms which determine the obligations agreed to by the parties. Insurance contracts are no exception to this general principle and are also made up of express terms which both define the extent of the cover and regulate the obligations of the parties, namely the assured and insurer. An express warranty is one of the terms of an insurance contract and it contains a number of stipulations, either as to the existence or continuation of a certain state of affairs or as to the performance or non-performance of some act by the assured. In other words, an express warranty forms one of the main undertakings of the assured and in case of its breach the insurer is discharged from liability as from the date of breach.[1]

Express warranties have a distinct role in the context of marine insurance. This is because they are included in one form or another in almost all marine policies. The aim of this chapter is to evaluate the express warranties in the context of marine insurance as concisely as possible. In this respect, a detailed examination of the formation of express warranties will be followed by a part which discusses the rules adopted by the courts for their construction. Construction of an express warranty may be both essential and crucial, as disputes may arise as to its extent. In this way, it can be ascertained whether the warranty was intended to apply in the events which have happened. After clarifying the issues as to formation and construction of express warranties, the standard examples of express warranties which are usually employed in marine policies will be described for the purpose of illustration. At the end of the chapter, differences between express warranties and other terms of a marine insurance contract, such as conditions, exclusion clauses etc will be evaluated. Such an

[1] See, s 33(3) of the MIA 1906. This issue will be discussed in detail later in Chapter 6.

examination is essential as different legal consequences are afforded for breach of different express terms.

2.1 FORMATION OF EXPRESS WARRANTIES AND NECESSITY FOR INCLUSION IN POLICY

S 35(1) of the MIA 1906 clearly provides that no formal or technical wording is required for the creation of an express warranty. An express warranty can be created with any kind of wording provided that the parties intended to give warranty status to the clause. The words 'warranty' or 'warranted' are, therefore, not essential in order to create an express warranty.[2] Accordingly, in *Aktielskabet Greenland* v. *Janson,*[3] a clause worded: 'No mining timber carried', was held to be an express warranty. Similarly, in *Sea Insurance Co* v. *Blogg,*[4] the court did not hesitate to give warranty status to a clause which, without using the word 'warranted', required the insured vessel to sail on or after a specific date. Provided that there is an intention to warrant between the parties, any variety of terms of contract may be given a warranty status. In *Overseas Commodities Ltd* v. *Style,*[5] for example, where a cargo of canned pork was insured, the assured warranted that all tins were marked by manufacturers with a code for verification of date of manufacture.

To determine whether the parties intended to create an express warranty is not an easy task. This process can be quite problematic if the words used are ambiguous and make it very difficult to derive the presumed intention of the parties. The courts may use some internal and external aids when determining whether there is an intention to warrant or not. Their starting point would, presumably, be ascertaining whether the clause in question possesses the characteristic properties of a promissory warranty

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[2] However, it must not be thought that the use of these words are of no importance. They may be good evidence of the parties' intention to create an express warranty. As was stated in *Ellinger & Co* v. *Mutual Life Insurance Co of New York* [1905] 1 KB 31, the use of the word 'warranted' shows *prima facie* that the parties understood that a breach of it should be a permanent or temporary bar to the insurer's liability.

[3] (1918) 35 TLR 135.

[4] [1898] 2 QB 398.

[5] [1958] 1 Lloyd's Rep 546.

stated in s 33(1) of the MIA 1906. To this end, they must determine whether the assured in the clause had undertaken that some particular thing shall or shall not have been done or that some condition shall have been fulfilled or whereby he had affirmed or negatived the existence of a particular state of facts. The courts may also consider the substance of the clause in question to see if it is fundamental to the contract, bearing in mind its relation to the risk, its business purpose, and whether it would be unfair to leave the insurers without a defence to a claim.

Despite the fact that no specific form is necessary to create an express warranty, s 35(2) of the MIA 1906 requires a warranty to be included in or written upon the policy or contained in some document incorporated by reference into the policy. Necessity for inclusion of an express warranty in the policy is unique to marine insurance and has no application in non-marine insurance where the answers in the proposal form can be included in the contract as express warranties by a 'basis of the contract clause'.[6] Answers to questions contained in slips or proposal forms can only become warranties in marine insurance, if they are inserted or incorporated either directly or indirectly by way of reference into the policy.

A warranty may be written in any part of the policy, either at the top or bottom[7] or transversely on the margin[8] or on the back.[9] In Lloyd's Marine Policy (MAR 91) a separate section has been allocated for the insertion of special conditions and express warranties and it has been stated that they form part of the policy. Therefore, no dispute arises in modern policies as to whether the warranty has been inserted into the policy or not.

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[6] The Law Commission Report on *Insurance Law: Non Disclosure and Breach of Warranty*, Law Com no 104, 1980, London: HMSO, evaluated the present law as to the legal effect of 'basis of the contract' clauses at Part VII pp 90-2, and concluded that the current situation creates injustice for the assured and it is in need of reform. Accordingly, insurers have volunteered not to use 'basis of the contract' clauses in insurances of individuals. (See para 1(b) of the Statement of General Insurance Practice and of the Statement of Long-Term Insurance Practice 1986). It is also submitted that clauses of this nature are open to challenge under the Unfair Contract Terms in Consumer Contracts Regulations 1994 (SI 1994/3159).

[7] *Blackhurst* v. *Cockell* (1789) 3 TR 360.

[8] *Bean* v. *Stupart* (1788) 1 Dougl 11 and *Kenyon* v. *Berthon* (1788) 1 Dougl 12(n.).

[9] If written on the back, it should be referred to on the face of the policy, since if the policy is apparently complete on the face of it, the assured's attention might never have been directed to the back and he would be entitled to accept what appeared on the face as constituting the whole contract between the parties.

Despite the existence of a number of decisions by Lord Mansfield to the contrary,[10] it is settled by modern authorities which have been accepted by appellate courts that warranties attached to the policy or contained in a slip pasted on to the policy can be considered as being included in the policy.[11]

An express warranty contained in another document (eg a slip), can only be considered as being incorporated into the policy if the reference to it in the policy is clear. In *Doak* v. *Weekes and Commercial Union Assurance Co plc*[12] in the proposal form expressly warranted that the vessel was 19.90 m in length whereas it was over 20 m. The only reference to the proposal form in the policy was:[13]

'It is hereby understood and agreed that this insurance is subject to the following signed declaration and warranty which appears in the proposal form: non operating owners must ensure that the details provided in this form in respect of the vessel's operator(s) are correct in every respect. Notice of change of the operator(s) together with full details of his/their experience must be given immediately.'

The Australian first instance court rejected the insurer's submission that there had been a breach of warranty on the owner's part in relation to the statement of the length of the vessel. Ryan, J, said:[14]

'I do not read this clause as having the effect of incorporating the proposal in the policy. It operates at most to incorporate into the policy warranties about certain matters which have nothing to do with the length of the vessel... In my opinion there is nothing written upon the policy or contained in a document incorporated by reference in the policy which amounts to an express warranty that the vessel was 19.90 m in length.'

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[10] See, *Pawson* v. *Barnevelt* (1778) 1 Dougl 12(n) 4 where it was held that a separate document, even if delivered with the policy cannot form part of it. Lord Mansfield also held in *Bize* v. *Fletcher* (1778) Dougl 12n (4), that even where the document was wafered on the policy it cannot be a part of it.

[11] See, *Bensuade* v. *Thames & Mersey Marine Insurance Co* [1897] AC 609; *Cordogianis* v. *Guardian* [1921] 2 AC 175; *Rozanes* v. *Bowen* (1928) 32 LIL Rep 98. It is the personal opinion of the author that this approach is consistent with s 35(2) which employs a broad term: 'to be included'.

[12] (1986) 4 ANZ Insurance Cases 60-697.

[13] *Ibid*, at 74, 154.

[14] *Ibid*, at 74, 154.

Finally, it must be borne in mind that an express warranty does not exclude an implied warranty, unless inconsistent therewith. This rule, which is incorporated in s 35(3) of the MIA 1906, merely reflects the common law situation. In *Sleigh* v. *Tyser*,[15] the policy provided that the fittings of the vessel to carry cattle were to be approved by a Lloyd's surveyor, and they were in fact approved. During the voyage a large number of cattle died, partly due to insufficiency of appliances for ventilation and partly due to an insufficient number of cattlemen to afford them. The ship was held to be unseaworthy in both respects and the implied warranty was not excluded by the approval of the fittings by the surveyor.[16]

2.2 CONSTRUCTION OF EXPRESS WARRANTIES

2.2.1 Necessity for Construction and Significance of Precedent

Even if the words used are sufficient to allow an express warranty to be inferred, in some cases there remains the difficulty of interpretation of the actual words used. Such a situation arises either because the parties fail to make their intentions clear in the words which they adopt or because the inherent ambiguities of language may make it impossible to state the parties' intentions in such a way that no misinterpretation is impossible.

Whatever the reason for construction of an express warranty is, the object is to ascertain the exact meaning of words used by parties. If express warranties are construed very broadly and against the assured, the function of insurance in seeking to prevent loss supersedes the primary function of loss distribution. Similarly, adopting a narrow construction for express warranties might lead to results which contradict the main policies behind insurance. From the insurer's point of view, risk prediction is one of the main elements of insurance and the premium is adjusted according to the extent of the risk undertaken. Since express warranties serve a function of determining the extent of the risk, construing them narrowly will, though unintentionally, make the

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[15] [1900] 2 QB 333.

[16] See also, *Quebec Marine Insurance Co* v. *Commercial Bank of Canada* (1870) LR 3 PC 234 to the same effect.

insurers undertake a risk which they would not have accepted or would have accepted with a higher premium had they known that such a construction for the express warranty would have been adopted.

Where the Court has already decided the meaning of words used in an express warranty, the same interpretation can be adopted by means of the application of the doctrine of precedent, if the meaning of the words be an issue in a later case.[17] There are, however, some dangers of applying the doctrine of precedent in a strict sense when construing express warranties. First, as was expressed by Atkin, LJ,[18] where the wording differs in important respects from that used in earlier formulations, it is dangerous to construe it by analogy with the earlier provisions, since it may well be that the wording has deliberately been altered for the purpose of overcoming the original decision. Secondly, it must be borne in mind that the words appearing in an express warranty might mean different things in marine and non-marine insurance.

2.2.2 Rules Adopted by Courts for Construction of Express Warranties

Since marine insurance law is a part of contract law, the rules and principles adopted by general contract law for the construction of contractual terms can also be employed for the construction of marine policies.[19] In this part, it is intended to examine the guidelines which have been developed by courts over the past years in relation to the construction of marine warranties. In this respect, the different approaches of the courts for the construction of express warranties will be classified under different

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[17] The importance of the doctrine of precedent in insurance law was highlighted by Parke, B, in relation to construction of a term of the policy in *Glen* v. *Lewis* (1853) 8 Exch 607 at p 618 in the following way:

'If a construction had already been put on a clause precisely similar in any decided case, we should defer to that authority.'

[18] *Re Caf and Sun Insurance Office* [1920] 2 KB 366, at p 382.

[19] Brett, LJ, highlighted this point at the Court of Appeal in *West India & Panama Telegraph Company Ltd* v. *Home & Colonical Marine Insurance Company Ltd* (1880) 6 QBD 51 at p 58:

'An English policy is to be construed according to the same rules of construction, which are applied by English Courts to the construction of every mercantile instrument.'

The principles for the construction of contractual documents were summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd* v. *West Bromwich Building Society* [1998] 1 WLR 896 at pp 912-3.

categories. During this analysis, the case law will be referred to intensively and also some illustrations will be made by taking standard Institute Clauses published by the Institute of London Underwriters into account. It must, however, be borne in mind that this process is a rather complicated one which does not invite easy generalisation.

2.2.2.1 Literal Construction

In case of a dispute as to the meaning or extent of an express warranty, the courts' primary function is to interpret what the parties have in fact said in their contract. Accordingly, the words used in a warranty must be construed in their plain, ordinary and popular sense, that is to say in accordance with their dictionary meaning.[20] Such a construction is, however, subject to some qualifications. When examining the meaning of a word used in a warranty, the commercial understanding of the word in question must also be considered.[21] The commercial understanding as to a specific word used in an express warranty has qualified its literal meaning in a number of cases. In *Bean* v. *Stupart*[22] the court had to construe the meaning of an express warranty which required the vessel to carry 'thirty seamen besides passengers'. In fact, 26 mariners had signed the ship's register, and, to make up the number 30, the assured reckoned the steward, cook, surgeon and some boys. The court held that boys were included under the term 'seamen' by mercantile usage and accordingly the warranty was satisfied. The commercial understanding as to 'seamen' meant persons employed in navigation as distinct from passengers. Similarly in *Hart* v. *Standard Marine Insurance Co Ltd*[23]

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[20] Lord Watson observed ,in a general sense, in *Thomson* v. *Weems* (1884), 9 App Cas 671 at p 687:

'The (matter) must be, in my opinion, interpreted according to the ordinary meaning of the words used if that meaning be plain and unequivocal and there be nothing in the context to qualify it.'

[21] Nield, J, remarked in *Lowenstein (J) & Co Ltd* v. *Poplar Motor Transport (Lymm), Ltd (Gooda, Third Party)* [1968] 2 Lloyd's Rep 233 at p 238:

' I am satisfied that... I should construe the words according to the understanding of business people so as to make their meaning realistic and such as to give business efficacy to the agreement between the parties.'

Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA* v. *Salen Rederierna AB (The Antaios (No2))* [1985] AC 191, at p 201:

'... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a confusion that flouts business common sense, it must be made to yield to business common sense.'

[22] *Ibid.*

[23] (1889) 22 QBD 499.

where there was a warranty stating 'warranted no iron or ore exceeding the net registered tonnage', it was held that an ordinary business man would consider that the term iron include steel and accordingly the warranty was breached when a quantity of steel in excess of such tonnage was shipped.

In order to interpret the ordinary meaning of words in question, one would also have to admit evidence as to whether those words had any special meaning to the individuals in the area. In other words, the meaning of words used in an express warranty may also be qualified by usages of trade which are known, or presumed to be known in any locality.[24] In *Dolbec* v. *United States Fire Insurance Co*,[25] a vessel was securely moored at a dock in Montreal with her engine removed when she was destroyed by fire. The marine policy stipulated an express warranty that during the winter months, the yacht was to be 'laid up and out of commission'. Against the insurer's allegation as to breach of warranty, the assured argued that the yacht was securely moored with her engine removed and therefore the warranty was satisfied. The Canadian court held that the words 'laid up and out of commission' had to be interpreted in accordance with the usual practice followed in laying up boats in the area where the loss occurred. The court found that the practice in the Montreal region was to remove boats from the water during winter months, and accordingly the warranty was breached as this was not done so.

In addition to qualifications mentioned above, when adopting a literal construction, certain traditional canons of interpretation, namely *ejusdem generis* and *expressio unius est exclusio alterius*, can also be relied on. The meaning and potential applications of these rules to some standard marine insurance warranties will be considered next.

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[24] See, the remarks made by Henry, J, in *Provincial Insurance Co of Canada* v. *Connoly* [1879] SCR 258 at p 269.

[25] [1963] RR 153.

2.2.2.1.1 Ejusdem Generis

The *ejusdem generis* rule which is laid down with reference to the construction of statues, namely, that where several words preceding a general word point to a confined meaning the general word shall not extend in its effect beyond subjects of the same class,[26] applies in the construction of contracts.[27] This rule was expressed in relation to a marine insurance policy by Lord Birkenhead, LC, as follows[28]:

'Where specifications of particular things belonging to the same genus precede a word of general signification, the latter word is confined in its meaning to things belonging to the same genus, and does not include things belonging to a different genus.'

If this is applied to the interpretation of express warranties, it can be concluded that if particular words used in a warranty have a generic character, more general following words must be construed as having the same character. Standard Institute Fishing Vessels Clauses,[29] for example, stipulates a disbursements warranty in the following way:

'Warranted that no insurance is or shall be effected to operate during the currency of this insurance by or for account of the Assured, owners, managers or mortgagee on: disbursements, commissions or similar interests,...'

Applying the *ejusdem generis* rule in accessing the extent of this warranty, it can be concluded that the words 'or similar interests' will have the same character as the words 'disbursements and commissions' and would probably include an insurance policy on profits or Excess or Increased Value of Hull and Machinery but not P&I cover which has a completely different character.

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[26] *Sendiman* v. *Breach* (1827) 7 B & C 96; *R.* v. *Nevill* (1846) 8 QB 452 and *Att - Gen* v. *Brown* [1920] 1 KB 773.

[27] *Cullen* v. *Butler* (1816) 5 M & S 461 and *Harrison* v. *Blackburn* (1864) 17 CB 678.

[28] *Stoomvart Maatschappij 'Sophie H'* v. *Merchants Marine Insurance Co Ltd* 122 LT 295 at p 296.

[29] (20/7/87), drafted by The Institute of London Underwriters.

2.2.2.1.2 Expressio Unius Est Exclusio Alterius

According to this rule, express mention of one thing may imply the exclusion of another related thing.[30] It can be applied in marine insurance where an express warranty might have covered a number of matters, but in fact mentions only some of them. Unless these are mentioned merely as examples, the rest are considered to be excluded from the proposition. Standard Institute Warranty on Indian Coal is worded:

'Warranted not to sail with Indian Coal as cargo:-...'

The application of expressio unius est exclusio alterius rule suggests that, since it is not expressly excluded the warranty does not cover Indian Coal, if any, carried as fuel.

2.2.2.2 Departures from Literalism

As discussed above, the starting point in construing express warranties is to consider the ordinary meaning of the word or phrase in question. Where the words are plain and bear an unmistakable meaning, no evidence will be admitted for the purpose of putting a different construction upon them. However, in case of ambiguity where the words used in an express warranty are capable of more than one construction or where their meanings are not clear, the courts depart from literal construction and interpret the meaning of the words in question by other means. The two main approaches adopted by courts in construing ambiguous words or phrases in an express warranty will be discussed now.

2.2.2.2.1 Ascertaining the Presumed Intention of the Parties

When departing from literalism in construing the meaning of an express warranty, the

[30] *Blackburn* v. *Flavelle* (1881) 6 App Cas 628, at p 634.

first step for the judges is to examine the presumed intention of the parties.[31] The idea is that if the intention of parties in incorporating that specific warranty into the insurance policy is identified, its extent could easily be determined. Identifying the presumed intention of two contracting parties has always been problematic for a third party, simply because 'intention' is an intangible object and it is dynamic in the sense that it changes according to other factors existing during the time of contracting.

The judge must not speculate as to the intention of parties but, if necessary, may interpret the words used in a warranty by reference to the surrounding circumstances[32] and the whole of the contract. In *Colby* v. *Hunter*[33] a vessel was insured at and from Hamburg to Vigo and warranted 'in port on 19 October'. The vessel was in port of Cuxhaven some ninety miles outside the limits of port of Hamburg on that day, and disputes arose whether there was a breach of warranty. The warranty in question was an express warranty as to the position of the ship at a certain date and Lord Tenterden, CJ, held that the parties must have intended the vessel to be in the port where the policy would attach. Accordingly the warranty should be construed as requiring the vessel to be in the port of Hamburg on 19 October. As can be seen, the other provisions of the policy (the fact that it was an 'at and from policy') played an important role in the decision of Lord Tenterden, CJ, in identifying the intention of parties.

In any case, a reasonable construction is to be preferred as presenting the presumed intention of parties.[34] In *Berns & Koppstein Inc* v. *Orion Insurance Co Ltd*,[35] there

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[31] This is, in fact, the case in all areas of contract law. For instance, in *Pioneer Shipping Ltd* v. *BTP Tioxide Ltd* [1982] AC 724, Lord Diplock said:

'The object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them.'

[32] *Union Insurance Society of Canton Ltd* v. *George Wills & Co* [1916] I AC 281.

[33] 1 Moo & M 81.

[34] See *Reardon-Smith Line Ltd* v. *Hansen-Tangen* [1976] 1 WLR 989 where Lord Wilberforce said:

' When one speaks of the intention of the parties to the contract one speaks objectively- the parties cannot themselves give direct evidence of what their intention was-and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.'

[35] [1960] 1 Lloyd's Rep 276.

was a warranty requiring the cargo shipped to be surveyed 'immediately' prior to shipment. It was, in fact, surveyed up to two weeks before the shipment and the insurer claimed that the survey warranty had been breached. It was held that the term 'immediately' should be interpreted reasonably and adopting a strict interpretation would presumably conflict with the intention of the parties because this would overlook the actual operating conditions under which goods are surveyed and shipped.

2.2.2.2.2 *Contra Proferentem* Rule

The *contra proferentem* rule is to the effect that any ambiguity, or other doubt in an express warranty must be resolved against the insurer. The logic behind this rule is that the underwriter is usually the person who has drawn the policy and inserted the warranty for his own protection, therefore in a case of a dispute the warranty must be interpreted against him. With the adoption of this rule the insurer is, in a way, punished for not making the extent of the warranty crystal clear.

In order to apply this rule, the existence of ambiguity must be identified first. In *Capital Coastal Shipping Corporation & Bulk Towing Corporation* v. *Hartford Fire Insurance Co (The Christie)*[36] an express warranty provided that a particular person should be master of the insured vessel. At the time of sinking, a different person was her master and the District Court for the Eastern District of Virginia Norfolk Division refused to construe the warranty *contra proferentem*, because the evidence indicated that the assured had a clear understanding of the importance and operation of the warranty and could not contend that it was too vague.

It is the personal opinion of the author that although the *contra proferentem* rule is relied on by judges quite a lot in non-marine insurance, has not found the same degree of support in marine insurance.[37] The possible reason for this might be the fact that in

[36] [1975] 2 Lloyd's Rep 100, hereinafter referred to as *The Christie*.

[37] The rule, for example, has been adopted in construing non-marine warranties in: *Havelock* v. *Hancill* (1789) 3 TR 277; *Australian Agricultural Co* v. *Saunders* (1875) LR 10 CP 668; *Yorke* v. *Yorkshire Insurance* [1918] 1 KB 662; *Simmonds* v. *Cockell* [1920] 1 KB 843; *Glicksman* v. *Lancashire & General Assurance Co Ltd* [1927] AC 139; *Provincial Insurance Co* v. *Morgan & Faxon* [1933] AC 240; *Woolfall & Rimmer Ltd* v. *Moyle* [1942] 1 KB 66; *Sweeney* v. *Kennedy* (1948) 82 LlL Rep 294.

non-marine insurance the assured is usually a non-professional in the sense that is not a person whose everyday business dealings involve the making and carrying out insurance contracts, while this is not the case in marine insurance. The assured in marine insurance usually operates in a market governed by long-standing and well-known rules of law and practices and for this reason he can reasonably be expected to be aware of the niceties of insurance law and the extent of terms of the contract he has signed.[38] This might well be the thought in the judges mind which prevents them from adopting *contra proferentem* rule easily, when construing express marine warranties.

Nevertheless, the rule has been adopted by the judges occasionally to construe marine warranties. For instance, in *Muller* v. *Thompson*[39] it was held that the insurance 'on the cargo, being 1031 hogshead of wine' imported no warranty that the wine was the only cargo. More recently, the Supreme Court of Canada applied the rule in *Shearwater Marine Ltd* v. *Guardian Insurance Co of Canada*[40] to construe an express warranty. In that case, the assured's vessel was taken out of service and laid up. It was moored about 300 yards from the assured's office, but was visible there-from and from other vantage points on the assured's lands and floats. The policy for the vessel incorporated an express warranty which required the vessel to be inspected on a daily basis and pumped as necessary. The vessel was not boarded on a daily basis and it was often inspected from a distance of 300 yards. After the vessel had sunk on a rainy night, the assured claimed compensation from the insurers, but they argued that the assured breached the warranty set out in the policy. The insurer supported the view that the warranty required the assured to have on board inspections daily. The assured, on the other hand, argued that persons familiar with the vessel and knowledgeable about the lay or attitude of a vessel in the water can tell from a distance whether there is sufficient water in the bilge to require pumping, and accordingly the warranty was satisfied when the vessel was viewed from distance. The *contra proferentem* rule was applied and the meaning most favourable to the assured was adopted. In this respect,

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[38] The same justification was given by the Law Commission for excluding marine insurance contracts from a potential reform on breach of warranty in insurance law. See, *ibid*, s 2.8, p 14.

[39] (1811) 2 Camp 610.

[40] [1997] 29 BCLR (3d) 13.

the assured was held to satisfy the warranty by viewing the vessel from a distance on a daily basis to determine whether pumping was necessary.

2.3 STANDARD EXAMPLES OF EXPRESS WARRANTIES

As examined earlier, the parties are given a wide range of discretion not only to create an express warranty on any point but also to determine its extent. Simply for this reason, an attempt to describe all different types of express warranties which can be employed in a marine policy is a futile exercise. It is, however, possible to examine the main express warranties which appear in the Institute Clauses and the ones which were specially identified and mentioned in the MIA 1906, namely warranty of good safety, nationality and neutrality, for the purpose of illustration. It is believed that such an examination will be quite useful and informative.

It is, therefore, the object of this part to carry out such an examination and when doing this the warranties under examination will be classified in two categories, namely warranties as to future events and continuing warranties. This distinction is based on the moment at which the warranted event or condition is required to be complied with.[41]

2.3.1 Warranties As to Future Events

With an express warranty as to future events, the assured undertakes that that a given state of affairs will be satisfied or avoided at some time after the inception of the risk. Breach of such a warranty does not prevent the risk from running and leaves untouched any right which has already vested in the assured at the time of the breach. Accordingly, the assured may still claim for a partial loss which occurred before the breach.

2.3.1.1 Warranties As to Geographical Limits (Locality Warranties)

It is the general understanding of the assured and insurer that the ship may navigate in any navigable waters, unless restrictions have been expressed in the policy to the

[41] See Chapter 1.2.2.1 at p 12 for more information.

contrary. The position is acknowledged in the Institute Clauses with the following words which are quoted from the ITCH (1995):[42]

' The vessel is covered, subject to the provisions of this insurance, at all times and has leave to sail with or without pilots to go on trial trips and to assist and tow vessels or craft in distress...'[43]

Some certain restrictions are placed on the movement and operation of the insured vessel in the policy and they are usually in the form of a warranty. These kind of warranties are called navigation (locality) warranties where the assured undertakes either that the insured vessel will navigate within the confines of a specified area or she will not navigate in specific waters or beyond a specified point. There are five sets of locality warranties which were designed by the London Market Joint Committee and they are published by the Institute of London Underwriters.[44] One of these Institute warranties which provides restrictions to proceed to North Russian Waters, for example, is worded as follows:

'Warranted no North of 70 degree North Latitude other than voyages direct to or from any port or place in Norway or Kola Bay.'

The common feature in all five sets of Institute warranties as to navigation of the insured vessel is that the assured undertakes that the vessel will not proceed to specific areas or beyond a specified point. These are the areas which preserve a lot of dangers for navigation such as poor visibility, icebergs and arctic weather conditions. Apart from these standard Institute warranties as to locality, the parties have a liberty to create any type of express warranty restricting the assured vessel to proceed to areas where, for example, there is war or similar hazardous situations such as a possible pirate attack.

Arnould has advocated that a clause restricting the navigation of vessels to certain geographical limits is not a warranty in its strict sense, but a term which defines the

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[42] Clause 1.1.

[43] The same wording has been adopted by the 1983 version of the ITCH.

[44] Under reference cl 26 (1/7/76).

risk covered by the policy.[45] This argument has been based on the fact that since mid-19th century to the present day, clauses of this nature have been assumed to be a warranty and the issue has never been considered in detail.

It was first in *Colledge* v. *Hardy*[46] where the court had to determine whether a clause restricting the geographical limits of navigation of a vessel was a warranty or an exception in legal terms. The clause in question stated that the ships were 'not to sail from any port on the east coast of Great Britain to any port in the Belts between 20th December and 15th February.' After hearing arguments from both sides, it was held that such a term was a warranty. Later in *Birrell* v. *Dryer*[47] where the policy contained the clause: 'Warranted no St. Lawrence between October 1 and April 1', the House of Lords considered it as a warranty by relying on the precedent.[48]

Arnould cited the statement of Scrutton, LJ, in Re *Morgan* and *Provincial Insurance Co*[49] to support the argument that clauses of this nature are not warranties. Although the case was not concerned with marine insurance, Scrutton LJ, *obiter*, said:[50]

'... if a time policy contains a clause 'warranted no St. Lawrence between 1st October and 1st April', and the vessel was in the St Lawrence on 2nd October, but emerged without loss, and during the currency of the policy in July a loss happens, the underwriters cannot avoid payment on the ground that between 1st October and 1st April the vessel was in the St Lawrence (*Birrell* v. *Dryer*). That is an example of a so-called warranty which merely defines the risk insured against.'

With all respect to Arnould, the writer is of the opinion that the status of the clauses in question in the above mentioned cases were correctly identified. In both cases, the

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[45] *Arnould's Law of Marine Insurance and Average*, (16th ed, Stevens & Sons, 1981), para 698. Also Hodges, S, *Law of Marine Insurance*, (Cavendish Publishing Ltd, 1996) supports a similar view, at pp 115-20.

[46] (1851) 6 Exch 205.

[47] (1884) 9 App Cas 345.

[48] See also, *Provincial Insurance Co of Canada* v. *Leduc* (1874) LR 6 PC 224 and *Simpson SS Co Ltd* v. *Premier Underwriting Association Ltd* (1905) Com Cas 198 where the clauses restricting the navigation of the insured vessel were held to be warranties.

[49] [1932] 2 KB 70.

[50] *Ibid*, at p 80.

assured undertook to fulfil an obligation, in other words he affirmed that a certain event (entering to the specified areas) would not occur during the currency of the policy. This was done by using the phrase 'the vessels shall not sail...' in *Colledge* v. *Hardy* and 'Warranted no St. Lawrence...' in *Birrell* v. *Dryer*. Therefore, the intention in incorporating the said clauses was not to bring the insurer off risk during the period when the assured does not comply with them and again on risk when he does. If the intention was to create a clause to that effect, this could have been done with a different wording which did not impose any obligation on the assured. A wording as follows, for example, would be ideal for such a purpose: 'The insurer is not to be on risk while the vessel sails in the areas specified...' Furthermore, the statement of Scrutton, LJ, in *Morgan* v. *Provincial Insurance Co* is *obiter dictum*, and for this reason does not form a precedent that must be followed.

However, Arnould's view as to clauses restricting the navigation of the insured vessel has recently found judicial support in Supreme Court of British Columbia of Canada. In *Federal Business Development Bank* v. *Commonwealth Insurance Co Ltd (The Good Hope)*[51] there was a clause in the policy which stated:

'Warranted vessel laid up at the north foot of Columbia Street with permission granted to demonstrate within Vancouver Harbour for the purpose of sale.'

The trial judge found as a fact that, for a short period of time, the vessel had been outside the geographical limit specified in the clause. It was held that the clause in question was not a warranty but only a provision delimiting the risk. The decision was based on the fact that it could not be the intention of the parties to preclude the assured for breach of that clause, specially in cases where the situation was restored later on.[52]

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[51] [1983] 2 CCLI 200.

[52] Such a reasoning is the same reasoning adopted by the British Columbia Court of Appeal in *Case Existological Laboratories Ltd* v. *Foremost Insurance Co et al (The Bamcell II)* 133 DLR (3d) 727; aff'd by the Supreme Court of Canada [1983] 2 SCR 47 (sub nom *Century Insurance Co of Canada* v. *Case Existological Laboratories Ltd*), hereinafter referred to as *The Bamcell II.* This case and its justification will later be discussed in detail at pp 48-51. The same approach was adopted in another case in Canada. In *Britsky Building Movers Ltd* v. *Dominion Insurance Corporation* [1981] 1 LR 1-1420, Mantitoba Country Court held that the clause: ' Warranted confined to the navigable waters of the Province of Mantitoba' was not a warranty but a clause delimiting the risk.

In my opinion, with appropriate wording a legal effect other than warranty can be given to a clause which restricts the navigation of the insured vessel. It is, however, not right to generalise the issue, like Arnould, by saying that the clauses of this kind are not warranties but clauses delimiting the risk. The legal status of the clause in question depends on its wording. It can be argued, by relying on the House of Lords, that the standard Institute clauses as to locality are warranties.[53] On the other hand, the courts would not hesitate to give a different legal status to a clause restricting the navigation of the insured vessel which with clearer terms manifests an intention not to warrant. In *Navigators and General Insurance Co Ltd* v. *Ringrose*,[54] for example, a clause worded as: 'the vessel is insured whilst within the United Kingdom' was held to be a clause delimiting the risk rather than a warranty by the Court of Appeal.

2.3.1.2 Institute Warranty As to Towage and Salvage Services

Towage and salvage services are operations which posses high risks for the vessels engaged in them. In order to restrict the engagement of the insured vessels in such operations, an institute warranty has been employed in hull policies.[55] This warranty provides that the insured vessel will not be towed any time after the inception of the risk. Customary towage and towage to the first safe port or place when in need of

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[53] See *Birrell* v. *Dryer, ibid*, where a clause similarly worded with that of Institute Warranties was held to be a warranty. The law on locality warranties, however, has shown dramatic changes in America during recent years. In *La Réunion Française SA* v. *Halbart* [1999] AMC 14, a locality warranty, which limited the operation of the insured vessel to the Atlantic Coast of the United States and a defined area in the Bahamas and the Caribbean, was subject to judicial examination. The Federal District Court held that any locality warranty, which could confine an insured to a coastal region, such as East Coast of the United States, or West Coast of Mexico and which does not express itself in a numeric figure, is utterly without meaning or effect. The Court's judgment read, *ibid*, at p 23:

' The language of an insurance policy must be accorded its plain meaning. The plain meaning of the navigational Limits Warranty does not comprehend a mileage limitation. Without such limitation in the Policy, [the assured] could not have breached it.'

Cf La Réunion Française SA v. Christy [1999] AMC 2499 delivered by the Middle District Court of Florida.

[54] [1962] 1 WLR 173.

[55] See, cl 1.1 of ITCH and IVCH (both the 1983 and 1995 versions) which provides:

' ...it is warranted that the Vessel shall not be towed, except as is customary or to the first safe port or place when in need of assistance, or undertake towage or salvage services under a contract previously arranged by the Assured and/or Owners and/or Managers and/or Charterers.'

assistance are excepted from the scope of the clause and, therefore, are not covered by the warranty. It is possible to determine the extent of the warranty by evaluating the scope of these exceptions.

Whether a towage service is customary or not, will be identified according to the practice and customs in the trade for the vessels concerned. For instance, it is likely that a towage service engaged whilst the insured vessel is manoeuvring in restricted waters (eg in a harbour, canal or river) will be considered as a customary towage. Similarly, if towage services are engaged by a professional tower for the safety of the insured ship, the warranty in the policy does not prejudice the assured. In order to grasp the scope of the exception, some hypothetical situations will now be taken into account and in each case whether the towage services are engaged for the safety of the insured vessel will be discussed.

The warranty will not be barred in cases where the insured vessel is in distress at sea and her master enters into a contract with a passing ship, whereby the other ship undertakes to tow her to safety subject to payment for towage services whether or not they are successfully completed. The same is true, if the master of the insured vessel accepts a salvage from a salvage tug while she is in distress at sea, verbally agreeing to base the operation on the Lloyd's 'No cure - no pay' salvage agreement and accordingly the insured vessel is towed to a safe port.[56] Similarly, the warranty will still be satisfied, if the insured vessel has been reasonably abandoned by her master, officers and crew and an independent vessel finds her drifting and tows her to a place of safety.[57] Such towage services are, however, restricted by the clause until the first safe port or place. Therefore, the warranty is barred in cases where the assured enters into a towage contract for the towage of the insured vessel from a port of distress to a repair port.

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[56] For more information on salvage and particular salvage forms see, Baughen, S, *Shipping Law*, (Cavendish Publishing Ltd, 1998), pp 255-89.

[57] This is a pure salvage service and the salvor is entitled to a award upto the value of the salved property under the International Convention on Salvage 1989 which has been given force of law in the United Kingdom by s 224 and Schedule 11 of the Merchant Shipping Act 1995.

The second obligation imposed on the assured is not to undertake towage or salvage services under a contract previously arranged. The logic behind such a restriction is crystal clear. Undertaking salvage services as salvor or towage services as tower increases the risk insured against and the insurers do not wish the insured vessel to be exposed to unnecessary peril simply to afford the assured the opportunity to benefit from a salvage award or towage fee. Accordingly, the warranty is breached in cases where the insured vessel enters into a contract to tow or salve another vessel, which is not in distress, from one place to another in return of a benefit. The extent of this second obligation has, however, been narrowed to give the assured an opportunity to undertake salvage or towage services in cases where there is no contract previously arranged. The reason for this exception is not to discourage the master of the insured vessel from taking a distress vessel in tow where human life may be in danger or where the distressed ship is drifting and no other salvage services are available. Therefore, there is no breach of warranty if the master of the insured vessel agrees within the terms of Lloyd's 'No cure- no pay' salvage agreement to take a distressed ship in tow to a safe port.

2.3.1.3 Warranties As to The Cargo Carried

It is a common practice, specially in time hull policies, to incorporate a warranty which restricts the type of cargo the ship may carry or sometimes the way in which cargo shall be carried. There is a standard Institute Warranty to this end in relation to Indian Coal which provides:[58]

'Warranted not to sail with Indian Coal as cargo:-
(a) between 1st March and 30th June, bdi
(b) between 1st July and 30th September, bdi except to ports in Asia, not West of Aden or East of or beyond Singapore.'

The Indian Coal is a form of lignite which is particularly subject to spontaneous combustion if carried in a damp condition during the hotter parts of the year. The aim of this Institute Warranty is to reduce the risk of fire on board the insured vessel by

[58] Warranty 6 of Cl 26 (1/7/76) drafted by the Institute of London Underwriters.

preventing the assured from carrying Indian Coal as cargo during the main monsoon season (March to June) and to limit the distance for carrying such coal as cargo during the later mansoon season (July to September).

Apart from this standard Institute Warranty in respect of Indian Coal, any kind of cargo warranty restricting the carriage of specific cargo may be incorporated in the policy. For example, in *Aktielskabet Greenland* v. *Janson*,[59] a warranty was incorporated into the policy prohibiting the insured vessel from carrying mining timber. Similarly, it was warranted in *Hart* v. *Standard Marine Insurance Co Ltd*[60] that no iron or ore in excess of the registered tonnage would be carried.

2.3.1.4 Laid Up and out of Commission Warranties

Some hull policies, specially the ones effected to provide cover for yachts, incorporate warranties which require the insured vessel to be laid up and out of commission on a specific time of the year. With cl 4 of Institute Yacht Clauses (IYT),[61] for example, it is warranted that the assured yacht will be laid up out of commission as stated in the Schedule to the policy. The reported cases illustrate that there might be some disputes as to the extent of this warranty. It is not wrong to conclude that its extent must be interpreted according to the practice and custom at the place where the insured vessel was located.[62] In any case, a reasonable interpretation must be adopted when examining the meaning of a warranty of that type. In *MacDonald* v. *Liverpool and London Globe Insurance Co Ltd et al*,[63] a policy of insurance warranted that the yacht insured was to be laid up and out of commission from October 1st, at noon until April 1st, at noon. The assured had removed all of the navigational lights and equipment, unplugged the stove and fridge, sealed some windows, and filled the fresh water tanks with anti-freeze. The vessel was destroyed by fire on October 6th while moored

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[59] *Ibid.*

[60] *Ibid.*

[61] (1/11/85) drafted by the Institute of London Underwriters.

[62] See, the Canadian cases *Daneau* v. *Laurent Gendron Ltée: Union Insurance Society of Canton Ltd (Third Party)* [1964] 1 Lloyd's Rep 220 and *Dolbec* v. *United States Fire Insurance Co, ibid.*

[63] [1978] 22 NBR (2d) 172.

awaiting to be hauled out of water for the winter. The Canadian first instance court found for the assured and Richard, J, summarised the judgment in the following way:[64]

' In large measure, the defence is a technical one. It is the equivalent of saying that if the boat had burnt one minute past 12:00 noon of the 1st day of October, 1976, that it would not have been covered by the insurance. Upon a consideration of all the evidence before me, I would find it most reasonable to interpret the warranty clause as meaning that sailing of the boat must terminate on the specified day and that retrieval from the water must be carried out within a reasonable time thereafter.'

2.3.1.5 Warranty of Good Safety

In earlier days when the communication was not so advanced, it was quite important for the assured, for the purpose of accessing the risk, to know exact position and state of the vessel at certain date. For this reason, warranties declaring the whereabouts or condition of the vessel on a date named, used to be inserted into marine policies quite frequently. In this respect, it is not suprising to have a special section in the MIA 1906, which was drafted early this century, regulating this type of express warranties. Section 38 of the MIA 1906 provides that where the subject- matter is warranted 'well' or 'in good safety' on a particular day, it is sufficient it be safe on any time during that day. The creator of this section is *Blackhurst* v. *Cockell*,[65] where a policy on a ship contained a warranty stating : 'lost or not lost. Warranted well on 9 December.' The policy was subscribed between 1 pm and 3 pm on 9 December. The vessel was, in fact, lost at about 8 am on that day. It was held that the warranty was complied with by the fact that the vessel was safe at some time on the day when the underwriters subscribed the policy, although she was not safe at the particular hour when they subscribed it. The use of warranties of this kind has been limited dramatically in modern marine policies, as a result of developments in the communication.

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[64] *Ibid*, at p 181.

[65] *Ibid.*

2.3.2 Continuing Warranties

A warranty of this type is a warranty that a given state of affairs will not only exist or satisfied at the inception of the risk, but also during its continuation. In cases where the warranted state of affairs do not exist at the inception of the risk, the insurer is not liable for any loss which occurs during the currency of the policy. On the other hand, if the warranted state of affairs cease to exist at one point during the continuation of the policy the insurer is discharged from further liability from that moment, but any right which has already vested in the assured until the time of breach remains untouched.

2.3.2.1 Warranty of Nationality

Section 37 of the MIA 1906 expressly states that there is no implied warranty as to the nationality of the vessel, or that her nationality shall not be changed during the risk. A warranty of this kind can, however, be created by agreement in a marine insurance contract. It is not uncommon to see express warranties as to the nationality of the insured vessel and a continuing warranty status is usually given to them, that is to say the assured not only warrants that the ship has a specific nationality at the inception of the policy, but he also warrants to keep her in the same nationality throughout the risk.[66]

In cases where such a warranty has been created, the vessel must carry the usual documents and other things which are necessary to prove her nationality. These are the flag, the certificate of registry, log-book, certificates of origin and etc.[67]

2.3.2.2 Warranty of Neutrality

It often happens in time of war that the assured warrants the insured ship or goods to be neutral. Such a warranty is referred to as a 'warranty of neutrality', and it is the only express warranty which has been both qualified and described by the MIA 1906. After

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[66] *Eden* v. *Parkinson* (1781) 2 Dougl KB 732 and *Tyson* v. *Gurney* (1789) 3 Term Rep 477.

[67] *Geyer* v. *Aguilar* (1898) 7 Term Rep 681; *Rich* v. *Parker* [1798] 7 Term Rep 705 and *Baring* v. *Claggett* (1802) 3 B & P 201.

creating a continuing warranty status, s 36 of the MIA 1906 imposes certain obligations on the assured and he has to comply with these obligations unless otherwise has been stated expressly in the warranty. Therefore, in cases where a warranty of neutrality have been created in respect of the ship or goods and nothing else is stated in the provision, the warranty is subject to these qualifications.

According to s 36, the property must have a neutral character at the commencement of the risk and so far as the assured can control the matter its neutral character must be preserved. If the vessel is warranted neutral, she must be wholly owned by neutrals. In this respect, the nationality of the person or persons who own the vessel must be identified to see whether they are the subjects of a neutral state or not. As to what establishes nationality, Lord Kenyon LCJ, held in *Tabbs* v. *Benedelack*[68] that persons residing in a country carrying on a trade, by which both they and the country were benefited, were also considered as the subjects of that country, and were also considered by the law of nations, at least, so far as to subject their property to capture by a country at war with the country in which they lived. Therefore, a person can be considered as the subject of a state when he resides and carries out his business in that state, even though he is not citizen of that state.[69]

In cases where the goods carried are warranted neutral, again the test adopted by Lord Kenyon has to be applied to determine the nationality of the people who own them. If the goods carried on the same vessel are in different ownerships and are covered by separate insurance policies, only the goods warranted neutral must be so. It is not necessary that the whole cargo be neutral-owned.[70] However, in cases where goods warranted neutral are loaded upon an armed vessel of a belligerent, or the ship on which they are loaded sails under convoy or in company of an armed belligerent force or under licence of a hostile government, this is a breach of the warranty of neutrality of the goods.[71]

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[68] 4 Esp 108.

[69] If the insured vessel is owned by a single ship company, the corporate veil must be lifted and the nationality of the people behind the corporate entity must be identified to judge whether she is owned by neutrals or not.

[70] *Barker* v. *Blakes* (1808) 9 East 283.

[71] *The Fanny* (1814) 1 Dodson's Adm R 443.

The warranty of neutrality will have a continuing effect only as far as the assured has control over the matter. It will, for example, be no breach of warranty if property warranted neutral be really owned by neutrals, but the parties become belligerents by the subsequent breaking out of hostilities between the state of which they are subjects and another state.

Section 36(2) imposes an implied condition that the insured vessel shall be properly documented as far as the assured can control the matter. That is to say that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers.[72] In case of breach of this obligation, the contract may only be avoided in the event of loss occurring through the breach. Therefore, breach of this condition does not discharge the insurer from liability automatically like the breach of neutrality warranty or other warranties.

2.3.2.3 Institute Disbursements Warranty

The disbursements clause[73] in the standard Institute Hull Clauses lists certain hull insurable interests, such as disbursements, managers' commissions and profits, in respect of which the assured is permitted to effect insurance policies to run additionally and concurrently with the hull and machinery policy to which the disbursements clause attach. Second part of the said clause introduces a warranty in which the assured warrants not to effect insurances on these ancillary interests in excess of the amounts stated in the first part of the clause, either at the inception of the hull and machinery policy or during its continuation. For example, the disbursements clause permits the assured to effect an insurance policy on disbursements in addition to the hull and machinery policy up to a sum not exceeding 25 % of the value stated therein. With the disbursements warranty, the assured warrants that he will not effect an insurance policy

[72] Note that there is no such obligation imposed by s 36(2) when the goods are warranted to be neutral.

[73] See cl 21.1 of ITCH (1983); cl 22.1 of ITCH (1995); cl 19.1 of IVCH (1983) and cl 20.1 of IVCH (1983).

in respect of disbursements in excess of the amount (25 %) stated in the hull and machinery policy.[74]

A warranty of this kind was introduced in Institute Hull Clauses following the case of *Thames & Mersey Marine Insurance Co* v. *Gunford Ship Co.*[75] In this case, the vessel was insured on a valuation which was in excess of the insurable value and the freight was insured under a valued policy for a sum in excess of the gross amount at risk. In addition, the shipowners had effected a valued policy on disbursements. In examining the list of payments which were alleged by the assured to be the subject-matter of the disbursements policy, the court found that they were items which were already covered by either the freight or the hull and machinery policies. It was accordingly held that the disbursements policy constituted an overinsurance by double insurance and the assured was not entitled to any sum in excess of the indemnity provided by law.

Furthermore, there are some sound underwriting reasons for introducing a disbursements warranty. In the absence of any restrictions upon the amount of additional insurances allowed, it would be possible for an assured to cover his vessel on full conditions for a valuation which he held sufficient to cover most partial losses and he could then arrange additional cover on 'total loss only' conditions at a lower rate of premium in order to bring the cover up to the full value required. Such an insurance programme would result in the first insurance becoming a first loss policy and would distort the premium loss ratio figure.

2.3.2.4 Institute Classification Warranty

The 1995 version of Institute Hull Clauses[76] (Both Time and Voyage) impose an obligation on the assured, owners and managers to ensure throughout the period of insurance that: (a) the vessel is classed with a Classification Society 'agreed by the insurers' and that her class is maintained; and (b) any recommendation or restriction

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[74] It must be noted that although breach of this warranty discharges the insurer from liability in respect of the hull and machinery policy, it has no direct effect on the additional policies.

[75] [1911] AC 529.

[76] See, sub-cls 4.1 and 4.2 of ITCH (1995) and 3.1 and 3.2 of ITVH (1995).

imposed by the Society, relating to the vessel's seaworthiness or maintenance of it, should be complied with by the dates required by that Society.[77]

Although the word 'warranted' has not been employed in the said clause, it is submitted that[78] it creates a continuing warranty as an intention to warrant can be inferred from its language and the specified remedy.[79] It is further expressly stated in the clause that breach of such duties will discharge the insurer from liability from the date of breach. The harsh consequence of breach of this warranty are curbed if the vessel is at sea at the time of breach. In such a case, the date of discharge from liability will be deferred until her arrival at the next port.

2.4 DISTINGUISHING OTHER EXPRESS TERMS OF THE MARINE INSURANCE CONTRACT FROM WARRANTIES

An express warranty is not the only express term of a marine insurance contract. There are some other express terms which either determine the extent of the cover or set up the rights and obligations to the parties of an insurance contract. The law has not, however, treated these different terms in the same way and accordingly different legal consequences have followed in case of their breach. Since the remedy afforded for breach of warranty is draconian, in the sense that it discharges the insurer from further liability automatically and can be enforced irrespective of whether the breach is material to the loss or not, it is not uncommon to see an attempt by the assured to classify the provision in question as a term other than an express warranty. Thus, it is necessary not only to identify the structure of express warranties but also to distinguish them clearly from other express terms of a marine insurance contract.

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[77] Introduction of this clause can be considered as a reaction of the Market towards the numerous bulk carrier (and tanker) losses in the 1980s and early 1990s.

[78] See, the contribution of Sheppard, AM, in Thomas, R (Ed), *The Modern Law of Marine Insurance* (LLP Ltd, 1996), at pp 62-4

[79] This clause was originally drafted as:

'Warranted that: the vessel is classed with... and existing class maintained'. See the document of 'Joint Hull 131 (30/06/89)'.

The object of this part is to examine the other similar express terms of a marine insurance contract and compare them with express warranties. It is believed that such an attempt will be quite useful in clarifying the place of express warranties in the ranks of contractual terms and in this way a clearer view of the overall situation can be obtained.

2.4.1 Conditions in Marine Insurance Contracts

Marine insurance contracts consist of terms known as 'conditions' on the fulfilment of which the validity of the policy or the liability of the insurer depends.[80] They are classified in three main categories with reference to the time when they come into operation, and these will now be considered separately.

2.4.1.1 Condition Precedent to the Attachment (Commencement) of the Risk

Some conditions of a marine insurance contract are so fundamental that non-fulfilment prevents the insurer from coming on risk.[81] In voyage policies, for example, the risk which an insurer undertakes is a particular marine adventure consisting of a voyage from a named point of departure to a specified destination. In this respect, the port of departure named in the policy and the destination specified in the policy are both conditions precedent to the attachment of risk.[82] If the vessel departs from a port other

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[80] In *W & J Lane* v. *Spratt* [1969] 2 Lloyd's Rep 229 at p 236, Roskill, J, defined conditions in respect of transit insurance with the following words:

'By a 'condition' I mean a contractual term of the policy, any breach of which by the assured in the event of a loss arising otherwise payable under the policy afford underwriters a defence to any claim irrespective of whether there is any causal connection between the breach of the contractual term and the loss.'

It is submitted that this description can also be used for marine insurance conditions.

[81] Conditions of this nature has been described by the Supreme Court of New South Wales (Australia) in *Kodak (Australasia) Pty Ltd* v. *Retail Traders Mutual Indemnity Insurance Association* (1942) 2 SR 231 at p 234 as:

'... a condition going to the operation of the policy as a binding document... [such a term] is intended to entitle the insurer to treat the policy as a document which never became binding on him.'

[82] See, MIA 1906, ss 43 and 44.

than the one specified in the policy or departs from the port specified in the policy but for a destination other than the one stated in the policy, the risk never attaches.[83]

An express warranty can be distinguished from a condition of this type in two senses. First, breach of an express warranty, unless it relates to a period before the attachment of the risk, does not prevent the contract from coming into existence while breach of the latter does. Secondly, in case of non-fulfilment of a condition precedent to the attachment of the risk, the assured is entitled to his premium for total failure of consideration.[84] However, when an express warranty is breached the assured could be entitled to his premium only if the warranty relates to a period before the attachment of the risk or if the warranty relates to a period after the attachment of the risk and the adventure insured is divisible into stages.[85]

2.4.1.2 Condition Precedent to the Liability of the Insurer (Procedural Condition Precedent)

Such conditions relate to matters arising after a loss under the policy and define the circumstances in which the liability of the insurer is to arise.[86] They are usually concerned with the claims process. A condition of this type can be created either by the use of the phrase 'condition precedent to the liability of the insurer' or a statement that in the event that the condition is not fulfilled, the insurer is not to be liable for the loss.[87] Breach of such a condition will prevent the assured from submitting a valid claim in respect of the loss in question and accordingly the insurer will not be liable for

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[83] However, where the policy is an 'at and from policy' the risk attaches if the vessel sails from the port specified in the policy, but for a destination other than the one stated in the policy. In such a case, the insurer is liable for all casualties prior to the change of voyage, but he is discharged from liability as from the time of change by virtue of MIA 1906 s 45, unless the policy otherwise provides. Modern marine clauses, however, usually held covered the assured in case of change of voyage provided notice be given to the insurer immediately after receipt of advices and any amended terms of cover and any additional premium required by them to be agreed. See, for example, cl 2 of IVHC (1995).

[84] See, MIA 1906, s 84(1).

[85] See, MIA 1906, ss 84(1) and (2).

[86] *London Guarantee Co* v. *Fearnley* (1880) 5 App Cas 911 per Lord Blackburn at p 915.

[87] In *Richardson* v. *Roylance* (1933) 47 LIL Rep 173, for example, a condition of this type was created by the use of the phrase 'No claim shall attach to this policy unless the terms of this condition have been complied with.'

that loss. Clause 13.1 of ITHC (1995), for example, is a condition of this kind and requires the assured to give notice to the underwriters in the event of accident whereby loss or damage, may result in a claim under the current insurance policy.[88] It is stipulated in the same clause that if notice is not given within a specified time, the insurers will be automatically discharged from liability for any claim under the current insurance in respect of or arising out of such accident or the loss or damage.

Express warranties are distinct from conditions of this kind, in the sense that in case of breach of an express warranty the insurer is discharged from further liability automatically as from date of breach. However, where a condition precedent to the liability of the insurer is breached, the validity of the policy itself is unaffected, unless the policy itself provides to the contrary, and in this way the insurer's potential liability for future claims is preserved.

2.4.1.3 Condition Subsequent

Conditions of this kind are concerned with the conduct of the assured after the formation of the contract of insurance. They usually deal with matters such as increase of risk, double insurance and termination. In general, consequences for breach of these conditions are spelt out expressly in the policy and the most common remedies are termination of contract at the option of insurer or in some cases termination of contract automatically. In the absence of an express provision in the policy as to the consequences of a breach of a condition subsequent, the effect of breach has not been fully explored by the English courts. It has, however, been suggested that a general contract approach may be appropriate. Accordingly, if the condition is one which is of some significance, eg a condition against the making of fraudulent claims, its breach can entitle the insurer to terminate the contract as from the date of breach. By contrast, if the term is relatively minor, its breach should give rise only to damages for the insurer.[89]

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[88] See, cl 11.1 of IVHC (1995) to the same effect.

[89] See *Hong Kong Fir Shipping Co Ltd* v. *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. For a more detailed discussion, see generally Merkin, RM (Ed), *Insurance Contract Law*, (4th ed, Kluwer Publishing, 1998) at pt B 2.2.

There are various examples of this type of condition found in policies of marine insurance and in the Rules of P&I Clubs which invariably specify the consequence of breach. Clause 4.1 of ITHC (1983),[90] for example, is a condition of this type and stipulates that change of the Classification Society of the vessel or a change, suspension, discontinuance, withdrawal or expiry of her class terminates the insurance contract automatically.[91] Similarly, a P&I Club rule which entitles the Club to terminate the cover by giving notice in cases where the member has failed to pay the premium or contribution, is a condition subsequent.[92]

The distinction between an express warranty and a condition subsequent can be drawn with fine lines. In the former, the assured undertakes to do or avoid certain things or fulfil certain requirements. In the latter, on the other hand, although some obligations may be imposed on the assured nothing has been undertaken by him. There is also a difference between the consequences afforded for breach of these terms. Breach of an express warranty, unless waived, discharges the insurer from further liability automatically in all cases.[93] The consequence afforded for breach of a condition subsequent, however, varies in each case. It may be spelt out expressly in the policy, but if it is not it depends on the actual impact of the breach on the contractual relationship.

2.4.2 Exclusion Clauses in Marine Insurance Contracts

In all types of insurance contracts, it is possible to see clauses which cut down the scope of cover and in this way define the extent of the policy. Since express warranties operate in a similar manner by defining the essence of the risk covered, one might find it difficult to draw the distinction between the two. The distinction is, however, crystal clear. Unlike an express warranty, the intention when incorporating an exclusion clause

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[90] Clause 5 in 1995 version.

[91] See, cl 4.2 of the ITHC (cl 5.2 in 1995 version) to the same effect.

[92] See, for example, r 31 of the United Kingdom P&I Club (1998 version).

[93] See, MIA 1906 s 33(3) and the decision of the House of Lords in *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1991] 2 Lloyd's Rep 191.

is not to warrant but to exclude liability. Exclusion clauses can be classified in two categories by reference to the way they come into operation. The types of exclusion clauses and their interrelation with express warranties will now be examined.

2.4.2.1 Clauses Which Exclude Insurer from Liability for A Particular Risk

Clauses of this kind exclude the liability of the insurer under the policy for certain risks. Therefore, the insurer has no liability in cases where the loss is caused or the peril brought into operation by clauses specified in the exclusion clause. The occurrence of such a peril, unlike breach of an express warranty, does not discharge the insurer from liability. The insurer remains liable for losses outside the exclusion clause, whether arising before or after the events which constitute the excluded peril. Here, causation plays a distinct role. If the risk excluded by the exclusion clause is the *proximate* cause of the loss within the meaning of s 55 of the MIA 1906, then the insurer has no liability for such a loss.

Although there is a clear distinction between an exclusion clause and an express warranty, some confusion might arise due to the traditional wording employed for exclusion clauses in some marine policies. It is, for example, not uncommon to encounter an exclusion clause worded as: 'Warranted free from capture and seizure'.[94] Such a clause simply means that the insurer is not liable for the perils of capture and seizure, and there is no intention to create an express warranty.[95]

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[94] Such a clause appeared in the policy in *Department of Fisheries and Oceans, Fishing Vessel Insurance Plan* v. *Lec Tulloch* (unreported, 6 February 1989) decided by the Federal Court of Appeal of Canada. The clause in question worded as:

'Warranted free from any claim for loss, damage or expense when anyone other than the assured is master of the insured vessel named in Clause 1 herein without prior approval of the Plan. On approval the Plan made charge an additional premium as a condition thereof.'

[95] In *Bank of Nova Scotia* v. *Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)*, *ibid*, at p 201, Lord Goff distinguished between '... those warranties which simply denote the scope of the cover (as in the familiar fc and s clause - warranted free of capture and seizure) and those which are promissory warranties, involving a promise by the assured that the warranty will be fulfilled.'

2.4.2.2 Clauses Delimiting (Describing) the Risk (Suspensory Provisions)

Some exclusion clauses operate not by excluding liability for certain events and risks, but by setting out the circumstances in which the insurer is to be on risk. An exclusion clause of this type is referred to as a term 'delimiting (describing) the risk' or sometimes a 'suspensory provision'. The effect of such a clause is that the operation of the policy is suspended for the period when the circumstances specified in the clause are not satisfied. Accordingly, the insurer is not liable for any loss which occurs during this period, but unlike breach of an express warranty, the validity of the insurance contract is not affected and the cover reattaches as soon as the original position is restored. In *Riverside Landmark Corporation* v. *Northumberland General Insurance*,[96] where a policy of marine insurance contained the words 'covering whilst being towed in tandem by Irving Tug TBA from Quebec City to Tampico, Mexico', it was the view of the Canadian court that the words were descriptive of the risk and the policy was not invalidated, but the cover was suspended during the period when the vessels in question were not towed in tandem.

Clause 9 of Institute Container Clauses (ICC) (Time)[97] is as an example of clauses of this type. This clause stipulates that each container is covered, including whilst on deck, within the sea and territorial limits specified in the Schedule. This means that the cover is suspended when the container is in port or at sea but outside the territorial limits specified in the Schedule and if it is damaged while in these areas the insurer is not liable at all. The cover, however, reattaches as soon as the container is at sea and in the territorial limits specified in the Schedule.[98]

Although the distinction between an express warranty and a term delimiting the risk seems to be a fine one, in some cases great problems arise in this respect. The reason for this is the poor drafting of some clauses and the use of the wording which is appropriate to the creation of either. One of the most celebrated cases which highlights

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[96] [1984] 8 CCLI 118.

[97] (1/1/87) drafted by the Institute of London Underwriters.

[98] See cl 6 of Institute War and Strikes Clauses Containers (Time) to the same effect.

this problem is *The Bamcell II.*[99] The Bamcell II was a converted chip barge which was used in oceanographic experiments. She was operated by compression of air which could be admitted or released through valves on deck. Raising or lowering the air pressure caused the stern of the barge to rise or fall, thus allowing the Bamcell II to float or float off certain modules used in experiments. The vessel sank during daytime, as a result of the negligence of an employee who opened the air valves and failed to close later. The marine policy in the case contained the following clause:

'Warranted that a watchman is stationed on board the Bamcell II each night from 2200 hours to 0600 hours with instructions for shutting down all equipment in an emergency.'

Such a watchman was never stationed on board the Bamcell II from the day after the inception of the policy until the accident. The underwriters gave evidence at the trial that this clause was intended to be a warranty and the risk was accepted on the basis that the assured would strictly comply with it. Accordingly, they contended that since the assured never placed a watchman on board from the first day after the inception of the risk, the warranty was breached and the insurer was discharged from liability under the policy from that moment even if the loss was unconnected with such a breach.

In the British Columbia Court of Appeal,[100] Lambert, JA, concluded that the clause was a suspensory provision and not a warranty. The assured was, accordingly, allowed to recover under the policy as the loss occurred during daytime and not between the hours stated in the clause. When reaching this decision, he cited the following passage from *MacGillivray & Parkington on Insurance Law*[101]:

'Clauses of this nature are sometimes referred to as 'warranties descriptive of the risk' or 'delimiting the risk.' This usage is not an accurate one, but it serves as a remainder that a court may be prepared to construe a clause as one descriptive of the risk even though the word 'warranty' or 'warranted' appears in it, as where a car was 'warranted used only for the following purposes.' That case illustrates the point that there is no magic in the word 'warranted' which is frequently used with considerable ambiguity in policies.'

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[99] *Ibid.*

[100] *Ibid.*

[101] (6th ed, Sweet & Maxwell, 1975) at pp 263-4.

The primary case relied upon by the editors of *MacGillivray & Parkington* at the above passage concerning suspensive provisions, is the case of *Farr* v. *Motor Traders' Mutual Insurance Society Ltd*[102] In that case, the assured ran a taxi business, using two taxis. On applying for insurance for the use of these vehicles, he warranted in the proposal form that each vehicle would be driven for only one shift each day. The policy was issued in February 1918 and the statement remained true until August 1918, when one of the taxis was driven for two shifts for one day or a little longer. Later, after this practice had ceased an accident occurred. It was held that the term in question was a term delimiting the risk and not an express warranty, so that the assured was entitled to recover for an accident happening at a time when the term was being complied with. It is the opinion of the writer that *The Bamcell II* can be distinguished from *Farr* v. *Motor Traders'*. In the latter case, the assured complied with the provision in question for a long time (from February until August) and was in breach of it only for a very short period. Therefore, the idea principle behind the court's decision was presumably to protect the assured, who was in breach of the relevant clause only for a short period, against the frequently harsh consequences of a warranty.[103] By contrast, in *The Bamcell II* the assured was in breach of the clause in question from the beginning of insurance period until the date of loss. In fact, he had never complied with it and in this respect, it can be concluded that there is no similarity between facts of these two cases. Classifying the watchman clause in *The Bamcell II* as a clause delimiting the risk, therefore, would provide protection to the assured who was in breach of it at all the material times and this is obviously inconsistent with the logic behind *Farr* v. *Motor Traders'*.

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[102] [1920] 3 KB 669.

[103] The same attitude, to protect the assured from harsh consequences of breach of warranty, can also be observed in other cases cited in *MacGillivray & Parkington on Insurance Law* when examining provisions of this type. In *Provincial Insurance Co Ltd* v. *Morgan & Foxon, ibid,* for example, the proposal form contained a clause which warranted that the insured lorry was to be used only for carrying coal. It was, in fact, occasionally used to carry timber instead of or as well as coal. The lorry had an accident shortly after offloading a quantity of timber. The Court of Appeal, the conclusion of which was upheld by the House of Lords, held that the clause was not a warranty but a clause delimiting the risk. Accordingly, the insurers were held liable as the lorry had not been carrying timber when damaged. The author believes that the fact that the clause in question was breached occasionally and not all the time and the idea to protect the assured played a crucial role in the court's decision. See also, *De Maurier (Jewels) Ltd* v. *Bastion Insurance Co Ltd & Coronet Insurance Co Ltd* [1967] 2 Lloyd's Rep 550 and *Roberts* v. *Anglo-Saxon Insurance Co* [1927] 27 LIL Rep 313 to the similar effect, both of which were cited in *MacGillivray & Parkington on Insurance Law*.

Furthermore, in the Court of Appeal Lambert, JA, suggested that in order to determine the status of the clause in question, the intention of the parties when incorporating it into the policy must be observed. He accordingly said:[104]

'[T]he parties cannot have intended that if the watchman was late one night, or even missed a night, then the insurers should be discharged from liability for the remainder of the term of the policy... [I]t is my opinion that the clause in this case under the heading of 'special conditions' is a clause which limits the risk and not a true warranty which discharges the insurer. The limitation on the risk has no effect in this case.'[105]

This observation, which makes sense in the first instance, is subject to some severe objections. Lambert, JA, has not cited any authority or given any explanation to support this statement. With all respect to his decision, the author is of the opinion that the presumed intention of parties when incorporating the clause in question cannot be ascertained simply by judging its fairness. As was stated by Hobhouse, J, in *Cooke and Arkwright* v. *Hayden*:[106]

' It is not the courts function, by process of construction, to make for the parties a reasonable contract which they have not made for themselves.'

The assured in *The Bamcell II* was in a position to bargain the conditions of the insurance contract. If he had doubts about the fulfilment of the obligations stated in the clause, he should not have agreed in the first place. Besides, he breached that clause deliberately from the beginning of the insurance period and never had any intentions of complying with it. Thus, defining the clause in question as a clause delimiting the risk

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[104] *Ibid*, at pp 740-1.

[105] Richie, J, in the Supreme Court of Canada concurring with the findings of Lambert, JA, said, *ibid*, at pp 55-6:

' The clause would only have been effective if the loss had occurred between 2200 hours and 0600 hours, and it was proved that there was no watchman stationed aboard during these hours. To this extent, the condition contained in the clause constituted a limitation of the risk, but it was not a warranty."

[106] [1987] 2 Lloyd's Rep 579 at p 582.

would mean awarding the assured who had not judged his position accurately and was deliberately in breach of an obligation he undertook, from the inception of the policy.

Finally, some judicial support can be drawn from various authorities to show that the interpretation adopted by the Supreme Court of Canada in The Bamcell II in relation to the status of the 'watchman clause' was inappropriate. In *Perryman Burns Coal Co Inc* v. *Northwestern Fire & Marine Insurance Co (The Harlem)*[107] a clause worded as: 'Warranted that a watchman is to be on board at all times when loaded', was held to be an express warranty and breached when the watchman left the barge for two hours to get his supper.[108]

For all the arguments advanced above, the author is of the opinion that the watchman clause in *The Bamcell II* was an express warranty and not a provision delimiting the risk. It is believed that if a clause worded in the same way as that in *The Bamcell II* is considered by English courts, under the light of the authorities cited, it will be regarded as an express warranty.[109]

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[107] [1927] AMC 1089.

[108] See also, *Lean G Bukwalter* v. *Aetna Insurance Co (The Dauntless)* [1928] AMC 1430; *Elizabeth B Briody* v. *Northwestern Fire & Marine Insurance Co (The Silk)* [1931] AMC 1348 and *Tacoma Oriental SS Co* v. *J F Tallant* [1931] AMC 1351.

[109] The Supreme Court of Canada had reached another contradictory decision on a similar issue long before *The Bamcell II*. In *James Staples* v. *Great American Insurance Co New York* [1941] SCR 213, a clause in a yacht policy which provided that the vessel was warranted to be used for pleasure purposes only, was held to be a clause delimiting the risk and not warranty. Kerwin, J, said:

'[I] cannot read the statement as a condition that upon the yacht being used for other than private pleasure purposes, the policy would be avoided even though at the time the loss was suffered, the yacht was not being so used.'

Again, no authority was cited for this statement. It is submitted that such an approach is beyond the scope of English marine insurance law. Accordingly, there is no dispute as to the warranty status of cl 3.2 of Institute Yacht Clauses ((1/11/85) drafted by The Institute of London Underwriters) which has been worded exactly in the same manner:

'Warranted to be used solely for private pleasure purposes.'

However, it should be noted that in non-marine insurance, occasionally, *The Bamcell* II has been assisted by English courts in order to justify that a certain clause is a suspensory provision and not an express warranty. Recently, in *Kler Knitwear Ltd* v. *Lombard General Insurance Co Ltd* [2000] LRIR 47, by citing *The Bamcell II*, Morland, J, held that the following clause in the assured's policy covering its business was a suspensory provision:

'SPRINKLER INSTALLATIONS WARRANTY

It is warranted that within 30 days of renewal 1998 the sprinkler systems at the Jellicoe Road/Gough Road/Spalding Road locations must be inspected by a LPC approved sprinkler engineer with all necessary rectification work commissioned within 14 days of the inspection report being received.'

To sum up, it can be argued that the distinction between an express warranty and a clause delimiting the risk is straightforward provided that a wording which can lead to misinterpretation has not been used. Accordingly, as the drafter of marine insurance clauses in many cases, the insurer is expected to use unambiguous words when drafting such clauses and emphasise the intention of the parties clearly. For instance, it must be avoided to employ an express warranty such as the one employed *The Christie*,[110] as the intention of the parties is not very clear and the assured may be enabled to challenge its status. The express warranty in the said case was drafted in the following way:

'Warranted the master of the insured vessel shall be Captain CT Chism and except in the event of emergency or distress, this policy does not provide coverage [when] operated by any other master.'

To avoid any inconvenience that may arise in future as to the status of an express warranty, it is advisable to draft express warranties in such a way that the effect of its breach is stated expressly. Alternatively, the parties can state in the policy that the clause in question is to be construed as a warranty within the terms of the MIA 1906.

2.4.3 Words Qualifying the Subject-Matter of Insurance in Marine Insurance Contracts

Not only in marine insurance but also in other areas of insurance law, the description of the subject-matter of insurance is one of the essential elements for the formation of an insurance contract. That the subject-matter insured must be designated in a marine policy with reasonable certainty has been stated in s 26(1) of the MIA 1906. In case of non-fulfilment of this provision an action on the policy would clearly fail, as the assured will be unable to show that the subject matter in respect of which he has suffered loss is the subject matter which is in fact insured by the policy.[111] Thus, words

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[110] *Ibid.*

[111] Blackburn, J, said in *Mackenzie* v. *Whitworth* (1875) 1 Ex D 36 at p 40:

'A description of the subject-matter of insurance is required both from the nature of the contract and from the universal practice of insurers... If no property which answers the description in the policy be

identifying the subject-matter of insurance are one of the express terms of an insurance contract.

When the case law is examined, it can be observed that in some circumstances the words qualifying the subject-matter of insurance were held to be express warranties rather than being mere words of description of subject-matter of insurance. In *Baring* v. *Clagget*,[112] for example, a policy was effected on goods which were qualified with the words 'on board the Mount Vernon, an American ship'. It was held that this description of the vessel contained a warranty that the goods were carried on board an American ship.[113] Therefore, when determining whether the words qualifying the subject-matter of insurance constitute an express warranty or only describe it, the first task is to identify for what purpose they have been inserted into the policy. If such words are inserted for the purpose of designating the subject-matter of insurance and distinguishing it from the others, then they are merely words describing the subject-matter of insurance. If, on the other hand, such words are furnished to the insurer to enable him to determine whether he will undertake the risk at all, and, if he does, what premium he shall demand, then they can be regarded as an express warranty. In other words, if words describing the subject matter of insurance contain a statement of fact bearing upon the risks undertaken, such words will be construed as an express warranty.[114]

In cases, however, where the words describing the subject-matter of insurance contain a statement of intention as to certain things rather than a statement of fact bearing upon the risks undertaken, such words cannot be construed as an express warranty. In *Grant* v. *Aetna Insurance Co*,[115] a steamship was described in a policy of fire insurance

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at risk, the policy will not attach, though the assured may have other property at risk of equal or greater value. The reason being that the insurers have not entered into a contract to indemnify the assured from any loss on that property.'

[112] *Ibid.*

[113] See also, *Lothian* v. *Henderson* (1803) 3 Bos & P 499 and *Baring* v. *Christie* (1804) 5 East 398.

[114] See, *Thomson* v. *Weems, ibid,* at p 684 where Lord Blackburn said:

'In policies of marine insurance I think it is settled by authority that any statement of fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty,..'

[115] (1862) 15 ER 589.

as 'now lying in Tait's Sock, Montreal and intended to navigate the St. Lawrence and Lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter in a place approved by the Company'. The ship never left the dock, and approximately 11 months later, was destroyed by fire. The words qualifying the subject-matter of insurance ware not construed as an express warranty by the Privy Council, but merely as an expression of the assured's intention to remove her for the purpose of navigation in the manner described. Accordingly, the assured was not precluded from recovery.[116]

2.4.4 Cancellation Clauses in Marine Insurance Contracts

Under ordinary circumstances, a marine insurance contract remains in force until the expiration of the insurance period.[117] In some cases, however, an express term of the contract may enable either the assured or insurer to determine the policy before it expires. Such clauses are called cancellation clauses. They are contained in almost all marine insurance contracts,[118] and require the party who wishes to operate them to give notice to the other party. In cases where such a clause is operated, the insurance comes to an end on the stipulated date and any loss happening after the date of termination is not covered.

There is no inter-relation between clauses of this nature and express warranties, as they are directed to different aspects. A cancellation clause gives the parties to an insurance contract the right to terminate it by giving notice and there is no breach of contract if

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[116] Lord Kingdown, of the Privy Council, gave the opinion of the Court at p 594, *ibid*,:

'Their Lordships are of the opinion that the question depends entirely on the meaning to be attached to these words. If they import an agreement that the ship shall navigate in the manner described in the policy, there being an engagement contained in the policy, they must be considered as a warranty; and the engagement not having been performed, whether the engagement was material or not material the insurers are discharged. But their Lordships think that this is not true meaning of the words used. They consider that the clause in question amounts only to this: the assured says, my ship is now lying at Tait's Dock; I mean to remove her for the purpose of navigation in the manner described, and if I do, the Policy shall still be in force; but in that case I engage to lay her up in winter in a place to be approved by the Company. This construction which implies no contract to navigate, seems to their Lordships the natural meaning of the words used, and imputes a reasonable interpretation to the parties to the policy.'

[117] This period is a specific period of time in time policies, while it is a certain marine adventure in voyage policies.

[118] See, for example, cl 11 of Institute Containers Clause (Time).

they are operated. Some obligations, on the other hand, are imposed on the part of the assured by an express warranty, and the insurance contract is breached if they are not complied with.

CHAPTER 3

IMPLIED WARRANTY OF SEAWORTHINESS

INTRODUCTION

As examined in the previous chapter, the express warranties are actually expressed in the policy or incorporated therein by reference. They, in fact, have been made a part of the insurance contract and are known by both parties to the contract. The implied warranties, on the other hand, do not appear in the policy; but are tacitly understood by the parties to be present. They are implied by law from the circumstances in which the bargain was effected.

Implied warranties are not present in any areas of insurance law except marine insurance.[1] The reason for this lies in the unique nature of the marine adventure. When a vessel is engaged in a marine adventure, apart from the shipowner, numerous interests, such as crew, buyer or in some cases seller of the cargo carried on board[2] are exposed to maritime perils; however neither the assured nor the insurer is in a position to ascertain the condition of the insured vessel during the period when she performs the voyage. In order to balance the conflicting interests of contracting parties and minimise the pitfalls of the marine adventure, marine insurance law has imposed certain implied warranties into marine insurance contracts.

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[1] There is, for example, no implied warranty in life insurance that the life is in good health or free from disease and similarly there is no implied warranty in fire insurance that the premises are well-built and incorporate fire precautions. Similarly, it was held in *Trickett* v. *Queensland Insurance Co* [1936] AC 159, that there was no implied warranty of roadworthiness in respect of motor insurance. Recently, in *Euro-Diam Ltd* v. *Bathurst* [1988] 2 All ER 23, it was stressed by the Court of Appeal that there was no implied warranty of legality in non-marine insurance.

[2] The person who effects the insurance in respect to the cargo carried on board is determined according to the type of the sales contract. If the sale is on so-called fob terms, the seller's part is performed when he puts the goods free on board the ship. In that case, the contract of carriage and insurance for the cargo shipped will normally be effected by the buyer. On the other hand, when the sale is cif the seller bears the cost of insurance and freight and the buyer takes the delivery abroad at the end of the transport. Here it is usually the seller who contracts with the shipowner for the conveyance of goods and engages in effecting the insurance for the cargo carried.

There are four warranties implied by the MIA 1906, namely, warranty of seaworthiness (s 39(1)(3)(4)); warranty of portworthiness (s 39(2)); warranty of cargoworthiness (s 40(2)) and warranty of legality (s 41). The drafter of the first Bill of the Act, Sir Mackenzie Chalmers, considered it necessary to specify the negative in s 37 that there is no implied warranty as to the nationality of a ship or, that her nationality shall not be changed during the risk; and in s 40(1) that there is no implied warranty that the goods or moveables shipped are seaworthy. This kind of drafting, although it seems strange in the first instance, in my opinion serves a very useful purpose. The intention of Sir Chalmers, with this negative wording, was presumably to state that the implied warranties in marine insurance are only the ones which have been employed by the MIA 1906. In this way a message was sent to judges not to impose any more implied warranties into a marine insurance contract.[3] This assumption may be justified by considering the nature of warranties in marine insurance.[4] A marine insurance warranty, in fact, imposes an obligation on the assured and in case of its breach affords an affirmative (positive) defence for the insurer. Implying a new warranty into a marine insurance contract naturally is in favour of the insurer and may harm the balance between the assured and insurer in a marine insurance contract. Therefore, if a warranty status need to be created in respect of nationality of the ship or the goods to be carried, it has to be inserted into the policy by express terms.

The aim of this chapter is to evaluate the implied warranty of seaworthiness from different angles. Considering the practical significance of this warranty, it is understandable why this chapter is the longest chapter of the thesis. Following a short historical examination, the meaning of seaworthiness in maritime law and the factors which must be taken into account when determining seaworthiness will be discussed in detail. Despite the fact that these are rather technical issues, the nature and scope of the implied warranty of seaworthiness cannot be clarified without such examination. The rest of the chapter will discuss the implied warranty of seaworthiness in marine

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[3] In contract law, a term might be implied into the contract by the courts. In deciding whether to imply a term, the courts are guided by general policy considerations affecting the type of contract in question, and to this extent considerations of necessity and fairness may enter into the implication of such terms. See, *Tai Hing Cotton Mill Ltd* v. *Liu Chang Hing Bank Ltd* [1986] AC 80 and *Barrett* v. *Lounava* (1982)Ltd [1990] 1 QB 348.

[4] See s 33(3) of the MIA 1906.

insurance. Justification for the concept in marine insurance will be followed by a detailed analysis of the position in voyage, time and mixed policies. Although the case law and statute provisions will be the main source of this analysis, application of the concept in practice will also be referred to. Then the importance of the seaworthiness defence in P&I cover and burden of proof in unseaworthiness allegations will be considered. At the end of the chapter, the possible legal effect of two instruments adopted by the International Maritime Organisation, namely the International Safety Management Code 1993 and 1995 changes to the Convention on Standards of Training Certification and Watchkeeping for Seafarers 1978, on provisions relating to seaworthiness will be discussed. These two instruments can be regarded as a part of a systematic attack of the international maritime community against sub-standard ships and the increasing role of the human factor in marine casualties and they are expected to have a great impact on many civil law issues, including marine insurance.

3.1 ORIGINS OF THE DOCTRINE OF SEAWORTHINESS

When the history of law is observed, it can be clearly seen that each legal rule or institution has been created in order to meet different needs of the social or commercial life. The situation is exactly the same in maritime law. For instance, the legal principles on general average were created around 500-600 BC[5], in order to protect the interest of parties who were involved in or affected by a sacrifice to preserve both the vessel and rest of the cargo in a case of emergency. The doctrine of seaworthiness was formed and developed for a similar reason, namely to protect the different interests exposed to a marine adventure from the possible hazards of marine adventure. In connection with the developments in maritime law, the doctrine was further advanced and received a different legal shape in marine insurance. The author is of the opinion that the origins of the concept and its development must be examined for two reasons.

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[5] It was expressed by a Roman lawyer of 3rd century AD, Paulus, in his famous book named *Sentence of Paulus* that Rhodian Sea Law contained the following provision as to general average:

'If for the sake of lightening a ship, a jettison of goods has been made, what has been given for all shall be made up by the contribution of all.'

For a detailed analysis on Rhodian Sea Law, see Ashburuner, W, *The Rhodian Sea Law*, (Clarendon Press, 1909).

First, one can have a deeper understanding of the present state of the doctrine and its function in marine insurance if he is aware of the stages that it had gone through since its derivation. Furthermore, by observing the evolution of the doctrine, it might be possible to make some assessments about its potential progression in the coming years.

Provisions relating to seaworthiness of a vessel first appeared in charterparties and carriage of goods by sea contracts in 5th century. According to Ashburner[6], Byzantine charterparties contained a seaworthiness provision. This provision did not, in fact, afford a legal consequence. It only recommended the merchants who wished to load great and valuable cargoes to determine whether the vessel had a complete set of tackles, a sufficient number of sailors and was watertight.

The Laws of Oleron, which were proclaimed about 1150 AD by Elenor, Duchess of Guienne[7] contained several provisions relating to seaworthiness.[8] These provisions, unlike the clause in Byzantine charterparties, regulated seaworthiness as an obligation and afforded some legal consequences in case of its breach. By virtue of art X, for example, the master of a ship, when chartering a vessel to merchants, had to show them the vessel's cordage, ropes and slings with which the cargo was to be hoisted abroad or ashore. If the master of the ship omitted to show the equipment to the merchants and there was an accident as a result of a defect in those equipment, he would be held liable for damages. Article XIII of the same codification set out the master's obligation to provide a sufficient crew. If he fails to do so, the shipowner would be liable for damages. Similar provisions are to be found in The Laws of

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[6] *Ibid.*

[7] These rules take their name from the Ile d' Oleron off the south-western coast of France and they are admitted to be the foundation of all the European maritime codes. The earliest French edition published in 1485, bears a title 'Jugemens de La M'ere, des Maisters, des Mariniers, des Merchants, et de tout leur estre', a literal translation of which is the title of the earliest English edition, published in the reign of Henry VIII- 'Judgements of the Sea, of Masters, of Mariners, and Merchants, and All Their Doings'. See, Prynee, 107; Sea Laws, 116,120, a version appears in 30 Fed Cas 1171 and another appears in the *Black Book of Admiralty*, Sir Travers Twiss.

[8] In these provisions the term 'seaworthiness' is not expressly mentioned. However, when they are examined carefully it can be seen that they contain rules about the categories to which seaworthiness extends. This issue will be discussed in detail in this chapter, at pp 70-91.

Wisbuy, published in 13th century.[9]

In 1681 a comprehensive body of Marine Ordinances was published by Louis XIV under the discretion of his celebrated minister of finance, Colbert.[10] The Ordinances included a provision which very likely formed the foundation of the commercial warranty of seaworthiness:

'However, if the merchant prove that when the ship put to sea she was unfit for sailing, the master shall lose his freight, and pay the other damages and losses.'[11]

The significant feature of this Ordinance was that it afforded the merchant a right to indemnity solely upon proof of the vessel's unfitness independent of any fault or negligence on the part of owner or master. This apparently was the interpretation of Valin, RJ, whose commentary on the Marine Ordinances published in 1766 was accepted as authoritative in Europe.[12] Charles Abbott, the author of the most popular English admiralty text of the early 19th century,[13] writing in 1802, seems to credit the Marine Ordinances and Valin's interpretation with being the source of the commercial warranty of seaworthiness. Abbott further declares that a contract of marine insurance is clearly void, if the ship, at the commencement of the voyage, be not seaworthy, although the person who has effected the insurance be ignorant of that circumstance.[14] Abbott's text leaves no doubt that the origin of the commercial warranty of

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[9] See, 20 Fed Cas 1180. Wisbuy, on the island of Gothland, in the Baltic Sea, was the great maritime and commercial port of the north of Europe, in the 13th century, and its maritime code was then known as 'Das Hogeste und das Oldeste Water Rechte von Wisbuy' (The Ancient and Supreme Water Law of Wisbuy). In parallel to art X of the Laws of Oleron, art XXII of the Laws of Wisbuy stipulated that the master of the ship and the mariners were obliged to show the merchant the cordage that was used for hoisting the cargo in and out of the ship. If they omitted to do so, they would be liable for damages in case of an accident. A provision similar to art XIII of the Laws of Oleron which dealt with sufficiency of the members of the crew can be found in art XXV of the Laws of Wisbuy.

[10] 30 Fed Cas 1203.

[11] The Marine Ordinances of Louis XIV, s 12.

[12] See, Abbott, C, *Treaties of the Law Relative to Merchant Ships and Seamen* (2d Am ed, 1810) at p vi.

[13] *Ibid*, at p 251-2. Abbott later became Lord Chief Justice of the King's Bench and is frequently referred to in texts and opinions as Lord Tenterden.

[14] Avoidance of the contract was the consequence of the breach of the seaworthiness warranty at that time. After the enactment of the MIA 1906, discharge from further liability has been made the consequence of the breach of the seaworthiness warranty by s 33(3). The remedy available to the insurer in case of breach of a warranty will be evaluated later in Chapter 6.

seaworthiness was the Marine Ordinance 1681 and an absolute warranty of seaworthiness implied by law prevailed in England at the turn of the 19th century as to contracts of affreightment and marine insurance contracts.

As can be observed, the law on seaworthiness has been developed gradually but dramatically over the last 2500 years. Initially, a provision regarding seaworthiness used to be inserted into charterparties in order to warn the merchant who would have loaded cargo on a vessel. This provision did not impose any obligation on the part of the shipowner and it was simply advising the merchants to inspect certain aspects of the vessel's structure before the commencement of voyage. Early in 13th century, seaworthiness gained a legal meaning in carriage of goods by sea contracts in the sense that a merchant who loaded cargo on a vessel was afforded a legal remedy (damages) in case of breach of this obligation as a result of the negligence of the master. Finally, parallel to the increasing concerns of safety at sea and importance of marine transport, legal remedy which was afforded to the merchants loading cargo on board a vessel was altered towards the end of the 17th century and the merchants were afforded a right of indemnity solely upon proof of the vessel's unseaworthiness independent of any fault or negligence on the part of the owner or master. The reflection of this development to marine insurance was immediate. Due to the distinct nature of the marine adventure, seaworthiness obligation has been implied into marine insurance contracts as a warranty with severe legal consequences from the assured's point of view of course. By considering these drastic change in the law of seaworthiness, it can be concluded that the significance of the concept in maritime law has increased over the years and the warranty status afforded in marine insurance seems to be in harmony with the realities of marine insurance. It will be discussed at the end of the thesis whether the remedy afforded for breach of this obligation is in need of reform at the new millennium.

3.2 MEANING NATURE AND EXTENT OF SEAWORTHINESS IN MARITIME LAW

3.2.1 Lack of Unique Definition of Seaworthiness in Maritime Law

'Seaworthiness' is a rather strange term for the non jurist. It can be defined as 'ability to withstand ordinary stress of wind, waves and other weather which the vessel might normally be expected to encounter.[15] The maritime law definition of seaworthiness can be found in s 39(4) of the MIA 1906 which stipulates as follows:

'A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.'[16]

Being a broad and general definition, this is not the only legal definition of seaworthiness in maritime law. In *McFadden* v. *Blue Star Line*,[17] Channel, J, employed a different definition of seaworthiness in respect of contracts of carriage contained in charterparties or bills of lading. According to Channel, J, to be seaworthy a vessel 'must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it.'

Marine insurance definition, therefore, determines seaworthiness of a ship by her ability to encounter the ordinary perils of the sea; whereas the common law criterion uses the standard of the ordinary, careful and prudent shipowner. By considering these, one might probably think that the meaning of seaworthiness is different in marine insurance from that in other areas of maritime law. However, that seaworthiness means the same thing with reference to a policy as it does with reference to a contract of carriage by sea, was held by Bateson, J, in the *Firemen's Fund Insurance Co* v. *Western*

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[15] *Black's Law Dictionary*, (6th ed, West Publishing Co, 1990).

[16] This definition is derived from the celebrated case of *Dixon* v. *Sadler* (1839) 5 M & W 405, affd, (1841) 8 M & W 895, where Baron Parke defined 'seaworthiness' in the following terms:

'... it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it meant that she shall be in a fit state as to repairs, equipment, crew and in all respects to encounter the ordinary perils of the voyage insured, at the time of sailing upon it.'

[17] [1905] 1 KB 697.

Australian Insurance Co Ltd & Atlantic Insurance Co Ltd[18] Although the emphasis of interest is different in marine insurance and carriage of goods,[19] the approach adopted by Bateson, J, in *Firemen's Fund* case is in a general sense true. The same word should mean the same thing when used in a mercantile contract, whether that contract be of one description or another. Furthermore, despite the fact that they approach the point from different angles, both definitions are in harmony and, in fact, complete each other. A vessel which is not able to encounter the ordinary perils of the voyage she is engaged in, is surely not a type of vessel which will be sent to sea by a prudent shipowner. By the same token, a vessel which will be sent to sea by a prudent shipowner is probably a vessel which can encounter the ordinary perils of the voyage she is engaged in. It can, therefore, be concluded that the term 'seaworthiness' means the same thing when used in an insurance contract or carriage contract. In this respect, when examining the scope and nature of the seaworthiness not only the insurance cases, but the carriage cases can be taken into account.[20] A combined application of both definitions was employed by Erle, J, in *Gibson* v. *Small*[21] as follows:

'[Seaworthiness] expresses a relation between the state of the ship and the perils it has to meet in the situation it is in; so that a ship before setting out on a voyage is seaworthy if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage unless it met with extraordinary damage.'

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[18] (1927) 138 LT 108.

[19] If a ship is insured for a voyage from A to B, the insurer's primary concern is whether she is reasonably fit at the commencement of the voyage to carry that sort of cargo which a vessel of her type might be expected to load over that part of the world's oceans at the time of the year. On the other hand, a cargo owner with a particular cargo to load on board that vessel at that time is specially concerned that the ship is reasonably fit to carry this particular cargo.

[20] See, for example, *Arnould's Law of Marine Insurance and Average*, (16th ed, Sweet & Maxwell, 1981) para 738, citing contract of carriage cases as relevant to unseaworthiness in the context of marine insurance. Similarly, see, *Carver Carriage by Sea*, (13th ed, Sweet & Maxwell, 1982) paras 147-57, citing marine insurance cases as relevant to unseaworthiness in the context of carriage of goods by sea.

[21] (1853) 4 HL Cas 353 at p 384.

3.2.2 Nature of Seaworthiness

When the definition of seaworthiness in s 39(4) of the MIA 1906 is examined carefully, a few points could be noted. First, the duty to supply a seaworthy ship is not equivalent to a duty to provide one that is perfect, and such as cannot break down except in extraordinary circumstances. It is sufficient if the ship has that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all probable circumstances of it.[22] In the same sense, it has been held in the United States that it is not the best and most skilful form of the construction that is required to meet the warranty of seaworthiness, but only a sufficient construction for vessels of the kind insured and the service in which they are engaged.[23] Moreover, the warranty does not imply that the assured of the vessel undertakes that she shall be free from suspicion of unseaworthiness. It is enough if she is seaworthy in fact.[24]

Secondly, the implied warranty of seaworthiness is very far reaching. As will be examined later in this chapter, it does not just cover the structure of the vessel, but extends to the smallest details on board, such as the adequacy of stores and accuracy of the charts. According to the drafter of the Act, Sir Mackenzie Chalmers, the words 'in all respects' in s 39(4) of the MIA 1906 include 'manning, equipment and stowage', but these additional words were cut out in the Lords, being regarded as unnecessary and probably restrictive.[25] In this way, an opportunity was given to the courts to extend the definition of seaworthiness according to the developments in shipping.

Finally, it is a question of fact, having regard to all the circumstances, whether the ship when she sailed was fit to encounter the ordinary perils reasonably expected on that voyage.[26] Each case has to be examined in the light of surrounding circumstances, and for this reason the concept does not lend itself to easy application or absolute

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[22] *Gibson* v. *Small*, *ibid*, at p 384 per Lord Erle.

[23] *Moores* v. *Louisville Underwriters*, 14 Fed Rep 226, per Hammond, DJ.

[24] *Towse* v. *Handerson* (1850) 4 Exch 890.

[25] See, Chalmers, MD & Archibals, JG, *The Marine Insurance Act 1906*, (3rd ed, Butterworth & Co, 1922), at p 64.

[26] *Steel* v. *State Line SS Co* (1877) 3 App Cas. 72.

definition. In other words, the concept is relative in a number of respects.[27] For instance, seaworthiness varies according to the voyage to be undertaken. A ship seaworthy for inland navigation or coastal voyages might be unseaworthy for an ocean voyage. In *Cohen (G) Sons & Co* v. *Standard Marine Insurance Co Ltd*,[28] a battle ship without steam power was held to be seaworthy for a tow from England to Germany. A recent Australian case, *Oleo Pty Ltd* v. *Vonguard Insurance Co Ltd*,[29] following the decision in *Cohen* case held that seepage of water through the wooden hull of a vessel did not necessarily make that vessel unseaworthy for the purposes of the Marine Insurance Act 1909 (Cht).[30] In this case, the assured sent the fishing vessel from Geraldton to Fremantle for repairs to her wooden hull, which had begun to take in water at a steady, but controllable rate. En route from Geraldton to Fremantle, the vessel began to take in water faster than the bilge pumps could pump it out and she sank. The insurer declined liability under the marine insurance policy, on the ground that the assured had sent the vessel to sea in an unseaworthy condition with privity to such unseaworthiness. Anderson, J, held that the assured was entitled to recover under the contract. Although the wooden hull of the vessel was leaking when she left Geraldton, this did not necessarily mean that she was unseaworthy. He held that unseaworthiness must be judged relative to the nature of the voyage to be undertaken and the evidence indicated that, on leaving Geraldton, the vessel was fit for the voyage to Fremantle. The extent of the seaworthiness obligation may also differ for the same voyage at different seasons. A ship, for example, may be seaworthy for a summer voyage but unseaworthy for the one undertaken in winter as she is not in a condition to overcome perils to be anticipated on a winter voyage, such as light ice. Similarly, a greater supply of bunkers is required for a winter North Atlantic voyage than for one in summer as ice may be encountered. Thus, a ship which is not provided with more supply of bunkers for the same winter voyage than the summer one, might be considered as unseaworthy in this respect. The extent of the obligation can also be

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[27] In *Foley v. Tabor* (1861) 2 F & F 663, Erle, CJ, in his direction to the jury said:

'...seaworthiness is a word which the import varies with the place, voyage, the class of the ship and even the nature of the cargo.'

[28] 41 TLR 232.

[29] Unreported, Anderson, J, 16 May 1991 (Supreme Court of Western Australia) .

[30] In Australia, Marine Insurance Act of 1906 was incorporated into local legislation by means of the 1909 Act. Therefore, the provisions are almost identical in both acts.

different for the same voyage at the same season. In one American case,[31] it was held that although the vessel was seaworthy for that voyage in ordinary weather at that season, she was unseaworthy as she left the port without being fitted to cope with the hurricane which was announced to approach. Moreover, the extent of the warranty may vary for the same voyage at the same season according to whether the ship is loaded with one kind of cargo or another. A celebrated case decided towards the end of the 19th century,[32] could be the best example to illustrate this point. In this case, a cargo of wet sugar was provided for the vessel, called the Isle of Wight, by her charterer. A great deal of moisture drains from the wet sugar and when the cargo had been nearly all shipped, it was found that there was an accumulation in the hold, the result of drainage from the sugar mixing with the ordinary leakage of the ship which the pumps were unable to deal with from the nature of the material and which rendered the ship unseaworthy for the voyage. The ship was perfectly seaworthy, except with respect to this particular kind of cargo, and the pumps were quite sufficient for all purposes. The nature of the cargo loaded, rendered the ship unseaworthy.

Seaworthiness may also vary with the class of the ship insured. The classical example on this point is *Burges* v. *Wickham*.[33] In this case, the vessel had been built for river navigation and on this account was generally unfit for ocean navigation. However, everything was done that could possibly be done by temporary appliances, to render a vessel of its type as strong as it could be made to withstand the perils of the voyage insured and the underwriters were so notified. The court held that the warranty must be taken to be limited to the capacity of the vessel and therefore was satisfied if, at the commencement of the risk, the vessel was made as seaworthy as it was capable of being made; although it might not make the vessel as fit for the voyage as would have been usual and proper if the venture had been one of sending out an ordinary sea-going vessel. In this respect, a ship will be considered seaworthy if she is made as seaworthy as is reasonably practicable by ordinary available means. Accordingly, a steamer of light construction built for inland navigation, was held to be unseaworthy for an ocean

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[31] *Texas and Gulf SS Co* v. *Parker*, 263 Fed Rep 864.

[32] *Stanton* v. *Richardson* (1874-5) LR 9 CP 39. See, also *Daniels* v. *Harris* (1874) LR 10 CP 1.

[33] (1863) 3 B & S 669.

voyage as it was not strengthened by putting in temporary strengthening, in *Turnbull and Others* v. *Janson*.[34]

The required standard of seaworthiness is not absolute in the sense that it is 'relative', among other things, to the state of knowledge and the standard prevailing at the material time.[35] Therefore, seaworthiness also develops over time to reflect evolving knowledge and standards of ship construction. The improvements and changes in the means and modes of navigation frequently require new equipment, or new forms of old ones; and these, though not necessary at first, become so when there is an established usage that all ships of certain quality or those to be sent on certain voyages or used for certain purposes shall have them. For example, when science produces new means to increase safety of vessels and their use becomes standard practice, a vessel becomes unseaworthy if the new means are not employed or kept in effective condition. On the other hand, if there is an international convention or statute requiring the vessels to be fitted with these new means then the absence of them will render the ship unseaworthy, even though their usage has not become general practice.[36] However, in the absence of a standard practice or statutory provision, seaworthiness need not be maintained at the cost of always introducing the latest, best appliances.[37]

This relative nature of the term, that the standard of seaworthiness required varies depending on the scientific developments, raises another question. What would the situation be, if a degree of equipment and preparation is deemed essential in some countries; whereas it is considered superfluous in others? In such cases, it has been held in the United States that seaworthiness is to be measured by the standard in the

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[34] (1877) 36 LT 635.

[35] *Burges* v. *Wickham, ibid*; *Barldey & Sons Ltd* v. *Federal Steam Navigation Co* (1926) 24 LIL Rep 446; *Western Canada SS Co Ltd* v. *Canadian Commercial Corporation* [1960] 2 Lloyd's Rep 313.

[36] As far as English ships are concerned, these regulations will be examined in part 3.2.3.4 at p 76 in detail.

[37] *Virginia Cardina Co* v. *Nortfolk SS Co* (No 2) (1912) 17 Com Cas 277, at p 279. For instance, one of the recent developments in ship design is centralised navigation control, which comprises a set of instruments that display on several screens all the data and commands needed to oversee and navigate the ship. This system is intended to allow the ship to be controlled by a single seaman. Presence of a system of this type has neither been a common practice nor been made compulsory by any international convention or national legislation, therefore is not, at the current moment, a standard in determining the seaworthiness of the vessel. It might, however, been regarded as a standard in the near future depending on the general acceptance of the system in the shipping world.

ports of the country to which the vessel belongs, rather than by that in the ports of the country where the insurance was made.[38] Arnould considers this rule as full of good sense and equity and worthy of adoption in English jurisprudence.[39] On the other hand, in my opinion, it is inconsistent with the wording of s 39(4) of the MIA 1906. This sub-section clearly states that the standard of seaworthiness required will be determined according to the voyage insured. Therefore, if this rule is adopted, the standard of seaworthiness required will be different for the same voyage for one ship flying the flag of a country which is not party to any Safety Convention and for an English flagged ship. This situation can be made clearer with a specific example. Let us imagine that, two sister ships, one English one Cyprus flagged, are insured separately under the IVCH (1995) for a voyage from Southampton to Vancouver. If both ships, at the commencement of the voyage, are not provided with the navigational equipment required by an International Convention which England is party to, the English ship will be considered unseaworthy and the insurers could be discharged from liability; while the Cyprus flagged ship will be considered seaworthy if Cyprus is not party to the same Convention and the required equipment is considered as superfluous in Cyprus ports. This hypothetical example shows that the adoption of this American rule would cause the standard of seaworthiness required for the same voyage to change and this situation is contrary to the wording of s 39(4).

Moreover, as was admitted by Arnould,[40] there is not any English marine insurance case that can be cited in support of this rule. Nor is there any English decision where the standard of the shipowner's obligation to the owners of the cargo in regard to seaworthiness, has been held to vary according to the nationality of the ship or of her owners. The cases are in reality all to the opposite effect.[41]

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[38] See, *Tidmarsh* v. *Washington Ins Co* (1827) 4 Mason 439, where Story, J, said:

' It seems to me that where a policy is underwritten on a foreign vessel, belonging to a foreign country, the underwriter must be taken to have a knowledge of the common usages of trade in such country as to equipment of vessel of that class, for the voyage in which she is destined.'

[39] *Ibid*, para 732, fn 31.

[40] *Ibid*, para 732, fn 31.

[41] As discussed earlier at pp 63-4, the carriage of goods by sea cases can be cited as relevant to seaworthiness in the context of marine insurance.

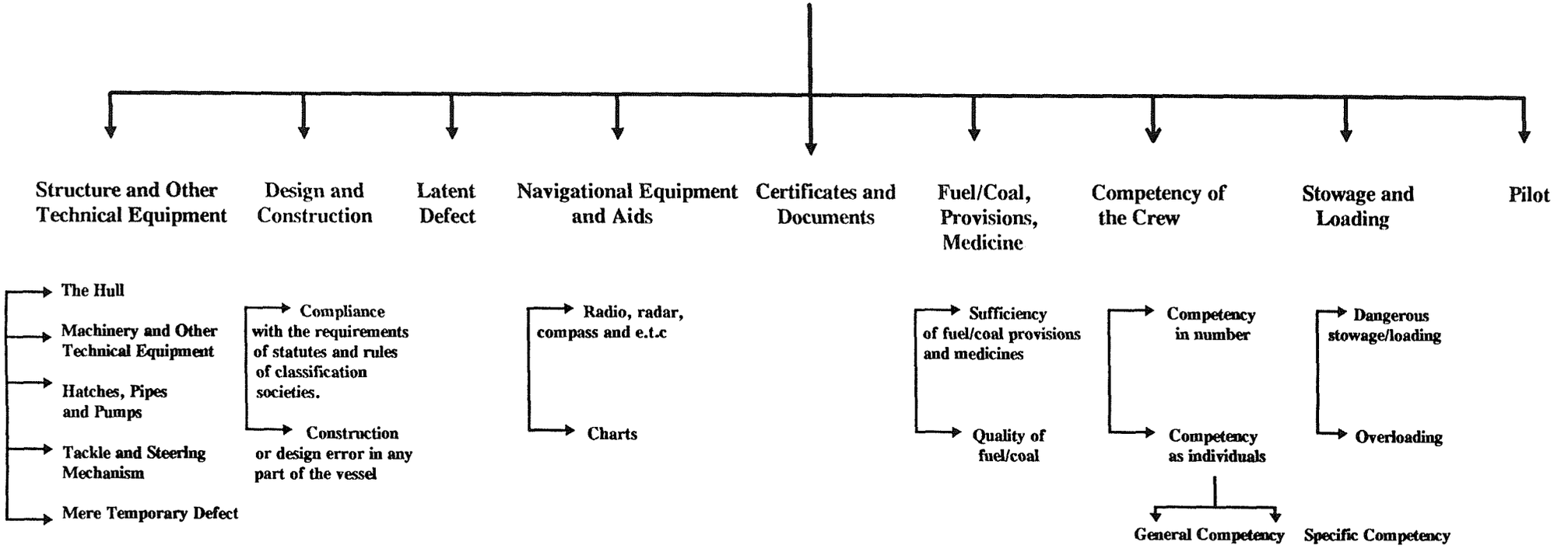
3.2.3 Categories of Matters to Which Seaworthiness Extends

It was examined in the previous part that the term of seaworthiness was relative in many respects and varied according to the voyage undertaken, the class of the ship and finally developments in ship construction. This relative nature of the term makes it nebulous and comprehensive. For this reason, to a certain extent, we must compromise in the definition of seaworthiness; although the concept is an ancient one and utilised in shipping law to attach or deny liability. It is also not sensible to attempt to define seaworthiness by listing the conditions which are necessary for the fitness of all ships, for all possible voyages, at all times. However, at least, the areas of attention which are likely to be important in the decision whether a particular ship is fit for a particular voyage may be indicated. It is, therefore, the basic aim of this part of the work to examine general aspects in which a vessel must be seaworthy. When doing this, mainly the case law and the statutes which impose obligations relating to seaworthiness will be taken into account.

The intention of diagram 1 is to show the main categories of matters to which seaworthiness extends and it will be followed by a detailed examination for each category.

Diagram 1

Categories of Matters to Which Seaworthiness Extends



3.2.3.1 Structure and Other Technical Equipment of the Vessel

3.2.3.1.1 The Hull

To be considered seaworthy, a vessel's hull must be tight, staunch and strong to safely encounter the ordinary action of the wind and waves to which she will be exposed. In this respect, bulkheads, plating and rivets in older ships must be in good condition. In *The Torenia*,[42] the ship was held to be unseaworthy as her hull structure was seriously weakened by corrosion. In *The Toledo*,[43] damage of the plating as a result of deformation of the brackets and frames in the internal structure of the ship which exposed her to much greater stresses than provided for when she was built, rendered the ship unseaworthy. Similarly, loose rivets[44], crack in one of the ship's hull plates[45] and corroded cap screws in the hull,[46] will render a ship unseaworthy.

3.2.3.1.2 Machinery and Other Mechanical Equipment

Under the implied warranty of the assured as to seaworthiness, it is necessary not only that the hull of the vessel be tight, staunch and strong, but the vessel's engines, boilers and generators be in good working order. Thus, in *Quebec Marine Insurance Co* v. *Commercial Bank of Canada*[47] the ship was held to be unseaworthy as her boilers were defective. The fact that the vessel is not properly equipped to fight an engine room fire renders her unseaworthy.[48] Similarly, a cut pipe which makes the emergency fire pump of the vessel useless also constitutes unseaworthiness.[49] Mechanical damage

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[42] [1983] 2 Lloyd's Rep 342.

[43] [1995] 1 Lloyd's Rep 40.

[44] *Southwestern Sugar & Molasses Co Insurance* v. *Artemis Maritime Co Insurance* [1950] AMC 2054.

[45] *Huilever SA* v. *The Otho* [1943] AMC 210.

[46] *CCR Fishing Ltd* v. *British Reserve Insurance Co* [1990] 1 SCR 814; [1990] AMC 1443; [1991] 1 Lloyd's Rep 89 (Supreme Court of Canada).

[47] (1870) LR 3 PC 234. See also, *Hong Kong Fir Shipping Co* v. *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 and *The Amstelsot* [1963] 2 Lloyd's Rep 223.

[48] *Asbestos Corp Ltd* v. *Compagnie de Navigation Fraissinet et Cyprinen Fabre* [1972] AMC 2581.

[49] *Manifest Shipping & Co Ltd* v. *Uni-Polaris Insurance Co Ltd & La Réunion Europénne, (The Star Sea)* [1995] 1 Lloyd's Rep 651, later reversed on some points by the Court of Appeal [1997] 1 Lloyd's Rep 361, hereinafter referred to as *The Star Sea*.

to the insulation of the vessel's electrical wiring is another reason for a ship to be considered unseaworthy.[50]

3.2.3.1.3 Hatches, Pipes and Pumps

Hatches should be tight enough not to allow water in if there is to be seaworthiness. The vessel will be considered unseaworthy where seawater enters through hatch covers and damages the cargo.[51] Similarly, the poor condition of hatch boards in the tween decks which prevents proper stowage and endagers the ship's safety could render the ship unseaworthy.[52]

The poor condition of the pipes can lead to the vessel's unseaworthiness in some cases. For example, an unseaworthy condition was created where the absence of a rose at the end of the pipe in the ballast tanks allowed a stick to pass through the pipe and jam the ballast tank valve.[53] In *Seville Sulphur & Cooper Co* v. *Colvis Lowden & Co*,[54] the clogged situation of steam pipes with muddy water rendered the vessel unseaworthy.[55] A defect in the pumps or breakdown of a centrifugal pump during severe but expectable weather also renders a vessel unseaworthy.[56]

3.2.3.1.4 Tackle and Steering Mechanism

The ship must be furnished with ground tackling, which is sufficient to encounter the ordinary perils of the seas. The House of Lords, in *Wilkie* v. *Geddes*,[57] held a vessel to be unseaworthy, where her bow anchor and the cable of the small bow anchor were

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[50] *The Subro Valour* [1995] 1 Lloyd's Rep 509.

[51] *Interstate Steel Corporation* v. *SS Crystal Gem* [1970] AMC 617.

[52] *Demsey & Associates Inc* v. *SS Sea Star* [1970] AMC 1088.

[53] *The Brilliant* 138 F 743.

[54] (1888) 15 R 616.

[55] This decision was, however, not followed in *Cunnigham* v. *Colvis Lowden & Co* (1888) 16 R 295.

[56] *The Vizcaya* [1946] AMC 469.

[57] (1815) 3 Dow 57; 3 ER 988.

defective. In the same sense, failure of electric steering system,[58] defect in steering gear[59] and leakage in telemor steering apparatus[60] also render a vessel unseaworthy.

3.2.3.1.5 Mere Temporary Defect

A temporary defect in the ship's structure or technical equipment due to some negligence at the time of sailing also constitutes a breach of the implied warranty of seaworthiness, provided that it is not capable of easy remedy. Thus, in *Dobell* v. *Rosemore*,[61] a ship was held to be unseaworthy where a port-hole was insecurely fastened and the fault could not be remedied without removal of the cargo, which was not practical at the time. On the contrary, a temporary defect which in the ordinary course of the voyage could and would be remedied by the crew does not constitute unseaworthiness. In such a case, the ship will be regarded as seaworthy despite the defect and it is immaterial whether the defect is not put right or not. If not, there is then negligence on the part of the crew but unseaworthiness of the ship will never be an issue. Thus, in the case of *Steel* v. *State Line SS Co*[62] it was stated, as *obiter dictum*, by Lord Blackburn that failure to close a port-hole securely, even though it was readily accessible, did not constitute unseaworthiness if the sea-water entered and damaged the cargo in heavy weather. It was also held in *Hedley* v. *Pinkey SS Co*[63] that, negligence of the master in having stanchions and rails fixed did not constitute unseaworthiness.[64]

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[58] *M/V Republica de Colombia (Complaint of Flora Mercante Grancolombian, SA)*, 440 F Supp 704.

[59] *Haracopos* v. *Mountain* (1934) 49 LlL Rep 267 and *Ionian SS Co* v. *United Distillers of America Inc* [1956] AMC 1750.

[60] *Erie & St Lawrence Corp* v. *Bernes-Ames Co* [1931] AMC 1995.

[61] [1895] 2 QB 408.

[62] *Ibid*, at pp 90-1.

[63] [1894] AC 222.

[64] See also, *Gilrow & Sons Co* v. *Prince & Co* [1893] AC 56 per Lord Hershell at p 64 and *Ajum Goolam Hossen & Co* v. *Union Marine Insurance Co* [1901] AC 362.

3.2.3.2 Design and Construction of the Vessel

A vessel must comply with the requirements of statutes[65] and rules of classification societies[66] in the course of construction and design. Failure to do so renders the ship unseaworthy. These rules and regulations are principally concerned with the strength of the ship and reliability of the machinery and equipment.

In *The Marine Sulphur Queen*,[67] for example, a vessel which was converted to a molten sulphur carrier from a T-2 tanker, was held to be unseaworthy, as it did not comply with American Bureau of Shipping Standards on transverse bulkheads. In some cases, construction or design error in any part of the vessel could be adequate to render her unseaworthy, if it impinges upon her ability to encounter the ordinary perils of the seas. In *United States* v. *Charbonnier*,[68] for example, defective construction of vent pipes which caused excessive internal pressure was held to be sufficient to render the vessel unseaworthy. Similarly, in *JJ Lloyd's Instrument Ltd* v. *Northern Star Insurance Ltd (The Miss Jay Jay)*,[69] a design error, namely using materials during design which were quite unfitted for the purpose of navigation were held to render the vessel unseaworthy.

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[65] The required standard which needs to be met during the construction and design of vessels varies according to the type and purpose of the vessel in question. For instance, cargo ships, passenger ships, fishing vessels and tankers each have their particular rules. The main current United Kingdom regulations dealing with ship construction are as follows: Merchant Shipping (Cargo Ship Construction) Regulations 1997 SI 1997/1509, which gives effect to the SOLAS 1974, as amended and implemented in part EC Council Directive 94/57; Merchant Shipping (Passenger Ship Construction: Ships of Class I, II and IIA) Regulations 1998 SI 1998/2514; Merchant Shipping (Passenger Ship Construction: Ships of Classes III to IV(A)) Regulations 1998 SI 1998/2515; Fishing Vessels (Safety Provisions) Rules 1975 SI 1975/330, made under the Fishing Vessels (Safety Provisions) Act 1970, s 1, as amended by SI 1975/471, 1976/432, 1977/313 and 498, 1978/1598 and 1873, 1991/1342, 1996/2419 and 1998/928; the Merchant Shipping (Prevention of Oil Pollution) Regulations 1997 SI 1997/1910, which apply to oil tankers.

[66] Ships may be built in any country to a particular Classification Society's rules, and they are not restricted to classification by the relevant Society of the country, where they are built. Classification is not compulsory, but the shipowner with an unclassed ship will be required to satisfy the governmental regulating bodies that it has sufficient structural assignment of a load line and issue of a safety construction certificate.

[67] [1961] 1 Lloyd's Rep 243.

[68] [1930] AMC 1875.

[69] [1987] 1 Lloyd's Rep 32; hereinafter referred to as *The Miss Jay Jay*.

3.2.3.3 Latent Defect in Hull or Machinery

A latent defect was defined in an American case as one which 'a reasonably careful inspection would not reveal. It is not a gradual deterioration but rather a defect in metal itself'.[70] There is a substantial amount of case law to support the proposition that a latent defect in hull or machinery would render a vessel unseaworthy if it impinges upon her ability to encounter the ordinary perils of the seas. The defect, therefore, has to be in relation to a matter which affects her capability to combat ordinary sea perils. A latent defect in loading equipment would not render a vessel unseaworthy as it would not affect her ability to encounter the ordinary perils of the seas. In *Mills* v. *Roebuck*,[71] a French-built vessel was fastened with iron bolts liable to rust, causing her to decay without any visible warning. She sprang a leak and was condemned. The precise inquiry was whether the assured could recover upon a ship which had a latent defect unknown to parties. Section 39 of the MIA 1906 does not answer this query. Without hesitation, the learned Chief Justice ruled that as the ship was unseaworthy, the insurer was exonerated from liability.[72] Recently, in *The Hellenic Dolphin*,[73] the ship was held to be unseaworthy because of an undetected defect in her basic plating.

3.2.3.4 Navigational Equipment/Aids

In order to be regarded as seaworthy, apart from being sound in structure, a vessel must be supplied with means whereby she may be safely navigated. Therefore, she must have on board devices and systems which will improve the safety and efficiency of maritime navigation, such as a reliable compass,[74] radio,[75] fog horn[76] and other equipment which a ship cannot do without so to speak for navigation.

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[70] *Sipowicz* v. *Wimble & Others, (The Green Lion)* [1974] 1 Lloyd's Rep 593.

[71] Reported in *Park: A System of the Law of Marine Insurances,* edited by Hildyard, F, (8th ed, Saunders and Benning Law Booksellers,1832).

[72] See also, *The Glenfruin* (1885) 10 PD 103 and *The Caledonia* (1894) 157 US 124.

[73] [1978] 2 Lloyd's Rep 326.

[74] See, *Paterson SS Ltd* v. *Robin Hood Mills Ltd (The Thordoc)* (1937) 58 LIL Rep 33.

[75] See, *The TJ Hooper* [1932] AMC 1169.

[76] See, *The Niagara* [1898] 84 Fed Rep 902.

Equipment of this type is referred to as 'navigational equipment/aids'.[77] Certain international conventions which aim to achieve higher standards of safety at sea, such as the Safety of Life at Sea (SOLAS) 1974, have made provisions regarding the navigational equipment which must be carried on board a vessel.[78] Regulation V/12 of the SOLAS 1974 requires a vessel to have the following navigational equipment, in working condition, during a marine voyage: compass (magnetic and gyro compass), radar (two installations for vessels of more than 10,000 gross tonnes), automatic radar plotting aid, echo-sounding device, speed and distance indicator, indicators to show the rudder angle, the rate of revolution of each propeller and radio direction finder. SOLAS 1974 has been implemented into the domestic law of UK[79] and there is a tendency of adopting SOLAS Codes (amendments to the existing Code), as they appear.[80] Therefore, to commence a voyage in violation of these regulations, at least, as far as British ships are concerned, will constitute unseaworthiness.[81]

To be able to navigate safely, apart from the above requirements, the ships must also be equipped with adequate and up-to-date charts,[82] light books and notices to mariners. By virtue of Regulation V/20 of the SOLAS 1974, State Parties must ensure that ships flying their flags 'carry adequate and up-to-date charts, sailing directions, list of lights, notices to mariners, tide tables and all other nautical publications necessary for the intended voyage'. In order to satisfy this requirement imposed on the British

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[77] This term must be distinguished from the term 'aids to navigation' which is used to define the equipment or services which intend to facilitate the conduct of ships and usually are situated on ashore or along the coast, such as maritime signals and beacons.

[78] SOLAS is designed as a standing code on ship-safety. Article III contains rules for its own amendment through the Maritime Safety Committee of the International Maritime Organisation, in whose deliberations all states parties to SOLAS 1974 may participate. Thus, as problems appear and technology and solutions change, the Code can be developed with all the necessary speed.

[79] SOLAS 1974 was let to the Merchant Shipping (Safety Convention) Act 1977 and the Merchant Shipping Act (MSA) 1979.

[80] For instance, Merchant Shipping (Navigational Equipment) Regulations 1993, SI 1993/1072, as amended by SI 1996/3188 implement the amendments to Regulation 12 of Chapter V of the SOLAS adopted at the Conference on Global Maritime Distress and Safety Systems in 1988. Similarly, Merchant Shipping (Radio Installation) Regulations 1998 SI 1998/2070 give effect to the amendments to Chapter IV of the SOLAS 1974, which were adopted at the conferences on Global Maritime Distress and Safety Systems in 1988, 1992 and 1995.

[81] For the definition of British and UK ship, see s 1 of the Merchant Shipping Act (MSA) 1995.

[82] *The Steel Scientist* [1936] AMC 387; *The Maria* [1937] AMC 934 and *The Irish Spruce* [1976] Lloyd's Rep 63.

government, the Merchant Shipping (Carriage of Nautical Publications) Regulations 1998 (SI 1998/2647) has been made by the Secretary of State using the power delegated by ss 85 and 86 of the MSA 1995. These rules require ships and hovercrafts registered in the UK, other than those less than 12 meters in length and fishing vessels, and other ships and hovercraft while in UK waters, subject to certain exceptions specified, carry such up-to-date charts of sufficient detail and other nautical publications as are necessary for each part of the intended voyage.[83] If a British flagged ship commences a voyage in violation of these regulations, there is little doubt that the vessel will be regarded as unseaworthy.

3.2.3.5 Certificates and Documents Necessary for the Protection of the Vessel and Cargo

To be considered seaworthy, the ship must also have on board all certificates necessary for the protection of the ship and cargo. In a sense, safety certificates are pieces of secondary rather than primary regulation since they are documents which declare that other specific safety rules have been complied with. For instance, schedule 3, of the MSA 1995[84] requires all UK ships, ships registered in a country which is a party to the International Convention on Load Lines 1966, ships flying the flag of a Convention

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[83] The publications and relative publishers so specified are:

Publication:	Publisher:
International Code of Signals	Her Majesty's Stationers Office
Merchant Shipping Notices	Department of Transport
Mariners Handbook	Hydroprapher of the Navy's
Notices to Mariners	----------
Nautical Almanac	----------
Navigational Tables	----------
List of Radio Signals	Hydroprapher of the Navy's
List of Lights	Hydroprapher of the Navy's
Sailing Directions	Hydroprapher of the Navy's
Tide Tables	----------
Tidal Stream Atlas	----------

[84] This Schedule gives effect to the 'The International Convention on Load Lines' signed in London on 5 April 1966.

country except warships, ships engaged in fishing and pleasure to hold a Load Line Certificate when they depart from a UK port. This Certificate, in fact, declares that the ship is deemed to have been surveyed in accordance with the load line rules. Similarly, a cargo ship departing from UK ports must carry a Radio Certificate which declares that the vessel, among other matters, complies with the 'Rules for Direction Finders' as contained in the amended form of SOLAS 1974.[85] Again, under the International Safety Management (ISM) Code, which has been implemented as part of the SOLAS 1974,[86] the vessels must have a valid safety management certificate and document of compliance showing that the management system in respect of that vessel complies with the requirements of the ISM Code.[87]

Furthermore, some provisions might make it compulsory for vessels to carry certain documents. For instance, the Merchant Shipping (Code of Safe Working Practices for Merchant Seamen) Regulations 1998 (SI 1998/1838) requires every UK ship to carry copies of Code of Safe Working Practices for Merchant Seamen.[88] Similarly, the Merchant Shipping (Carriage of Cargoes) Regulations 1999[89] (SI 1999/336) necessitates every sea-going UK cargo carrying ships and non- UK sea-going cargo carrying ships, while they are within the UK or the territorial waters thereof, to have appropriate documentation on cargo stowage and securing.[90] Such documentation may

[85] These rules are adopted into English law by the Merchant Shipping (Navigational Equipment) Regulations 1993 SI 1993/69, as amended by SI 1993/1072 and SI 1996/3188.

[86] This Code has been implemented into English law by the Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998 SI 1998/1561.

[87] For a detailed discussion on this point and the effect of ISM Code on provisions relating to seaworthiness see, chapter 3.4.2.3 at p 137.

[88] The Code of Safe Working Practices is obtainable from the Stationery Office Publications Centre.

[89] These regulations give effect to the amendments to Chapter VI of the SOLAS Convention 1974 adopted by the Maritime Safety Committee of the International Maritime Organisation (IMO) at its 66th session.

[90] These regulations do not apply when the cargo carrying ship loaded or intended to load liquids in bulk, gases in bulk and cargoes which are classified as dangerous goods.

consist of one or more of the specified Codes of Safe Practice.[91]

Commencing a voyage without the certificates or document specified by the above regulations will, therefore, render a vessel unseaworthy.[92] However, the absence of a document, such as a certificate of stowage given at the port of loading which is not a necessary document, or a foreign measurement certificate which is not shown to be a usual document,[93] does not render a vessel unseaworthy.[94]

3.2.3.6 Sufficiency of Fuel/Coal, Provisions and Medicines

Besides being competent in hull, machinery and other technical equipment to resist the ordinary perils of the voyage insured, the ship must be provided with sufficient fuel, stores, provisions and all other things which the custom of trade or statutes has made requisite for the voyage. Otherwise, it can not be considered as seaworthy. It was held in numerous cases that insufficiency of fuel/coal for the entire voyage rendered the ship unseaworthy.[95] It has been held in one American case that to be adequate the bunkers should be 20 % , 25 % greater than the tonnage of bunkers, which is estimated will be

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[91] The Codes of Safe Practice so specified are:

1- The Code of Safe Practice for Cargo Stowage and Securing adopted by the IMO by resolution A 714 (17) 1992 ed 2- The Code of Safe Practice for Ships Carrying Timber Deck Cargoes adopted by the IMO by resolution A 715 (17) 1992 ed 3- The Code of Safe Practice for Solid Bulk Cargoes adopted by the IMO by resolution, A 434 (XI) 1991 ed 4- International Code for the Safe Carriage of Grain in Bulk adopted by the Maritime Safety Committee of the IMO by resolution MSC 23 (59) on 23 May 1991.

[92] See, *Cheikh Boutros v. Ceylon Shipping Lines (The Madeleine)* [1967] 2 Lloyd's Rep 224 where the documentation for the voyage was inadequate and this was held to render the vessel unseaworthy.

[93] *Chellew Navigation Co Ltd* v. *AR Appelquist Kolimport SA* (1933) 45 LIL Rep 190 at p 193.

[94] *Wilson* v. *Rankin* (1865) LR 1 QB 162 and *Apex (Trinidad) Oil Fields Ltd* v. *Lunham & Moore Shipping Ltd* [1962] 2 Lloyd's Rep 203.

[95] See, *Thin* v. *Richards & Co* [1892] 2 QB 141; *The Vortigern* [1899] P 140; *McIver & Co Ltd* v. *Tate Steamers Ltd* [1903] 1 KB 362; *Greenock SS Co* v. *Maritime Insurance Co Ltd* [1903] 1 KB 367; *Timm & Son Ltd* v. *Northumbrian Shipping Co Ltd* [1939] AC 397. See, however, *Walford de Baedemaecker & Co* v. *Galindez Bros* (1897) 2 Com Cas 137 where insufficient coal was held not to amount to seaworthiness.

consumed on the contemplated voyage under normal conditions.[96] Having sufficient amount of bunkers may not be enough to render a vessel seaworthy in some cases. The ship will still be considered unseaworthy, if the quality of the bunkers is low. Thus, in *Fiumana Società di Navigazione* v. *Bunge & Co Ltd*[97] the vessel was held to be unseaworthy where she was provided with low grade coal which was liable to spontaneous combustion during the voyage.

Similarly, the vessel must have sufficient provisions[98] and medicine[99] on board for the intended voyage, in order to be considered seaworthy. As far as British ships are concerned, the Secretary of the State has made some regulations regarding these issues. The Merchant Shipping and Fishing Vessels (Medical Stores Regulations) (Amendment) 1996 (SI 1996/2821)[100] requires every UK ship and government ship, other than a ship employed in inland navigation, a pleasure vessel used for non-commercial purposes and not manned by professional crew or a tug not operating in harbour areas, to carry on board prescribed medical stores. The Merchant Shipping (Provisions and Water) Regulations 1989 (SI 1989/102)[101] requires every sea-going UK ship, other than a ship under 24 meters in length, a pleasure vessel, a submersible vessel or an offshore installation whilst on or within 500 meters of its working stations, to be provided with adequate water and provisions. An UK vessel, therefore, commencing a voyage in violation of these regulations will be considered as unseaworthy.

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[96] *The Willdomino* [1927] AMC 129. American cases are parallel to English ones in this area. See, for example, *The Edgecomb* [1933] AMC 421; *The Caledonier* [1929] AMC 69. *The Waalhaven* [1930] AMC 27 and *The Glymort* [1933] AMC 1293.

[97] [1930] 2 KB 47.

[98] *The Wilhelm* (1866) 14 LT 636.

[99] *Woolf* v. *Claggett* (1806) 3 Esp 257.

[100] These regulations amend the Merchant Shipping (Medical Stores) Regulations 1995 SI 1995/1802. They, basically, implement Council Directive of European Union, 92/29 of 31 March 1992, on the minimum safety and health requirements for improved medical treatment on board vessels, so far as that Directive relates to the carriage of medicines and other medical stores.

[101] As amended by SI 1993/1072.

3.2.3.7 Efficiency/Competency of the Crew

The human factor is extremely important in rendering a vessel seaworthy or unseaworthy. It has been submitted that while a good master may save a poor ship, a poor master may lose a good one. The fact that the term 'seaworthiness' includes a crew sufficient generally in number and skill for the proper navigation of the vessel was first stated in the *Wedderburn* v. *Bell*[102] at the beginning of the 19th century.

While in the *Wedderburn v. Bell*, the term 'efficiency' was used to express this concept, in some similar cases the term 'competency' was employed.[103] Although, the terms competent and efficient, do seem to be used interchangeably in practice, it is submitted that there is a slight difference in their meanings. In *The Makedonia,*[104] Hewson, J, held that efficiency was a better word, as it covers situations where (say) an officer is generally competent, but through lack of sleep, drink or illness may be inefficient. This approach seems accurate, since lack of application in the use of skill and knowledge does not seem to be within the ambit of 'competence'. As stated before, since the terms are used interchangeably in practice, this part of the work will follow the same approach.

Before considering the forms of incompetency or inefficiency, the distinction between them and negligence must be drawn. Such a distinction is crucial, because a ship will be considered as unseaworthy if her crew is incompetent, but not if her crew is merely negligent.[105] Therefore, if the vessel, crew and equipment be originally sufficient and the master and crew are persons of competent skill, the warranty of seaworthiness has been satisfied, and although such master and crew should by their acts or omissions have brought the ship in the course of the voyage, and at the time of loss, into an

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[102] (1807) 1 Camp 1. This case was later followed by *Holdsworth* v. *Wise* (1822) 7 B & C 794.

[103] See, for example, *Hong Kong Fir Shipping* v. *Kawasaki Kisen Kaisha, ibid, The Star Sea, ibid.*

[104] [1962] 1 Lloyd's Rep 316.

[105] This being the general situation, in some cases gross or severe negligence may be traceable to incompetence and thus can amount to unseaworthiness. In *The Roberta* (1937) 58 LlL Rep 159, Greer, LJ, commented:

'... he was a man who was incompetent to be an engineer of this vessel whether he had or had not been negligent. It seems to be inconceivable that a fully competent engineer should have failed to discover that this cock was open or indeed he should have left it open.'

unseaworthy state, yet the underwriter is liable for all loss which, remotely occasioned by such super induced state of unseaworthiness, is yet *proximately* caused by the perils insured against. (MIA 1906, s 55 (2)(a))[106]

The distinction between incompetence/inefficiency and negligence is simply the distinction between general capability and incapability. If a seaman is not capable of carrying out a task, he is incompetent. In other words, a seaman is incompetent, if he does not possess the level of capability or skill to be reasonably expected of an ordinary seaman of his rank. Basic incompetence has also been defined in the terms of '*disabling want or skill*'.[107] Negligence, on the other hand, arises where a seaman has the basic ability to perform his duties properly, but fails to carry them out to a reasonable standard on a particular occasion.[108]

Firstly, the crew on board a vessel must be competent in number. Most of the maritime nations have regulations governing the manning of ships of their flags. The UK is not an exception to this general rule. Accordingly, the Merchant Shipping (Safe Manning Hours of Work and Watchkeeping) Regulations 1997 (SI 1997/1320)[109] requires the manning of all ships sailing from a UK port to be maintained at all times to at least the levels specified in the safe manning document.[110] If a ship proceeds to sea with a crew less in number than her document requires, she is unseaworthy in this respect.[111] It is

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[106] 'It is the duty of the owner to have the ship properly equipped, and, for that purpose it is necessary that he should provide a competent master and crew in the first instance; but having done this he has discharged his duty', per Bayley, J, in *Walker* v. *Maitland* (1826) 5 B & Ald 171 at p175.

[107] *Standard Oil Co of New York* v. *Clan Line Steamers (The Clan Gordon)* (1924) AC 100, per Lord Atkinson, at p 121.

[108] See, *Norris* v. *William Mass & Sons Ltd.* [1954] 1 WLR 346; *Braizer* v. *Skipton Rock Co Ltd* [1962] 1 WLR 471 and *Blackfriars Ligherage & Cartage Co Ltd* v. *RL Hobbs (The Lander)* [1955] 2 Lloyd's Rep 554.

[109] These regulations give effect to amendments to the SOLAS 1974 adopted by the Maritime Safety Committee of the IMO.

[110] The safe manning document means a document issued in the case of a United Kingdom ship by the Secretary of the State, and in the case of any other ship by or on behalf of the Government of the State whose flag the ship is entitled to fly. This document shows the numbers and grades of the personnel required to be carried by the ship.

[111] It was held in many cases that undermanning rendered a vessel unseaworthy. See, *Forshaw* v. *Chabert* (1821) 3 Br & B 158 and *Burnard & Alger Ltd* v. *Player & Co* (1928) 31 LIL Rep 281. In Australia, however, breach of regulation of this type was held to amount to illegality of the adventure insured rather than unseaworthiness of the vessel. See, *Doak* v. *Weekes & Commercial Union Assurance Co plc* [1986] 82 FLR 334 and *Switzerland Insurance Australia Ltd* v. *Mowie Fisheries Pty Ltd* [1997] FCA 231. This issue will later be discussed in the subsequent chapter during the

suggested that the crew may also be considered collectively inefficient or incompetent, if they cannot efficiently communicate in a common language between themselves.[112] Although there is not any case law on this point, I think this approach is quite sensible. Lack of communication between the officers and crew may be extremely dangerous for the safety of the ship and other ships, and even may turn a ship into a floating danger.

The crew on board a vessel must also be competent as individuals. They must hold the necessary certificates that are required by the provisions of the relevant statutes. As far as the UK is concerned these statutes are: Merchant Shipping (Training and Certification) Regulations 1997 (SI 1997/348);[113] Merchant Shipping (Local Passenger Vessels) (Master's Licences and Hours, Manning and Training) Regulations 1993 (SI 1993/1213); Merchant Shipping (Certification of Ships' Cooks) Regulations 1981(SI 1981/1076); Fishing Vessels (Certification of Deck Officers and Engineer Officers) (Amendment) Regulations 1998 (SI 1998/1013); Merchant Shipping (Vessels in Commercial Use for Sport or Pleasure) Regulations 1998 (SI 1998/2771). Manning a ship in violation of these statutory provisions renders her unseaworthy.

The fact that the master or the officers of a ship hold the required certificates of competence, does not automatically render them competent. They can still be considered as incompetent, if they lack the ability, knowledge or training on a specific issue. In other words, a distinction must be drawn between general and specific competence. The most recent example of this situation can be seen in *The Star Sea* litigation.[114] An engine room fire occurred on board the Star Sea. The Star Sea's engine-room fire fighting system included four banks of Co_2 cylinders. The Safety Plan of the vessel stipulated that all the cylinders should be discharged into the engine room simultaneously, in the event of fire. The master did not know that all the Co_2 cylinders had to be discharged at once in the event of such a fire. He was also unaware of the

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examination of the implied warranty of legality. It is sufficient to say at this stage that these Australian decisions go beyond the English law.

[112] Roger, W, *Human Factor in Unseaworthiness Claims*, [1993] LMCLQ, p 345.

[113] As amended by SI 1997/1911. These regulations give effect to the international Convention on Standards of Training, Certification, and Watchkeeping (STCW) for Seafarers' 1978 as amended on 7 July 1995. The effect of the 1995 amendments of STCW 1978 on provisions relating seaworthiness will later be examined in chapter 3.4.3 at p 143.

[114] *Ibid.*

importance of introducing Co_2, as soon as it became apparent that a fire in the engine room could not be extinguished in another way. Tuckey, J, held that the vessel was unseaworthy, as the master was incompetent notwithstanding his long service. This case demonstrates that the courts are prepared to categorise a seaman as technically incompetent if he lacks knowledge or training on specific issues, even though he has performed adequately for years. The decision of Tuckey, J, on this point was later affirmed by the Court of Appeal which reversed the first instance decision on other grounds.[115]

Similarly, although the master or officer is properly certificated, yet by reason of the nature of the ship or her equipment, further instruction ought to have been provided by the owners. Lack of further instruction may render the ship unseaworthy. In *Standard Oil Co of New York* v. *Clan Line Steamers (The Clan Gordon)*,[116] a ship's ballast tanks were emptied and she capsized. Vessels of that construction, turret ships, were likely to do that if the tanks were emptied when they were carrying homogeneous cargoes, but not if they were carrying a variety of goods. The master, although generally competent and experienced in turret ships, had not been specifically instructed of this particular risk. The House of Lords held the vessel to be unseaworthy because of the master's incompetency. In the same sense, the vessel was considered unseaworthy in *The Schwan,*[117] as her engineer was not warned of the unusual and dangerous character of a three-way valve.

Even where the master or officer does hold the necessary certificate, there is always the fact that such competence as he once possessed may have been eroded by the ravages of time. In *Moore* v. *Lunn,*[118] the drunken state of the master and chief engineer when they started the voyage has been held to be sufficient to render the vessel unseaworthy. Another good example might be an officer, who has become lazy in relation to the techniques of navigation and seeks in time-honoured phrase to 'cut-corners'.

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[115] *Ibid.*

[116] *Ibid.*

[117] [1909] AC 450.

[118] (1923) 39 TLR 526.

There is one further factor to be investigated. If temporary incapacity, such as illness or tiredness, renders the master incapable of performing his duties at the commencement of the relevant voyage, he can be considered as incompetent. A ship which proceeds to sea in this condition, will be considered as unseaworthy. It must, however, be borne in mind that there is no warranty that the state of the master's health will be perfect. It is enough if he is reasonably in good health.[119]

3.2.3.8 Stowage and Loading

The cargo may be so badly stowed as to affect the seaworthiness of the vessel. In *Kopitoff* v. *Wilson,*[120] iron armour plates were so badly stowed and, as a consequence, during heavy weather went through the side of the ship, causing loss of the ship, which was found to be unseaworthy by reason of bad stowage. Similarly, in *The Standale*[121] a cargo of grain was stowed in the hold without adequate protection having been taken against its shifting, and this kind of stowage rendered the ship unseaworthy.[122] It must be borne in mind that bad stowage does not always render the ship unseaworthy. Bad stowage which affects only the cargo damaged by it and nothing more, still leaves the vessel seaworthy for the venture. In *The Thorsa,*[123] chocolate was stowed in the same hold with gorgonzola cheese, on arrival the chocolate was tainted with cheese. The stowage of chocolate and cheese in the same hold could not constitute a breach of warranty of seaworthiness, as the stowage did not endanger the safety of the vessel, but was simply bad stowage.[124] The ship shall again be considered unseaworthy if she carries on deck goods which having due regard to the safety of the ship, ought not to be carried there.[125]

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[119] *Rio Tinto Co Ltd* v. *Seed Shipping Co* (1926) 134 LT 764.

[120] (1876) 1 QBD 377.

[121] (1938) 6 LIL Rep 145.

[122] See also *Steel* v. *State Line SS Co, ibid,* and *Firemen's Fund Insurance Co* v. *Western Australian Insurance Co & Atlantic Insurance Co Ltd , ibid.*

[123] [1916] P 257.

[124] See also *Elder Dempster Co Ltd* v. *Paterson Zochonis & Co* [1924] AC 522, in which bad stowage crushed casks of palm oil, but did not render the vessel unseaworthy.

[125] *Daniels* v. *Harris, ibid.*

Seaworthiness requires that a vessel be safely loaded. If a vessel is loaded so heavily that she cannot safely sail on the voyage contracted for, she is unseaworthy. In *Foley* v. *Tabor*,[126] a vessel was held to be unseaworthy, as a result of the ship being overloaded to such extent as to increase her danger and difficulty in navigation. Similarly, a vessel was held to be unseaworthy, when she was inherently unstable having loaded an excessive deck cargo when she sailed.[127] The load lines fixed in the International Convention on Load Lines 1966[128] must not be submerged at any time. If at the commencement of the voyage the load lines are submerged, this will render the ship unseaworthy.[129] Similarly, loading a vessel in contravention of the international rules which are adopted for different types of vessels might render a vessel unseaworthy. For instance, in *Transocean Liners Reederer* v. *Euxine Shipping Co Ltd (The Imvros)*,[130] a carriage case, the vessel was held to be unseaworthy where a cargo of timber was loaded on deck in contravention of the IMO Code of Practice for Ships Carrying Timber Deck Cargoes.

3.2.3.9 Pilot

It was suggested by Ivamy[131] that, if any part of the voyage a pilot was required, the vessel would be considered unseaworthy, unless she obtained one. When the case law and the wording of the MIA 1906 is examined, it can be seen that the situation is much more complicated and different from what Ivamy had suggested. To clarify the issue, some presumptions will be made and the situation will be examined separately in each case.

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[126] *Ibid.*

[127] *Smith, Hogg* v. *Black Sea & Baltic Insurance* [1940] AC 977. See also, *Biccard* v. *Shepherd* (1861) 14 Moo PC 471.

[128] This Convention was implemented into English law by Schedule 3 of the MSA 1995.

[129] Overloading a vessel in contravention of the load line rules is a statutory offence, exposing the master or owner to criminal prosecution and the ship to detention under s 4 of the MSA 1995 Schedule 3.

[130] [1999] 1 Lloyd's Rep 848.

[131] Ivamy, ERH, *Law of Marine Insurance*, (8th ed, Butterworths, 1988) at p 376.

If a vessel sails from a port where a pilot may be procured and the nature of the navigation requires one, she would seem unseaworthy without one, unless the master himself has competent knowledge of the navigation.[132] Similarly, if a vessel sails from a port where pilot was made compulsory by a statute,[133] she will be considered unseaworthy without one. One might probably think whether to sail in violation of a statutory provision like this, would render the voyage illegal, and thus constitute a breach of the implied warranty of legality instead of breach of seaworthiness. This can be extremely important, as unlike the breach of the implied warranty of seaworthiness, breach of the implied warranty of legality cannot be waived by the insurer. Although, this issue will be examined later in Chapter 4 in detail, a short explanation can be made at this stage. The general rule established by the case law is that, a breach of a safety regulation does not render the voyage illegal but renders her unseaworthy.[134]

The situation is more complicated, if pilot is required at any stage or at the end of the voyage. If the usage requires a pilot at any stage or at the end of the voyage and the vessel does not get one, she cannot be considered unseaworthy. This approach, adopted in *Phillips* v. *Headlam*,[135] is consistent with the wording of s 39(4) of the MIA 1906, since according to this section the ship is required to be seaworthy at the commencement of the voyage and as will examined later in this chapter, there is no continuing warranty of seaworthiness. Accordingly, the state of unseaworthiness which occurs at a later stage either as a result of the negligence of the crew or any other reason, does not constitute breach of this implied warranty. In this case, the insurer might only argue that the master is incompetent as he does not know or consider the importance of the pilot for that specific part of the voyage. An argument like this can

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[132] *Dixon* v. *Sadler, ibid,* and *The Framlington Court* [1934] 69 Fed Rep 300.

[133] Article II of the 1923 Convention on the Regime of Maritime Ports recognises the right of each state to organise and administer pilotage services as it thinks fit. The State is free to impose a compulsory service, providing that it respects the principle of equality in the charges made; it may also exempt its own citizens from mandatory use of a pilot provided they meet certain technical conditions. In the United Kingdom, pilotage was originally the responsibility of independent individuals. Later, it was administered by the Corporation of Trinity House in certain districts, and by local pilotage authorities elsewhere. Since the Pilotage Act of 1987, it has been provided by competent harbour authorities. See, Corbet, A, *The Law of Pilotage*, (The Nautical Institute on Pilotage, 1990), for a brief commentary with specific reference to the Pilotage Act 1987.

[134] See, *St John Shipping Corp* v. *Joseph Rank Ltd* [1957] 1 QB 267.

[135] (1831) 2 B & Ad 380.

succeed depending on the facts of each case, but the burden which is on the shoulders of the insurer, is a heavy one.

In *Hollingworth* v. *Brodrick*,[136] it has been suggested by Patterson, J, that if usage requires for a particular stage of the voyage that a ship should take a pilot on board, such part of the voyage is to be treated as a separate stage for the purpose of the warranty of seaworthiness. This approach, which seems sensible at first instance, offers us to apply the doctrine of stages if usage requires a pilot for a particular stage of voyage. Accordingly, the ship will be considered unseaworthy if she is not provided with a pilot at that stage. Such an approach, however, is inconsistent with the wording of the s 39(3) of the MIA 1906. According to this sub-section, a voyage insured can be divided into stages, if only the ship requires different kinds of or further preparation or equipment. Since the ship does not require such a preparation or equipment for the part of the journey which the usage requires pilot, the doctrine of stages cannot be applied in this special case. Moreover, such an extension of the doctrine of the stages will be inconsistent with the logic behind it. The doctrine of stages was developed to protect the assured. If a ship is insured for an adventure which contains both sea and river voyage, she will not be considered unseaworthy from the moment she sails for the sea voyage without the necessary equipment for the river voyage. She can be provided with this equipment before the river voyage starts and by this way the implied warranty of seaworthiness is satisfied. If the doctrine of stages, however, is extended to cover this particular issue, this situation will cause a great disadvantage for the assured and a big weapon will be given to the insurer to discharge himself from further liability.[137]

It was held in *Law* v. *Hollingworth*[138] that failure to take on board a pilot at any stage or at the end of the voyage rendered a vessel unseaworthy, if it was made compulsory by means of a statute. In that case, the ship at the time of loss did not have a pilot on board as required by Act of Parliament.[139] It was made clear by the cases decided later

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[136] (1837) 7 A & E 40, at p 48.

[137] The application of the doctrine of stages doctrine to voyage policies will later be discussed in chapter 3.3.2.2 at p 101.

[138] (1797) 7 TR 160.

[139] The then Pilot Act of 5 Geo 2, c20.

that the breach of a duty imposed by an act could only render a vessel unseaworthy, if it was a duty relevant to the commencement of the voyage. Here, the duty imposed, taking a pilot on board, was a duty relevant to the last stage of the voyage. Its breach, therefore, should not constitute unseaworthiness. As discussed above, since it is not possible to apply doctrine of stages in situations like this, it is not wrong to conclude that *Law* v. *Hollingworth* was wrongly decided. It was later overruled by *Dixon* v. *Sadler*.[140]

The Standard Institute Hull clauses contain a clause giving leave to sail or navigate with or without pilots.[141] It is submitted, with approval of Arnould,[142] that the effect of this clause is to preclude the underwriters from avoiding the policy merely on the ground that the vessel was unseaworthy by reason of her lack of a pilot which was necessary, at the end or during the continuance of the voyage. It is further submitted that if the shipowner were to send the vessel to sea without a pilot, where one was compulsory by means of a statute at the beginning of the voyage, then the vessel will be considered unseaworthy. I think this approach is quite sensible and in accordance with the wording of s 39(4) of the MIA 1906.

3.2.4 An Attempt to Extend the Doctrine : Ships Subject to Arrest and Seaworthiness

In *Morrisey* v. *SSS & J Faith*,[143] the American judge Connell, JC, extending the meaning of seaworthiness dramatically, held that the term should not be limited to merely the physical facilities of the vessel. In this case, a contract of affreightment was concluded between the Pakistan government and the defendant company, for the carriage of a certain cargo with the company's vessel named Faith. Faith's crew was poorly fed and underpaid. Moreover, sister ships of the Faith owned by the defendant

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[140] *Ibid.*

[141] Clause 1.1 of ITCH and IVCH (1983 and 1995) stipulates as follows:

'The vessel is covered subject to the provisions of this insurance at all times and has leave to sail or navigate with or without pilots...'

[142] *Ibid*, para 726.

[143] [1966] AMC 71.

company had already been embroiled in litigation. There was a multitude of unsatisfied creditors, including the crew of Faith, and any of them could arrest the vessel. In a case of arrest, the owners lacked the resources to free her from the arrest process either by satisfaction of the claims or the posting of a bond. The judge, taking these into account, held the vessel to be unseaworthy. In delivering his judgement, Connell, JC, said that:

'If the owner leaves the vessel unprotected against the foreseeable seizure by creditors, she is just as liable to be stopped short of her destination as if she were left unprotected against the ordinary perils of the navigation.'

By considering the aims of the doctrine of seaworthiness, that a ship must be able to discharge the loaded cargo safely at the port of discharge, one can argue that this is a fair and sensible judgment. Such an interpretation is, however, inconsistent with the definition of 'seaworthiness' made in the MIA 1906. By using the words 'to encounter the ordinary perils of the seas', the draftsman intended to limit the scope of seaworthiness with the physical capacity of the vessel in question. The other factors, such as the possibility of arrest and lack of facilities to free her from arrest, do not play any role in determining a vessel's seaworthiness. It seems that English courts, at least in cases where the MIA 1906 applies, will hold a vessel to be seaworthy in a situation like this, under the restrictive wording of s 39(4).

3.3 IMPLIED WARRANTY OF SEAWORTHINESS IN MARINE INSURANCE

Being an ancient concept, the doctrine of seaworthiness is quite significant in several different legal contexts of maritime law. It is utilised in maritime law to attach liability for certain consequences and it operates both as a defence mechanism and also liability-imposing doctrine. For instance, apart from marine insurance, the doctrine

plays a crucial role in carriage of goods,[144] towage contracts,[145] general average,[146] seamen's contract of employment,[147] limitation of liability,[148] carriage of passengers[149] and even in public maritime law[150]. It is beyond the scope of this work to discuss the impact of the doctrine on these areas.

The implied warranty of seaworthiness plays a crucial role in the law of marine insurance, as it is one of the most effective defence mechanisms of the insurer. In many cases, its breach causes the insurance cover to be lost even though there is no causal relationship between the breach and the loss and in this respect it can be regarded as the 'instant death' of the assured. The MIA 1906 implies a warranty of seaworthiness only in a voyage policy, but not in a time policy.[151] The aim of this part is to examine the application of the doctrine of seaworthiness in different areas of marine insurance. The legal problems that may arise and the situation in practice will be considered. The case law and standard institute clauses will generally be referred to for the purpose of clarifying or explaining the legal position in this area. Before considering the legal aspects, the need to regulate seaworthiness as a defence in marine insurance will firstly be discussed.

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[144] See, Wilson, J, *Carriage of Goods by Sea*, (3rd ed, Pitman Publishing, 1998); Boyd, SC & Burrows, AS & Foxton, D, (Ed), *Scrutton on Charterparties and Bills of Lading*, (20th ed., Sweet & Maxwell, 1996), For a detailed analysis on the role of seaworthiness in charterparties, see, Liang, C, *Seaworthiness in Charter Parties*, [2000] JBL, p 1.

[145] See, Parks, AL, *The Law of Tug, Tow and Pilotage*, (3rd ed, Cornell Maritime Press, 1994).

[146] See, Rose, FD, *General Average Law and Practice*, (LLP Ltd, 1997).

[147] See, s 42 of the MSA 1995.

[148] For the development, systems and regimes of limitation of liability, see Gaskell, NJJ (Ed), *Limitation of Shipowner's Liability: The New Law*, (Sweet & Maxwell, 1986) and Griggs, P, & Williams, J, *Limitation of Liability for Maritime Claims*, (3rd ed, LLP, 1998). For recent developments in this area, see Gaskell, NJJ, *New Limits for Passengers and Others*, [1998] LMCLQ, p 312 and Soyer, B, *1996 Protocol to the 1976 Limitation Convention: A More Satisfactory Global Limitation Regime for the Next Millennium*? [2000] JBL, p 153.

[149] See, Arts 3, 13 and 18 of the Convention Relating to the Carriage of Passengers and Their Luggage by Sea of 1974 (Athens Convention). This Convention was implemented into English law by Schedule 6 of the MSA 1995.

[150] See, ss 94, 95 and 98(3) of the MSA 1995.

[151] The rationale for this difference will later be examined in chapter 3.3.3.1 at p 107.

3.3.1 The Need to Regulate Seaworthiness As A Defence in Marine Insurance

Marine insurance contracts are designed to provide indemnity for the assured for losses which are incident to a marine adventure.[152] Marine adventure is unique in the sense that once it has commenced, the assured has very limited control over his vessel and this situation needs to be taken into account when the balance between the parties of the contract is adjusted. In order to maintain the balance between the parties, English law has implied a seaworthiness warranty in voyage policies and somewhat lesser provision in respect of seaworthiness for time policies. Legal implications of these issues will be the subject of a detailed and extensive examination in the subsequent parts of this chapter.

Other legal systems have made an effort to keep the balance between the assured and insurer either in a way similar to English law or in an entirely different framework. The type and form of the defences afforded to marine insurers in other jurisdictions in case of unseaworthiness will be evaluated and compared to English law later in this work. As a result of such an examination, it is expected to reach a conclusion whether the warranty status afforded in respect of voyage policies and seaworthiness provision in respect of time policies serve the needs of the insurance market for the new millennium. In this part, however, the reasons for regulating seaworthiness as a defence for the insurer in marine insurance contracts will be examined.

The main reason for the existence of provisions relating to seaworthiness in marine insurance contracts is simply a reflection of the general shape of the contract to insure. 'Uncertainty' (either as to whether the event happens at all or as to when it happens)[153] is the characteristic property of insurance contracts and the underwriters are not expected to insure against certain events or inevitable losses. If the ship is sent to sea in an unseaworthy state, it is exposed to greater risk than normal and the probability of a loss is very high. In other words, the event in this case is one which can be in a way

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[152] Section 1 of the MIA 1906 reads as follows:

'A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.'

[153] The former refers to indemnity insurance, whereas the latter to life insurance.

determined by the assured and it is not totally 'uncertain'. Without such an obligation in marine insurance, underwriters would be expected to insure the assured against inevitable losses which is not the function of insurance in any circumstances. Furthermore, in an insurance contract the insurer agrees to indemnify the assured against a risk in return for a payment called premium. Risk, therefore, is the distinguishing factor of an insurance contract. An underwriter conducting business in the marine market must be taken to possess sufficient experience and sources of information to rate the risk that the vessel will suffer loss by the perils of the seas, etc during the voyage.[154] What he cannot rate is the possibility that the shipowner will not try or will try and fail to make the ship seaworthy before the risk ever commences. Imposing a seaworthiness warranty into voyage policies and a similar obligation as to seaworthiness in time policies, therefore, helps the insurer to rate the risk properly and adjust the premium accordingly.

Secondly, the rule is disciplinary in nature. It is designed to protect the innocent freighters and crew against the consequences of the owners' cynical act of sending the ship on its way in a condition which puts all the interests at risk. Lord Mustill, however, does not find this justification convincing and criticises it on two grounds.[155] First, he argues that in the case of cargo insurance, a claim under the policy will fail if the carrying vessel was unseaworthy at the start of the voyage even though the assured has no means of knowing whether the ship was seaworthy or not. Although this argument seems attractive at first sight, it is open to a fatal objection. Being an implied warranty in each voyage policy, seaworthiness is not conclusive in nature. That is to say, it can always be neutralised by means of a waiver clause. Thus, in all cargo policies this implied warranty has been waived on the condition that the assured or their servants are not privy to such unseaworthiness.[156] In this way, the harsh consequences of the breach of this implied warranty for the cargo owner are in practice disregarded. Moreover, Lord Mustill is of the opinion that to impute a regulatory function to marine insurance law is inconsistent with its private law character. In pure

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[154] For a technical analysis on premium calculation in insurance see, Vyleden, F & Goovaerts, M & Haezendonck, J (Ed), *Premium Calculation in Insurance*, (D Reidel Publishing Co, 1983).

[155] See, Mustill, MJ, *Fault and Marine Losses*, [1987] LMCLQ, p 310, at p 345.

[156] See, ICC (1982) (type A,B,C) cl 5.2.

theory, freedom of contract is the main principle dominating private law. In this sense, contracts are created only by agreement; that is, an agreement creating at least one obligation is, in principle, both necessary and sufficient for the contract. In the real word, however, pure theory is soon in tatters: the obligation creating agreement may be necessary and sufficient, but, for a number of reasons it is not conclusive. In other words, the principle dominating private law, freedom of contract, is not unlimited and its border lines are drawn by the law itself. For example, the main content of many contractual relationships is compulsory.[157] Similarly, the obligation to make contract may be created by common law,[158] by statute[159] or by Arts 85 and 86 of the EC Treaty (Treaty of Rome).[160] The concept of public policy may also play an important role in determining the borders of the freedom of contract principle. All these examples show that despite the fact that freedom of contract is the main principle of the private law, the contract between parties may be interfered with and some duties or obligations may be imposed on one or both parties by express or implied terms of the law. In this sense, to impose rules regulating the relationships between the contracting parties does not render the private law character of the marine insurance and the wider interests of the public have a part to play in this area of the law just like the other areas of private law. For these reasons, I personally find Lord Mustill's objections unsound and inconsistent with the realities of both contract and marine insurance law.

3.3.2 Voyage Policies

3.3.2.1 Extent of the Implied Warranty of Seaworthiness in Voyage Policies

Section 39(1) of the MIA 1906 declares in general terms that:

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[157] See, Dock Work Regulations Act 1976.

[158] For the common innkeeper or carrier.

[159] For example, Employment Act 1982, s 12, imposes an 'actionable' duty not to refuse a contract with non-union suppliers,

[160] *Garden Cottage Foods Ltd* v. *Milk Marketing Board* [1984] AC 130.

'In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.'

As can be observed, this provision does not make a distinction in the nature of the subject matter insured. This means that the warranty of seaworthiness is equally implied in a voyage policy,[161] whatever be the subject of insurance. The warranty, therefore, applies whether the policy is on ship, goods, freight or any property exposed to a maritime peril.[162] Similarly, in cases where the cargo insurance contracts are effected on an 'open cover' basis,[163] the implied warranty of seaworthiness would still apply to each overseas shipment embraced within the open cover, because each adventure relates to a separate voyage. Thus, each certificate of insurance issued under an open cover will be subject to s 39(1) of the MIA 1906.

Section 39(1) requires the ship to be seaworthy 'at the commencement' of the voyage. What is exactly meant by this wording? The voyage may be considered as commenced when the ship sails or alternatively when she leaves the port and proceeds to open sea. 'Sailing' in marine insurance cases, where there is a warranty to sail before a particular day, has been held to be 'breaking ground' leaving her moorings ready for sea, though not leaving port.[164] The importance of this issue can be observed when a ship which sails from her moorings but still is in the port has become unseaworthy by the negligence of the crew. If the time of sailing is the time which the voyage commences, the assured may argue that there is no breach of the warranty of seaworthiness, as unseaworthiness which occurs after the commencement of the voyage has no significance.[165] On the contrary, if the voyage commences after the ship leaves the port and proceeds to sea, then the insurer may use the breach of implied warranty of seaworthiness as a defence in this particular case.

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[161] For the definition of voyage policy see s 25(1) of the MIA 1906.

[162] See, ss 1 and 3 of the MIA 1906.

[163] An open cover is an agreement whereby the underwriter undertakes to insure all shipments or interests of the assured for certain voyages or trades, either at specified rates of premium, or at rates to be arranged. The underwriter is notified by the assured when the shipments are made, of the interests attaching to the cover.

[164] *Roelandts v. Harrison* (1854) 9 Ex 444 at p 465.

[165] 'The assured makes no warranty that the ship shall continue seaworthy throughout the voyage', per Lord Mansfield in *Berman v. Woodbridge* [1781] 2 Dougl 781. This point will later be examined under chapter 3.3.2.3 at p 105.

Since the phrase 'at the commencement of the voyage' is used in s 39(1) and not sailing, one might normally consider that there is a difference in their meanings and something else other than sailing is meant in this sub-section. I am of the opinion that this is not the case. One of the dictionary meanings of 'commencement' is 'sailing'.[166] Therefore, there is no doubt that the phrase 'at the commencement of the voyage' means the same thing as 'at the time of sailing'. If the draftsman's intention was to give a different meaning to s 39(1), this could have easily been achieved by wording the sub-section differently. For example, the sub-section could have been worded as:

'In a voyage policy there is an implied warranty that when the ship leaves the port, she shall be seaworthy...'

In addition to this, there is case law which can support this argument. The meaning of the phrase 'commencement of voyage' was considered, four years after the enactment of the MIA 1906, in *Mersey Mutual Underwriting Association Ltd v. Polland.*[167] According to this case, the voyage commences when the vessel being fitted and equipped for sea possessed of her clearances, crew, and if necessary, cargo commences to navigate upon her voyage, and no longer remains moored in the course of preparing. The commencement of a voyage as distinguished from the termination of lying in port is determined by that which purports to be done at the time of the act of quitting the actual mooring. This judgment clearly states that the voyage is considered as being commenced as soon as the ship sails, therefore, s 39(1), in fact, takes the time of sailing into account when determining the time which the warranty starts to bite. It must, however, be borne in mind that in some cases the sailing of the ship may not be enough for the commencement of the voyage. If there is no intention of commencing voyage merely the movement of the ship cannot be considered as an act which commences the voyage. This issue was discussed in *Insce Co v. Blogg.*[168] In this case, there was a sailing warranty requiring the ship to sail on or after 1st of March. It appeared that the ship in question had finished loading her cargo before 10 o'clock at

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[166] See, *The Concise Oxford Thesaurus*, compiled by Betty Kirkpatrick, (Oxford University Press, 1995).

[167] (1910) 26 TLR 386.

[168] [1898] 2 QB 398.

night 29 February, and having previously cleared the custom house, was then ready to proceed to sea; but by a regulation of the port ships were not permitted to go out at sea after dark. At 10 o'clock the master, with the object of keeping his crew on board, moved the ship away from the wharf about five hundred yards out into the river and there anchored. In moving so the ship, he placed her in a slightly more advantageous position for starting than she would have been if she had remained at the wharf. Gaining of that advantage was the only motive of the master in moving her. On the following morning, 1 of March, she proceeded on her voyage and it was held that the ship had sailed on 1 of March.

There is one final point that has to be discussed about the extent of the warranty of seaworthiness in voyage policies. Section 39(1) refers to the seaworthiness of the 'ship' only. In this respect, it can be considered whether the warranty of seaworthiness is implied for lighters, crafts and the like, employed for the conveyance of the cargo from the ship to the port of discharge. This question was raised in the case of *Lane v. Nixon.*[169] In that case, the goods were damaged while being carried from the ship to the port of discharge by means of a lighter. The insurers were held liable as a result of a cover clause worded as 'until the goods be safely landed in the port of discharge, including all risks to and from the ship'; but implied warranty of seaworthiness was held not to be attached to the lighters so used. This judgment is sound and consistent with the wording of s 39(1), as the seaworthiness is required only at the commencement of the voyage. Unless the process of landing of cargo by means of lighters can be considered as a separate stage of the voyage, the implied warranty does not apply after the voyage has commenced. The judges could not regard it in any sense as a stage of the voyage. Even though the judges had regarded this stage as a separate stage of the voyage, this time a further problem would have occurred. Can the lighters and other crafts employed for the conveyance of the cargo be regarded as a 'ship'? This issue was not discussed in *Lane v. Nixon* and the judgment was based on the fact that s 39(1) applies only at the commencement of the voyage and conveyance of cargo from the ship to the port of discharge is not a separate stage of the voyage. The general definition of ship can be found under the MSA 1995, s 313, which has defined

[169] (1866) LR 1 CP 412.

'ship' as including every description of vessel used in navigation. This definition laid particular emphasis on two points. First, it is not the form, construction, the rig, the equipment, or means of propulsion which is determinative in deciding whether a structure is a ship or not. Accordingly, a hopper barge, with no means of propulsion, was held to be a vessel in *The Mac*.[170]

Secondly, any structure which is in fact used in navigation is a vessel.[171] The term navigation has been described in *Steadman* v. *Schofield*[172] as 'a planned or ordered movement from one place to another.' Therefore, any structure which is capable of making a planned or ordered movement from one place to another and in fact does such a movement, is regarded as a vessel regardless of its size, shape and source of power.[173]

In the light of the criteria expressed in s 313 of the MSA 1995 and relevant case law, it is highly probable for an English court in case of a dispute to hold that the definition of 'ship' in the MSA applies to lighters and crafts used for similar purposes. It is obvious that they do navigate, in the sense that they make a planned or ordered movement from one place to another and perform their duties in this way. However, that there is no case law regarding the position of lighters or other crafts used for

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[170] (1882) 7 PD 126. In that case, whether hopper barge was a ship or not was decided by taking s 2 of the Merchant Shipping Act (MSA) 1854 (which was in force at that time) into account which read:

Ship shall include every description of vessel used in navigation not propelled by oars.

As can be seen, the present definition of a ship in s 313 of the MSA 1995, is quite similar to the definition in s 2 of the MSA 1854. In this respect, it is not wrong to conclude that the outcome of this case would be the same under s 313 of the MSA 1995 and *The Mac* is still good law. *The Mac* was later followed in *The Mudlark* [1911] P 116 where a sea-going steel hopper barge, 90 feet long and 19 1/2 feet wide without means of propulsion, was held to be a vessel under s 742 of the MSA 1894 which was worded exactly in the same way as s 2 of the MSA 1854.

[171] The definition of a vessel under American Federal law lays a particular emphasis on the expression 'transportation', instead of 'navigation'. Section 3 of 1 USC (originally enacted as Act of July 30, 1947, Ch 388, s 3, 61 Stat 633) defines the word vessel as:

'including every description of watercraft or other artificial contrivance used, or capable of being used as a means of transportation on water.'

[172] [1992] 2 Lloyd's Rep 163, at p 166.

[173] For instance, in *The Titan* (1923) 14 LIL Rep 484, limitation of liability was allowed for a floating crane which had broken down the River Tyne hitting several ships. Similarly, in *The Harlow* [1922] P 175, a dumb barge had been held to be a vessel, since she was moved about much more often than this structure would be moved about.

navigation and conservative and descriptive view of English courts regarding the definition of a vessel must be borne in mind.[174]

Lane v. Nixon has made it clear that there is no implied warranty of seaworthiness for lighters, crafts and the like employed for the conveyance of the cargo from the ship to the port of discharge. Is, however, the situation the same for crafts employed for the conveyance of the cargo to the ship at the beginning of the voyage? Although this issue was not considered in *Lane* v. *Nixon*, applying the same logic the solution must be the same. Section 39(1) requires the ship to be seaworthy at the commencement of the voyage. Conveyance of the cargo to the carrying vessel is a stage which occurs before the commencement of the voyage, so no implied warranty of seaworthiness is imposed on these crafts by the MIA 1906 even though they can be regarded as ship. If, however, these crafts which are used for the conveyance of the cargo to the ship are unseaworthy, the underwriter can exclude his liability. Accordingly, cl 5.1 of the ICC (1982) (type A,B,C) excludes liability caused by the unseaworthiness of these crafts. This clause is worded as follows:

'In no case shall this insurance cover loss damage or expenses arising from unseaworthiness of vessel or craft... where the assured or their servants are privy to such unseaworthiness... at the time the subject-matter loaded therein.'

This wording of section suggests that the underwriter, when defending the claim, is under an obligation to prove that unseaworthiness *proximately* caused the loss. Accordingly, the underwriter will be provided with a defence in cases where unseaworthiness is one of the proximate causes of the loss and he can show the existence of a causal link between the unseaworthiness and loss. For his defence to succeed under cl 5.1., the underwriter has also to show that the assured or their servants were privy to the unseaworthiness at the time the goods were loaded onto the craft. In modern shipping practice few cargo assured are in a position to know whether or not the vessel/craft used for carrying the cargo to the ship is seaworthy or not,

[174] For example, in *The Blow Boat* [1912] P 160 a dredger, in *Merchant's Marine Insurance Co Ltd v. North of England P&I Club* (1926) 25 LIL Rep 446 a pontoon carrying a crane was held not to be a ship by English courts.

effectively cl 5.1 is of little practical value to cargo underwriters where most cargo insurances are concerned.

There is only one extraordinary case that s 39(1) can play an important role for the lighters or other crafts employed for the conveyance of the cargo. Since these crafts can be considered as a ship, in the light of case law discussed above,[175] if the stage which the goods are conveyanced to or from the carrying vessel is insured separately from the main voyage; then s 39(1) imposes a warranty of seaworthiness for these crafts as well. This is an extreme situation considering that in all cargo policies the risk attaches when the goods leave the warehouse and terminates when the goods are put into the warehouse at the port of discharge.[176]

Last but not least, it must be borne in mind that MIA 1906 also applies to hovercraft by virtue of Hovercraft (Application of Enactments) Order 1972, Art 4.[177] In this respect, when a hovercraft or property carried on hovercraft are insured for a voyage, an implied warranty of seaworthiness is imposed on the hovercraft.

3.3.2.2 Doctrine of Stages

The voyage undertaken may be so long that it is impossible to take in a sufficient amount of bunkers for the entire journey. Similarly, a different preparation or equipment may be required for different stages of the journey and it is impractical to have this equipment at the commencement of the voyage when there is an opportunity of taking them on board from an intermediate port. If, however, the implied warranty of seaworthiness in voyage policies is applied in a strict sense, the assured may lose his insurance cover in cases explained above. For this reason, s 39(3) of the Marine Insurance Act provides:

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[175] It must be noted that there is no case law in respect of lighters or other crafts employed for the conveyance of the cargo.

[176] See, ICC (1982) (Type A,B,C) cl 8.

[177] SI 1972/971.

'Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each voyage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.'

The origin of this rule is *Bouillon v. Lupton*[178] which will later be discussed in detail. The doctrine of stages has been developed mainly to reconcile the interests of the assured on the one hand and those of the insurers on the other in voyage policies. It must be clearly understood that where the voyage is not divisible into stages, a breach of warranty may be established by the vessel being unfit to withstand those perils which she can ordinarily be expected to encounter only on one part of the adventure in which she engages. On the other hand, when the voyage is divisible into stages and if the ship were lost in one stage of the voyage, it would be no defence that she was not then seaworthy for a stage which she has not commenced. Section 39(3) clearly requires the ship to be seaworthy, if of course the voyage can be divisible into stages, at the commencement of each voyage in respect of different kinds of or further preparation or equipment. This point is very crucial and can be confusing, for this reason what is exactly meant with this provision will be tried to explain with a hypothetical example. Let us assume that the voyage is divided into two stages for bunkering purposes and the vessel which commenced the first stage in a seaworthy state has a defective boiler during this part of the voyage. This vessel will still be considered seaworthy for the whole of the voyage if she commences the second stage by only taking in bunker and not repairing the defective boiler, as s 39(3) requires her to be seaworthy at the commencement of the second voyage in respect of bunkering purposes.

As discussed above, there have been attempts to extent the boundaries of the doctrine since its enactment. First, it was argued that the part of the voyage which pilot was compulsory formed a different stage.[179] Then, the conveyance of cargo from a ship to a discharge port by means of a lighter was claimed to be a separate stage.[180] The courts, however, always refused to extend the limits of the doctrine. From the wording of s

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[178] (1863) 33 LJ CP 37.

[179] *Hollingworth* v. *Brodrick, ibid.*

[180] *Lane* v. *Nixon, ibid.*

39(3), it is obvious that there has to be a physical or commercial need to warrant a division of the voyage into stages. Merely, because a vessel may legitimately call at an intervening port does not produce a voyage in stages.[181] In this regard, the doctrine has only been applied in two different cases which will be discussed now.

3.3.2.2.1 Physical Factors

Due to physical factors different equipment, preparation or crew may be required for different parts of the voyage. The presence of such circumstances justifies the division of the voyage into stages. This situation is well illustrated as regards a river and sea voyage by the case of *Bouillon v. Lupton.*[182] In this case, the vessel was insured from Lyons to Marseilles (on River Rhone), thence to Galatz (by sea). For the voyage on the river only the crew was carried and she was without her masts and heavy tackle, as they would have rendered this section of the journey impossible. These were customarily left at Marseilles. At Marseilles, the sea crew took the vessel to sea properly equipped however she was lost in the Black Sea during a storm. The underwriters maintained that the vessel was not seaworthy for the whole voyage while the court decided that she was reasonably fit to encounter the perils on the river and at sea and was, therefore, 'seaworthy' for both stages. Similarly, the division of a voyage into stages, in relation to the warranty of seaworthiness, may take place in different parts of a sea voyage as a result of physical factors. For example, a ship insured for a voyage from a port in Mediterranean to a port in North Atlantic may require some extra equipment or preparation for the Atlantic part of the voyage and the voyage may be divided into stages in this respect.

3.3.2.2.2 Stages for Coaling and Bunkering

In the cases discussed above, the doctrine of stages has been applied where the nature of the risk changes due to some physical factors from one stage to another. The doctrine has also been applied where a ship cannot and does not at the commencement

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[181] *Thin* v. *Richards & Co, ibid.*

[182] *Ibid.*

of the voyage carry enough fuel for the whole of the insured voyage, and is, therefore, obliged to take in fuel at some further port or ports. That it should be possible to apply the doctrine of stages for bunkering and coaling, was first highlighted in *Thin v. Richards & Co.*[183] The doctrine, however, was applied for bunkering and coaling for the first time in *The Vortigern*[184] at the end of the 19th century. Here, it was held that the unseaworthiness of the vessel due to insufficiency of coal or other fuel would be decided according to the capability of dividing the voyage. Whether a voyage was divisible depended upon necessity and the insurers having established that the vessel was unseaworthy from the outset of the voyage the assured was allowed to show the necessity for dividing the voyage. This ruling was later upheld in *Greenock SS Co v. Maritime Insurance Co Ltd*[185] involving a vessel coaling in stages, one of which between Montevideo and St Vincent. Due to the negligence of the engineer, supplies of coal were insufficient for that stage and in order to reach port without assistance some of the ship's fittings and spars and also part of the cargo were burnt as fuel. In the Court of Appeal, upholding the principle established by *The Vortigern*, Romer, LJ, stated that the voyage could have been divided into stages for coaling if there was necessity, but it was the duty of the assured to make sure that there was sufficient coal for that stage of the voyage. In this sense, the vessel was found unseaworthy on leaving Montevideo and, therefore the insurers were not liable. The application of the doctrine laid down by *The Vortigern* was made clearer in 1939 in *Timm & Son v. Northumbrian Shipping Co.*[186] After passing through the Panama Canal en route for St Thomas in the Virgin Islands, the captain realised that he had insufficient bunker coal to reach the destination and altered the course for Jamaica. However, whilst proceeding to Jamaica, the vessel struck a reef and with her cargo became a total loss. It was held by the House of Lords that the intention on sailing definitely fixed the stage of the voyage and that the quantity of the bunkers sufficient to make a vessel seaworthy for that stage must be determined in view of all contingencies which a prudent shipowner ought to contemplate; that in fixing that quantity a shipowner was

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[183] *Ibid.*

[184] *Ibid.*

[185] *Ibid.*

[186] *Ibid.*

not entitled to take into account the existence of optional bunkering facilities en route. Therefore, the vessel could not be held to have been sufficiently supplied with bunkers for that stage from Vancouver to St Thomas, which was the next bunkering port fixed by the owners and she was unseaworthy on leaving Vancouver.

One might consider whether it is possible to divide the voyage into stages even if the vessel could carry enough fuel for the whole voyage. In shipping practice, commercial necessities may require such a division in the voyage. Although this issue was not discussed in *Timm & Son v. Northumbrian Shipping Co*, a positive answer can be given to this inquiry by evaluating the reasoning of the judges in the House of Lords. As the shipowner has a freedom to divide the voyage into stages for bunkering purposes provided that they are reasonable, there is nothing preventing him from doing so even if the vessel could carry enough fuel for the entire voyage. Support for this argument could be found in the judgment of Tucker, LJ, in *Neomijula SS Co v. Minister of Food.*[187] In this case, it was expressly stated that the shipowner was under no obligation to use bunkering stages and was entitled at his election to carry fuel for the whole voyage. This points implies the converse proposition that the shipowner may elect to bunker in stages even if he could carry fuel for the whole voyage.

3.3.2.3 No Continuing Warranty of Seaworthiness

There is no warranty that a ship originally seaworthy for the voyage insured shall continue to be seaworthy or that the master and crew shall do their duty during the voyage. The negligence and misconduct of master or crew after the voyage has commenced, therefore, is no defence to an action on the policy where the loss has been immediately occasioned by the perils insured against. In other words, the assured makes no warranty that the ship shall continue to be seaworthy throughout the voyage.[188] This principle laid down by Lord Mansfield in the late 18th century, is full of good sense and in accordance with shipping realities. Neither the assured nor his

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[187] [1951] 1 KB 223 at p 234.

[188] *Berman v. Woodbridge, ibid,* at p 788 per Lord Mansfield, CJ; *Eden v. Parkinson* (1781) 2 Dougl KB 732 at p 735; *Watson v. Clark* (1813) 1 Dow 336 at p 344, per Lord Eldon, LC ; *Busk v. Royal Exchange Assurance Co* (1818) 2 B & Ald 73 and *Biccard v. Shepherd, ibid.*

managers has any means of ascertaining the condition of the vessel after the voyage has commenced. To make them liable for something which is completely out of their control, would be harsh. In this sense, it is logical that they are not responsible for the unseaworthiness caused by the negligence or misconduct of their servants.

Even though the policy is on a voyage out and home, the risk being entire and indivisible, it is sufficient if the ship is seaworthy for the entire voyage when she first sails from the homeport of loading. Thus, in *Holdsworth v. Wise*[189] where a ship was insured 'at and from Belfast to her port or ports of loading in British America, during her stay there, and back to the port of discharge in the UK' and the evidence showed that she was seaworthy for the entire voyage when she sailed from Belfast, but unseaworthy when she left St Andrew's on the homeward passage, it was held that the implied warranty of seaworthiness was satisfied.

In fact, there is no express provision in the MIA 1906 that the ship must be seaworthy only at the commencement of the voyage. However, s 39(5) provides that there is no implied warranty that the ship shall be seaworthy at any stage of the adventure in respect of time policies. This wording makes it clear that the law on the voyage policies established by Lord Mansfield remains unamended under the MIA 1906 and there is no continuing warranty status.

3.3.3 Time Policies

In time policies,[190] there is no implied warranty of seaworthiness. This does not, however, mean that the question of seaworthiness is irrelevant in time policies. There is somewhat lesser provision in respect of seaworthiness for time policies now embodied in s 39(5) of the MIA. This sub-section will be the main interest of this part and its legal implications on time policies will be analysed. Before this legal examination, reasons for the distinction between voyage and time policies in respect of the application of the implied warranty of seaworthiness will be considered.

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[189] (1828) 7 B & C 794. See also, *Redman (SP)* v. *Wilson* (1845) 14 M & W 476.

[190] See s 25(1) of the MIA 1906 for the definition of time policies.

3.3.3.1 Rationale for the Distinction Between Voyage and Time Policies in Respect of Seaworthiness and Its Justification

It is not just a coincidence that a warranty of seaworthiness is implied for voyage policies and not for time policies. The rationale for the difference in the law between time and voyage policies in respect of seaworthiness can be found in the celebrated case of *Gibson v. Small.*[191] First, there was seen to be a problem in identifying the moment at which the warranty would bite if seaworthiness was an implied warranty in time policies. Should this be the time when the contract of insurance was made or at the time fixed for the inception of the risk or at the moment when the ship broke ground on the first voyage after the inception of the risk? Or, alternatively should the warranty relate to the moment when the ship commenced the intended enterprise? Whichever of these alternatives is chosen, some consequences, which are not consistent with the basic principles of insurance law, may arise. If the time when the contract was made or the time fixed for the inception of the risk is considered as the moment at which the warranty will bite, some difficulties may arise if at this time the insured vessel is at sea. In a situation like this, the assured has no means of ascertaining the condition of the vessel at the time she comes on risk. The insurance cover may, however, be lost if the vessel becomes unseaworthy at sea at the moment when the warranty starts to bite. Similarly, if the moment when the ship broke ground on the first voyage after the inception of the risk is taken into account, this may have some harsh consequences for the insurer. If at the time the policy is effected the insured vessel is at sea and lost before reaching her next port of call due to the unseaworthiness which existed at the commencement of this voyage, the insurers will be liable. Choosing the moment when the ship commenced the intended enterprise as the time to which the warranty relates, seems more appropriate than the other alternatives, as the assured has control of the vessel at this time. However, in this way a retrospective effect is given to the new insurance contract, as the assured is made

[191] *Ibid.*

liable for something which occurred before the insurance contract is concluded and this is definitely beyond the main stream of insurance contracts.[192]

The second reason given in *Gibson v. Small* for the distinction in law between voyage and time policies is less convincing than the first one discussed above. Whereas under a voyage policy the standard of seaworthiness could be pitched by reference to the contemplated voyage, this will not work where the cover may encompass only the later part of a voyage which is already in progress or the part plus one or more wholly different voyages with or without the addition of the first part of yet another voyage. In respect of these voyages, the standard required might be quite different and quite unpredictable at the moment of inception. Lord Mustill, criticising this argument, supports the view that the increased homogeneity of sea transport has greatly diminished the former importance of this problem.[193] According to Lord Mustill, most of marine insurance is concerned with non-specialised ocean-going vessels. These vessels are expected to be fit for the carriage of all but abnormal cargoes on all but abnormal voyages. Whether engaged on a short coastal hop in mid-summer or a North Atlantic passage in mid-winter, the ship ought to be able to deal with any weather conditions which are reasonably to be contemplated.

Admittedly, there are some sound reasons for not imposing an implied warranty of seaworthiness in respect of time policies. The insured vessel may be at sea when a time policy commences and in this respect the assured may have no opportunity to verify the condition of his vessel on inception, at the same time there may be some difficulties in determining the moment when the warranty will bite. It, however, appears almost equally inequitable that after a vessel has returned to the control of her owner or manager, or of those who are in other respects acting as his agents in her management, the underwriter should still remain deprived of the protection which he would enjoy if the vessel were insured voyage by voyage. Even in time policies the assured, through

[192] It should also be borne in mind that almost all time policies keep the insured vessel insured if at the time the policy expires she is at sea, provided that notice is given and additional premium is agreed. See cl 2 of ITCH (1983 and 1995 version).

[193] See, Mustill, MJ, *Fault and Marine Losses, ibid*, p 347.

his agents, is in a position to access the requirements in order to render the vessel seaworthy for the voyages after the attachment of the risk.

The current state of law will be examined later in this part and the possibility of a reform in this area will be discussed in detail in the final part of this work. It is probably sufficient to say at this stage that the justification for creating a different status for time policies in relation to the application of the implied warranty of seaworthiness is far from being convincing.

3.3.3.2 Legal Situation in Respect of Seaworthiness in Time Policies

As mentioned on several occasions in this part, the legal situation is different in time policies from voyage policies in respect of seaworthiness. A line of 19th century case law refused to imply any seaworthiness warranty into time policies, but recognised a defence based upon knowledge of the assured.[194] The case law on this point has been codified by s 39(5) of the MIA 1906 which provides as follows:

'In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.'

The meaning of this provision and the cases when s 39(5) defence can be raised by the underwriter will be examined now.

3.3.3.2.1 Unseaworthiness When the Ship Is Sent to Sea

Under the wording of s 39(5), the assured is prevented from recovery only where the vessel was unseaworthy when she was sent to sea. It is crystal clear from this wording that this sub-section is not operated by subsequent unseaworthiness. In other words, if a ship, which has commenced her voyage in a seaworthy state, becomes unseaworthy

[194] *Gibson* v. *Small, ibid*; *Micheal* v. *Hooper* (1856) 17 CB 551; *Thompson* v. *Hooper* (1856) 6 E & B 937; *Fawcus* v. *Sarsfield* (1856) 6 E & B 192 and *Dudgeon* v. *Pembroke* (1877) 2 App Cas 284.

at a later stage of the voyage and a loss occurs due to this unseaworthiness the underwriter cannot rely on s 39(5) to deny liability.[195]

Section 39(5) also refers to the ship being sent to sea. Therefore, this section can only protect underwriters in respect of unseaworthiness on sending to sea, not merely for a transit within a port, canal lake or river, nor where a vessel is lost or damaged in port or at her moorings. It must, on the other hand, protect the underwriters when the ship is sent on a sea voyage in an unseaworthy stage and the first part of this voyage is in a canal, river or lake. There is no case law regarding these matters, but the above principles can be concluded by evaluation of the section and taking the logic behind it into account.

3.3.3.2.2 Privity of the Assured

The assured's state of mind is a relevant factor in the application of s 39(5), for the vessel must have been sent to sea in a unseaworthy state with the privity of the assured. This phrase, privity of the assured, has given rise to a series of problems, as it is not very clear what is exactly meant by it. The case law must be intensively referred to for some clarification in this area.

The first question arising in this context is the meaning of the phrase 'privity of the assured'. Until *Compania Maritime San Basilio SA* v. *Oceanus Mutual Undertaking Association (Bermuda) Ltd* (*The Eurysthenes*),[196] one of the most celebrated cases of marine insurance, the meaning of the word 'privity' in s 39(5) was not considered in detail.[197] In this case, the meaning of the word 'privity' was examined and clarified by

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[195] In general a subsequent unseaworthiness occurred as a result of a latent defect or negligent of the crew is covered by the policy. See cl 6.2 of ITCH (both 1983 and 1995 version)

[196] [1977] 1 QB 49, hereinafter referred to as *The Eurysthenes.*

[197] In *Compania Naviera Vascongada* v. *British & Foreign Marine Insurance Co Ltd (The Gloria)*, (1938) 54 LIL Rep 34, hereinafter referred to as *The Gloria*, Barson, L, at p 58, although rejecting an argument that privity was confined to actual knowledge of seaworthiness, stated his opinion as follows:

' I think if it were shown that an owner had reason to believe that his ship was in fact unseaworthy, and deliberately refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness of his ship. But the mere omission to take precautions against the possibility of the ship being unseaworthy cannot, I think, make the owner privy to any unseaworthiness which such precaution might have disclosed.'

the Court of Appeal, when a member of a P&I Club claimed indemnity for a cargo claim arising from the unseaworthiness of the vessel. The P&I Club refused to indemnify the member on the ground that the member was privy to the alleged unseaworthiness.[198] The question in this case was whether in order to prove 'privity' within that section, it was necessary for the Club to prove a) negligence and/or b) knowledge of the fact constituting unseaworthiness and/or c) some deliberate or reckless conduct in sending the ship in an unseaworthy state. It was contended by the shipowners that the word 'privity' in s 39(5) meant 'wilful misconduct' and accordingly the assured was deprived of the indemnity if he deliberately or recklessly sent the ship to sea knowing that she was unfit. When constructing this argument, much reliance was placed upon certain 19th century cases[199] upon which it was argued that Sir Mackenzie Chalmers had based s 39(5). In effect, it was urged that 'privity' in s 39(5) had to be equated with 'wilful misconduct' in s 55 (2)(a). The P&I Club, on the other hand, argued that the word 'privity' in s 39(5) was indistinguishable from the phrase 'actual fault or privity' which appears in some limitation conventions and that any personal act of commission or omission by the shipowner in relation to sending the ship to sea in an unseaworthy state would amount to 'privity' within s 39(5).[200]

One of the arguments about the meaning of 'privity' in s 39(5) traced the origins of the section to the antecedent case law, while the other attracted the attention to the long line of limitation statutes. All three judges in the Court of Appeal rejected these arguments. If the intention of the draftsman was to equate 'privity' with 'wilful misconduct', this could easily have been achieved by using the same language both in s 39(5) and 55(2)(a). Moreover, the attempt to equate the word 'privity' to the words 'wilful misconduct' is open to a fatal objection. As was stated by Lord Roskill,[201] circumstances can be envisaged in which sending a ship to sea in an unseaworthy state to which the assured was privy could be said to amount to wilful misconduct, and, if a

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[198] The application of s 39(5) in cases between a P&I Club and its member will later be examined in part 3.3.5 at p 130.

[199] *Thompson* v. *Hooper, ibid; Dudgeon* v. *Pembroke, ibid* and *Trinder Anderson & Co* v. *Thames & Mersey Marine Insurance Co* [1898] 2 QB 114.

[200] The 1924 and 1957 Limitation Conventions take the 'actual fault or privity' test into account in determining whether the shipowner loses his right to limit or not.

[201] *Ibid*, at p 78.

loss followed, the underwriter might successfully plead both s 39(5) and s 55(2)(a) by way of defence.[202] But whilst there could not be wilful misconduct by an assured without privity in the sense of conscious knowledge, an assured might be privy in the sense of sending a ship to sea in an unseaworthy state without at the same time being guilty of wilful misconduct. In other words, the fact that the assured is aware of the unseaworthy condition of the ship when she is sent to sea does not necessarily mean that he is guilty of wilful misconduct. Arnould, sharing the same view, has provided an illustration:

'It is possible to conceive cases where, with the privity of the assured, an unseaworthy ship may be sent to sea without any real misconduct on his part. For instance, in time of war, a shipowner fearing an attack upon a naval port may very properly order his vessel to sail at once, although he knows that she is not perfectly seaworthy in all respects.'[203]

This simple examination shows that the privity in s. 39(5) means something else than the term 'wilful misconduct'. It was also held that there was nothing in the antecedent cases, cited as the origin of s 39(5), which justified a different view of the construction of the sub-section from the construction of the language of the Act.[204]

Similarly, if the word 'privity' means the same as the phrase 'actual fault or privity', why the later was not used in s 39(5). Moreover, that the word 'privity' and the phrase 'actual fault or privity' do not mean the same thing, can easily be shown by reference to the previous case law. The definition of the phrase 'actual fault or privity' is to be found in *Asiatic Petroleum Co* v. *Lennard's Carrying Co* in the judgment of Buckley, LJ,:[205]

'The words 'actual fault or privity' infer something personal to the owner, something blameworthy in him... If the owner be guilty of an act of omission to do something which he

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[202] The interrelation between positive defences of the underwriter (wilful misconduct, warranties, good faith and sue and labour clauses) will later be examined in Chapter 9 at p 274.

[203] *Ibid*, para 720, fn 62.

[204] *Ibid*, per Lord Roskill at p 79.

[205] [1915] AC 415 at p 432. Hamilton, LJ, also made a very similar definition in the same case at p 436.

ought to have done, he is no less guilty of an 'actual fault' than if the act had been done one of omission.'

This judgment, which was later affirmed in the House of Lords,[206] clearly states that the personal act or privity is the acts or matters which the shipowner did or omitted to do. It includes positive and negative forms of personal wrongful act. 'Privity', on the other hand, is directed to a different subject matter, namely to acts or matters which were done with the assured's knowledge and consent.

It was, therefore, the intention of the draftsman when using the word 'privity' in s 39(5), to give a different meaning to the concept rather than 'wilful misconduct' or 'actual fault or privity'. That the meaning of the word 'privity' in s 39(5) must be ascertained by looking at, and only at, the MIA 1906, was stated by Lord Roskill in his judgment.[207] Similarly, Lord Geoffrey Lane considered the word 'privity' as a neutral word deriving colour from its surroundings.[208]

After specifying the position of the word 'privity', the judges in the Court of Appeal tried to define and draw the lines of the concept. Eventually, they were in agreement that the word 'privity' meant with 'knowledge and consent'. Their Lordships indicated that 'knowledge' did not only mean positive knowledge but also the sort of knowledge expressed in the phrase 'turning a blind eye' (constructive knowledge). Thus, if a man, suspicious of the truth, turns a blind eye to it and refrains from inquiry - so that he should not know it for certain- then he is to be regarded as knowing the truth. On the

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[206] Sub-nom, *Lennard's Carrying Co* v. *Asiatic Petroleum* [1915] AC 705.

[207] *Ibid*, p 75. When holding this, Lord Roskill cited the speech of the Lord Hershell in *Bank of England* v. *Vagliano Brothers* [1891] AC 107, at pp 144-5, (The Code in question was the Bills of Exchange Act 1882):

' I think the proper course is in first instance to examine the language of the statute and ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view... I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate... What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.'

[208] *Ibid*, at p 81.

other hand, negligence in not knowing the truth is not equivalent to knowledge of it.[209] If the owner of a ship says to himself : 'I think a reasonable prudent owner would send this vessel to sea with a crew of 12. So I will send her with 12,' he is not privy to unseaworthiness, even though a judge may afterwards say that she ought to have had 14. He may have been negligent in thinking so, but he would not be privy to unseaworthiness. But, if he says to himself: 'I think that a reasonably prudent owner would send her to sea with a crew of 12, but I have only 10 available, so I will send her to sea with a crew of 10' then he is privy to the unseaworthiness, if a judge afterwards says he ought to have had 12. The reason being that he knew that she ought to have had 12 and consciously sent her to sea with 10.

Accordingly, the assured ought not to be held privy to something, if the Court is satisfied that he did not know the facts, or did not realise that they rendered the ship unseaworthy, even though he was negligent in not knowing. Besides, the presence of blind eye knowledge can only be observed, if there is 'some consciousness or suspicion' about the unseaworthiness of the ship, so that the assured does not know for certain. In this respect, it was held in *The Gloria*[210] that the omission of a regular survey, which if held, would presumably have discovered a state of unseaworthiness, did not mean the assured turned a blind eye to the knowledge.

Recently, the Court of Appeal found a golden opportunity to re-examine the law on this point in *The Star Sea*.[211] The Star Sea was insured under a time policy. She and two other ships, Kastora and Centaurus which had been lost in the previous couple of years as a result of fire, were beneficially owned by the Kollakis family and they were all managed by the same ship managers, Kappa Maritime Ltd, of which the directors were Captain Kollakis, his two sons, and Mr Nicholaidis. After having sailed from Nicaragua bound for Zeebrugge with a full cargo of bananas, mangoes and coffee, a fire started in the Star Sea's engine-room. It later spread to other parts of the ship and

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[209] *Ibid*, per Lord Denning MR, at p 68.

[210] *Ibid.*

[211] *Ibid.*

was not put out for several days by which time the ship had become a constructive total loss.

The Star Sea was unseaworthy in several aspects but only two of them, the ineffective sealing of the engine room and the 'massive ignorance' of the recently appointed maser to activate the Co2 system as soon as it was realised that the fire could not be fought in any other way, were causative of the loss. The additional damage was brought about by a combination of both aspects of seaworthiness. In other words, the Star Sea was rendered a constructive loss when she was wholly consumed by a fire the extent of which could have been easily contained had the dampers been effective and master competent. When the shipowners brought a claim for the additional damage caused by fire, the insurers relied on a s 39(5) defence alleging that the assured was 'privy' to the unseaworthiness of the vessel which caused the additional damage so they were to be denied of the right of recovery.[212]

The Court of Appeal, agreeing with Lord Denning in *The Eurysthenes,* re-affirmed that the notion of 'privity' envisaged in s 39(5) covered not only positive knowledge but also constructive knowledge, that is to say knowledge that can be expressed in the form of 'turning a blind eye'. Upholding *The Gloria,* the Court of Appeal held that 'what the defendant underwriters had to establish was a suspicion or realisation in the mind of at least one of the relevant individuals that [the Star Sea] was unseaworthy in one of the relevant aspects and a decision not to check whether that was so for fear of having certain knowledge about it'.[213] Therefore, as was stated in *The Eurysthenes,* negligence on the part of individuals in not taking the necessary steps to make the ship seaworthy does not amount to 'privity' of the assured in the application of s 39(5).

After clarifying the meaning of word 'privity', the next task of the Court of Appeal was to determine whether there was any reason for the assured to suspect that the recently appointed master would be incompetent. The underwriters claimed that the two earlier fires on Kastora and Centarus, must have aroused the assured's suspicion

[212] The insurers also alleged that the assured was in breach of the utmost good faith duty emphasised in s 17 of the MIA 1906, however this was rejected by the Court of Appeal.

[213] *Ibid,* at p 377.

that there may be something faulty or defective in the fire fighting armoury of their fleet and they were privy to the unseaworthiness simply because they refrained to carry out further inspections fearing that they would discover the unseaworthy state of the vessel. In fact, Tuckey, J, at first instance, held that there was a 'suspicion' in the minds of any of the relevant individuals that an incompetent master might have been employed and for this reason they were privy to the unseaworthiness which caused the additional loss. On the other hand, the Court of Appeal, reversing the first instance decision, held that there was no reason for the assured to suspect that the recently appointed master of the Star Sea was incompetent in using the Co_2 extinguisher. The Court of Appeal based its decision on the fact that the assured was merely negligent in failing to ensure that the master was instructed.

Without a doubt, the decision of the Court of Appeal in *The Star Sea* has clarified the meaning of the word 'privity' in s 39(5) by affirming the previous decisions on this point. However, I am of the opinion that the Court of Appeal's interpretation as to the privity of the assured in the specific case could be criticised and the findings of the first instance judge, Tuckey, J, are more accurate than the Court of Appeal's.

Admittedly, there may have been no reason for the assured to suspect that the recently appointed master was incompetent, however the previous two fires in the assureds' vessels must 'tell' them that there is a problem either in the condition of their fire-fighting equipment or the efficacy of their fire-fighting regime. As a prudent owner, the assured, therefore, should have taken some steps to inspect these aspects in his ships. Consequently, he should have appointed superintendents to inspect the safety equipment to discover the deficiencies and to ensure the crew were carrying out the necessary routine maintenance at sea. Had a superintendent been appointed, the ineffective state of the fire-fighting system of the assured's vessels would have been discovered. In such a case, the assured would have been more cautious when appointing a new master to the Star Sea and would have checked whether he was competent or not in using the Co_2 equipment in case of a fire. By ignoring the previous two fires in his ships, I think the assured turned a blind eye to the unseaworthy state of the vessel. It must be borne in mind that whether the shipowners had or had not taken steps to inspect their ships is irrelevant in this respect. The crux of the matter is

whether their suspicion ought to have been aroused in the specific case as a result of two previous fires. I think in *The Star Sea* there was enough evidence to make the assured suspicious about the ineffective state of the fire extinguishing system in his ships. Indeed, as was stated by Hodges, S:

'...the temptation to ask the question, - how many more ships must be lost in the same fashion before the owners (or managers) can be regarded as having been alerted or awakened to the fact that the fire fighting system on board their ships may not be up to standard- is irresistible.'[214]

The second issue concerning privity is the identification of the person to whom the 'privity' requirement applies. If the assured is an individual who runs his own affairs, it is the knowledge of that individual which is relevant.[215] If the assured, on the other hand, is a company it cannot attain knowledge simply because it is an artificial entity. In such a case, our task is to determine the extent to which knowledge of the servants of a company can be regarded as the knowledge of the company itself. A line of English case law appears to establish that the principles governing the attribution of knowledge to companies in these circumstances requires the search for the company's 'directing mind and will'. The accepted source of the abstract 'directing mind and will' test for attributing knowledge to a company is the opinion of Viscount Haldane LC, in *Lennard's Carrying Co Ltd* v. *Asiatic Petroleum Co Ltd*[216] This test has been interpreted as requiring the court to search for the '*brains and nerve centre*'[217] or the '*soul*'[218] of the company. Accordingly, the 'directing mind and will' of a company is generally a person or persons in control of corporate policy. As such, a company's board of directors or individual directors possessed of executive powers of management, may normally be regarded as the company's 'directing mind and will'.

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[214] See, Hodges, S, *Seaworthiness and Safe Ship Management*, [1998] IJIL, p 162 at p 169.

[215] Here, the word 'knowledge' has been used as including both the actual knowledge and the knowledge that could be expressed in the form of 'turning a blind eye'.

[216] *Ibid*, at p 714.

[217] *HL Bolton (Engineering) Co Ltd* v. *TJ Graham & Sons Ltd* [1956] 3 All ER 624 at p 630 per Denning, LJ, (as he then was).

[218] *Deutsche Genassenschaftsbank* v. *Burnhope* [1995] BCC 488, per Staughtot, LJ, at p 492.

Recently, in *Meridian Global Funds Management Asia Ltd* v. *The Securities Commission*,[219] the Privy Council re-directed the attention away from the widely applied concept of the 'directing mind and will' of a company and offered a much more flexible 'functional' approach focusing on the true construction of the particular substantive rule of law concerned. Lord Hoffmann suggested that the 'directing mind and will' test was not applicable on all occasions to all statutory provisions, and accordingly whether the company has knowledge of a certain fact must be determined by the rules of attribution. His Lordship has drawn a distinction between primary, general and special (particular) rules of attribution. The primary rules of attribution, that is to say the acts specifically authorised by a resolution of the board of directors or an unanimous agreement of shareholders, were generally to be found in the company's constitution, most typically in its articles of association. Some, on the other hand, are implied by company law. These primary rules, however, are supplemented by more general rules, rules that apply equally to individuals, such as agency and estoppel. However, there are cases where these rules may be inapplicable. The particular (specific) rule of law under consideration may, expressly or impliedly, rule out reliance on both the primary and the more general rules of attribution: 'for example, a rule may be stated in a language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself' as opposed to its servants or agents.'[220] This is exactly the case in s 39(5) which reads as follows:

'... but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state,...'

In such cases, according to Lord Hoffmann, if it is decided the substantive rule is nevertheless to be applied to companies, the court must fashion a special (particular) rule of attribution to determine whose knowledge was for this purpose intended to count as the act of the company.

Thus, such a special rule of attribution in respect of s 39(5) can be fashioned by applying the usual canons of interpretation and taking into account the language of the sub-section and its content and policy. Section 39(5) is available for the insurers in

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[219] [1995] 3 WLR 413.

[220] *Ibid*, at p 419.

cases where the ship is sent to sea in an unseaworthy state with the knowledge of the assured. Therefore, after a careful literal construction of the sub-section it is clear that our task is to find the inter-relation between the process of sending the ship to sea and the persons in the company who has authority to do this.

Accordingly, in cases where the assured is a company, the person or persons within the company who were involved in the decision making process required for sending the ship to sea need to be determined. The knowledge of these people about the unseaworthy state of the vessel can be attributable to the knowledge of the company. In modern company structure, the board of directors of a company usually delegate some part of their functions of management (such as putting the ships to sea) to senior managers giving them full discretion to act independently of instructions from them. In such cases, there is no doubt that the knowledge of a 'senior manager' as to unseaworthy state of the vessel can be considered as the knowledge of the company. However, after *Meridian Global Funds Management Asia Ltd* v. *The Securities Commission*, it is possible that a junior manager's knowledge as to the unseaworthy state of the vessel can be considered as the knowledge of the assured company, if he has been delegated power to put the vessel to sea for that specific voyage. In short, it is a question of fact in each case to determine whose knowledge within the company as to unseaworthiness of the vessel is attributable to the company.

The same test also applies in cases where the assured is a company which has appointed a ship management company to manage its ships. Such an appointment is usually carried out under the standard ship management contracts, such as BIMCO Shipman.[221] The person or persons in the ship management company who is involved in the decision making process required for sending the ship to sea must be identified. The knowledge of that person or persons within the ship management company as to unseaworthy state of the vessel will be attributable to the knowledge of the assured

[221] This standard contract was drafted in 1987 by a subcommittee of BIMCO and now is widely used. In particular, the 1998 version of the contract has been almost universally adopted in the Japanese market- the strongest 'new' ship management market of the past decade. For more information about ship management contracts see, Willingale, M, *Ship Management*, (3rd ed, LLP Ltd, 1998).

company.[222]

The position is obviously more complicated where one corporation owns the ship and is 'the assured' technically, but where the management and responsibility of the ship has been placed in the hands of another corporation. This is usually the case in one-ship companies.[223] This situation was considered by the Court of Appeal in *The Star Sea*. In that case, the assured was a one-ship company managed by Kappa, an English company based in London. The registered managers were Charterwell, a Greek company registered in Greece. Mr Faraklas was the sole director of the one-ship company. Captain Kollakis, Lou Kollakis, George Kollakis and Mr. Nicholaidis were the directors of Kappa. Captain Kollakis and Mr. Faraklas were the directors of Charterwell. The Court of Appeal had to decide whose knowledge as to unseaworthiness would be considered as the knowledge of the one-ship company when a s 39(5) defence was brought by the insurers. Although the court's task is more complicated when a one-ship company is involved, there is no difference in the test which will be applied. Again, the ultimate question is the identification of the persons who participated in the decision-making process which resulted in the vessel being put to sea. The Court of Appeal suggested that in each case a circle must be drawn and the persons who have *de facto* management and control of the relevant aspect of the company's business (putting the vessel to sea) must be placed in that circle. The knowledge of persons in that circle about the unseaworthiness of the vessel will amount to knowledge of the company. Accordingly, it was held that the knowledge of

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[222] If the vessel is sent to sea in an unseaworthy state with the knowledge of the ship manager company and this enables the insurers to bring a s 39(5) defence successfully, the managers might be liable to the assured company for breach of the management contract. Clause 18 of the BIMCO Shipman, for example, provides that the managers shall be under liability to the owners in cases where a loss has arisen from the negligence, gross negligence or wilful misconduct of the manager or his agents or subcontractors. In which case the managers liability for each incident shall be limited to a total ten times the annual management fee. This limitation of the managers liability will, however, not apply where the loss had resulted from the manager's personal act or omission committed with the intent to cause such loss or recklessly and with knowledge that such loss, damage, delay or expense would probably result.

[223] The one-ship company is a way of organising the maritime enterprise which presents great advantages for maritime entrepreneurs. The essential feature of a one-ship company is that it has distinct personality from the persons which formed it and as a result of this the company has the capacity to conduct business and to sue and be sued in its own name. Furthermore, one ship company's property is owned by the company as a separate person and not by members that formed it. Accordingly, the members of the company are not personally liable for the latter's debts and if the company becomes insolvent, its members stand to lose only the amount of their investment to the company.

directors of the management company, namely Lou Kollakis, George Kollakis and Mr Nicholiadis and the sole director of the one ship company, Mr Faraklas could have been attributable to the knowledge of the one ship company.

The final unclear point in this context was whether the insurer would be exempted from liability for loss attributable to any kind of seaworthiness or to the particular unseaworthiness to which the assured was privy when he sent the ship to sea. The answer to this question is crucial especially if the ship is sent to sea in an unseaworthy state in two respects, the assured being privy to the one and not privy to the other, and the ship is lost due to the unseaworthiness which he is not privy. Here, it could be said that the assured should recover, as he was not aware of the unseaworthiness which caused the loss; but it is equally possible to argue that as the vessel was sent to sea in an unseaworthy condition with the privity of the assured and the loss was attributable to unseaworthiness, the plain wording of s 39(5) precludes recovery.[224] This question arose in *Thomas* v. *Tyne & Wear SS Freight Insurance Association.*[225] In this case, the vessel is put to sea in an unseaworthy condition by reason of the state of the hull and also inadequate crew. The assured was privy to inadequacy of the crew but not to the state of the hull and the vessel was lost due to the state of the hull. Atkin, J, adopted the former approach and held the insurers liable. Consequently, the assured must be privy to the particular or actual unseaworthiness which results in loss, before he will be debarred from recovery. I am of the opinion that Atkin J, construed the subsection accurately and reached the right decision. The intention behind s 39(5) was that the assured should be unable to recover in respect of a loss occasioned by his own fault. If, therefore, a loss occurs as a result of a factor to which the assured was not privy, he should be able to recover even though he was privy to another factor which would cause the loss, but did not.

Similarly, if the vessel is unseaworthy in more than one aspect and the loss is caused by operation of both of them, 'privity to both aspects of unseaworthiness' is necessary for

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[224] Interestingly, s 39(5) adopts the word 'unseaworthy' and not 'the unseaworthiness'. This might be interpreted as allowing the insurer to rely on this provision in cases where the ship is sent to sea in an unseaworthy state despite the fact the assured is not privy to this particular situation.

[225] [1917] KB 938.

the application of s 39(5). This was highlighted in *The Star Sea* by Leggatt LJ,[226] who held that the assured was not privy to one aspect of the unseaworthiness which caused the loss, namely the incompetence of the master, and for this reason it was unnecessary for the court to go further to attend to the second aspect of unseaworthiness suffered by the vessel.

3.3.3.2.3 Loss Attributable to Unseaworthiness and Causation Problem

If a vessel suffers a loss as a result of her being sent to sea in an unseaworthy state, s 39(5) can only operate where that loss is attributable to the unseaworthiness. Seaworthiness and causation is, therefore, directly relevant in time policies. In marine insurance causation problem was tried to be solved by the *proximate cause* doctrine. Accordingly, s 55(1) of the MIA 1906 stipulates as follows:

'Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against.'

In the light of this provision, in cases where there are two or more possible causes of loss, an insurer is liable for a loss if it is *proximately* caused by a peril insured against. For a considerable period of time, the principle of *causa proxima* was applied in different ways in marine insurance. According to one point of view, which applied in *Pink* v. *Fleming*[227] the last cause only must be looked to and the others rejected in determining the *proximate* cause. Another school of thought had looked for what was 'efficient' and 'predominant' as the *proximate cause*. This was applied by the Court of Appeal in *Reischer* v. *Borwick*.[228] It seems to me that the idea of thought which uses time as the criterion in determining the *proximate cause* is open to a fatal objection. The last event occurred in the chain is not necessarily the main cause of the loss. Besides, in many cases the last event would not have occurred, if the previous event or events had been avoided. The law in this area was uncertain and contradictory until the

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[226] *Ibid*, at p 378.

[227] (1890) 25 QBD 396, at p 397, per Lord Esher MR.

[228] (1894) 2 QB 584.

celebrated case of *Leyland Shipping Co Ltd v. Norwich Union Fire Insurance Society Ltd*[229] In this case, the House of Lords conclusively settled the law of *proximate cause* under s 55(1) of the MIA 1906. The decision in *Reischer* v. *Borwick* was approved and the *proximate cause* was held to be the cause which was proximate in efficiency.[230] By equating the *proximate cause* with that which is efficient, real and dominant, the law has in effect invited judges to weight the causes of loss to determine their strength, influence and predominance. Under this rule, it is possible for there to be more than one *proximate cause*, while there would be only one under the last in time approach.[231]

However, in s 39(5) causation problem was addressed with the phrase 'attributable to'.[232] What is meant by this phrase and why did Sir Mackenzie Chalmers abandon the phrase '*proximately* caused by' when drafting s 39(5)? The adoption of the phrase 'attributable to' in the context of seaworthiness can be readily comprehended given the drafting of the Act towards the end of the 19th century, when last in time approach to causal *proximity* was in fashion.[233] If, therefore, the phrase '*proximately* caused by' was used in s 39(5), as a result of the dominant causation theory of that time, last in time theory, the insurer would not be able to rely on s 39(5) defence in many cases. For example, if a loss was caused by entry of sea-water due to the unseaworthy state of the hull, the *proximate* cause of the loss would have been held to be 'perils of the seas' and accordingly he insurer would have been deprived of the s 39(5) defence. In

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[229] [1918] AC 350, hereinafter referred to as *The Leyland* case.

[230] Lord Shaw illustrated his understanding of the law of *proximate* cause in the following words at p 369 of T*he Leyland case*:

'To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were distinct from one another as beads in a row or links in a chain, but - if this metaphysical topic has to be referred to- it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joint at the point of effect was the proximate and which was the remote cause... What does 'proximate' here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency.'

[231] The principle of *The Leyland case* was subsequently applied in two subsequent House of Lords decisions, namely, *Board of Trade* v. *Hain SS Co Ltd* [1929] AC 554 and *Yorkshire Dale SS Co Ltd* v. *Minister of War Transport, (The Coxwold)*, (1942) 73 LIL Rep 1.

[232] The situation is the same in the context of the defence of wilful misconduct in s 55(2)(a) of the MIA 1906.

[233] *Pink* v. *Fleming, ibid.*

addition to this, in the 19th century a linear view of causation was dominating in the law of causation. On this approach, the peril of the sea used to rank as the *proximate* cause as that which was last in time and the unseaworthiness was regarded as causally remote. Even though the unseaworthiness was accepted as continuing to operate through the occurrence of the loss, the peril of the sea viewed as a separate operative loss.[234] For instance, in *Redman* v. *Wilson*[235] negligent loading of cargo rendered a vessel unseaworthy, leading the master to run the vessel ashore in order to save both vessel and cargo. The insurers were held liable for a loss immediately caused by a peril of the sea (*viz* stranding) with negligence being regarded as remote and the unseaworthiness receiving no causation mention. For these reasons, a different causal formula was required to permit the courts to look behind the cause most immediate in point of time.

After *The Leyland* case, as discussed earlier, there had been dramatic changes in the law of causation. The courts began to look for the dominant or efficient cause or causes when determining the *proximate cause* of a loss. Thus, more than one cause can be held to be the *proximate cause* and in this sense, there is nothing preventing us from considering seaworthiness as the sole *proximate cause* or one of the *proximate causes* of the loss.[236] This change in the legal approach does not affect the situation in respect of s 39(5). The phrase 'attributable to' must be viewed as having always been held to be synonymous with the *proximate* in efficiency test. The application of s 39(5) when seaworthiness is a *proximate cause* or the *proximate cause* of the loss together with the possible causation problems and how they are addressed will be discussed in this part of the work with reference to the case law.

If seaworthiness is found to be a *proximate cause* (one of the *proximate causes*) of the loss, the assured will be precluded from recovery if he is privy to this specific unseaworthiness when the vessel is sent to sea. If, however, the assured is not privy to

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[234] See, the contribution of Bennett, H, in Thomas, R (Ed), *Modern Law of Marine Insurance*, (LLP Ltd, 1996), at p 192.

[235] (1845) 14 M & W 482.

[236] Accordingly, in *Frangos* v. *Sun Insurance Office Ltd* (1934) 49 LlL Rep 354; *Monarch SS Co Ltd* v. *Karlshamns Olie Fabriker* [1947] AC 196; and recently in *The Miss Jay Jay, ibid,* seaworthiness was held to be one of the proximate causes of the loss.

the specific unseaworthiness which was a *proximate* cause of the loss, the insurer will be precluded from bringing a s 39(5) defence and whether he will indemnify the assured or not for the loss, will entirely depend on the general principles of causation. In such a case, if seaworthiness is a *proximate cause* of the loss with another *proximate cause* of equal or nearly equal efficiency, then the insurer must indemnify the assured in cases where the other *proximate cause* comes within the terms of the policy. The reason for this is that unseaworthiness is not expressly excluded by the policy and other *proximate* cause of the loss is expressly covered by the policy. This principle is derived from one of the most famous marine insurance cases of 1980s, *The Miss Jay Jay.*[237] In this case, the subject matter of the insurance was a fast and luxurious motor yacht. In the event it proved that the class of boats of which the Miss Jay Jay formed part was by design and construction quite unfitted for this purpose and, when this particular example met some nasty weather on the way back from Le Havre large sections of the hull peeled off, happily without fatal results. It was held that the owner was entitled to recover under the policy insuring against losses caused by 'external accidental means', notwithstanding that the boat was obviously unseaworthy on sailing.[238] On the other hand, underwriters can deny liability, when unseaworthiness is a *proximate cause* of the loss with another *proximate cause* of equal or nearly equal efficiency and the other *proximate cause* of the loss is expressly excluded by the policy. This principle was well-settled in insurance law long before *The Miss Jay Jay* was decided. In the case of *Board of Trade v. Hain SS Co Ltd*[239] the House of Lords, in relation to a dispute under a charterparty, expressed the view that if a loss is 'the product of two causes, joint and simultaneous', and the one of the causes is expressly excluded by an exclusion clause, the insurers are not liable. Similarly, in a case concerned directly with insurance, *albeit* not marine, *Wayne Tank & Pump Co Ltd v. Employer's Liability Insurance Corporation Ltd,*[240] an exception was held to take

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[237] *Ibid.*

[238] This principle was laid down in *The Miss Jay Jay* by Lord Justice , as follows:

'It now seems settled law, at least as far as this court is concerned, that, if there are two concurrent and effective causes of a marine loss, and one comes within the terms of the policy and the other does not, the insurers must pay.'

[239] *Ibid.*

[240] [1974] QB 57. *Board of Trade* v. *Hain SS Co Ltd, ibid,* was cited with approval by Lord Denning, MR.

priority over the general words of a policy.[241] Such a situation may arise when a ship is lost due to the unseaworthiness resulting from ordinary wear and tear. Ordinary wear and tear is excluded in policies by virtue of s 55(2)(c), provided that the policy does not provide otherwise. None of the modern time policies on hulls provides otherwise, so in a case like this the underwriter can deny liability.

There may be some cases in which unseaworthiness is the sole *proximate cause* of the loss. For example, if a vessel with an unseaworthy hull takes on water or sustains damage on encountering only ordinary risks simply because of the defective character of the hull, the only *proximate cause* of the loss is unseawothiness. In cases like this, even if the assured is privy to the unseaworthiness when she was sent to sea, the insurer does not need to bring s 39(5) defence to deprive himself of liability simply because unseaworthiness is not a peril insured against in time policies. To invoke s 39(5), the loss has first to be brought under the policy. This principle was laid down in *Fawcus* v *Sarsfield*.[242] In this case, the vessel, without encountering any more than ordinary risks, was obliged owing to her defective state when she set sail to put into port for repair. The Court ruled that as the sole *proximate cause* of loss was unseaworthiness, which was not a peril insured against, the assured failed in their claim.[243]

One might be tempted to argue along the lines that the common law situation existing before the enactment of the MIA 1906 has been altered by s 39(5). This argument can be supported on the strict literal construction of the sub-section. Section 39(5) provides that the insurer is not liable for losses *proximately* caused by the

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[241] The same approach can be observed in a pre-statute case of *Cory* v. *Burr* (1883) 8 App Cas 393, decided by the House of Lords, in respect of marine insurance. Lord Sumner said much of the same thing in his dissenting speech in *Samuel & Co Ltd* v. *Dumas* [1924] AC 431 at p 467:

'Where a loss is caused by two perils operating simultaneously at the time of loss, and one is wholly excluded because the policy is warranted free of it, the question is whether it can be derived that the loss was so caused, for if not warranty operates.'

This passage was approved by Morris, LJ, in *Atlantic Maritime Co Inc* v. *Gibbon* [1954] 1 QB 88, at p 138.

[242] (1856) 6 E & B 192, at p 204.

[243] See also *Ballantyne* v. *Mackinnon* [1896] 2 QB 455, where the Court of Appeal held that, 'the loss complained of arose solely by reason of the inherent vice of the subject-matter insured which was not a risk insured against. Accordingly, the insurers cannot recover under the policy.'

unseaworthiness of the vessel with the privity of the assured. This wording does not make a distinction between unseaworthiness being the only *proximate cause* or one of the *proximate causes*. This must mean that s 39(5) can also operate in cases where the unseaworthiness is the sole *proximate cause* of the loss. The result of the construction of s 39(5) in the way stated above is that the insurers will be liable for any loss solely caused by unseaworthiness of the vessel in time policies, provided that the assured is not privy to such unseaworthiness.[244] This argument was brought into discussion by an Irish case, *Ashworth* v. *General Accident & Fire & Life Assurance Corporation*.[245] In this case, The Supreme Court of Ireland held that the sole *proximate cause* of the loss was unseaworthiness, but differed in their findings as regards the question of privity. The majority which found that the assured was aware of the condition of the ship in all aspects which made her unseaworthy, held that the loss was not recoverable. The judges did not expressly pronounce that s 39(5) was applicable in cases where unseaworthiness was the only *proximate cause* of the loss, but they rejected the claim on the ground that the assured was privy to the unseaworthiness which caused the loss. This shows that they considered the application of the sub-section in the particular case but they did not apply, as one of its application conditions, not to be privy, was not satisfied.

The author is of the opinion that such an argument is unsound. Section 55(1) of the MIA 1906 clearly provides that subject to the provisions of this Act and unless the policy otherwise provides, an insurer is liable for any loss which is *proximately* caused by a peril insured against. This means that, unless there is a specific provision in the Act or in the policy, the insurer is not liable for any loss which is *proximately* caused by a peril uninsured against. There is no specific provision in the modern standard time policies suggesting that the insurer is liable for the loss caused by unseaworthiness.[246]

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[244] Arnould has interpreted s 39(5) in a similar way, *ibid*, at para 718.

[245] [1955] IR 268, hereinafter referred to as *The Ashworth case*.

[246] The position is, however, different when a vessel is rendered unseaworthy due to a latent defect in her hull or machinery or negligence of the crew and such unseaworthiness is found to be the only *proximate* cause of the loss. In such cases, modern marine policies, (cl 6.2.2 of ITCH (1995)), provide cover unless such loss or damage has resulted from want of due diligence by the Assured, Owner or Manager. Therefore, if the assured is not privy to such a situation, he should be indemnified under the policy. See, *Coast Ferries Ltd* v. *Cuntury Insurance Co of Canada & Others, (The Brentwood)* [1973] 2 Lloyd's Rep 232, where unseaworthiness caused by wrong loading, for which the master was to blame, was found to be the *proximate* cause of the loss. In that case, the Court of Appeal of British

Then, the judges in *The Ashworth* case suggest that sub-s 39(5) is one of the exceptions to the general rule of causation stated in s 55(1). When the comments of Mackenzie Chalmers, the drafter of the Act, and the Parliament discussions are examined, it can be clearly seen that it was not the intention of the drafter to makes 39(5) one of the exception provisions of the Act stated in s 55(1). Besides, an objection can be brought to such an argument by considering the logic behind s 39(5). This sub-section's intention was to preclude the assured from recovery in respect of a loss occasioned by his own fault. If, however, s 39(5) is construed in the way the judges in *The Ashworth* case and Arnould suggested the assured is awarded, as he is entitled to be indemnified for losses caused by a peril which is not insured against in the policy. Such a result is obviously beyond the main stream of this sub-section.[247]

For all the arguments advanced above, the author is of the opinion that s 39(5) as worded, should not be as ready as capable of imposing liability upon an insurer for a risk which he has not, under the contract of insurance, specially agreed to insure. Its use has to be limited to the particular case where the loss is *prima facie* recoverable under the policy in question. Therefore, it is not wrong to say that the law in this area has not been altered by the enactment of s 39(5) and if unseaworthiness is the sole *proximate cause* of the loss, then the insurer is deprived of liability since unseaworthiness is not a peril insured against.

Columbia was prepared to hold the underwriters liable under the policies unless the owner was privy to the master's negligence within the meaning of s 41(5) (same as s 39(5) of the MIA 1906), since such unseaworthiness was covered by cl 2 of the policy which worded as follows:

'2- This insurance specially to cover (subject to the average warranty) loss of or damage to the subject-matter insured directly caused by the following-

... negligence of Masters, Charterers other than an Assured, Mariners, Engineers or Pilots; provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel,...'

The assured was not privy to the master's negligence, but the Court of Appeal held that on evidence the loss had resulted from want of due diligence on their part within the meaning of cl 2, so they were refused to be indemnified.

[247] This kind of construction of s 39(5) was also criticised by Black, J, in his dissenting judgement in *Ashworth case*, at p 293:

'... whether the action of the sea upon the ship in question at any material time constituted a peril of the sea at all; for if it did not, no time need be wasted on the other question, since the loss would not be covered by the policy.'

3.3.4 Mixed Policies

The concluding sentence of s 25(1) of the MIA 1906 states that a contract for both voyage and time may be included in the same policy. Such a policy is called a mixed policy and is generally effected in respect of vessels. A mixed policy usually insures the hull, etc, of a vessel for a voyage, and, by agreement, for a certain period after her arrival at the port of destination.[248] There was no authority deciding whether a warranty of seaworthiness had been implied into a mixed policy until *Almojil (M) Establishment* v. *Malayan Motor & General Underwriters (Private) Ltd (The Al-JUBAIL IV).*[249] In this case, a vessel was insured for a voyage from Singapore to the Persian Gulf and 12 months from her arrival while trading within the Persian Gulf. On her voyage from Singapore to the Persian Gulf, she was capsized. The underwriters denied liability on the ground that the vessel was not seaworthy at the commencement of the voyage. The Singapore Court of Appeal considered the logic behind the implied warranty of seaworthiness in voyage policies, when reaching a decision on this point. The reason why the warranty of seaworthiness is implied in the case of voyage policies is that an assured is usually in control and possession of a vessel before she embarks on a voyage and in this respect is capable of rendering her seaworthy. In a mixed policy, as far as the voyage stage is concerned, the assured is in possession and control of the vessel and this part of the cover has all the attributes of a voyage policy. The Court of Appeal, accordingly held that the warranty of seaworthiness was implied in mixed policies in respect of the voyage part of the cover even though this was not expressly stated by the MIA 1906.[250] The author believes that the solution adopted by the Singapore Court of Appeal is sensible and should also have application in English marine insurance law.

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[248] A policy covering a vessel for a period of time within certain specified geographical limits is, however, a time policy and not a mixed policy. See the Australian case of *Wilson* v. *Boag Sup Ct NSW* [1956] 2 Lloyd's Rep 564.

[249] [1982] 2 Lloyd's Rep 637.

[250] MIA 1906 has been enacted into the domestic legislation of Singapore.

3.3.5 Protection & Indemnity Club Cover

It has always been the intention of the P&I Clubs to cover the liabilities of the shipowners that are not covered by Hull and Machinery policies. The principal cover provided by the P&I Clubs falls into these categories: cargo claims, collision claims not covered under the three-fourths collision liability clause in the 'Hull and Machinery Policy' (the one fourth, the excess over valuation, contact with fixed and floating objects, personal injury claims, wreck-raising, pollution and clean-up costs), crew claims, passenger claims, port charges, life salvage, some towage costs, general average contribution that are irrecoverable under the hull policy.[251] The aim of this part is to examine shortly whether the implied warranty of seaworthiness has a role to play in cover offered by the P&I clubs.

In *The Eurysthenes*, the Court of Appeal held that the contract between the Club and the owners was a time policy within the meaning of s 25 of the MIA 1906. Since, entry in a P&I Club is regarded as a time policy, then the member of the Club is subject to s 39(5) and might lose his P&I cover if he sends the vessel to sea in an unseaworthy condition and he is privy to this unseaworthiness.[252] The parties to a contract of insurance can expressly or impliedly contract out of the operation of s 39(5). Therefore, the Rules of a Club may exclude the application of s 39(5).[253] However, this would only occur if the Rules of the Club are such that they exclude or contradict the sub-section or render its implied inclusion insensible. It was held in *The Eurysthenes* that a Club Rule which contains a promise by the association to indemnify a member against liability for damage to cargo arising out of unseaworthiness and unfitness of the entered vessel, was not sufficient to suppose that the application of s 39(5) was excluded. A more express, pertinent and opposite language is required to contract out of the operation of s 39(5).[254]

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[251] Legal expenses in defending claims are often separately covered by Clubs, under Freight Demurrage and Defence Rules.

[252] Club Rules generally provide with express terms that the club may avoid liability in respect of claims which have arisen by virtue of the unseaworthiness of the vessel where the member was privy to such unseaworthiness.

[253] None of the modern P&I Clubs, however, contract out of the operation of s 39(5) in their rules.

[254] Rules of many P&I Clubs contain similar provisions. See, for example, rl 34 of Grant P&I Association (1997 version) and rl 10 of Braekhus & Rein P&I Club (1996 version).

3.3.6 Burden of Proof in Unseaworthiness Allegations

As a general rule, the insurer carries the burden of proving a vessel unseaworthy at the relevant time.[255] Therefore, if the insurers claim that the seaworthiness warranty was breached, they are under an obligation to show that the vessel was unseaworthy at the relevant time. Similarly, in time policies in order to be able to bring a s 39(5) defence, the insurer must prove that the ship was unseaworthy when she was sent to sea and the assured were privy to this unseaworthiness.

Where, however, a ship soon after sailing starts leaking or becomes disabled or sinks without apparent cause and this cannot be ascribed to any violent storm or other adequate cause, there is a presumption of fact that it arose from unseaworthiness at the commencement of the voyage and the burden of proof is then shifted to the assured. The reluctance of the Court of Appeal to raise the presumption of unseaworthiness can clearly be seen in *Pickup* v. *Thames & Mersey Marine Insurance Co*,[256] where the vessel had to put back to port 11 days after sailing. The court held that the facts of the case did not raise the 'irresistible inference' that the ship was unseaworthy when she sailed. The trial judge was held to have misdirected the jury when he instructed them that the mere fact that the ship had returned to port so soon after sailing was in itself sufficient to raise the presumption that she was unseaworthy at the time of sailing. All the judges in the Court of Appeal agreed on the fact that time cannot of itself, without more, give rise to the presumption to shift the onus of proof. Time is only one of the factors and of 'secondary consideration'. They also emphasised the fact that if the circumstances of the case are such that, 'it is possible to ascribe the result to any other cause than the condition of the vessel on starting on the voyage', the presumption cannot be invoked. As a final point, the court warned that it is in each case a question of fact, not of law, for the jury to draw the necessary inference.[257] Again, in *Lindsay* v.

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[255] *Davidson* v. *Burnard* (1868) LR 4 CP 117 and *Hoffmann (C) & Co* v. *British Insurance Co* (1922) 10 LIL Rep 434.

[256] (1878) 3 QBD 594.

[257] The Court of Appeal took the opportunity to clarify the decision of *Watson* v. *Clark, ibid,* which has sometimes been cited as having laid down the rule that the presumption was one of law, and that the mere fact that a ship had to return to port shortly after leaving it was in itself sufficient to raise a

Klein (The Tatjana),[258] Lord Shaw fully acknowledged that the burden of proving unseaworthiness lay on the party so alleging, but affirmed that this principle of law in no way impaired 'certain presumptions of fact' arising from, for example, the age, admitted defects and classification or absence of classification or survey of the ship, generally poor and deteriorating record of the vessel and breakdown of machinery immediately or almost immediately after sailing.[259]

In America, however, the sinking of a vessel in calm water gives rise to a presumption of unseaworthiness (a presumption of law) which denies recovery unless either the assured can adduce rebuttal evidence of seaworthiness which will in turn arise a counter-presumption of loss by perils of the sea or the unseaworthiness caused by a latent defect or act covered by the Inchmaree Clause.[260]

3.4 POTENTIAL LEGAL IMPLICATIONS OF RECENT DEVELOPMENTS AT INTERNATIONAL MARITIME ORGANISATION ON PROVISIONS RELATING TO SEAWORTHINESS

3.4.1 Introduction

For more than twenty years, there has been general agreement on the overriding importance of the human factor in safety at sea. Official figures for shipping

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presumption of unseaworthiness. What Lord Eldon was, in fact, saying in that case was that, "if a ship was seaworthy at the commencement of the voyage, though she became otherwise only one hour after, still the warranty was complied with and the underwriter was liable."

[258] [1911] AC 194.

[259] See also, *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co, ibid,* where a ship inexplicably capsized and sank just 24 hours after leaving the Port Louis, but again insufficient evidence was presented to make an 'irresistible inference' of unseaworthiness.

[260] See *Capital Coastal of Shipping Corporation* v. *Hartford Fire Insurance Co (The Cristie)* [1975] 2 Lloyd's Rep 199; *The Ettore* [1933] AMC 323; *The Doyle* [1939] AMC 852; *The Ionian Pioneer* [1956] AMC 1780; *The Southern Sword* [1956] AMC 1518. The situation is exactly the same in Norwegian law. Section 3-22 of the Norwegian Marine Insurance Plan of 1996 provides that in cases where the ship springs a leak whilst afloat, the burden of proof of seaworthiness shifts to the assured. This formulation of American and Norwegian laws, however, goes beyond English law.

casualties[261] and insurance reports[262] have confirmed that human error is the principal cause of almost 80 % of all shipping accidents. In order to reduce the effect of human element and achieve a higher standard of safety, certain international conventions, including SOLAS 1974, MARPOL 73/78, Collision Regulations 1972, Load Line Convention 1966 and STCW have been adopted. However, marine casualties demonstrated no decline. Several marine tragedies which had destructive effects on environment, such as Exxon Valdez,[263] occurred in 80's and unfortunately there has been an increase in the number of injuries and loss of life at sea during this period when compared with the previous decades. Most of these disasters were again human error related.[264]

Diagram 2 intends to illustrate the increase in the number of casualties arising from shipping accidents over the years.

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[261] In 1980, the British Department of Transport entrusted the first research into the influence of human factors in shipping casualties to the Tavistock Institute of Human Relations. The report prepared for this Institute, by Bryant, DT & De Bievre, A & Dyer-Smith, M, *The Human Element in Shipping Causalities*, (August 1988), revealed that 90 % of collisions and 75 % of fires and explosions occurring in the British merchant fleet between 1970-9 were caused by human error. A similar study was carried out in Germany by the Institute of Shipping Economics and Logistics in 1994. As a result of an analysis of 380 accidents occurring between 1987 and 1991, concerning 481 merchant ships, the Report emerged that 75 % of these accidents were caused by either heavy workloads for the crew particularly in port and inadequate specialised training. See also, 'Safer Ships, Cleaner Seas: Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping', presented to Parliament by the Secretary of State for Transport by command of Her Majesty, London: HMSO, 1994.

[262] A survey published in West of England P&I Club Annual Revision 1992, at pp 34-5, illustrates that 65 % of all compensation claims submitted to this Club between 1987 and 1992, were due to human error. Mainly, dangerous practices by the crew, alone responsible for nearly a quarter of insurance claims.

[263] Following a navigational error, the Exxon Valdez ran aground on Bligh Reef, tearing its hull and spilling 40 000 tonnes of crude oil into the sea. Nine hours after the accident the National Transport Safety Board carried out alcohol tests on the ship personnel where the Captain was found over the limit.

[264] For instance, the Official Report prepared by Lord Justice Sheen in relation to the tragic accident of the Herald of Free Enterprise where 193 people died, left no doubt that the cause of the disaster was mainly human error.

Diagram 2

Major disasters involving passenger ships from the beginning of the 20th century - the end of 1980s

Name of the Ship	Date	Number of casualties
TITANIC	1912	1501
EMPRESS OF IRELAND	1914	1012
MORROCO CASTLE	1934	134
LAKONIA	1963	128
DON JUAN	1980	1000
TAMPOMPAS	1981	450
ADMIRAL NAKHIMOV	1986	423
DONA PAZ	1987	4200
HERALD OF FREE ENTERPRISE	1987	193
BINTANG	1988	200
DONA MARILYN	1988	300
HASAIL	1988	150

As can be observed, while only 4 disasters occurred from 1912-1963 resulting the loss of 2775 lives, in 8 years (1980-1988) 8 tragic incidents led the loss of 6916 lives. The increase in the number of casualties is almost 250 %.

In the 1990s, the IMO realised that drastic measures had to be taken to allow the industry to address the problem of human element. To this end, two instruments namely the ISM Code[265] and 1995 version of STCW were introduced to the maritime world by the IMO. The former focuses on the management of shipping companies and requires them to adopt a standard management scheme, while the latter introduces a comprehensive revision of the STCW 1978 Convention. These two instruments are expected to have a great impact on various aspects of maritime law including marine insurance. In the final part of this chapter, it is intended to evaluate the potential legal implications of these new instruments on provisions relating to seaworthiness.

[265] The full name is 'International Management Code for the Safe Operation of Ships and Pollution Prevention'.

3.4.2 Potential Legal Implications of the ISM Code on the Provisions Relating to Seaworthiness

3.4.2.1 Introduction

In order to minimise the human error in shipping operations, there was a need to create a culture of self-regulation of safety. In other words, it was essential to concentrate on internal management and organisation for safety and encourage individual industries and companies to establish targets for safety performance. By looking at the practices of the industry for solution, IMO came to the conclusion that a quality assurance system, similar to that of ISO 9000, could help in minimising human error. ISO 9000 was developed by the International Organisation for Standardisation and originally designed for the needs of production originated companies.[266] Its object is to improve safety standards in the companies and thus limit eventual damages to employees and other people. By taking ISO 9000 as a model the Marine Safety Committee of the IMO designed the ISM Code for shipping companies in 1993.[267]

3.4.2.2 Implementation and Extent of the ISM Code

The ISM Code was drafted as a self-contained document. Its provisions were, in effect, brought into force internationally when, at the SOLAS Conference in 1994, compliance with the Code became mandatory under a new Chapter IX to the SOLAS Convention.[268] The Code became mandatory for passenger ships, high speed vessels, tankers, bulk carriers and gas carriers of more than 500 gross tons, from 1 July

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[266] Some shipping companies had implemented the requirements of the ISO 9000 voluntarily, before the implementation of the ISM Code was made mandatory.

[267] Discussions on this issue started as early as April 1988, one year after The 'Herald of Free Enterprise' disaster. The Maritime Safety Committee, during its 55th session, called for the development of guidelines on safe ship management.

[268] The SOLAS Convention has been adopted and ratified by the vast majority of the world's flag states, covering about 96 % of the world's merchant tonnage. The reason why the ISM Code has been implemented as part of SOLAS is that it will apply under the convention's tacit acceptance procedure automatically to SOLAS contracting states, unless a reserve is actually made.

1998.[269] It will be compulsory for all cargo ships of more than 500 gross tons from 1 July 2002.[270]

The ISM Code is mainly concerned with the procedures whereby a ship is managed, both on board and ashore. The shipping company must define and document the levels of authority and lines of communication between the ship and shore and the roles of all personnel involved in safety issues, and in this way establish a safety management system in respect of each vessel.[271] There must be adequate shore-based personnel, and perhaps most importantly, there must be a 'designated person' onshore to provide a link with the vessel, who has direct access to the highest levels of management within the company.[272] The company must also define and document numerous issues relating to the responsibilities and authority of the master for safety and environmental matters, and training of the master and others on board.[273] There are key provisions of the Code dealing with the development, verification, reporting and auditing plans for the shipboard operations, emergency preparedness, reporting hazardous or emergency situations and accidents.[274] Finally, the Code contains provisions dealing with the systems required for ensuring the maintenance of the ship and her equipment generally.[275]

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[269] The provisions of the ISM Code has been implemented into English law by the Merchant Shipping (International Safety Management (ISM) Code) Regulations 1998, SI 1998/1561.

[270] However, the Council of the European Union adopted the ISM Code on 8 December 1995 and declared that it should be mandatory for the owners of ro-ro ferries operating a regular service to or from a part of a member state of the European Community with effect from 1 July 1996: EC Council Regulation No. 95/3051.

[271] *Ibid*, Arts 1.3, 1.4, 2, 3.

[272] *Ibid*, Arts 3.3, 4.

[273] *Ibid*, Arts 5, 6.

[274] *Ibid*, Arts 7, 8, 9, 12.

[275] *Ibid*, Art. 10.

3.4.2.3 Implications of the ISM Code on Provisions Relating to Seaworthiness[276]

In social science, each area is so closely connected with others that a change or development in one has an immediate effect on the other related areas. For example, an Act regulating the functions and operations of banks has considerable effect on economy and sociology. In this respect, although the ISM Code is a set of guidelines for shipowners and not, in itself, law, it is inevitable that its terms will have a considerable impact on maritime law. The main areas that are expected to be affected by the ISM Code are cargo claims (seaworthiness and due diligence provisions), limitation of liability and marine insurance. The aim of this part of the work is to discuss the possible impact of the ISM Code on provisions relating to seaworthiness in marine insurance. The impact of the ISM Code on general principles of marine insurance law will be examined first, before considering its implications for particular forms of policy.

3.4.2.3.1 Implications of the ISM Code on the Implied Warranty of Seaworthiness

As examined above,[277] s 39(1) of the MIA 1906 imposes an implied warranty of seaworthiness in respect of voyage policies. Accordingly, at the commencement of the voyage, the vessel must be seaworthy for the purpose of the particular adventure insured. Seaworthiness is a relative term which extends not only to the physical condition of the vessel but also to other aspects of the ship such as adequacy of fuel, sufficiency of the crew and even stability. Compliance with the ISM Code does not establish that a particular vessel is seaworthy in all aspects. A ship which has a satisfactory safety management system (SMS) and complies with the requirements of the ISM Code may still be unseaworthy due to a latent defect in her hull. Compliance with the ISM Code, therefore, is not conclusive evidence of seaworthiness.

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[276] For a more detailed examination on the effect of the ISM for marine insurance see, Soyer, B, *Potential Legal Implications of the ISM Code For Marine Insurance*, [1998] IJIL, p 268.

[277] See Chapter 3.3.2 at p 96.

On the other hand, as the ISM Code has been made mandatory by the SOLAS Convention, the standard of seaworthiness with which the vessel must comply is now to be tested against the requirements of the Code. Thus, there is a strong possibility that an English court will find a ship unseaworthy if she fails to comply with the requirements of the ISM Code. If, for example, the vessel does not have a satisfactory safety management system (eg she lacks a safety management certificate or safety and environmental protection policy), she will be considered unseaworthy. Similarly, in cases where a satisfactory safety management system is in place, but the owner or operator has failed to comply with it on the occasion in question, it may be argued that the ship was unseaworthy. Consequently, in voyage policies non-compliance with the requirements of the ISM Code at the commencement of the voyage may render a ship unseaworthy and the insurers are discharged from liability unless the implied warranty of seaworthiness has expressly been waived.

3.4.2.3.2 Burden of Proof in Unseaworthiness Allegations

When underwriters intend to bring an unseaworthiness defence, as a general principle, they carry the burden of proof that the vessel was unseaworthy at the relevant time.[278] This has caused difficulties for insurers on many occasions in the past, but it has become easier with the ISM Code. The Code imposes substantial requirements on shipowners to produce and maintain documents and data relevant to the safety management system. The requirements invoke systems for dealing with reporting, filing, correcting and verifying deficiencies.[279] The documentary and filing procedures will undoubtedly make it easier for underwriters to prove unseaworthiness by obtaining information and documentation regarding shipboard operations, including instances in which the vessel failed to comply with the safety management system. Such documentation and information will almost certainly be discoverable in litigation, as rl 31(6) of the Civil Procedure Rules 1998 makes the disclosure of such documents by

[278] See Chapter 3.3.6 at p 131.

[279] Article 9.1, for example, establishes requirements for reporting, investigating and analysing non-conformities, accidents and hazardous situations. See, also Arts 9.2, 9.3, 10.2, 11 and 12.

the assured obligatory.[280]

3.4.2.3.3 Section 39(5) of the MIA 1906

As examined in detail above,[281] s 39(5) of the MIA 1906 clearly states that there is no implied warranty of seaworthiness in time policies. However, if the vessel is sent to sea in an unseaworthy state with the privity of the assured, the underwriter is not liable for any loss attributable to unseaworthiness. The ISM Code has a considerable impact on this provision, as it obliges every ship operating or managing company to designate a person or persons ashore, having direct access to the highest level of management. The designated person must monitor the safety and pollution-prevention aspects of the operation of each ship. Under a satisfactory safety management system, therefore, the designated person must have all relevant information about the recent condition of the vessel.

The interesting question which has been raised in this context is whether the privity of the designated person about the unseaworthy state of the vessel when she is sent to sea would constitute privity of the assured for the purpose of a 39(5) of the MIA 1906. In other words, can the designated person be considered to be the 'directing mind and will' of the assured company for the purposes of this sub-section?

As examined earlier,[282] the Privy Council in *Meridian Global Funds Management Asia Ltd* v. *Securities Commission*[283] has brought a new dimension to the discussion by

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[280] The Civil Procedure Rules 1998 rl 31(6) provides:
'Standard disclosure requires a party to disclose only-
a) the documents on which he relies; and
b) the documents which-
i) adversely affect his own case
ii) adversely affect another party's case; or
iii) support another party's case; and
c) the documents which he is required to disclose by a practice direction.'

[281] See Part 3.3.3.2 at p 109.

[282] See, pp 117-21.

[283] *Ibid.*

attracting the attention to the rules of attribution of a company. In this respect, a special rule of attribution must be fashioned to determine 'whose knowledge' is for the purpose of s 39(5) intended to count as the knowledge of the company. As examined earlier, the knowledge for the purpose of s 39(5) is the knowledge of the person who is involved in the process of sending the ship to sea. A careful analysis of the Code would reveal the fact that the designated person can under no circumstances be regarded as a person who is involved in such a process.[284] The Code specifically contemplates that the designated person should have direct access to the highest level of management. This must, presumably, indicate that he is not a 'directing mind and will' for the purposes of the sub-section. In this sense, he would be regarded as an employee akin to the master, and it was expressly stated in *The Star Sea* that the knowledge of an employee of that type could not have been attributed to the assured company for the purpose of s 39(5).

Having said this, it must be borne in mind that the ISM Code can still play a crucial role in the application of s 39(5). The Code obliges the designated person to pass on what he knows about the condition of the vessel to 'the directing mind and will' of the company. So if the designated person informs the directing mind and will of the company about a defect in the vessel which constitutes unseaworthiness but the latter person takes no action and the ship is sent to sea in an unseaworthy state, the underwriter could possibly bring a s 39(5) defence for losses attributable to this unseaworthiness. The assured, in this specific example, has turned a 'blind eye' to the unseaworthiness.[285]

Generally speaking, the privity of the designated person about unseaworthiness is, *prima facie*, the privity of the insured company. The insured company might claim that it did not have information about the unseaworthy state of the vessel because the designated person did not pass that information to it. In such a case, the burden of

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[284] In smaller companies, the senior manager may be appointed as the designated person. However, this is an exceptional situation and will not be taken into account when considering the legal effects of the Code on the subsection.

[285] Knowledge for the purpose of s 39(5), includes both positive knowledge and knowledge that can be expressed in the form of 'turning a blind-eye'. See, *The Eurysthenes, ibid,* and *The Star Sea, ibid.*

proof is on the assured to show that the information was not passed on by the designated person. This is a very heavy burden and the assured must not only prove that the information was not passed on but also that adequate resources and shore-based support are provided to enable the designated person to carry out his functions.[286] In other words, the assured must also prove that there was no negligence in or insufficiency of the safety management system.

Even if the assured proves that the information was not passed on, this may create some harsh consequences for him in other respects. This proof simply means that the safety management system in respect of that vessel is defective or inefficient. The cargo claimants, for example, may use this, as the thrust of their case would probably be to show that just such a problem existed. As can be observed, the provisions of the ISM Code make life easier for underwriters. Following the introduction of the ISM Code, it seems likely that the s 39(5) defence, which has not yet been used widely by insurers due to evidential reasons, will be used more frequently in future.

3.4.2.3.4 Legal implications of the ISM Code for Particular Forms of Policy

The standard Institute voyage policies on hull and freight do not expressly waive the breach of the implied warranty of seaworthiness. The vessel, therefore, must be seaworthy at the commencement of the relevant voyage in respect of these policies. The ISM Code is not expected to have a direct impact on these policies. The only possible effect may be that the underwriters may prove the unseaworthiness at the commencement of the voyage by means of the documentation under the safety management system, as discussed above under the effect of ISM Code on burden of proof in unseaworthiness allegations.[287]

In the standard Institute cargo policies, on the other hand, the breach of the implied warranty of seaworthiness has been expressly waived, provided that the assured or his

[286] *Ibid*, Art 3.3.

[287] *Ibid.*

servants are not privy to such unseaworthiness.[288] As the assured in cargo policies is either the cargo owner or freight forwarder, the ISM Code will not have any direct or indirect impact on the current provisions of these policies.[289] The filing and documentation procedures carried out under the safety management system of the vessel, therefore, cannot help the underwriters in proving that the cargo owner or his servants are privy to unseaworthiness.[290]

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[288] See cl 5.2 of ICC (1982) (type A, B, and C).

[289] On the other hand, two new cargo clauses have been introduced and recommended by The Joint Cargo Committee of Lloyd's and Institute of London Underwriters, to deal with ISM Compliance and consequences of non-compliance. These clauses could be introduced into cargo policies, if the parties wish to do so. The first clause, ISM Endorsement Clause (JC 98/019), which intends to give full support to the ISM Code's introduction, reads:

'In no case shall this insurance cover loss, damage or expense where the matter insured is carried by a vessel that is not ISM Code-certified or whose owners or operators do not hold an ISM Code Document of Compliance when, at the time of loading of the subject-matter on board the vessel, the assured were aware, or in the ordinary course of business should have been aware:

Either that such vessel was not certified in accordance with the ISM Code or that a current Document of Compliance was not held by her owners or operators as required under the SOLAS Convention as amended.

This exclusion shall not apply where the insurance has been assigned to the party claiming hereunder who has brought or agreed to buy the subject-matter insured in good faith under a binding contract.'

The other clause, ISM Forwarding Charges Clause (JC 98/019), deals with issues that might arise when the vessel which carries the insured cargo is detained by authorities because of failure to comply with the ISM Code. This clause, which can be used only with the ISM Endorsement Clause, reads:

'In consideration of an additional premium to be agreed, this insurance is extended to reimburse the Assured, upto the limit of the sum insured for the voyage, for any extra charges properly and reasonably incurred in unloading, storing and forwarding the subject-matter to the destination to which it is insured hereunder following release of cargo from a vessel arrested or detained at or diverted to any other port or place (other than the intended port of destination) where the voyage is terminated due either

(a) to such vessel not being certified in accordance with the ISM Code.

or

(b) to a current Document of Compliance not being held by her owners or operators as required under the SOLAS Convention 1974 as amended.

This clause, which does not apply to General Average or salvage or salvage Charges, is subject to all other terms or conditions and exclusions contained in the policy and to JCC Cargo ISM Endorsement JC 98/019.'

[290] However, Males, S & Kenny, J, in their recent article, *Unseaworthiness, the Institute Cargo Clauses and the ISM Code*, [1999] ITLQ, p 136, took the view that in cases where an assured who does not at least insist on seeing ISM document to demonstrate that a ship has been inspected for compliance with the Code will be held to be privy to the ship's unseaworthiness provided that his failure in not inspecting can be characterised as deliberate 'turning a blind eye'. The author disagrees with this statement. The carriage contract between the shipowner and cargo interest (assured) requires the shipowner to use an ISM compliant vessel during performance of the contract, but there is no legal requirement on the part of the cargo interest to check whether this is the case. Of course, in cases where the shipowner fails to use an ISM compliant vessel, he is in breach of the carriage contract and

3.4.3 Potential Legal Implications of the Amendments to the Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STCW) 1978

3.4.3.1 Background of the 1995 Amendments

Soon after the IMO became aware of the acute nature of safety problems arising from human factors in the late 60s and early 70s, it concentrated its efforts to improve the quality of crew and other seafarers. The result was the STCW 1978 which came into force on 28 April 1984, and has so far been ratified by 112 states, whose shipping represent 93.5 % of world tonnage. This Convention regulates the arrangements for the training, certification and watchkeeping for seafarers.

STCW 1978 was an improvement for that period and it was a step towards harmonisation of rules in certification and increasing the quality standard of seafarers.[291] A couple of years after its adoption, however, it became clear that the Convention in fact did not have sufficient strength and clarity to fulfil the perceived needs of the maritime world in terms of increasing safety at sea.

Certain vague expressions used in the Convention have given rise to diverging interpretations, raising doubts about whether the Convention could provide a basis for uniform international regulations. For instance, Art IV of the STCW 1978 required the candidates for certification to be competent 'to the satisfaction of the Administration'. This vague term exposed the STCW 1978 to different interpretations, resulting in a failure to establish a uniform minimum level of competence internationally, thus

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liable to the cargo interest, but this does not mean that the cargo interest is under any contractual duty of inspection. Furthermore, accepting the existence of such a duty will represent a real unfairness for the third party whom the policy is later assigned to, eg a cif buyer. This is the case because the shipper's failure to ensure that a ship has valid documentation will preclude the application of the waiver clause (cl 5.2 of the ICC) and accordingly discharge the insurers from liability for breach of implied warranty of seaworthiness, even where the loss or damage has nothing to do with ISM compliance.

[291] Traditionally, before 1978, it may be argued that the recognised maritime states, mainly European, had their own well established procedures, to the highest standards, in order to regulate such requirements. It was the emergence of another non- traditional administrators, less able to establish such standards, which led to the need for a convention. In this respect, the STCW 1978 was a result of compromise between those nations proceeding ahead for higher standards and those concerned about their ability to implement such measures.

harming confidence in the reliability of the STCW certificate issued by certain governments. Criticism has also been levelled at the procedures for issuing certificates in certain countries where, apparently, insufficient supervision is exercised over the examination system and delivery of certificates. This even allows the papers needed to become a seaman to be obtained fraudulently without the necessary qualifications.[292] Furthermore, STCW 1978 was drafted in terms of conventional shipboard work organisation, based on traditional divisions between the deck and engine departments, failing to accommodate modern developments in training and shipboard organisation.[293]

All the above, in conjunction with the Herald of Free Enterprise disaster which drew additional attention to concerns about general levels of crew competence, led the IMO Secretary to consider revising the STCW 1978 Convention. Maritime Safety Committee of the IMO found this reasonable and decided to convene a diplomatic conference towards the middle of 1995.[294] The Conference was held at IMO head quarters in London from 26 June to 7 July 1995 and a package of radical amendments to the STCW Convention was adopted.

3.4.3.2 Structure and Extent of the STCW 1995 [295]

The 1995 amendments to the STCW 1978 entered into force on 1 February 1997 through the 'tacit acceptance procedure'.[296] The new Convention imports a completely new structure. Technical requirements are re-arranged in a Code appended to the Convention. This Code is divided into two parts. Part A describes the standards of

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[292] *'Plain Speaking'*, Lloyd's List, 17 October 1995.

[293] Pamborides, GP, *International Shipping Law Legislation and Enforcement*, (Kluver Law International, 1999), at p 167.

[294] Kramek, R, *The Human Element and Revision of the STCW Convention*, [1995] BIMCO Review, p 221, at p 225.

[295] These amendments have been implemented into English law by Merchant Shipping (Traning and Certification) Regulations 1997 SI 1997/348.

[296] The STCW Convention provides a transitional regime to facilitate implementation of its provisions. Accordingly, until 1 February 2002, the parties may continue to issue, recognise and endorse certificates which applied before that date in respect of seafarers who began training on seagoing service before 1 August 1998.

training, certification and watchkeeping for seafarers, which all governments have to implement, whereas Part B contains recommendatory guidance which many governments may nevertheless decide to apply on a mandatory basis.[297] The advantage of placing all the technical requirements in a Code is obvious. It is far easier and faster to amend a code than a convention. In this way, it will be possible to update the new STCW Convention without excessive delay, so that the technical relevance can be preserved.

The STCW 1995 also contains explicit new responsibilities with which shipping companies must comply and also lays down requirements for flag administrators.[298] The rest of this part will examine the obligations and duties imposed on shipowners with the 1995 STCW, since they are expected to have an impact on certain provisions relating to seaworthiness. It must be noted at this stage that the duties imposed on shipping companies by STCW 1995 are very similar to the ones imposed by the ISM Code.[299] The only difference is the fact that the emphasis of the STCW on company responsibilities is more precise; whereas the ISM Code requires shipping companies to ensure that certain procedures relating to personnel are established, the STCW 1995 stipulates that companies must be able to demonstrate the relevant STCW provisions have been implemented to ensure that the Convention's intentions have been brought into effect. Put another way, the ISM Code sets up the targets and gives a discretion to the shipping company in the way to achieve them, while the same is not the case for the STCW 1995.

Regulation 1/14 of the STCW 1995 sets out in detail the responsibilities of shipping companies in implementing the provisions of the Convention. Accordingly, the owners

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[297] For a technical examination of the STCW Code, see ISF's publication, *The Revised STCW Convention: A Guide For the Shipping Industry on the 1995 Amendments to the IMO International Convention on Standards of Training, Certification and Watchkeeing for Seafarers*, published in 1995.

[298] For instance, flag states which allow foreign seafarers to serve on their vessels by accepting certificates issued by another state are obliged to take responsibility for checking the competence of such seafarers.

[299] For the areas of overlap between the ISM Code and STCW 1995, see the submission of the Bahamas Maritime Authority to the 29th session of the IMO sub-committee on Standards of Training and Watchkeeping, STCW 29, 12-16 January 1998. The actual point of the paper was to draw attention to the duplication which takes place between what the auditors for STCW are doing and what the auditors for ISM are doing. The submission, however, did not receive major support.

must ensure that officers serving on their ships hold valid certificates of competency for the function and responsibility which they hold and the vessel is manned in accordance with the requirements of the national administrators.[300] Furthermore, the company must maintain records of seafarers' experience, training received before and during employment, medical fitness and competence in assigned duties and the company is under a duty to ensure that these records are readily accessible. The same provision requires the companies to provide the master with written instructions concerning the familiarisation of newly joined seafarers with specific equipment and operating procedures[301] and ensure that the crew as a unit can effectively co-ordinate its activities when performing functions related to safety or pollution prevention or when dealing with emergency situations.

Part A of the STCW Code establishes a minimum resting period for persons involved in watch-keeping.[302] Last but not least, STCW 1995, for the first time, establishes precise standards of competence related to the actual ability of seafarers to perform their duties safely and effectively. The standards of competence are set out in the 'Competency Tables' of Part A of the STCW Code.[303]

3.4.3.3 Potential Legal Implications of STCW 1995 on Provisions Relating Seaworthiness

3.4.3.3.1 Implied Warranty of Seaworthiness

STCW 1995 is clearly a new standard for measuring seaworthiness, particularly where manning requirements are concerned and where competence and training are relevant issues. Put another way, STCW 1995 sets out some rules regarding manning, training

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[300] As far as British ships are concerned, these requirements are stated in the Merchant Shipping (Safe Manning Hours of Work and Watchkeeping) Regulations 1997 SI 1997/1320.

[301] The issue of familiarisation is dealt with extensively in Part A of the STCW Code, which is also mandatory. Section A- 1/14 provides that the Company must issue written instructions describing its policies and procedures on the issue of familiarisation and prescribes the minimum content of these instructions. Furthermore, Section A-VI/1 extends the concept of familiarisation in safety matters to cover all personnel serving on board the vessel, regardless of the fact that their routine or emergency duties do not include matters of safety.

[302] See, Section A VIII/I of the STCW Code.

[303] See, for example, Table A II/I dealing with the matter of navigation at the operational level.

and competence of crew and unseaworthiness of a vessel is likely to be measured against these rules. For example, in cases where the seafarer fails to carry out his duties due to lack of knowledge in relation to the particular equipment, this might render the vessel unseaworthy provided, of course, the company has not taken all the necessary measures to ensure that the particular individual was properly trained and familiarised with the ship's equipment and his duties. Similarly, if a seafarer who is involved in watchkeeping, commences the voyage without taking the minimum resting period established by the STCW Code, this will render the vessel unseaworthy due to the temporary incompetence of the individual.

To sum up, STCW 1995 imposes new standards in relation to manning, training and competence of crew on shipowners. There is no doubt that in cases where these standards are not met, the vessel in question will be regarded as 'unseaworthy'. If this situation arises at the commencement of voyage, the implied warranty of seaworthiness imposed into voyage policies by s 39(1) of the MIA 1906 will be breached, and the insurer will be discharged from liability.

3.4.3.3.2 Burden of Proof in Unseaworthiness Allegations

In some cases, STCW 1995 may assist underwriters to prove that the crew on board is incompetent and this renders the insured vessel unseaworthy. Regulation 1/14 of the STCW 1995 requires the shipping companies to maintain records of training received before and during employment. In cases like *The Star Sea*, where a seafarer is incompetent in using a fire fighting equipment, the insurer might rely on the records kept by the company regarding the training received by that seafarer before and during employment, to prove that his lack of knowledge about how to use that particular equipment has rendered the vessel unseaworthy.[304] In other words, records kept by the shipowner company will constitute a valuable 'information bank' for lawyers of the

[304] See, *Standard Oil Co of New York* v. *Clan Line Steamers Ltd, ibid,* where the new appointed master had not been instructed by the shipowners of a particular risk facing the turret ships and this was held to render the vessel unseaworthy. The outcome of this case would not have changed if STCW 1995 had been in force at the time it was decided, however with the help of the records kept by the company, it would have been easier for the insurer to show that the vessel was unseaworthy due to the incompetence of the master.

insurer seeking to prove the insured vessel's unseaworthiness. On the contrary, these records may be used by the assured shipping company to prove that a certain training had been given to the particular seafarer at some point, so he was not incompetent in that respect.

3.4.3.3.3 Section 39(5) of the MIA 1906

Although the STCW 1995 is not expected to have a great impact on s 39(5) of the MIA 1906, it is still possible that some aspects of this sub-section will be affected. As mentioned earlier on numerous occasions, the STCW 1995 generates a series of primary obligations for the shipping company, like for example, to ensure that all new crew members undergo a familiarisation period before they are engaged in their duties. In the light of these provisions, it will be impossible for the assured to claim that he is not privy to an unseaworthiness which is caused by the crew's incompetence of eg using a certain emergency system. The assured shipping company is under an obligation imposed by the STCW 1995 to familiarise the crew with the vessel and if he fails to do so, he will be precluded from relying on the defence that he is not privy to that particular incompetence. The STCW 1995, therefore, broadens the scope of the assured's 'privity', specially in areas where certain duties are imposed on him.

3.4.4 Conclusion

Neither the ISM Code nor the STCW 1995 is directly concerned with the shipowner's commercial or contractual relations with third parties. They are, however, expected to have some significant effects on certain areas of maritime law, and seaworthiness provisions in marine insurance is one of them. Specially the STCW 1995 lays down standards as to the implied warranty of seaworthiness and both instruments make available to underwriters a large quantity of documentation which can be used to satisfy their burden of proof in unseaworthiness allegations. Furthermore, the STCW 1995 makes it difficult for the assured to turn 'a blind eye' to certain aspects which might render the insured vessel unseaworthy and the ISM Code is expected to assist

the insurers by shifting the burden of proof from the underwriter to the assured when a s 39(5) situation arises.

These are the main areas that will be affected by these two instruments, but the reaction of the courts needs to be observed in order to make further comments on the issue. The courts might decide to take on board all the possibilities offered to them by these two documents and impose further implications to the provisions regarding seaworthiness.

It can be argued that compliance with the STCW 1995 and ISM Code will give confidence to underwriters and in the long term the increased safety of ships should lead to a fall in the level of insurance premiums and a decline in the number of unseaworthiness allegations. The argument that a fall in the level of insurance premiums is expected can be supported by the statistical information provided by the Swedish Club.[305] A new claims study carried out by this institution has produced direct evidence that ships complying with the ISM Code have made significant claims improvements in comparison with non-ISM vessels. The study examined hull and P&I claims in turn, over the four years ending 30 June 1999.

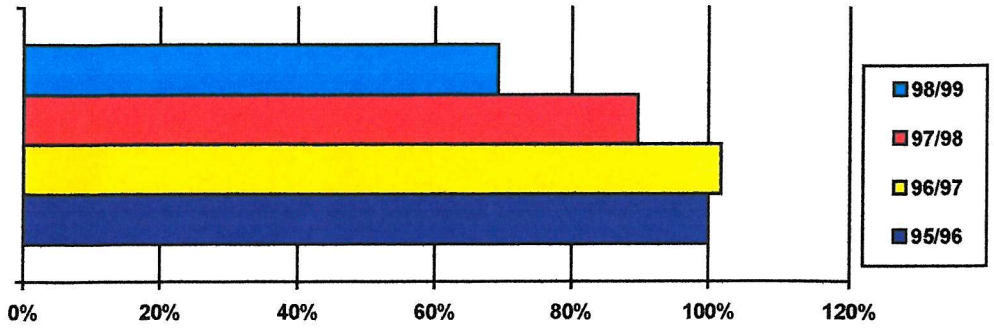
The project involved close assessment of the claims records of 'Phase 1' vessels (required to achieve ISM Code certification by 1 July 1998) and 'Phase 2' vessels (subject to the July 2002 deadline). 'Phase 1' vessels of four main types were considered: oil tankers, product tankers, chemical tankers and bulk carriers. 'Phase 2' types reviewed were container vessels, reefers, general cargo vessels and ro-ro cargo ships. 1995 was used as a starting year for the study and the claims development over the following years was then measured against the situation in 1995-96. **Figure 1** shows the claim development in hull insurance for 'Phase 1' vessels in relation to 'Phase 2' vessels.

[305] This information was released to public on 1 December 1999 and can be found on inter-net at http://www.swedishclub.com/corporateinformation/media/991201.htm.

Figure 1

Hull Claims Development Since 95/96

For Phase 1 Vessels in Relation to Phase 2 Vessels



The claims development from 1995-96 to 1996-97 was basically the same for the two vessel groups. The major change, however, is apparent in the final two years of the study period, with a significant reduction (over 30 %) in hull claims involving 'Phase 1' vessels. Commenting on the results, Martin Hernqvist, loss prevention officer of the Swedish Club, said:

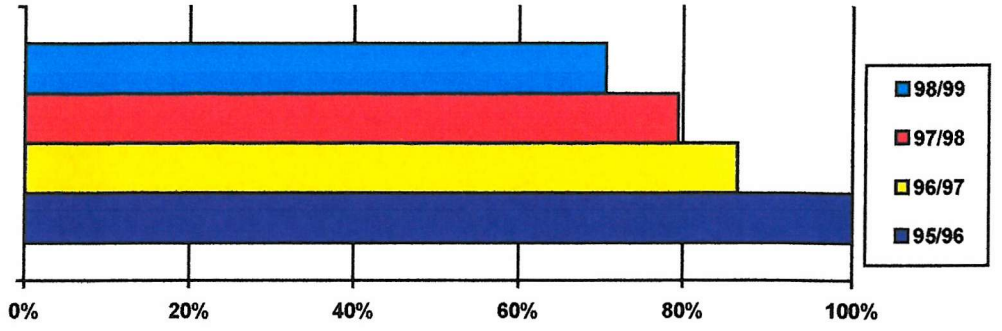
'It is important to appreciate that this study highlights the relative positions of both groups and, therefore, the statistics do not show the development of actual number of claims dealt with by the Club. This is not the important issue, as that is very much related to the level of deductibles. It is natural that more claims are reported to the clubs if deductibles go down. That has been the case, both for hull and P&I over the last years. What is important in this study is the investigation of whether the changes in deductibles followed a similar pattern for the two vessel groups. The findings were they did.'

Figure 2, which has been prepared in the same way, illustrates the claim development in P&I insurance for 'Phase 1' vessels in relation to 'Phase 2' vessels.

Figure 2

P&I Claims Development Since 95/96

For Phase 1 Vessels in Relation to Phase 2 Vessels



The amount of claim improvement in P&I insurance is almost equal to the amount in hull insurance. The only difference is that in P&I insurance an improvement emerged immediately from 1995-96 to 1996-97, while in hull insurance there was no improvement until 1997-98. According to Hernqvist, this could be explained by the start made to develop procedures and checklists by the Club. The focus, initially, was on hazards that produced the most frequent types of claims and are thus closer to both the people on board and those ashore. Hazards producing injuries and cargo operation hazards are good examples; both are common types of P&I claims. He also added that this was speculation and they did not have real proof that this had been the case. Nevertheless, he concluded that this assumption had the force of logic.

To sum up, it can be concluded that application of the ISM Code seems to have a highly beneficial effect, in reducing both hull and P&I claims and this might in future force the underwriters to make a reduction in the premium.

CHAPTER 4

OTHER IMPLIED WARRANTIES

INTRODUCTION

Other implied warranties, namely warranty of portworthiness, cargoworthiness and legality, will be the topic of this chapter. The implied warranty of portworthiness and cargoworthiness will be examined shortly while a more detailed examination will be carried out for legality. The reason why warranty of portworthiness and cargoworthiness will be examined briefly is that they do not play an important role in marine insurance practice. The implied warranty of cargoworthiness is usually excluded from cargo policies and case law suggests that the implied warranty of portworthiness has rarely caused a dispute between the parties. The implied warranty of legality is different in nature from the other implied warranties. First, unlike other implied warranties, a continuing warranty status has been afforded by the MIA 1906 for the implied warranty of legality. This means that subsequent illegality of the adventure insured due to events within the assured's control will infringe the warranty. Second, the implied warranty of legality cannot be waived in a marine insurance contract. For these reasons, it plays a crucial role in both voyage and time policies and need to be evaluated in depth at the end of the chapter. After a short discussion of the reasons which made the draftsman regulate 'legality of the adventure' as an implied warranty, a detailed examination will be carried out in determining the factors which may render a marine adventure illegal. The case law and the legislation in force will be the main sources of such an examination. In accordance with general principles of illegality, it would seem that the entire adventure must be tainted with illegality rather than there have been some technical infringement of a regulatory law. In conjunction with this examination, the scope of s 41 will be evaluated and clarified.

4.1 IMPLIED WARRANTY OF PORTWORTHINESS

4.1.1 Introduction

Where a voyage policy attaches 'at and from' the place named in the policy, s 39(2) of the MIA 1906 requires that the vessel, while in port, must be reasonably fit to encounter the ordinary perils of the port. It is the main object of this part to examine the nature and scope of this warranty.

The term 'portworthiness' does not appear either in s 39(2) or anywhere else in the Act. It is a quite new term which was first employed by Hodges.[1] The other authors, such as Arnould, Ivamy and Bennett, treat this warranty simply as an aspect of the seaworthiness warranty and examine it under that heading. Although the warranty of portworthiness seems like an aspect of the seaworthiness warranty due to the similarity in their nature, in my opinion at least for pragmatic reasons, it has to be dealt with as a separate type of implied warranty.

Unlike the implied warranty of seaworthiness, there is almost no litigation concerning the implied warranty of portworthiness.[2] The reason for this is partly technical. As a result of regular surveys and controls carried out by classification societies, the vessels are usually fit enough to encounter the ordinary perils of the ports, when the risk attaches, and for this reason very few disputes have arisen on the breach of this warranty.

4.1.2 Nature of the Implied Warranty of Portworthiness

The words used in s 39(2) 'reasonably fit to encounter the ordinary perils of the port' show the relative nature of the implied warranty of portworthiness. The degree of fitness required to encounter the ordinary perils of the port may vary according to

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[1] Hodges, S, *Law of Marine Insurance*, (Cavendish Publishing Ltd, 1996), at pp 122-3 and Cases and Materials on Marine Insurance Law, (Cavendish Publishing Ltd, 1999) at pp 302-3.

[2] The implied warranty of porthworthiness has been judicially explored in: *Parmeter* v. *Cousins* (1809) 2 Camp 235; *Gibson* v. *Small* (1853) 4 HL Cas 353 and *Buchanan & Co* v. *Faber* (1899) 4 Com Cas 223.

different factors.[3] Firstly, the class of the vessel in question can be quite crucial in determining the degree of fitness required. In this sense, while a cargo ship can be considered as portworthy for a specific port, a pleasure boat may not. Similarly, the degree of fitness may vary from port to port. A lower degree of fitness is required in a port which is located in a bay than a port which is open to waves and tides of an ocean. The time of the year is another factor which plays an important role in determining the degree of fitness required. A vessel which is portworthy for a certain port in the summer season may not be in the winter season. As a result of this relative nature of the term, whether a vessel is portworthy or not is a question of fact.

4.1.3 Scope of the Implied Warranty of Portworthiness

In a policy which attaches while the vessel is in port, namely an 'at and from' policy, there is an implied warranty of portworthiness according to s 39(2) of the MIA 1906. This section is obviously not applicable, when the subject matter is insured 'from' a particular place, as the risk under such a policy does not attach while she is at that port. Section 39(2) is worded to apply to all voyage policies, whether on ship, cargo or freight unless expressly excluded by the policy. The extent of this warranty has been dramatically narrowed by standard insurance clauses. In Institute Cargo Clauses, for example, there is no implied warranty of portworthiness simply because the policy attaches from the time the goods leave the warehouse or place of storage and not while the ship is in port.[4]

The warranty of portworthiness, on the other hand, is implied in 'at and from' policy on the ship effected under IVCH. According to Schedule 1 rl 3(a) of the Rules for Construction of the Policy, the risk attaches immediately on such a policy, if the vessel is at that place in 'good safety' when the contract is concluded. Schedule 1 rl 3(b) states that if the vessel is not at that place when the contract is concluded, the risk attaches as soon as she arrives there in 'good safety'.

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[3] The degree of fitness required for portworthiness is definitely less than that of the degree required for seaworthiness, eg a full crew is not required and the vessel need not be fully provisioned or fuelled.

[4] See cl 8 of ICC (1982) (type A, B and C).

Whether a ship has to be fit to endure the ordinary perils of the port throughout the period of her stay while 'at' that port, is an issue which has never been raised. The author believes that an answer to this question can be given as a result of the literal construction of the section. Section 32(2) is worded exactly in the same way as s 39(1) which regulates the implied warranty of seaworthiness in voyage policies. As the implied warranty of seaworthiness is applicable only at the commencement of the voyage, it could be said that the implied warranty of portworthiness should, like wise, apply on the commencement of the risk. The wording of s 39(2) is sufficiently clear to support the assumption that the vessel need only be portworthy at a specific point in time. Therefore, it is not wrong to conclude that there is no continuing warranty status. If the vessel becomes unportworthy, for example, due to negligence of the crew after the attachment of the risk and is lost the insurer is still liable for that loss.

4.2 IMPLIED WARRANTY OF CARGOWORTHINESS

4.2.1 Introduction

The main purpose of each transportation facility is to transfer the goods from one place to another safely and in the same state as they were loaded into the transportation vehicle. The aim is not different in marine transport. To this end, the vessel on which the goods are shipped must not only be strong enough to encounter the ordinary perils of the voyage, but also fit enough to carry the goods without causing any deterioration in their original nature.

The cargoworthiness warranty has been employed to make sure that the goods shipped are carried safely to their destination and requires the ship and her equipment to be fit for this purpose. In carriage of goods by sea, the scope of the implied warranty of seaworthiness is wide enough to cover 'cargoworthiness' as well.[5] Therefore, the term 'seaworthiness' in a bill of lading, *prima facie*, includes both fitness of the ship to

[5] *Reed* v. *Page* [1927] 1 KB 743 per Scrutton, J, at p 755.

encounter the perils of navigation and her fitness to carry cargo.[6] In marine insurance, on the other hand, cargoworthiness has been regulated as a separate implied warranty, other than the implied warranty of seaworthiness, by s 40(2) of the MIA 1906 which is worded as follows:

'In every voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.'

The implied warranty of cargoworthiness has been severely criticised on the ground that it might create freakish results for the assured in cargo insurance. A claim under the policy will fail if the carrying vessel was uncargoworthy at the start of the voyage, even though the assured has no means of ensuring whether the ship was cargoworthy or not. For this reason, in almost all cargo policies the implied warranty of cargoworthiness has been waived provided that the assured or their servants are not privy to such unfitness.[7] In this way, the importance of this warranty has been reduced dramatically in practice. The main aim of this part is to examine the meaning, nature and scope of the implied warranty of cargoworthiness. During this examination the case law will usually be referred to for clarification.

4.2.2 Meaning and Nature of the Implied Warranty of Cargoworthiness

Section 40(2) of the MIA 1906 defines 'cargoworthiness' as being reasonably fit to carry the goods or other moveables to their destination. According to this definition,

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[6] *Rothborne* v. *Maclever* [1903] 2 KB 378. Article III, rl 1 of the Hague Visby Rules stipulates as follows:

' The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to-

(a) Make the ship seaworthy.

(b) Properly man, equip and supply the ship.

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.'

[7] See cl 5.2 of ICC (1982) (type A, B, C).

the main factor which has to be taken into account when determining whether a ship is cargoworthy or not is her capability to carry the particular cargo in question. Cargoworthiness means in the first place that the vessel is in a fit state to receive the contractual cargo. Therefore, the warranty would not be satisfied where the vessel's holds needed fumigating or cleaning before being in a fit state to receive cargo. In *Tattersall* v. *National SS Co*,[8] for example, a vessel which had carried cattle with foot-and-mouth disease was not properly cleansed and disinfected before a fresh lot of cattle were received on board, and these consequently caught the disease; it was held that the cargoworthiness warranty was breached.[9]

In order to be considered cargoworthy, a ship must also be equipped to carry the particular kind of cargo which she has contracted to carry.[10] If, for example, the cargo is frozen meat, then the refrigerating machinery, holds etc must be in proper order, efficient and fit to receive and carry that particular cargo.[11] Similarly, a vessel intended for the carriage of grain in bulk must be supplied with sufficient separation cloths and adequate shifting boards.

Section 40(2) of the MIA 1906 requires the vessel to be reasonably cargoworthy. It appears from this wording that the implied warranty of cargoworthiness will be construed in the light of the technical efficiency of the ship both in design and equipment. A vessel may, therefore, be cargoworhy for the carriage of lumber and not be cargoworthy for a load of steel rails.[12] Similarly, a vessel built for the carriage of fruit cargoes would probably be quite unsuitable for the transport of heavy mineral ores. The voyage undertaken is another factor which is extremely important in determining whether a vessel is cargoworthy or not. While a vessel is perfectly cargoworthy for carrying one type of cargo around the harbour, it may not be for

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[8] (1884) 12 QBD 297.

[9] See also *Ciampa* v. *British India SN Co* [1915] 2 KB 774 and *Compañia de Naviera Nedelka* v. *Tradex International (The Tres Flores)* [1973] 2 Lloyd's Rep 247.

[10] See, *Stanton* v. *Richardson* (1874) LR 7 CP 421.

[11] See also *Maori King (Cargo Owners)* v. *Huges* [1895] 2 QB 550 and *The Waikato* [1899] 1 QB 56.

[12] See, *The Briton* [1934] AMC 667.

carrying the same cargo on an ocean voyage. To sum up, the implied warranty of cargoworthiness is relative in nature, just like the implied warranty of seaworthiness, and it is a question of fact in each case to determine whether a vessel is cargoworthy or not.

4.2.3 Scope of the Implied Warranty of Cargoworthiness

The extent of the implied warranty of cargoworthiness is much narrower than the implied warranty of seaworthiness. Section 40(2) makes it clear that it only applies to a voyage policy on goods or other moveables.[13] This distinction can be justified when the logic behind the warranty of cargoworthiness, to enable the transport of the goods shipped to their destination without changing their nature, is taken into account.

Section 40(2) requires the ship to be cargoworthy at the commencement of the voyage. A maritime voyage is usually considered as commenced, when she breaks ground.[14] In carriage of goods, however, in each case the implied undertaking as to cargoworthiness is operative as from the commencement of loading. So in *McFadden* v. *Blue Star Line*[15] after cargo had been safely loaded, the ship's engineer opened a sluice door on a watertight bulkhead and closing it failed to secure it properly, with the result that water percolated through and damaged the plaintiff's cargo. It was held that, since the defective closure of the sluice door occurred after the cargo had been loaded, it did not constitute a breach of the cargoworthiness undertaking.

McFadden v. *Blue Star Line*, not only emphasises the difference between carriage of goods and marine insurance in respect of the commencement of the implied warranty of cargoworthiness, but it also makes clear that there is no continuing duty to keep the vessel cargoworthy throughout the voyage in carriage of goods by sea. Lord Mansfield

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[13] Rules for Construction of the Policy 17 provides:

' The term goods means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.'

[14] See pp 96-8 for a detailed discussion on the commencement of a voyage.

[15] [1905] 1 KB 697.

had, in fact, stated the same principle in respect of the seaworthiness warranty in marine insurance in *Berman* v. *Woodbridge*.[16] As the wording of the provisions which regulate these warranties in marine insurance, ss 39(1) and 40(2), is the same, there is nothing preventing us from evaluating them in the same way. Thus, it can be concluded that uncargoworthiness which occurs after the commencement of the voyage, does not amount to breach of the implied warranty of cargoworthiness in marine insurance. This situation can be made clearer with an example. Say the refrigerating machine in a vessel, which was in good order and condition at the beginning of the voyage, breaks down at one point after the commencement of the voyage this will not infringe the implied warranty of cargoworthiness.

4.3 IMPLIED WARRANTY OF LEGALITY

4.3.1 Evolution of the Implied Warranty of Legality

The intention of every insurance contract, whether marine or non-marine, is to provide indemnity to the assured within the limits of the law. Therefore, in non-marine insurance if the subject-matter insured, eg car in motor insurance and property in home insurance, has been put to some unlawful use, the assured is precluded from indemnity by public policy. The situation is much more complicated in marine insurance. The reason for this is the presence of an extra element in marine insurance that has no equivalent in non-marine insurance, namely marine adventure.[17] In marine insurance, therefore, not only the subject matter insured (eg ship, freight, cargo) must not be tainted with illegality, but the adventure insured must be lawful and must be performed lawfully.

To this end, s 3(1) of the MIA 1906 provides that: 'every lawful marine adventure may be the subject of a contract of marine insurance' and s 41 imposes the implied warranty of legality in the following way:

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[16] [1781] 2 Doug KB 781, at p 788.

[17] That the implied warranty of illegality does not exist in non-marine insurance has been recently expressed by the Court of Appeal in *Euro-Diam Ltd* v. *Bathurst* [1988] 2 All ER 23.

'There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.'

As can be observed, the warranty regulated by s 41 is a continuing one, so that subsequent illegality due to events within the assured's control will infringe the warranty. The scope of the warranty will be examined in detail in the rest of this chapter. However, before such an examination is carried out, the reasons which made the drafter of the Act regulate 'legality of the adventure' as a warranty will be discussed.[18]

4.3.1.1 Why 'Legality of Adventure' Has Been Regulated As A Warranty?

Section 41 of the MIA 1906 regulates the legality of the adventure as an implied warranty. There is no doubt that marine insurance contracts which insure unlawful adventures or are performed illegally would still be regarded as void on the grounds of public policy in the absence of s 41. In fact, before the enactment of the MIA 1906, marine insurance contracts insuring unlawful adventures or performed unlawfully were held to be void and unenforceable, even though a warranty of legality had not been employed at that time.[19] At this point, a very interesting question arises. Why the draftsman preferred to give a warranty status to the 'legality of the adventure'? The

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[18] It must be borne in mind that in some cases, a marine insurance contract can be regarded as 'unenforceable' due to illegality, even though the adventure insured is legal and accordingly there is no breach of the implied warranty of legality. This is the case when a marine insurance contract is effected by or on behalf of an enemy alien (for the definition of an enemy alien see s 2(1) of the Trading with Enemy Act 1939, as amended by the Emergency Laws (Miscellaneous Provisions) Act 1953, s 2) or a marine insurance contract is effected with a person lacking insurable interest (see, s 1 of the Marine Insurance (Gambling Policies) Act 1909 where such contracts are expressly prohibited). Furthermore, it must be noted that the fact that certain marine insurance contracts are void, does not necessarily mean that they are illegal. If a marine insurance contract is void, the law refuses legal enforcement to the contract but the parties remain at complete liberty to make and perform it if they want to do so. It is the illegal contracts which cannot be made and performed even though the parties want to do so. In this respect, wagering policies (policies where the parties, by express terms, disclaim the intention of making a contract of indemnity) and marine policies effected with unauthorised insurers are merely void and not illegal, since issuing such policies has not been expressly prohibited by law. See, s 1(b) of the Marine Insurance (Gambling Policies) Act 1909 and s 132 of the Financial Services Act 1986 respectively.

[19] See, *Farmer* v. *Legg* (1797) 7 TR 186; *Camden* v. *Anderson* (1798) 6 TR 723; *Johnston* v. *Sutton* (1799) 1 Doug 254; *Marryat* v. *Wilson* (1799) 1 Bos & P 430; *Cunard* v. *Hyde (No 2)* (1859) 29 LJQB 6; *Pipon* v. *Cope* (1808) 1 Camp 434; *Wilson* v. *Rankin* (1865) LR 1 QB 162.

reasons for this have not been discussed anywhere before and even the drafter of the Act, Sir McKenzie Charmers, makes no reference to this point. The author believes it is possible to find some sensible justifications for such a regulation simply by evaluating the general principles of insurance law and taking the case law into account. This issue, in my opinion, must be discussed from two different and opposite view points. Namely insurer's and assured's position must be taken into account in order to grasp the logic behind s 41.

4.3.1.1.1 Insurer's Position

The warranty status employed by s 41 provides some sort of protection to the insurer and makes life much easier for him. If s 41 did not provide a continuing warranty status, illegality, which occurs during the performance of the adventure insured, would not affect the validity of the policy at the date of its formation. The position of English law on this point has been summarised by Tenterden CJ, in *Wetherell* v. *Jones*[20]:

'Where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law, not contemplated by the contract, and in the performance of something to be done on his part.'

Therefore, English law does not recognise the possibility that a contract, which is lawful in its inception and which is capable of lawful performance, can become illegal as formed simply because one of the parties to it breaks the law in the course of his performance. Therefore, in the absence of s 41, the insurer would not be able to claim that an insurance contract which was lawful at the inception, has become illegal later due to the unlawful act of the assured. The most that could happen in such circumstances was that the insured would be precluded from enforcing the agreement, but even this would be the case where the illegality was closely connected to the loss and was sufficiently serious in nature to bring notions of public policy into play.[21] Illegality is considered as being closely connected to the loss in cases where it has been

[20] (1832) 3 B & Ad 221 at p 225.

[21] See, *Baresford* v. *Royal* [1938] AC 586.

causative of the loss or although not causative in cases when the assured's action under the policy is an attempt to benefit indirectly from his unlawful act.[22]

4.3.1.1.2 Assured's Position

If illegality occurred during the performance of the contract was not regulated as a warranty by s 41, public policy would compel such insurances to be enforced.[23] In such a case, once shown that the assured broke the law during the performance of the voyage, it would be irrelevant whether he intended to break the law or not. In other words, the assured would lose his insurance cover due to an illegality committed by his master without his knowledge during the performance of the adventure.

Section 41 of the MIA 1906 provides that the assured under a marine policy impliedly warrants that, so far as he can control the matter, the adventure upon which insured property is bound shall be carried out in a lawful manner. Therefore, under s 41, the assured is not responsible for any unlawful act committed by his master or employees during the performance of the voyage unless he has control over the issue.

4.3.1.2 Scope of the Implied Warranty of Legality

The implied warranty of legality is laid down in s 41 as follows:

'There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.'

In this provision, no distinction has been made between voyage and time policies in respect of the application of the implied warranty of legality. The common feature of time and voyage policies is the fact that in both an insurable property is exposed to a marine adventure. As the word 'adventure' is used in s 41, this shows that the warranty is imposed by law both for time and voyage policies. Therefore, where the policy covers a ship for a period of time, the implied warranty is imposed for each

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[22] *Euro-Diam Ltd* v. *Bathurst, ibid.*

[23] *Camden* v. *Anderson, ibid,* and *Parkin* v. *Dick* (1809) East 502;

voyage on which the ship embarks. Similarly, the implied warranty of legality is incorporated, by law, in the marine insurance policy covering each separate interest in a common maritime adventure. Therefore, s 41 has applicability whether the subject matter of the insurance is ship, cargo, freight or anything else.[24]

Section 41 regulates not only the legality of the adventure, but also the legality of the performance of the adventure. Accordingly, a marine adventure must not only be legal at the inception of the policy but it must be performed legally, so far as the assured can control the matter. This distinction, which is basic to any discussion of the effects of illegality, originated in the 18th century. For pragmatic reasons, s 41 will be divided into two parts and examined under two different headings in this part of the work.

4.3.1.2.1 Illegality of the Adventure Insured

If the adventure insured is illegal from the outset, the implied warranty of illegality is broken and this is so irrespective of the ignorance or otherwise of the parties. In fact, the remedy for the breach of warranty is discharging of the insurer from further liability.[25] Since breach occurs before the attachment of risk and accordingly no rights or liabilities can accrue, one might consider that the discharging remedy operates in the same way as holding the contract void *ab initio*. Such a statement is, in a general sense, accurate. The only thing which needs to be kept in mind is that when the implied warranty of legality is breached due to illegality of the adventure insured, the assured can, under no circumstances, recover the premium paid in advance.[26]

At this point, it is necessary to examine under which circumstances a marine adventure can be regarded as illegal. A marine adventure may be illegal either by statute or because it is in violation of common law or the prize law as administered in England or

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[24] Moveables, passage money, commission, profit, loan, disbursements or any liability to a third party may also be the subject matter of a marine insurance contract under s 3(2)(a)/(b)/(c) of the MIA 1906.

[25] See, s 33(3) of the MIA 1906.

[26] Section 84(1) of the MIA 1906 reads:

'Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.'

of proclamations or orders made by the Queen in Council or in contravention of treaties made by the UK government with other countries. These will now be examined separately.

I By Statute

It has to be said that it is not always easy to answer the question whether a contravention of a particular statute or regulation would render an adventure illegal. The literal meaning and the object of the statute in question must be interpreted carefully to reach a conclusion on this point.[27]

In cases where a statute specifically prohibits insurances in respect of a particular class of adventure, it seems that the court has no discretion in the matter and a policy insuring such a adventure will be rendered illegal by that statute. If, for example, a statute prohibits the exportation of goods without a licence, it generally follows that an insurance in respect of a voyage which contravenes this requirement is illegal.[28]

The statutes, however, are usually silent as to the effects of illegality and in such cases it is necessary to determine, by means of interpretation, whether violation of that statute renders the adventure insured illegal or not. In the earlier editions of Arnould, it was stated that where Acts of Parliament form part of the general commercial policy of the state, a violation of their provisions generally renders the adventure illegal.[29] In my opinion, this statement states the position too broadly and goes beyond the lines determined by courts. For example, despite the fact that they form part of the general commercial policy of the state, shipping safety legislation has in general been treated as collateral and breach of their provisions was held not to render an adventure illegal.[30]

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[27] See the speech made by Lord Ellenborough CJ, on this point in *Atkinson* v. *Abbott* (1909) 11 East 135 at p 141.

[28] *Lubbock* v. *Potts* (1806) 7 East 449; *Gray* v. *Lloyd* (1812) 4 Taunt 136; *Gibson* v. *Service* (1816) 5 Taunt 433; *Re Mahmoud and Ispahani* [1921] KB 717; *Strongman Ltd* v. *Sincock* [1955] 2 QB 525.

[29] Lord Chorley (Ed), *Arnould on the Law of Marine Insurance and Average*, (14th ed, Stevens & Sons Ltd, 1954), para 745.

[30] *Redmond* v. *Smith* (1844) 7 Man & Gr 457.

Since the 14th edition of Arnould, the courts have developed some tests to determine whether violation of a particular statute renders the adventure insured illegal. Accordingly, when determining the legal effect of a statute, a court has to apply these tests and must not reach a decision simply by a single consideration.[31] The most important factor to be considered is whether the policy of the statute is aimed at prohibiting dealings in the course of which its provisions infringed, or whether its scope is limited to the mere infliction of a penalty. In other words, in every case it is a matter of construing the statute to determine whether the intention of Parliament was to ban such contracts or merely to impose fines upon those transgressing its terms, a process which will be straightforward.[32] Another important consideration is whether the act prohibited by the statute affects the core of the contract. If the contract has as its whole object the doing of the very act which the statute prohibits there is generally a clear implication that the contract is also prohibited, but this is not the case if the prohibited act is merely incidental.[33]

II By Common Law

A marine adventure can usually be rendered illegal by common law, if it is in contravention of war policy of the UK. The sovereign power of every state has in time of war a clear right to establish an embargo on all ships in any port of its dominion. Thus, if an insurance contract insures an adventure which will be carried out in contravention of such embargo, it will be deemed to be illegal. In *Delmada* v. *Motteux*,[34] where the British government in time of war had laid an embargo on all ships with provisions from any port in Ireland, an insurance effected on a neutral (Venetran) ship, in contravention of such embargo, was held to be void on the ground that the adventure insured was illegal.

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[31] *St John Shipping Corp* v. *Joseph Rank Ltd* [1957] 1 QB 267.

[32] The leading analysis remains that of Devlin, J, in *St John Shipping Corp* v. *Joseph Rank Ltd, ibid,* at p 287.

[33] Per Devlin, J, in *St John Shipping Corp* v. *Joseph Rank Ltd, ibid,* at p 288. See also, *Archbolds (Freightage) Ltd* v. *Sparglett (S) Ltd, Rendall Third Party* [1961] 1 QB 374; *Crouch & Lees* v. *Haridas* [1972] 1 QB 158 and *Curragh Investments Ltd* v. *Cook* [1974] 1 WLR 1559.

[34] (1785) ITR 85n.

III By Prize Law

As a general rule, whenever any property, according to prize law as administered by the courts of UK is liable to British capture, the insurance in England on that property is illegal and void. A property may be subject to British capture on many various grounds, for example, because it is enemy property or contraband carried to a hostile country or because it is employed in violation of a blockade by the United Kingdom government or its allies; or is engaged in carrying the enemy's troops or in any other manner which is considered by the English prize law to be illicit or illegal.[35]

IV By Orders Made by the Queen/King

An adventure may also be rendered illegal by the Orders made by the Queen/King. Thus, where, during the Napoleonic war, an act, had been passed empowering His Majesty to prohibit exportation of all naval stores without a licence[36] and an Order in Council was accordingly made, in which such exportation was prohibited. In *Parkin* v. *Dick*,[37] a marine insurance contract which insured a voyage that would have been made without such a licence was held to be void on the ground of illegality of the adventure insured.[38]

V By Treaties and Other International Instruments

Nowadays, a large part of commercial intercourse has been regulated by commercial treaties. In the case of *The Eenrom*[39] Lord Stowell stated that:

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[35] *Janson* v. *Driefontein Consolidated Mines Ltd* [1902] AC 484 per Lord Davey at p 499.

[36] The Act was 16 Geo 3 c 5 (1775).

[37] *Ibid.*

[38] See also *Johnston* v. *Sutton, ibid.*.

[39] (1799) 2 C Rob 1 at p 6.

'Every treaty is a part of the private law of each of the countries which are parties to it, and is as binding on the subjects of each as any part of their municipal laws.'

Although this statement, in general sense, reflects the general position, it is essential to mention the British practice in terms of adopting treaties into the domestic law. Commercial treaties which affect the private rights of British subjects or involve any modification of the common law or statute law[40] must receive Parliamentary assent through an enabling Act of Parliament, and, if necessary any legislation to effect the requisite changes in law must be passed.[41] On the contrary, the European Community treaties have direct effect in the member states[42] and do not need implementation in order to be enforced by individuals before the national (eg United Kingdom) courts.[43] Therefore, in cases where a commercial treaty, which has been implemented into English law, and/or EC Treaty expressly prohibits certain voyages, all insurance policies on ships or goods navigated or conveyed contrary to the provisions of such a treaty will be illegal on the same principle as those effected on trading adventures which contravene the positive prohibitions on English statutes.

Similarly, certain voyages may be rendered illegal by international law. For instance, in cases where the United Nation sanctions are introduced against a country, say an embargo was put and accordingly trading with that country was prohibited, all members of the international community are required to enact legislation which prohibits trading with that country in order to comply with these sanctions.[44] After the enactment of national legislation in order to prohibit trade with the country the sanctions imposed against, if an insurance policy insuring a voyage to that country is effected, this will lead to the breach of the implied warranty of legality.

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[40] Note the constitutional convention known as the 'Ponsonby Rule', whereby treaties subject to ratification, are tabled in both Houses of Parliament for a period of 21 days before the government proceeds to ratification.

[41] *The Parlement Belge* (1879) 4 PD 129; *Walker* v. *Baird* [1892] AC 491 and *Laker Airways Ltd* v. *Department of Trade* [1977] QB 643.

[42] See, European Communities Act 1972, s 2; *R* v. *HM Treasury, ex P Smedley* [1985] QB 657.

[43] For this purpose 'community law' does not include the European Convention on Human Rights 1950.

[44] For instance, during the Gulf War United Nations established embargo on trade with Iraq and all the members of the international community were required to take the necessary steps and prohibit trading with Iraq: Resolution 1990/661 of the United Nations.

4.3.1.2.2 Illegality During the Performance of the Adventure Insured

The implied warranty imposed by s 41 requires an insurance contract, which is concluded to provide indemnity for a legal adventure, to be performed in a lawful manner.[45] That means implied warranty of illegality will again be broken in cases where the adventure is lawful but during its performance the assured violates a statute or regulation.[46] As discussed above,[47] the statute or regulation which is violated must be one prohibiting an act and illegality must also go to the core of the adventure. It was held in *Ingham* v. *Agnew*[48] that although the adventure insured was lawful at its outset, it was not performed legally as the assured sailed without a convoy in violation of a statute which prohibited sailing without a convoy. In *James Yatchs Ltd* v. *Thames & Mersey Marine Insurance Co Ltd and Others*,[49] the Canadian court had to decide whether the violation by the assured of the bylaws and regulations of the local authority rendered the performance of the adventure insured (ship building business) illegal. After a careful consideration, the court held that the performance of the adventure insured was illegal as the object of those regulations was to forbid the performance of such a business in that specific place. Similarly, if a certificate required by the statute to carry passengers is not obtained, the performance of the adventure will be illegal despite the fact the adventure insured is lawful.[50] The warranty is again broken in cases where the adventure insured is legal but the vessel is used for smuggling.[51]

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[45] The origins of this rule in s 41 can be traced to: *Farmer* v. *Legg, ibid, Carstairs* v. *Allnutt* (1813) 3 Camp 497; *Metcalfe* v. *Parry* (1814) 4 Camp 123; *Cunnard* v. *Hyde (No 1)* (1858) EB & E 670; *Cunnard* v. *Hyde (No 2), ibid* and *Wilson* v. *Rankin, ibid.*

[46] It must be borne in mind that where goods are insured on a 'warehouse to warehouse' basis, the implied warranty of legality applies through the period covered by the policy, and, therefore, the warranty may be broken even after the goods are discharged at the port of discharge and while they are transported to the warehouse. See cl 8 of the Standard ICC (1982) (type A, B, C).

[47] See pp 164-5.

[48] (1812) 15 East 517.

[49] [1977] 1 Lloyd's Rep 206.

[50] *Dudgeon* v. *Pembroke* (1877) 2 App Cas 284. See also, the judgment of the Privy Council in *Australasian Insurance Co* v. *Jackson* (1875) 33 LT 286 (breach of the Pacific Islanders Protection Act 1872 (repealed)).

[51] *Pipon* v. *Cope, ibid.*

On the contrary, if the object of the statute or regulation which is violated is merely to impose fine in case of its violation, then its violation does not render the performance of the adventure illegal. Accordingly, violation of shipping safety legislation has not been considered as a factor which makes the performance of the adventure illegal. In *St John Shipping Corp* v. *Joseph Rank Ltd*,[52] a shipowner committed a statutory offence by overloading his ship while performing a number of contracts for carriage of goods. Devlin, J, held that he was nonetheless entitled to freight, because the object of the statute was to prevent overloading and not to prohibit contracts. This object was to be achieved by imposing a fine, and not by subjecting the owner to the additional loss which would result from invalidating the contract of carriage as a result of illegality. Similarly, the want of a written agreement with the crew, in the form and of the contents required by the Merchant Seamen's Act[53] was held not to render the performance of the adventure illegal.[54] The law, however, has developed in a different dimension in Australia and violation of shipping safety legislation has been regarded as a factor which renders the performance of the adventure illegal. In *Doak* v. *Weekes & Commercial Union Assurance Co plc*,[55] Ryan, J, held that leaving a port without persons holding the required certificates as required by a regulation made with the power given by s 196(4)(vi) of the Marine Act 1958, rendered the voyage illegal. The assured in that case argued that the relevant provision only provided a monetary penalty, so the intention of the Act was not to prohibit such voyages but assure safety at sea. Ryan, J, however, had a different view and held:[56]

'I consider that a regulation which requires a ship which goes to sea to be provided with a duly certificated crew and imposes a penalty on the owner and master if this requirement is not complied with, must be treated as one which in effect a prohibition of the voyage unless performed with the crew or master that the law required.'

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[52] *Ibid.*

[53] 5 & 6 Will 4, c19. Now regulated by the Merchant Shipping Act 1995 s 25.

[54] *Redmond* v. *Smith, ibid.*

[55] [1986] 82 FLR 334.

[56] *Ibid*, p 339.

This decision was later impliedly affirmed by the Federal Court of Australia in *Switzerland Insurance Australia Ltd* v. *Mowie Fisheries Pty Ltd*[57] In this case, the underwriters, along the other issues, argued that the insured vessel (a fishing boat) sailed from a port without the prescribed complement of officers as required by s 119 of the Marine Act 1976 (Tasmania) and this rendered the insured voyage illegal. The Court was prepared to hold that violation of s 119 of the relevant Act was sufficient to render the voyage illegal, however s 119 had no application in the case, since the port of refugee where the vessel had sailed from was not regarded as a port under the Marine Act 1976 (Tasmania). Accordingly, s 119 of the said Act was not violated by the assured and in this respect he was not in breach of the implied warranty of legality.

As can be observed, the Australian courts have adopted a different interpretation as to the effect of breach of safety regulations. The position in English law expressed in *St John Shipping Corp* v. *Joseph Rank Ltd*, however, remains unaffected from the decisions of the Australian courts, at least until it is overruled by a competent English court. It is the opinion of the author that the solution brought by English law serves the realities of marine insurance more than the Australian one. If violation of each safety regulation constitutes illegality, a great number of marine insurance contracts will be affected by this and this will, without a doubt, harm the balance between the assured and insurer. Furthermore, Parliament focuses on a different subject matter when it adopts a safety regulation. The main object of a safety regulation is to protect the seafarers and other interests from the possible hazards of sub-standard vessels rather than prohibiting insurance contracts where at one point after their formation a safety regulation is breached.

The continuing warranty status imposed by s. 41 is qualified by the term 'so far as the assured can control the matter'. It is crystal clear from this wording that the assured will be in breach of the warranty when he is a party to the illegality.[58] However, mere

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[57] [1997] FCA 231.

[58] In cases where the assured is a company, the company will be a party to the illegality when its 'directing mind and will' or the person (senior or junior manager) within the company, who is authorised to carry out transactions in respect of that specific business, is committed to the illegal act. See the judgment of the Privy Council in *Meridian Global Funds Management Asia Ltd* v. *The Securities Commission* [1995] 3 WLR 413.

knowledge on the part of the assured that there is some illegality in the performance of the voyage does not make him a party to the illegality when he has no control over the navigation of the ship.[59] Usually, the assured gives full authority to his managers by an agency agreement on the navigation of the vessel. In such a case, it can be concluded that the assured has control over the matter through his managers and if the managers are negligent in taking the necessary steps to prevent an illegality during the performance of the adventure, the assured will be in breach of the implied warranty of legality.[60]

In short, if an act of illegality is committed contrary to the assured's instruction or wishes or if the assured is not in a position to have control over the illegal performance, then there is no breach of continuing warranty of illegality. In *Wilson* v. *Rankin*,[61] the master of a ship bound on a voyage from British North America to England loaded part of timber cargo on deck contrary to the provisions of the Consolidation Act 1853[62] and sailed without the certificate required by that statute. The Exchequer Chamber held that the owner could recover on a policy on the freight of the voyage as he had no information about illegality committed by his master and crew during the performance of the voyage.

In cases where the assured has no control over the illegality and accordingly the implied warranty is not broken, he will be entitled to recover loss caused by illegality of the performance of the adventure, as long as it is caused by an insured peril.[63] For example, if the illegality is on the part of the master or crew, the assured is entitled to recover on the basis of the insured peril of barratry.[64]

Illegality which occurs during the performance of a legal adventure might have different effects on different types of policies. In some cases, for example, illegality of

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[59] *Cunard* v. *Hyde (No 1), ibid.*

[60] Of course in such a case the manager will be in breach of his management contract and be held liable to the shipowner for damages.

[61] *Ibid.*

[62] 16 & 17 Vict c 107.

[63] *Carstairs* v. *Allnutt, ibid,* and *Wilson* v. *Rankin, ibid.*

[64] For the definition of barratry see the MIA 1906, Schedule 1, rl 11.

part of a voyage renders the insurance of other parts illegal as well. These different situations will now be discussed shortly.

In case of a policy on a ship 'at and from', if there be any illegality in the risk while the ship is at port, this will render the whole voyage illegal though the illegality may cease before the ship sails. Thus, in *Bird* v. *Appleton*[65] where a policy was effected on an American ship 'at and from Canton to Hamburg', and it appeared that the ship on arriving at Canton, and for a short time while she lay in harbour there (consequently after the inception of the risk on ship under this policy) had on board an illegal cargo, which she had taken in Bombay for sale at Canton in the course of a separate and distinct voyage; this was held to vitiate the policy on the ship, though she disposed all her illegal cargo at Canton and sailed for Hamburg with another cargo.

If the voyage be an integral and entire voyage under charterparty or otherwise, any illegality at the commencement or in the course of it, which will make the whole illegal, will prevent the assured from recovering on a policy effected to protect any part of it although there may have been no illegality in the part of the voyage so insured.[66] Thus, in *Wilson* v. *Marryatt*[67] where a ship was chartered for one entire voyage 'from London to Madeira and thence to the East Indies' and a policy was effected on the ship only 'from Madeira to the East Indies', the assured was prevented from recovering on the policy 'from Madeira to East Indies' as the ship had been engaged in smuggling or any other illegal act between London to Madeira with the privity of the assured; although there had been no illegality in this latter stage of the voyage. This judgment, although at first instance seems to extend the effect of the warranty, is sound and can be justified. If the whole voyage (voyage from London to East Indies) was insured under the policy, the breach of the warranty at an earlier stage would discharge the insurer from further liability and the assured would be uncovered for the rest of the voyage. The same result, therefore, must be achieved even if the part of the voyage is insured under the policy. In the absence of such a ruling, a chance would be given to

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[65] (1800) 8 TR 562 at pp 566 and 569.

[66] Admitted by Lord Kenyon in *Wilson* v. *Marryatt* (1798) 8 TR 31 at p 46 and expressly ruled by him in *Bird* v. *Pigon* (1800) 2 Selw NP (13th ed) 932.

[67] *Ibid.*

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this will lead to an illegality in the performance of the adventure and he will be in breach of the implied warranty of legality.[71]

4.3.1.3 Miscellaneous Issues

4.3.1.3.1 Illegality Must Form Part of the Insured Adventure

The scope of the warranty of legality has been qualified with the term 'adventure insured' in s 41 of the MIA 1906. In this respect, illegality which occurs at the outset of the insured adventure or during its performance can violate the implied warranty of legality. What happens if an illegal act which is not related to the adventure insured occurs either before the commencement of the adventure insured or even during its performance? For instance, what if the assured, who has effected a hull policy (voyage) for his vessel, is involved in an illegal transaction, eg bribing the port authorities to secure a berth for the vessel in her return. Taking the literal meaning of s 41 into account, it can be suggested that, in such a case, illegality is not a part of the insured adventure so the insurer cannot rely on the breach of warranty of legality defence to discharge himself from liability. This is a sensible solution, but there was no case law supporting this argument until *Royal Boskalis Westminister and Others* v. *Trevor Rex Mountain and Others*[72] was decided in the Court of Appeal. The facts of this case can be summarised as follows: The plaintiffs were five Dutch companies who owned and operated a dredging fleet. Two of them formed a joint venture and on 28 October 1989 contracted with the General Establishment of Iraqi Ports (GEIP) to carry out dredging work at the port of Umm Quasr, close to the Iraq-Kuwait border. The contract was subject to Iraqi law and Paris arbitration. The fleet was insured against war risks with the defendant insurers under policies subject to English law. While the work was being performed Iraq invaded Kuwait on 2 August 1990. A short while after the invasion, United Nations sanctions were introduced against Iraq. On 16 September 1990, Iraq passed Law No 57 which purported with effect from 6 August 1990 to seize all the assets of companies whose countries had enacted sanctions legislation

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[71] *Sanday & Co* v. *British & Foreign Marine Insurance Co Ltd, ibid,* per Bailhache J at p 788.

[72] [1997] 2 All ER 929.

against Iraq. The plaintiff's fleet and ancillary equipment were under threat of seizure pursuant to these laws. Further, the Iraqis threatened to use persons employed by the joint venture as human shields in the impending conflict with the United States of America and its allies. In order to permit demobilisation of the fleet and personnel, the joint venture entered a Finalisation Agreement with GEIP under which it renounced all contractual claims against GEIP and released a substantial part of deposit held by AMRO bank in Holland under a letter of credit opened by GEIP as security for payment under the dredging contract. The Court of Appeal held that such an agreement would have constituted a sue and labour expense, if the plaintiff (joint venture) had been able to show that it was an enforceable agreement. They failed to do so. The court concluded that any civilised tribunal would have refused to give effect to such a waiver. Furthermore, GEIP had intended throughout to perform the Finalisation Agreement in an unlawful way, namely in breach of Dutch sanctions legislation. Therefore, for that reason too the waiver could not be enforced by GEIP in a Paris arbitration, unless the illegal part of the contract (release of deposit) could be served. It could not, either because it would be contrary to English public policy to circumvent the effect of United Nations sanctions or because the relevant terms were inextricably linked with the waiver.

After reaching the decision on this ground, the Court of Appeal, *obiter dictum*, briefly considered the argument brought by the underwriters that the assured's claim under the sue and labour clause was illegal since the adventure was unlawful or performed in an unlawful manner and accordingly implied warranty of legality was breached. It was held that making an unlawful payment to secure the release of the insured subject-matter from detention had not been a part of the marine adventure insured. Accordingly, this argument was rejected. It is, therefore, clear after the *dictum* of the Court of Appeal in *Royal Boskalis Westminister and Others* v. *Trevor Rex Mountain and Others*, that illegality which does not form part of the adventure insured does not violate the implied warranty of legality.

4.3.1.3.2 Illegality Must Arise under English Law

It is not expressly stated in s 41 whether the word 'lawful' means that the adventure must be legal merely in accordance with English law or foreign law must also be taken into account when determining the legality of the adventure. There is no doubt that the legality of the adventure must be determined in accordance with English law.[73] Until 1950s, illegality of the adventure under the laws of a foreign state was not taken into account in determining whether the implied warranty of legality was broken. The reason for this was explained by some judges, notably Lord Hardwicke and Lord Mansfield, as the paramount importance of the UK of the fullest freedom of trade.[74] More recently, in accordance with changing notions of international comity, there has been a change in this rule adopted by English judges at the end of the 18th century. The House of Lords held, in *Regazzoni* v. *KC Setnia (1944) Ltd*,[75] that the privilege of not having taken notice of any foreign laws cannot nowadays be carried too far, especially when a 'friendly' state is involved.[76] In this case, the contract was for the sale of jute bags, of Indian origin, to be shipped from India to Italy for resale in South Africa. The export of jute from India to South Africa was prohibited by Indian law. The respondents repudiated the contract and relied on the illegality by Indian law; it was held that they were entitled to do so. After this decision, it is submitted that any contract coming within the rule in *Regazzoni* case will be 'unlawful' within the meaning of s 3 of the MIA 1906. Therefore, the implied warranty expressed in s 41 of the Act will be broken if the adventure is illegal under the laws of a 'friendly' foreign state.[77]

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[73] 'It is of course, obvious that no court, consistently with its duty, can lend itself to the furtherance or enforcement of a contract which, or the performance of which, necessarily involves a violation of law that that court is bound to administer.' 1 Emerigon, c vii, s 5, p 215; 3 Kent, Com 262.

[74] See, Arnould, *ibid*, para 744 at p 582.

[75] [1957] 2 Lloyd's Rep 289.

[76] 'Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign state and it will do so because public policy demands that defence to international comity.' *Regazzoni* v. *KC Setnia (1944) Ltd*, *ibid*, per Viscount Simonds at p 298.

[77] Note that any adventure contravening a foreign law which had not been acted upon or enforced by its own country would not constitute a breach of the implied warranty. *Francis.* v. *Sea Insurance Co* (1898) 3 Com Cas 229.

4.3.1.3.3 Potential Effect of the ISM Code on the Implied Warranty of Legality

It must be borne in mind that the ISM Code, which was discussed in the previous chapter in detail, might have a certain impact or at least might be claimed by the underwriters to have an impact on the implied warranty of legality. Inspections carried out by port authorities, to a certain degree, guarantee that the vessels which do not have a valid ISM certificate will not be able to operate between the ports. If, however, a vessel without a valid ISM certificate is involved in a marine adventure and this adventure is insured, would that be sufficient to warrant the adventure of an unlawful one as far as s 41 of the MIA 1906 is concerned? If it would, then the shipowner's insurances during the period of that adventure may well prove to be void due to breach of the implied warranty of legality.

As was stated in its preamble, the main object of the ISM Code is to increase the safety standards and reduce the effect of the human element in shipping casualties. In this respect, it is designed as a safety regulation and the Code is not focused on illegalising insurance policies which violates its provisions. There is an established case law which states that breach of safety regulations does not render a voyage illegal.[78] Accordingly, the author is of the opinion that even if the assured manages to get engaged in a marine adventure without having a valid ISM certificate and obtain an insurance cover for that adventure, such an adventure will not be regarded as illegal under the principles of English law. The vessel which commences such a voyage, however, might be regarded as unseaworthy due to breach of a safety regulation.[79]

4.3.1.3.4 Implied Warranty of Legality: A *Sui Generis* Warranty

There are two factors which make the implied warranty of legality *sui generis*. First, although s 34(3) of the MIA 1906 states that a breach of warranty may be waived, a breach of the implied warranty is an exception to this rule.[80] Legality of the adventure

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[78] See, *St John Shipping Corporation* v. *Joseph Rank Ltd, ibid.*

[79] See, Chapter 3.4.2.3.1 at pp 137-8.

[80] *Gedge & Others* v. *Royal Exchange Assurance Corporation* [1900] 2 QB 214.

insured and legality in its performance, as stated before, determines the limits of a marine insurance contract. For this reason, the parties may not be given an opportunity to disregard these limits by waiving this warranty.

Second, there is no implied warranty of legality in non-marine insurance. The reason for this is that the policy in non-marine insurance is one on property and nothing more. This was explained by Staughton J, in the first instance in *Euro-Diam Ltd* v. *Bathurst*[81] with the following speech:

'Suppose that a motor car is insured for a calendar year, and is driven in January in excess of the speed limit. Would that be an answer to a claim for loss by theft or fire or a road accident in June? If a publican insured his stock of glasses and they were stolen in June, would it matter that they had been used for drinking after permitted hours in January? Those examples demonstrate the point that the insurance here was upon goods, and not upon any adventure. I therefore reject the argument of the implied term.'

The Court of Appeal[82] affirmed this approach: in its view, implying a term which potentially had these consequences was not necessary to give business efficacy to the agreement.

[81] [1986] 2 FLTR 639 at p 647.

[82] *Ibid.*

CHAPTER 5

CERTAIN FEATURES WHICH ARE COMMON TO BOTH TYPES OF WARRANTIES: NATURE OF MARINE WARRANTIES

INTRODUCTION

Despite differences which have been illustrated in earlier chapters, express and implied warranties have one thing in common. They are both terms of a marine insurance contract. This explains why certain legal features are common to both express and implied warranties. The object of this chapter, by scrutinising these common grounds, is to clarify the nature of this contractual term. These features, which have been laid down by the case law and the MIA 1906, distinguish marine warranties from other terms of a marine insurance contract. After clarifying the exact nature of marine warranties, the examination on the current status of marine warranties will be completed with an intensive analysis on the effect and waiver of breach of warranties in Chapters 6 and 7 respectively.

5.1 EXACT (STRICT) COMPLIANCE IS REQUIRED

It has always been the case since Lord Mansfield's day that the obligation undertaken by a marine warranty must be exactly complied with, so that as he himself said *obiter dictum* in *Pawson* v. *Watson*,[1] 'nothing tantamount will do or answer the purpose'. Accordingly, in *De Hahn* v. *Hartley*,[2] a warranty which required the insured vessel to sail with at least 50 hands or upwards was held to be breached when the insured vessel

[1] (1778) 2 Cowp 785.

[2] (1786) 1 TR 343.

sailed with 46 crew members on board, although six more did join soon after departure.[3] This approach of Lord Mansfield has been adopted into the MIA 1906 s 33(3) by Sir Mackenzie Chalmers.

Being one of the features of warranties, the exact compliance doctrine is certainly not the one which distinguishes them from other terms of an insurance contract. For example, conditions in insurance contracts which deal with particular matters also need to be exactly complied with, a substantial performance only being insufficient. In other words, if the condition goes to details, those details must be literally fulfilled and it is no defence for the assured to assert that such details are immaterial. Accordingly, in *Jacobson* v. *Yorkshire Insurance Company Ltd*[4] where a condition in a burglary insurance requiring the insured to keep proper books of account with a complete record of all purchases or sales was held not to be fulfilled by keeping records of purchases only.

It has been observed on numerous occasions that the courts are ready to interpret the obligations imposed by warranties narrowly in order to overcome the strictness of the exact compliance doctrine. For instance, in *Hide* v. *Bruce*[5] an express warranty which required the insured vessel to commence the intended adventure with twenty guns were held to be satisfied, even though there were 20 guns but not the men necessary to work them on board. Similarly, it was held in *Muller* v. *Thompson*[6] that a warranty that the vessel would carry a particular cargo did not preclude the assured from carrying additional cargo.

Whether the courts could also assist *de minimis non curat lex* rule in order to mitigate the harsh consequences of strict compliance doctrine has been brought into discussion in *Overseas Commodities Ltd* v. *Style*.[7] In commercial law, the application of this rule could be observed particularly when numerical calculations are involved. Accordingly,

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[3] See also, *Hore* v. *Whitmore* (1778) 2 Cowp 784; *Earle* v. *Harris* (1780) 1 Doug KB 357; *Sanderson* v. *Busher* (1814) 4 Camp 54n.

[4] (1933) L1L Rep 281.

[5] (1773) 3 Doug KB 213.

[6] (1811) 2 Camp 610.

[7] [1958] 1 Lloyd's Rep 546.

in cases where this rule applies non-performance or defective performance of a commercially insignificant amount has no legal consequence.

In *Overseas* case, the assured shipped two consignments of tinned pork from France to London under an all risk policy of insurance underwritten by the insurers. The policy contained a warranty which required that all the tins should be marked by the manufacturers verifying their date of manufacture. When the tins were delivered, many of them were found to be rusty or broken and much of the pork was either condemned or sold off cheaply. The assured claimed on the policy but the insurer rejected the claim on the basis that, as many of the tins did not have the date of manufacture upon them, the warranty was breached. The court ruled that lack of such marks on many of the tins amounted to breach of warranty and, thus, the underwriters were not liable. However, the judgment of McNair, J, leaves no doubt that the possible application of this rule has been considered by the court. Towards the end of his judgment, McNair, J, states:[8]

'Being satisfied that, as regards both policies, a substantial number of tins- *well exceeding any tolerance that could be disregarded under the de minimis rule*- were not marked with a code which enabled the true and correct date of manufacture to be established, I have no option to hold that the breach of the express warranty affords the underwriters a complete defence in this action.'

The author is certain that had only one tin out of, say, a thousand not been stamped in accordance with the warranty, by applying the *de minimis rule*, McNair, J, would have held that the warranty was not breached. The application of this rule, specially in cases like *Overseas* case, is fully justified and there is case law which suggests that such a rule could be applied in all areas of commercial law, including marine insurance. In *Navigation Agency Ltd* v. *Henry W Peabody & Co of London Ltd*,[9] Sellers LJ, referring to the rule of *de minimis non curat lex* said:[10]

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[8] *Ibid*, at p 558. (emphasis added)

[9] [1965] 2 QB 431.

[10] *Ibid*, at p 444.

'I think it is a rule of general application. It matters not whether it be a claim of defence. It matters not the nature of the transaction. It seems to me that in all cases the court is called upon to consider the substance of the matter and will not regard or give effect to what are undoubtedly, in the view of the court, trivialities, matters of little moment, of a trifling and negligible nature.'

In fact, Malaysia High Court in *Boon & Cheah Steel Pipes SDN BDH.* v. *Asia Insurance Co Ltd*[11] discussed the application of *de minimis rule* to a marine insurance contract.[12] In that case, the assured were the owners of 668 steel pipes which were insured free from particular average and carried from Prai to Brunei by a barge towed by the tug Selvaliant. In the course of the voyage, the vessel and cargo were damaged by perils of the sea insured against and only 24 of the pipes were delivered, 12 of them in a damaged condition. The assured sued the insurer on the ground that the cargo was an actual total loss by reason of the *de minimis* rule. The court considering the facts of the case decided that although the rule has application in marine insurance contracts, it cannot be applied since 12 pipes which were delivered in a good condition formed too high proportion of 668 pipes. Delivering the judgment of the court, Shah, J, said:[13]

'It may be that in the case of a single pipe or two out of the whole consignment, the rule would apply, but I fail to see how it is possible to hold that 12 pipes can be ignored or treated as trifling and to be brushed aside.'

Therefore, it can be concluded that the *de minimis rule* could be applied to overcome the strictness of strict compliance doctrine to a certain degree. However, the application of this rule is rather limited and the breach should involve only a trivial part of the whole undertaking.

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[11] [1975] 1 Lloyd's Rep 452.

[12] It should be noted that Malaysia is one of the common law countries which has adopted the MIA 1906 into its legal system.

[13] *Ibid*, at p 460.

5.2 NO MATERIALITY AND CAUSAL LINK REQUIRED

Section 33(3) of the MIA 1906, repeating the rule set by Lord Mansfield,[14] declares that a warranty needs to be complied with whether it be material to the risk or not. This rule, in fact, implies two things. First, it means that an express warranty might cover anything, even if it be 'absurd' or 'fanciful'.[15] Put another way, the facts warranted may be of a sort which could not affect the risk in any manner. For example, if the assured in a hull policy warrants that the name of the insured vessel shall not be altered, despite the fact that this point could have no effect on the risk insured against, still a warranty of that type must be exactly complied with. Furthermore, it also implies that even though the warranted event concerns things which could be material in a general way, whether the particular breach by the assured has any material effect on the case in question is irrelevant. Accordingly, in *Yorkshire Insurance Co Ltd* v. *Campbell,*[16] where the insurance was on a horse against marine perils and risks of mortality during a sea voyage, and it was described in the proposal form as - 'Bay gelding by Soult X St. Paul (mare) 5 years', the pedigree as stated was incorrect and the Privy Council held that since on its construction the description of the horse was a warranty, the inaccuracy provided insurers with a defence to the owner's claim when the horse died on the voyage. It is clear that in such an insurance policy the pedigree of the insured horse has a bearing on its temperament and thus its ability to withstand a marine voyage, but there was no evidence in the case that the horse's actual pedigree adversely affected in this regard or it had made no difference in the actual circumstances of the loss. However, the fact that there was a breach of warranty in the case was sufficient to discharge the insurer from liability.[17]

A line of antecedent case law also suggests that although the loss may not have been in the remotest degree connected with the breach of warranty, the insurer is nonetheless discharged on that account from all liability for the loss, if the warranty has in fact been

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[14] In *De Hahn* v. *Hartley, ibid,* at p 345 Lord Mansfield said:

'It is perfectly immaterial for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with.'

[15] See, *Farr* v. *Motor Traders Mutual Insurance Society* [1920] 3 KB 669, per Bankers, LJ, at p 673.

[16] [1917] AC 218.

[17] See, also *Blackhurst* v. *Cockell* (1789) 3 TR 360 to the same effect.

broken. Thus, in *Hibbert* v. *Pigou*[18] where a ship warranted to sail with convoy had in fact sailed without it and went down in a storm, the underwriter was held not liable for this loss.[19] Again, in *Foley* v. *Tabor*,[20] Chief Justice Erle's address to the jury on this point was[21]:

'It is not necessary for the insurer to make out that the loss was caused by the unseaworthiness relied upon. The question depends upon the state of the ship at the time when she sailed upon her voyage.'

Although no point has been made in the MIA 1906 as to this issue, by virtue of s 91(2) these cases are still good law nowadays[22] and it is an established rule that breach of a marine warranty discharges the insurer from further liability regardless of the existence of a causal link between the breach and loss. More recently, this rule has been regarded as 'one of the less attractive features of English insurance law' by Lord Griffiths in *Forsikringsaktieselskapet Vesta* v. *Butcher*.[23] Admittedly, allowing the insurer to discharge himself from liability even in cases where there is no causal link between the loss and breach creates unfair consequences for the assured and need for a possible reform in this area will be discussed in the final chapter of the thesis.

5.3 BREACH OF WARRANTY CANNOT BE REMEDIED

Section 34(2) of the MIA 1906 reads:

'Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.'

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[18] (1783) 3 Doug KB 213.

[19] See, also *Christian* v. *Ditchell* (1797) Peake's Add Cas 141; *Thomson* v. *Weems* (1884) 9 App Cas 671; *Wedderburn* v. *Bell* (1807) 1 Camp 1; *Lane* v. *Nixon* (1866) LR 1 CP 412.

[20] (1861) 2 F & F 663.

[21] *Ibid*, at p 672.

[22] Section 91(2) reads as follows:

'The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.'

[23] [1989] 1 All ER 402, at p 406.

This sub-section has been derived from cases which were decided in late 18th and 19th century. In *De Hahn* v. *Hartley*,[24] when the insured vessel commenced the intended voyage, the warranted number of crew were not on board. The warranted number of crew had been recruited, before the vessel sailed on the leg of the voyage during which the casualty occurred. However, it was held that once the warranty was breached it was immaterial whether it was remedied later. Similarly, in *Quebec Marine Insurance Co* v. *Commercial Bank of Canada*[25] the vessel was insured for a voyage at and from Montreal to Halifax, Nova Scotia. After leaving Montreal, her boiler, which had been defective from the outset, became unmanageable when seawater entered and she had to seek refuge nearby in order to effect repairs. The repairs were duly made but, soon after resuming her voyage, she encountered severe weather and was lost. The Privy Council ruled that the assured were in breach of the implied warranty of seaworthiness and the insurers were not liable under the policy even though the defect was remedied before the loss occurred.

5.4 NO EXCUSE FOR BREACH OF A WARRANTY- EXCEPTIONS TO THE GENERAL RULE

As was stated by Arnould:[26]

'No cause, however sufficient; no motive however good, no necessity, however irresistible, will excuse non-compliance with a warranty.'

This principle was declared in the late 18th century and is still good law by virtue of s 91(2) of the MIA 1906. In *Hore* v. *Whitmore*,[27] the insured vessel was warranted to sail on a given day, however she was prevented from doing so by an embargo imposed on by a British governor. It was ruled that this breach of the warranty was sufficient to discharge the insurer from liability, despite the fact that such embargo came expressly within the words 'restraints and detainment of kings, princes and people', which were

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[24] *Ibid.*

[25] (1870) LR 3 PC 234.

[26] *Ibid*, at para 687.

[27] *Ibid.*

perils expressly insured against in the policy. Also, whether the assured is innocent or not is immaterial. In *Douglas* v. *Scougall*,[28] Lord Eldon said:

'It is not necessary to inquire whether the owners acted honestly and fairly in the transaction; for this it is clear law that, however just and honest the intentions of the owner may be, if he is mistaken in the fact and the vessel is, in fact, not seaworthy, the underwriters is not liable.'

This means that if the insured vessel is diverted to a port due to storm and by doing this a navigation warranty is breached, the insurer will still be discharged from liability should a loss occurs. Similarly, if the master and crew takes the insured vessel to a different destination from that ordered by the owner, and during this time a warranty is breached the insurer will still be discharged from liability even though 'barratry'[29] is a risk insured against in modern hull cover.

Although, the rule itself has not expressly been spelt out in the MIA 1906, Sir Mackenzie Chalmers felt that it was essential to indicate its exceptions in s 34(1). This was probably done in order to limit the scope of exceptions and prevent courts from adopting new exceptions to the rule by considering the special circumstances of the case in question.

The first case where non-compliance with marine warranties could be excused is when the warranty ceases to be applicable to the circumstances of the contract by reason of a change of circumstances. At first sight, the scope of this exception seems to be extensive. However, evaluating the example provided by Sir Mackenzie Chalmers himself, in the commentary for the MIA 1906[30] it could be observed that it has only a limited application. According to the drafter of the Act, if during war a warranty to sail with a convoy at a future time from some foreign station were inserted, the intervention of peace before the period at which the ship was so to sail would excuse the necessity of compliance. Thus, under this sub-section, in cases where a warranty

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[28] (1816) 4 Dow 269, at p 276.

[29] Rule 11 of Rules For Construction of Policy reads:

The term 'barratry' includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.

[30] See, Chalmers, Sir MD & Archibals, LJ, *The Marine Insurance Act 1906*, (3rd ed, Butterworth & Co, 1922).

was incorporated into the policy for a particular reason, the assured will be excused for not complying with it provided that the reason which made parties agree on such a warranty ceases to exist after the attachment of the policy. In this respect, the exception expressed in s 34(1) seems to be an implication of the celebrated Latin maxim *cessante ratione, cessat lex.*[31] If the analysis of the author is accurate, then it can be concluded that this exception has no application as far as implied warranties are concerned since it is very unlikely that the reason behind an implied warranty will cease to exist during the currency of the policy.

According to s 34(1) of the MIA 1906, non-compliance with a warranty is excused in cases where compliance with the warranty is rendered unlawful by any subsequent law. It is an established rule of law, that if a man agrees to do a thing which is lawful at the time, but an Act of Parliament comes in and hinders him from doing it, the agreement is repealed.[32] The exception in s 34(1) could be regarded as a reflection of this principle to marine warranties regime. The author believes that this sub-section is essential in order to harmonise the warranty regime with s 41 of the MIA 1906 which imposes an implied warranty to the effect that the assured should make sure that the adventure is carried out in a lawful manner, so far as he can control the matter. Without such an exception, the assured would have found himself in a 'no win' situation, because he would have been in breach of an implied warranty while trying to comply with another one. Furthermore, expecting the assured to commit illegal activities to comply with the terms of an insurance contract would be against the principles of public policy.

As was indicated by Clarke,[33] in non-marine insurance, apart from these two exceptions, the assured might be excused for breach of an express warranty if he neither knew of the warranty nor had the opportunity of knowing it. This is because the warranty was not a term of the contract or was not intended to apply, until the terms including warranty had been communicated to the assured.[34] By virtue of s 35(2)

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[31] With the reason of the law ceasing, the law itself ceases.

[32] *Brewster* v. *Kitchin* (1698) 1 Ld Raym 321

[33] Clarke, M, *The Law of Insurance Contracts*, (3rd ed LLP Ltd, 1997), 20-6B2, p 545.

[34] *Re Coleman's Depositories Ltd & Life & Health Insurance Association* [1907] 2 KB 798, per Vaughan Williams, LJ, at p 805; per Buckby, LJ, at p 812.

of the MIA 1906 which requires all express warranties to be included in or written upon the policy or contained in some document incorporated by reference into the policy, the assured could not allege that he did not have knowledge about the existence of an express warranty. The formal requirement that all express warranties must be, somehow, incorporated into the policy makes the application of such an exception impossible as far as marine insurance contracts are concerned.

5.5 RETURN OF THE PREMIUM AND RIGHT TO CLAIM DAMAGES IN CASE OF BREACH OF A MARINE WARRANTY

The remedy in case of breach of a marine warranty, as mentioned on numerous occasions and will be examined in the following chapter in detail, is to discharge the insurer from further liability. Whether the assured in such a case will be entitled to his premium depends on the nature of the warranty breached. If the warranty in question, is one which needs to be complied with before the attachment of the risk, in case of its breach the insurer never comes on risk.[35] In such a case, it is reasonable to expect the insurer to return the premium since he has never been at risk of indemnifying the assured. Accordingly, s 84(1) of the MIA 1906 provides:

'Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.'[36]

However, if the warranty breached is one which has to be complied with at one certain point after the attachment of the risk, then by virtue of s 84(2) of the Act the premium is not returnable at all if the risk insured against is entire and indivisible. Conversely, in cases where the risk is divisible the assured is entitled to the part of the premium which belongs to the unattached part of the risk. This rule laid down in s 84 of the MIA 1906, was undoubtedly on the mind of Lord Goff when delivering the judgment of the House of Lords in *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association*

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[35] See, *Thomson* v. *Weems, ibid.*

[36] By virtue of this section, if the implied warranty of legality is breached because of illegality of the insured adventure, then the assured is not entitled to return of the premium

(Bermuda) Ltd (Good Luck)[37] where he, referring to the effect of breach of a warranty, said[38]:

'It is possible that there may be obligations of the assured under the contract which will survive the discharge of the insurer from liability, as for example a continuing liability to pay a premium.'

It should, however, be borne in mind that determining whether the risk is divisible is a rather problematic task and the existence of commercial useage in that area could be a decisive factor. In *Meyer* v. *Gregson*[39] a ship insured 'at and from Jamaica to Liverpool, warranted to sail on or before the first of August', did not sail till September 1, so that, by this breach of warranty, the insurer was off risk. The assured, however, contended that the risk was divisible, and had attached upon the ship while she lay in port at Jamaica before August 1; he, however, gave no proof of a useage of trade to consider such risks divisible, or to make a rateable return of the premium for the risk after leaving the island. Under these circumstances, the court held that there could be no apportionment.[40]

Finally, it should be noted that despite the fact that the remedy afforded by the MIA 1906 in case of breach of marine warranties is discharge from liability, breach of warranty also entitles the insurer to the alternative remedy of damages in accordance with contractual principles. At the end of the day, a marine warranty, whether express or implied, is a term of the contract and in case of its breach the injured party should be entitled to claim damages. However, if the insurer chooses the alternative remedy of claiming damages, this inevitably means that he has waived his right to rely on breach

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[37] [1991] 2 Lloyd's Rep 191.

[38] *Ibid*, at p 201.

[39] (1784) 3 Dougl 402.

[40] *Cf Gale* v. *Machell* 2 Park Ins 797 where the risk was held to be divisible in an 'at and from policy' due to the existence of a commercial useage. More recently, the Court of Appeal, in *Chapman* v. *Kadirga Denizcilik Ve Ticaret* [1998] LRIR 377 , considering the facts of the case in question and surrounding circumstances, decided that the risk was not divisible and, even though the insurer discharged from further liability for breach of a payment warranty, the whole of the premium should be paid.

of warranty to discharge himself from liability.[41] It must be noted that, under the principles of general contract law, damages are limited to the loss suffered by the insurer as a result of the breach.[42] Accordingly, if the insurer fails to show that he has suffered a loss, he will be awarded only nominal damages and nothing else. Therefore, it is advisable to the insurer to claim damages in cases where breach of warranty has caused the loss or increased the amount of loss and despite such a breach he wishes to keep the insurance relation alive. In such a scenario, by claiming damages the insurer will be able to reduce some or all of the amount of the money he is going to pay under the insurance contract for a loss caused by a peril insured against.

[41] See, *Cia Naviera Maropan SA* v. *Bowaters Lloyd Pulp & Paper Mills Ltd* [1955] 2 QB 68 and *Motor Oil Hellas (Corinth) Refineries SA* v. *Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391.

[42] The underlying and fundamental principle in this area, as stated in *Robinson* v. *Harman* (1848) 1 Ex 855, is to replace the injured party (here insurer) in the same position as he would have been in, had the breach not occurred, insofar as money is able to do this.

CHAPTER 6

BREACH OF MARINE INSURANCE WARRANTIES

INTRODUCTION

A warranty, whether express or implied, is a term of the marine insurance contract and a legal consequence has been afforded in case of its breach, just like the other terms. Although the remedy afforded to insurers in case of breach of a warranty has been considered as 'draconian' by the majority of commentators, it can be, to a certain extent, justified on the ground that warranties serve the purpose of determining the extent of the cover.

Despite the existence of a considerable amount of case law on the point before the enactment of the MIA 1906, it was not until the 1990s that the effect of breach had been considered judicially. The main object of this part is to examine the effect of breach of warranty in marine insurance from all angles. The examination will be carried out with reference to case law and especially to the House of Lords decision in *The Good Luck*. The consequences of this celebrated case both to the legal position and insurance market will be carefully analysed.

6.1 MEANING OF BREACH AND BURDEN OF PROOF

The effects of breach of a warranty, which will be discussed later in this chapter, arise in cases where there is an actual breach. For example, a warranty of locality is breached from the moment the insured vessel trades outside the warranted area. Intention to commit a breach of warranty does not itself constitute a breach. Thus, in *Simpson SS Co Ltd* v. *Premier Underwriting Association Ltd*[1] where a policy contained a warranty of locality which prevented the vessel from proceeding east of

[1] (1905) 10 Com Cas 198.

Singapore and she sailed from Cardiff bound for a port east of Singapore, underwriters were not held to be relieved of liability when she sailed as there was at most an intention to breach.[2]

As mentioned on numerous occasions, breach of a warranty is one of the positive defences of the insurer.[3] In this respect, it is understandable that law has put the onus to prove breach of warranty on the shoulders of the insurer.[4] It is, however, open to the parties to insert express words to shift the burden of proof. For instance, it may be provided in the policy that on the happening of certain events, warranty will be regarded as breached and the assured has to prove that this is not the case.

6.2 EFFECT OF BREACH

6.2.1 Relative Usages of the Expression 'Condition Precedent'

During the process of evaluating the effect of breach of a promissory warranty, compliance with an insurance warranty has been referred to as a condition precedent to 'the attachment of risk' or a condition precedent to 'the liability or further liability of the insurer'.[5] Both for practitioners and academics any text which refers to the expression 'condition precedent' has been considered as 'deceptive' and in some cases 'confusing'.[6] One source of confusion is the use of the expression in both a contingent and promissory sense in English contract law,[7] unlike modern continental systems

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[2] See also, *Baines* v. *Holland* (1885) 10 Exch 802 to the same effect.

[3] The meaning of the term 'positive defence' and main positive defences available to the insurer will be evaluated in detail in Chapter 8.

[4] *Barrett* v. *Jermy* (1849) 3 Exch 535; *Stebbing* v. *Liverpool & London & Globe Insurance Co Ltd* [1917] 2 KB 433; *Pooney* v. *Cornhill Insurance Co* (1931) 40 LIL Rep 39; *Bond Air Services Ltd* v. *Hill* [1955] 2 QB 417; *W & J Lane* v. *Spratt* [1969] 2 Lloyd's Rep 229 and *Sofi* v. *Prudential Assurance Co* [1993] 2 Lloyd's Rep 559.

[5] See Chapter 6.2.2 and 6.2.3, *ante*.

[6] See, Treitel, GH, *Conditions and Conditions Precedent*, [1990] 106 LQR p 185 at p 185 where he said:

' One of the most notorious sources of difficulty in the law of contract is the variety of senses in which it uses the expression 'condition' '

[7] For the distinction between promissory and contingent conditions, see *Roadworks (1952) Ltd* v. *Charman* [1994] 2 Lloyd's Rep 99 at p 103. For an academic view on the issue, see Carter, JW, *Conditions and Condition Precedents*, [1990] JCL, pp 90-106 and Treitel, GH, *ibid.*

which employ the expression only in contingent sense.[8] The issue is further complicated by the use of the expression to refer to an express term in insurance contracts. Thus, a brief analysis of the different usages of the expression 'condition precedent' in contract and insurance law is essential for the sake of clarity before the effect of breach is considered. It is believed that such an examination will provide the necessary background to an academic evaluation of the effect of breach.

6.2.1.1 Condition Precedent in 'Contingent Sense'

The expression 'condition precedent' is used in contingent sense to describe a situation where either the contract or the obligation of one or both parties to perform the contract is dependent on the occurrence of an event. Where an agreement or obligation is subject to a contingent condition precedent, before the occurrence of the condition there is no duty on either party to render the principal performance promised by him. If, for example, A agrees to buy B's yacht subject to receipt of a 'satisfactory survey', B is not bound to deliver and A is not bound to pay until a satisfactory survey is received. There is no contract or no obligation to perform in cases where the event in question does not occur.

Principally, a contingent condition precedent does not impose any obligation on one or both parties. However, depending on the true construction of the term specifying the condition, a variety of different effects and obligations may be created even by a contingent condition precedent.[9]

First, a contingent condition precedent may operate, not to negative the very existence of a contract, but to suspend, until it is satisfied, some right or duty or consequence which would otherwise spring from the contract.[10] Secondly, although the main obligations have not accrued before the event occurs a contingent condition precedent

[8] In these systems, the word 'condition precedent' refers only to an external fact upon which the existence of the obligation or contract depends.

[9] For a more detailed analysis on this point, see Treitel, GH, *The Law of Contract*, (10th ed, Sweet & Maxwell, 1999) pp 58-62, Cheshire & North, *Contract Law*, (7th ed, Butterworths, 1993), pp 146-55.

[10] See, *Marten* v. *Whale* [1917] 2 KB 480;

may prevent the parties from withdrawing so long as the event can still occur.[11] Thirdly, a contingent condition precedent may impose a duty on one of the parties to use reasonable effort to bring the event about.[12]

6.2.1.2 Condition Precedent in 'Promissory Sense'

In contract law, the expression 'condition precedent' is used in order to determine the scope of the promissor's obligation to perform. If, therefore, the performance by the promissor is a condition precedent to the liability of the other party, then he has to perform before the other party's liability accrues. For example, if A agrees to sell goods to B and B agrees to open a letter of credit, obtaining the letter of credit is a condition precedent to A's obligation to deliver.[13] If B fails to open a letter of credit, A is entitled to refuse to deliver the goods so long as the failure continues. This situation of itself, however, does not justify A in electing to terminate the contract or refuse further performance from B.[14]

6.2.1.3 Condition Precedent As 'A Term of The Contract'

The expression 'condition precedent' can also be used to refer to an express term in a contract of insurance.[15] Non conformity with a term of this nature either affects the

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[11] *Smith* v. *Butler* [1900] 1 QB 694. *Cf Felixstowe Dock & Ry Co* v. *British Transport Dock Bdl* [1976] Lloyd's Rep 656; *Alan Estates Ltd* v. *WG Stores Ltd* [1982] Ch 511.

[12] *Hargreaves Transport Ltd* v. *Lynch* [1969] 1 WLR 215; *Brauer* v. *Clark* [1952] 2 Lloyd's Rep 147. This is usually the case in charterparty/sale of ship contracts where the parties have in their negotiations used such phrases as 'subject to survey' or 'subject to Government permission' or 'subject to shippers approval'. In such cases, usually the contract binds immediately but its main obligations come into operation only if and when the 'survey' has been carried out or 'permission' or 'approval' has been given. However, the condition precedent puts one of the parties under an obligation to do what is reasonable to try to fulfil it. For more information on this point see, Wilford, M & Coghlin, T & Kimball, JD, *Time Charters*, (4th ed, LLP, 1995), pp 52-3.

[13] For different examples, see *Societe Generale de Paris* v. *Milders* (1883) 49 LT 55; *Cresswell* v. *Board of Inland Revenue* [1984] ICR 508; *Motor & General Insurance Co Ltd* v. *Pavy* [1994] 1 Lloyd's Rep 607.

[14] See, *Wilusznski* v. *Tower Hamlets LBC* [1989] ICR 493; *Ticehurst & Thompson* v. *British Telecomunications* [1992] ICR 383.

[15] Terms of this type are discussed in detail and distinguished from express warranties in Chapter 2 at pp 43-5.

validity of the policy or liability of the insurer.[16] For example, a term in an insurance contract which requires the assured to give notice to the insurer within a prescribed time after the loss in order to be indemnified, is a condition precedent to the liability of the insurer. If notice is not given within the prescribed time, the assured cannot be indemnified in respect of the loss occurred.

6.2.2 Effect of Breach for Warranties Which Relate to A Period Before the Attachment of the Risk

As examined in Chapter 1, some warranties relate in time to circumstances at the inception of the risk.[17] In such a case, the warranted event or condition must be complied with at some time before the risk attaches. For instance, the MIA 1906 implies a warranty of portworthiness in respect of a voyage policy on hull which attaches 'at and from' the place named in the policy.[18] Section 39(2) of the MIA 1906 requires such a vessel to be reasonably fit to encounter the ordinary perils of the port at the commencement of the risk. Similarly, s 41 of the MIA 1906 implies a warranty of legality in all policies and requires the insured voyage to be a lawful one. Express warranties can also be drafted to cover a period before the attachment of the risk. For instance, express warranty of neutrality requires the vessel to be warranted neutral, to have such a character at the commencement of the risk.[19]

In cases where the warranty relates in time to circumstances at the inception of the risk, breach will result in the insurer never coming on risk. Compliance with a warranty of this type was considered as 'a condition precedent to the attaching of the risk' in *Thomson* v. *Weems*[20] by Lord Blackburn. There, the assured in a life policy had warranted the accuracy of the statements made by him in the proposal form. When the evidence clearly proved that the assured's statement as to his temperance in his habits

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[16] For more information on different conditions in insurance contracts, see Ivamy, ERH, *General Principles of Insurance Law*, (4th ed, Butterworths, 1979), pp 288-318.

[17] See, chapter 1.2.2.1 at p 12.

[18] For nature and scope of this implied warranty see Chapter 4.1 at pp 153-5.

[19] See, s 36 of the MIA 1906.

[20] (1884) 9 App Cas 671 at p 684.

was untrue, the policy was held null and void. There is no doubt that Lord Blackburn employed the expression 'condition precedent' in a contingent sense in the above speech about the effect of breach. Accordingly, the validity of the insurance policy depends on the compliance with the warranty and once the warranty is breached the contract never comes into existence. The suspensive effect of contingent condition precedent which may arise in some contracts,[21] therefore, has no application in this context due to the special nature of insurance contracts. In such a case, it seems likely that the premium is refundable due to total failure of consideration unless the breach of warranty is in fact fraudulent.[22]

One may argue that the principle in relation to breach of warranties which relate to a period before the attachment of the risk was derived from a non-marine case and therefore has no application in marine insurance. Two contra-arguments can be developed to prove that this is not the case. First, Lord Blackburn in *Thomson* v. *Weems* expressly stated that in his opinion, as regards the effect of breach of warranty, the same principles applied whether the insurance be marine or not.[23] Secondly, two different judgments of Lord Mansfield in relation to marine warranties delivered in the late 18th century are to the same effect. In *Woolmer* v. *Muilman*[24] the insured vessel was warranted neutral and was lost by perils of the sea. In the trial, there was evidence to the effect that she was not neutral property and Lord Mansfield CJ, said:[25]

'This was no contract, for the man insured neutral property and this was not neutral property.'

Similarly, in *De Hahn* v. *Hartley*,[26] he described a marine warranty which related to a period before the attachment of the risk, in a very similar sense as Lord Blackburn did in *Thomas* v. *Weems*:[27]

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[21] See, Chapter 6.2.1.1, at p 193.

[22] See, Section 84(1) of the MIA 1906.

[23] *Ibid*, at p 684. He based his argument on the decision of Lord Eldon, C, in *Newcastle Fire Insurance Co* v. *Macmorran & Co* (1815) 3 Dow 255.

[24] (1763) 3 Burr 1419.

[25] *Ibid*, at p 1420.

[26] (1786) 1 TR 343.

[27] *Ibid*, at pp 345-6.

'A warranty in a policy of insurance is a condition or contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with.'

Since there is no express provision in the MIA 1906 in relation to the effect of breach of warranties of this type, by virtue of s 91(2)[28] Lord Mansfield's judgments can still be regarded as good law.

6.2.3 Effect of Breach for Warranties Which Relate to A Period After the Attachment of the Risk

Some warranties concern the assured's future conduct and require him to do or not to do a particular thing or fulfil some condition at one period after the attachment of the risk.[29] The warranty of seaworthiness which is implied in respect of voyage policies by the MIA of 1906[30] and most of express warranties, such as locality warranties, institute warranty as to towage and salvage services and laid up and out of commission warranties[31] are examples of warranties of this type. Since the warranted event or condition relates, in time, to a period after the attachment of the risk; breach of a warranty of this type does not have any effect on the existence of the contract unlike breach of warranties discussed earlier in previous part. The legal effect of breach for this kind of warranties is spelt out in s 33(3) of the MIA 1906 in the following way:

' ... the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.'

The meaning of this sub-section became the subject of judicial examination in the 1990s in *The Good Luck*. It is to be noted that, though the case was concerned directly

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[28] This sub-section reads as follows:

'The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.'

[29] See, Chapter 1.2.2.1, at p 12.

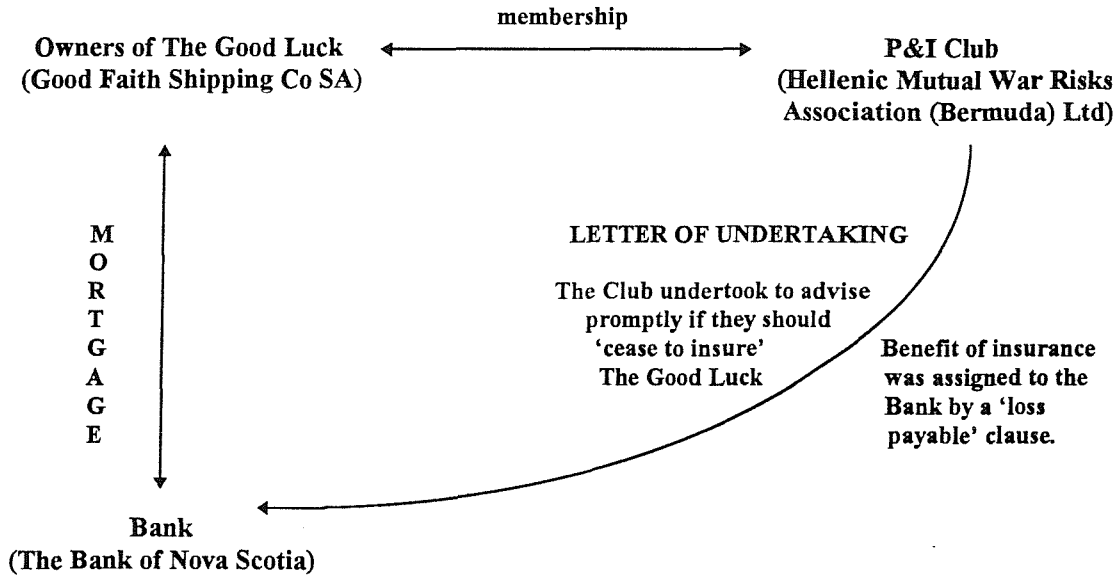
[30] See, s 39(1) of the MIA 1906.

[31] For a detailed analysis on express warranties of this type see chapter 2.3.1 at pp 29-37.

with an express warranty, namely warranty of locality, the principles enunciated therein on the effects of a breach also apply to implied warranties.

The facts of the case may be summarised as follows. *The Good Luck* was insured with the defendant club and mortgaged to the plaintiff bank. As required by the mortgage, the benefit of the insurance was assigned to the bank, and the club gave a letter of undertaking to the bank, whereby the club promised to advise the bank promptly if they should 'cease to insure' the ship. The overall situation can be seen with a clearer perspective in the following diagram.

Diagram 1



The rules of the relevant club (rule 25) contained an express warranty prohibiting the insured vessel from entering certain declared areas. These areas were areas of such extreme danger that it was not considered acceptable by the club that they should cover vessels entering these areas. If an owner wanted such cover while his vessel was in a prohibited area special arrangements had to be made. The owners of the *Good Luck* were in the practice of sending the vessel into prohibited areas but neither the club nor the bank were informed. The managers of the club later discovered what was going on but they neither took any steps to deter the owners of the *Good Luck* from carrying on, nor informed the bank of what they had discovered. On her last voyage,

the *Good Luck* was sent to part of the Arabian Gulf in breach of warranty. She was hit by Iraqi missiles and became a constructive total loss. Both club and bank knew of the total loss, but whereas the club discovered the breach of warranty, the bank negligently did not investigate the possibility.[32] In the mistaken belief that the loss was covered, the bank made further loans to the shipowners. In view of breach of warranty, the insurance could not be enforced, but the bank brought an action against the club for having failed to give prompt notice that they had ceased to insure the ship. Accordingly, it was contended that the club was in breach of the letter of undertaking given by them to the bank.

The bank relied on three different grounds. First, they alleged that the club was liable to them for breach of a continuing duty of good faith, expressed in s 17 of the MIA 1906. The existence of such a duty was denied by both the first instance judge Hobhouse, J, and the Court of Appeal.[33] Secondly, it was contended that the club was liable to the bank in tort for 'breach of a duty to speak'. This argument which was accepted at first instance was reversed by the Court of Appeal.[34] The third allegation of the bank gave rise to a serious and intense judicial examination of s 33(3) of the MIA 1906, as a result of which the effect of breach for warranties which relate to a period after the attachment of the risk was clarified. The bank contended that by virtue of s 33(3), breach of warranty brought the vessel's insurance to an end automatically and accordingly the insurer was in breach of the express provisions of the letter of undertaking in failing to notify the bank as to such a breach. This argument which was accepted at first instance by Hobhouse, J, was challenged by the club in the Court of Appeal. The club supported the view that breach of a warranty does not automatically discharge the insurer from liability, but gives the club a right to avoid it. Since the club

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[32] The bank was of the opinion that an arrangement was made between the owners and the club to keep the vessel insured while she was in the prohibited areas.

[33] See, [1989] 3 All ER 628, at pp 656-60, where the *dictum* of Slade LJ, in *Banque Financiere de La Cite 'SA* v. *Westgate Ins Co Ltd* [1989] 2 All ER 952 at pp 993-94 was applied.

[34] *Ibid*, at p 663, where *dictum* of Lord Wilberforce in *Liverpool City Council* v. *Irwin* [1976] 2 All ER 39 at p 43; *Tai Hing Cotton Mill Ltd* v. *Liu Chong Hing Bank Ltd* [1986] AC 80; *dicta* of Lloyd, LJ, in *National Bank of Greece SA* v. *Pinios Shipping Co No 1, (The Maria)* [1989] 1 All ER 213 at p 223 and of Slade, LJ, in *Banque Financiere de La Cite 'SA* v. *Westgate Ins Co Ltd, ibid,* at p 1011 were applied. For a detailed analysis on these issues, the extent of the duty of continuing good faith and duty of disclosure, see Davenport, BJ, *The Duty of Disclosure*, [1990] LMCLQ, p 251.

elected to terminate the contract for breach, at a time after the loans were made by the bank, the provisions of the letter of undertaking were not breached.[35] Agreeing with the contention of the club, the Court of Appeal held that breach of a warranty did not automatically discharge the insurer from liability and he was required to take active steps to rescind or avoid the contract as he would have to in the case of a breach of a condition under ordinary principles of contract law. Accordingly, since the club had not taken such steps to avoid the contract before further loan was given by the bank, they were not in breach of the letter of undertaking they had given to the bank. When delivering their judgment, the Court of Appeal was influenced by some academic texts relating to insurance law and two different reports one of which was signed by Lord Jenkins, Parker, Devlin and Diplock, equating breach of warranty with a repudiatory breach.[36] Citing Arnould,[37] the Court of Appeal also found that the 'automatic discharge' remedy in case of breach of a warranty contradicts with the possibility of waiver by the insurer of the breach, as expressly contemplated by s 34(3) of the MIA 1906.[38] In the view of the Court of Appeal, a contract which has come to an end cannot be revived by the act of one party, namely the insurer. Revival would require the making of a new contract by both parties. Furthermore, the Court of Appeal found it impossible to reconcile the concepts of 'condition precedent' properly so called, non-fulfilment of which results in there being no contract, and breach of a promissory warranty which cannot be contended to have that result.[39]

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[35] There is a whole world of difference in saying that a contract is 'void', and that the insurer is 'discharged from liability'. In the case of a discharge under s 33(3), the insurer is discharged from liability only as from the date of the breach; all rights and liabilities accrued before the breach are preserved. When the contract is void, it has no legal consequences from the very beginning.

[36] *Ibid*, pp 651-53.

[37] *Arnould's Law of Marine Insurance and Average*, para 708 fn 18 which reads:

' The statement made by Arnould that the breach of warranty avoids the policy is clearly inaccurate, since after it had been avoided it would not be possible for the insurer to affirm it, as he has always been able to do, by waiving the breach. It was no doubt for this reason that the draftsman of the Marine Insurance Act 1906, preferred to use the expression 'discharged from liability'. Strictly speaking, however, this is open to the same objection, since if he had once become 'discharged as from the date of the breach' it would logically become impossible for the insurer to make himself liable by subsequent waiver, unless possibly he could be held estopped from pleading 'the discharge'. The true position appears to be that the breach of warranty gives the insurer the right to avoid the policy, and to make such avoidance operate from the time of breach..."

[38] *Ibid*, at p 653.

[39] *Ibid*, at p 654. To support their view, the Court of Appeal cited the *dictum* of Donaldson, J, in De *Maurier (Jewels) Ltd* v. *Bastion Insurance Co Ltd* [1967] 2 Lloyd's Rep 550 at pp 558-9, where he said:

Reversing the Court of Appeal's decision, the House of Lords held that breach of a warranty of this nature automatically discharges the insurer from liability from the date of breach. Accordingly, the club was in breach of the letter of undertaking as they were automatically, without any election, discharged from liability from the moment the *Good Luck* entered the prohibited area without making any further arrangements. The reasoning of the House of Lords and their accuracy will be discussed in the following part.

6.2.3.1 Justification of the Decision of the House of Lords in '*The Good Luck*'

Unlike the Court of Appeal which suggested the existence of an irreconcilable contradiction between the concepts of 'condition precedent' and 'breach of a promissory warranty', Lord Goff, in the House of Lords, referring to the wording of s 33(3) held that:[40]

'... if a promissory warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, for the simple reason that fulfilment of the warranty is a condition precedent to the liability or further liability of the insurer.'

Further in his judgment, Lord Goff, made the following remark as to the meaning of the expression 'condition precedent' in the above passage:[41]

'In the case of conditions precedent, the word 'condition' is being used in its classical sense in English law, under which the coming into existence of (for example) an obligation, or the duty

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' I also hold, as was ultimately conceded, that the warranty delimits and is part of the description of the risk and is not of a promissory character. By a warranty of a promissory character I mean a warranty by the assured that a particular state of affairs will exist, breach of which destroys a substratum of the contract and entitles the underwriter to decline to come on risk or, as the case may be, to terminate the risk as from the date of breach. In the marine field 'warranted free from capture and seizure' is a warranty of the former character leaving the contract effective in respect of loss by other perils. 'warranted to sail on or before a particular date' is, however, of a promissory character, breach of which renders the contract voidable. The commercial reasoning behind this legal distinction is clear, namely, that breach of the former type of warranty does not affect the nature or extent of the risks falling outside the terms of the warranty; breach of a promissory warranty may, however, materially affect such risks.'

[40] [1991] 2 Lloyd's Rep 191 at p 202.

[41] *Ibid*, at p 202.

or further duty to perform an obligation, is dependent upon the fulfilment of the specified condition.'

This statement makes clear that Lord Goff employed the expression 'condition precedent' in the contingent sense when ruling that fulfilment of the warranty is a condition precedent to the liability or further liability of the insurer. Accordingly, in an insurance contract before fulfilment of the warranty, no duty arises on the part of the insurer to render the principal performance (promise to indemnify the assured in case of loss) undertaken by him. As mentioned above, under general contract law, sometimes in case of breach of a contingent condition precedent, the injured party, here the insurer, is only justified in refusing to perform for so long as the failure continues.[42] Put another way, breach of a condition precedent may have a suspensive effect in some cases according to construction of the term in question. Whether such an effect exists in this context is a question which may arise. When considering Lord Goff's rule of automatic discharge, it is, in my opinion, not possible to support the presence of such an effect. If the rule of automatic discharge is to be carried to its logical conclusion, the insurer is discharged from liability from the time the warranty is breached unless such breach is later waived. Accordingly, the automatic effect of breach precludes the application of the suspension theory here and once the condition precedent is not fulfilled there is no liability on the part of the insurer.

Despite the fact that no authority has been cited to support the 'condition precedent' analysis in the context of breach of a warranty, Lord Goff might have borrowed this idea from Bramwell, B, in *Jackson* v. *Union Marine Insurance Co Ltd.*[43] In that case, a voyage charterparty was held to be frustrated due to an unreasonable delay in delivering the vessel for the contracted voyage and the charterer was discharged from further performance of his obligations. Bramwell, B, said:[44]

'There are the cases which hold that, where the shipowner has not merely broken his contract, but has also broken it that condition precedent is not performed, the charterer is discharged:...

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[42] See, Chapter 6.2.1.1, at p 193.

[43] (1874) LR 10 CP 125.

[44] *Ibid*, at p 147.

Why? Not merely because the contract is broken. If it is not a condition precedent, what matters is whether it is unperformed with or without excuse? Not arriving with due diligence, or at a day named, is the subject of a cross-action only. But not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract, but discharges the charterer. And so it should, though he has such an excuse that no action lies.'

Accordingly, in a voyage charterparty delivery of the chartered vessel in a reasonable time was held to be a contingent condition precedent to the enforceability of the primary obligations of the charterer. In case of a breach of the condition precedent the remedy is discharge of the charterer from his further obligations.

Lord Goff employed a similar solution for warranties which relate to a period after the attachment of the risk. In this context, fulfilment of the warranty is a contingent condition precedent to the liability of the insurer and in case of breach the remedy is automatic discharge of the insurer from his further liabilities. It is the personal opinion of the author that this analysis is not only logical and consistent with the general principles of general contract law, but also has judicial support. Thus, the Court of Appeal's decision that there is an irreconcilable contradiction between concepts of 'condition precedent' and 'breach of warranty' cannot be supported by any judicial authority. At the same time, the *obiter dictum* of Donaldson, J, in De *Maurier (Jewels) Ltd* v. *Bastion Insurance Co Ltd* which was cited to support the Court of Appeal's decision[45] fails to explain the existence of an irreconcilable contradiction between these two concepts.

When equating the effect of breach of a marine warranty with breach of a condition in general contract law, the Court of Appeal, in the words of Lord Goff[46] was 'led astray by passages in certain books and other texts'. Lord Goff made no further explanation regarding the sources which mis-directed the Court of Appeal. Thus, a careful examination in respect of the books and texts relied on by the Court of Appeal has to be carried out in order to test the accuracy of Lord Goff 's statement.

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[45] *Ibid.*

[46] *Ibid*, p 202.

Two of the books referred to by the Court of Appeal, namely *A Digest of the Law Relating to Marine Insurance* (1st ed. 1901; 2nd ed. 1903) and *The Marine Insurance Act 1906* (1st ed. 1907; with subsequent editions in 1913, 1922 and 1932), were written by Sir Mackenzie Chalmers, one of the co-authors of the draft Bill of the Marine Insurance Act of 1906. In all editions of both books the following commentary appears:

'It is often said that breach of a warranty makes the policy void. But this is not so. A void contract cannot be ratified, but a breach of warranty in insurance law appears to stand on the same footing as the breach of a condition in other branch of contract.'

There is no doubt that the case law and specially the *dictum* of Lord Mansfield in *De Hahn* v. *Hartley*[47] which ruled that a breach of warranty entitled the insurer to repudiate, led Sir Mackenzie when making the above commentary. It definitely reflects the legal position prior to the enactment of the Marine Insurance Act. Also, there are cases decided after the enactment of the Act which held that breach of a non-marine warranty entitled the insurer to repudiate the contract.[48] The judges in those cases simply relied on marine cases decided before the enactment of the Act and made no reference to s 33(3) of the MIA when delivering their judgements.

The question which needs to be raised at this stage is: 'Whether s 33(3) of the MIA 1906 intended to alter the legal position in respect of breach of a warranty which relates to a period after the attachment of the risk?' If the answer is 'Yes', Sir Mackenzie's commentary in the above mentioned books is misleading, since it reflects the position before the enactment of the Act and ignores the new status which was adopted.

The author is of the opinion that the common law position in respect of breach of a warranty was altered by s 33(3) of the MIA 1906. This argument can be supported by considering different provisions of the Act as a whole. Some provisions of the Act

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[47] *Ibid.*

[48] See, *West* v. *National Motor and Accident Insurance Union Ltd* [1955] 1 All ER 800 and *CTN Cash & Carry Ltd* v. *General Accident Fire & Life Assurance Corporation Ltd* [1982] 1 Lloyd's Rep 188.

adopt the use of 'avoidance'. If, for example, the utmost good faith be not observed by either party the contract may be avoided by the other by virtue of s 17. Similarly, if the assured fails to disclose a material fact or makes a material misrepresentation in the course of pre-contract negotiations, the insurer may avoid the contract.[49] A further group of provisions, including s 33(3), on the other hand speaks of discharge from liability.[50] As can be seen, different consequences have been afforded for breach of different provisions of the Act. Therefore, if the parliamentary draftsman had had intentions of retaining the common law position in respect of breach of a warranty, he would have adopted a different wording for s 33(3). Indeed, at one stage during its chequered passage to the statute book,[51] the second sentence of s 33(3) of the Bill read: '...if it be not so complied with, the insurer may avoid the contract.' The fact that s 33(3) was enacted in the present form indicates that the Parliamentary draftsman intended to change the common law position in respect of the effect of breach of warranty. The following speech of Swinfen-Eady LJ, in *Sanday & Co* v. *British & Foreign Marine Insurance Co*[52] in relation to principles of construing a codifying act, also supports the notion that s 33(3) of the Act altered the common law position:

' The proper course is in the first instance to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of law, and not to start with inquiring how the law previously stood.'

Presumably, when the Bill was drafted the intention was to retain the common law position for breach of a warranty and accordingly entitle the insurer to avoid the contract in case of a breach. The final wording of s 33(3), however, made this impossible and Sir Mackenzie paid no attention to this fact when writing the above commentary by relying on the antecedent case law. Accordingly, Lord Goff, was quite accurate to suggest that the Court of Appeal was misled by Sir Mackenzie.

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[49] See, ss 18(1) and 20(1) of the MIA 1906 respectively. See also ss 36(2) and 42(1).

[50] See, s 45(2), for example, which provides that if there is a change of voyage the insurer is discharged from liability as from the time of change. See, also ss 46 and 48.

[51] The Marine Insurance Act of 1906 had been first introduced into Parliament in 1894 and was re-introduced many times thereafter with variations in its language.

[52] [1915] 2 KB 781 at p 786.

The other books cited by the Court of Appeal to support its decision can also be criticised as being 'misleading' in this context. The full title of *MacGillivray and Parkington on Insurance Law*[53] which was quoted by the Court of Appeal is: 'MacGillivray and Parkington on Insurance Law Relating on All Risks Other Than Marine'. It seems that the present editors of this book took only pre-Act non-marine cases, mentioned above,[54] into account and when commenting that breach of warranty entitles the insurer to avoid the policy. Similarly, in *Chitty on Contract*,[55] another book cited by the Court of Appeal, the authority cited[56] does not support the proposition that breach of warranty entitles the assured to avoid the contract.

The reports evaluating different aspects of insurance contracts, namely The Fifth Report of Law Reform Committee, *Conditions and Exceptions in Insurance Policies (1957)* and Law Commission Report, *Insurance Law: Non-Disclosure and Breach of Warranty (Law Com no 104)*, were also cited by the Court of Appeal to support the idea that breach of a marine warranty has the same effect as breach of a condition in contract law. Agreeing with Lord Goff, the author believes that, just like the books cited, these reports are misleading in this context as well. The former refers to the common law position on the effect of breach of a warranty before the enactment of the Marine Insurance Act ignoring the possible effect of s 33(3) of the Act,[57] while the latter cites the books which had already been considered above as misleading.[58]

To sum up, the effect of s 33(3) and accordingly the effect of breach of a marine warranty had been considered neither by high minds from the pantheon on common law purity including Sir Mackenzie Chalmers, nor by academics commenting on the

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[53] 8th ed, 1988, para 790.

[54] *Ibid.*

[55] 25th ed, para 3706. This section appears in para 4250 of the new edition of this book.

[56] *Equitable Life* v. *Reed* [1914] AC 587.

[57] In para 8 of The Fifth Report of the Law Reform Committee on *Conditions and Exceptions in Insurance Policies Cmnd 62,1957, London:HMSO,* Lord Mansfield's *dicta* in *De Hahn* v. *Hartley, ibid* ,was cited as authority when equating breach of a warranty in insurance law with breach of a condition in general contract law.

[58] Paragraph 6.2 of the Law Commission Report on *Insurance Law: Non-Disclosure and Breach of Warranty,Law Com no 104, 1980, London:HMSO,* refers to *MacGillivray and Parkington on Insurance Law* when commenting on the effect of breach of an insurance warranty.

issue for over seventy years. All the commentaries made on the topic were based on the antecedent case law and accordingly, as was accurately stated by Lord Goff, they led the Court of Appeal which relied on them intensively to a wrong path.

Another ground relied on by the Court of Appeal when denying the automatic discharge remedy for breach of a warranty is the 'potential difficulties' that may arise in this context.[59] Citing a foot note from Arnould,[60] the Court of Appeal ruled that the remedy of automatic discharge from the contract would be inconsistent with the insurer's right to waive the breach expressed in s 34(3) of the MIA 1906.

As a strict analysis, a contract which has come to an end cannot be revived by the act of one party alone; revival would require the making of a new contract by both parties. From this point of view, the Court of Appeal's interpretation is accurate since there would be an obvious inconsistency between the concepts of 'termination of contract' and 'waiver of the breach and accordingly revival of the contract by the act of one party'. However, Lord Goff, speaking for the House of Lords, made it clear that the Court of Appeal was wrong when suggesting that the contract comes to an end as a result of breach of warranty[61] He expressed the effect of s 33(3) in the following way:

'Certainly, it [section 33(3)] does not have the effect of avoiding the contract *ab initio*. Nor, strictly speaking, does it have the effect of bringing the contract to an end. It is possible that there may be obligations of the assured under the contract which will survive the discharge of the insurer from liability, as for example a continuing liability to pay a premium. Even if in the result no further obligations rest on either parties, it is not correct to speak of the contract being avoided: and it is, strictly speaking, more accurate to keep to the carefully chosen words in s. 33(3) of the Act, rather than to speak of the contract being brought to an end, though that may be the practical effect.'[62]

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[59] Ibid, at p 653.

[60] Ibid, fn 708.

[61] Ibid, at p 202.

[62] He was, of the opinion that the dicta of the Court of Appeal caused Lord Justice Kerr to express himself in tentative terms about the effect of breach of an insurance warranty in *State Trading Corporation of India Ltd* v. *M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at p 287, where he, *obiter dictum*, said:

'Thus, the correct analysis of breach of warranty in an insurance contract may be that, the consequence of the breach is that the cover ceases to be applicable unless the insurer subsequently

Thus, under the solution adopted by Lord Goff, there is still an opportunity for the insurer to waive the breach, simply because the contract remains on foot after breach, although the insurer is, in theory, discharged from liability.[63]

For all the arguments advanced above, the writer is of the opinion that Lord Goff's interpretation of the effect of s 33(3) is accurate and full of sense. After almost 75 years from the enactment of the Act, finally the effect of breach of warranty in marine insurance has been clarified. The possible ramifications of Lord Goff's *dicta* in the market practice will be considered next.

6.2.3.2 Reflections and Effect of '*The Good Luck*' Litigation in the Market

The automatic discharge rule employed by *The Good Luck* in case of breach of a marine warranty surely will have an impact on the position of the assignee. Under s 50(1) of the Act, a marine policy can be assigned to a third party and s 50(2) provides that in such a case the insurer is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected. Therefore, in cases where the loss is made payable to a third party (eg a mortgagee) and accordingly a claim is made by this person, the insurer could rely on the automatic discharge remedy to free himself from liability, even though he is in no way responsible for the breach. One way of preventing this harsh consequence, from the assignee's point of view, is to incorporate a clause to the contract in the effect that breach of this warranty shall not afford the insurer any defence to a claim made by a mortgagee who has accepted the insurance without knowledge of such breach.[64] Accordingly, after *The Good Luck,* it is advisable for the assignee (specially mortgagee) to insist on a clause of this nature in the hull policy, before the loan is made and the policy is assigned.

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affirms the contract, rather than to treat the occurrence as a breach of the contract by the insured which the insurer subsequently accepts as a wrongful repudiation.'

[63] The effect of *The Good Luck* on the doctrines of waiver and estoppel will be evaluated in detail in the following chapter.

[64] Standard Institute Clauses on Hull include such a clause in respect of the disbursements warranty. See, ITCH (1983) cl 21.2; ITCH (1995) cl 22.2; IVCH (1995) cl 20.2.

In general, it seems that the practice of the insurance market will mainly remain unaffected by *The Good Luck* litigation. Where an underwriter discovers that a breach has taken place without any claim arising, although he is, in theory, discharged from liability automatically, he should still notify the assured that he is minded to regard himself as discharged from liability.[65] If he does not, he runs the risk of waiving the breach or being estopped from relying on the breach. For instance, acceptance of premium after the breach may be considered as waiver or in some cases estoppel depending on the knowledge of the insurer.

Similarly, in cases where a claim is made and the insurer suddenly discovering a previous breach refuses to pay, he will be justified in his refusal, provided of course he has not committed any act since the time of the breach which can be considered as waiver or estoppel. The only difference from the past state of law is the effect of the 'silence' in this context. In the past, when breach of warranty was considered to entitle the insurer to avoid the policy, silence of the insurer for a considerable amount of time after a breach might have been regarded as 'waiver'. However, after *The Good Luck* and adoption of the remedy of automatic discharge, this is not the case anymore. In order to show that breach of warranty has been waived, the assured now has to prove conduct by the insurer which affirms the policy both positively and unequivocally.

Finally, in a case where the breach and claim are simultaneous and are related to one another, in order to reject the claim the insurer still need to notify the assured that he regards himself as discharged and not to commit any act, such as acceptance of premium, which might entitle the assured to claim that the breach has been waived or the insurer has been estopped from relying on the breach.

[65] The situation was exactly the same before *The Good Luck* when breach of an insurance warranty was considered to entitle the insurer to elect to terminate the contract

6.3 MISCELLANEOUS POINTS

6.3.1 A New Contractual Term?

When evaluating Lord Goff's analysis in relation to the effect of s 33(3) in *The Good Luck,* Susan Hodges came to the conclusion that a new hybrid contractual term which is a 'cross' of two contract law concepts, namely 'condition' and 'condition precedent' is inherent in his proposal.[66] According to Hodges, this new hybrid contractual term resembles a 'condition' because breach of it entitles the insurer to refuse to perform or accept performance from the assured and brings the policy to an end in practical terms. It also looks like a 'condition precedent', the breach of which automatically discharges the insurer from liability, without the insurer having to take steps to rescind the contract.

With respect to Hodges, the writer is of the opinion that her analysis is open to a fatal objection. The expression 'condition precedent', as was explained above, is employed in a contingent sense in Lord Goff's judgment. Accordingly, an attempt to find a correlation between a contractual term, namely condition and an event fulfilment of which determines the existence of a contractual obligation is not only a futile exercise, but also illogical. Each of these terms belongs to different categories and Lord Goff's intention when employing the expression 'condition precedent' was simply to show the relation between compliance with a marine warranty and liability of the insurer.[67]

Thus, *The Good Luck* litigation has not created a new hybrid contractual term as was alleged by Susan Hodges. A warranty in marine insurance is unique in nature, but it is not and cannot be a cross of a 'condition' and 'condition precedent'. This unique insurance term has been created by the relevant provisions of the MIA 1906 and some unclear points as to its character were clarified by the analysis of Lord Goff in *The Good Luck.*

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[66] See, Hodges, S, *Law of Marine Insurance*, (Cavendish Publishing, 1996), p 105.

[67] Note that a similar observation does not appear in the new book of the author, *Cases and Materials on Marine Insurance*, (Cavendish Publishing, 1999), which is regarded as the companion of her first book. In this study, a marine warranty is described as a 'promissory condition precedent', at pp 275-6.

6.3.2 Application of Section 33(3) to Breach of the Warranty of Legality Which Requires the Insured Adventure To Be Carried out In A Lawful Manner

As discussed earlier[68], if a marine policy is illegal due to reasons other than illegality of the adventure insured,[69] it is void *ab initio*. Due to the special nature of a marine contract, s 41 of the MIA 1906 imposes an implied warranty of legality in respect of all policies. This warranty is two-fold and requires both the adventure insured to be a lawful one and also the adventure insured to be carried out in a lawful manner so far as the assured can control the matter. If the adventure insured is not a lawful one, the issue is straight forward. In such a case, a warranty which relates to a period before the attachment of the risk is breached and accordingly the risk never attaches.[70] The doubtful issue is the future of a policy where the insured adventure is lawful, but an illegality arises afterwards within the control of the assured. Will the contract be void *ab initio* or the discharge remedy spelt out in s 33(3) be applied here as well? If the discharge remedy applies, this means that the insurer will be under an obligation to indemnify the assured for loss which occurs before such a breach occurs.

It is possible to support the view that the marine insurance contract should be void *ab initio*, as illegality is a concept which involves the notion of public policy. However, the writer is of the opinion that this is not the case. Section 33(3) is drafted to apply to all warranties, whether implied or express and there is nothing in s 41, which regulates the implied warranty of legality, preventing the application of s 33(3) to breach of warranty of legality.[71] Furthermore, holding the whole contract void and accordingly affording no cover for the assured in a case where the illegality arises only at the final stage of an insured voyage, is unfair from the assured's point of view. In such a scenario, the assured would be left unprotected for a period where no illegality was committed either by him or by his servants. Support for this contention can be drawn

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[68] See, p 160.

[69] This is the case, for example, when a marine insurance contract is effected with an enemy alien or with a person who lacks insurable interest.

[70] Section 84(1) of the MIA 1906 precludes the assured from recovery of the premium in such a case.

[71] Section 41 reads as follows:

'There is an implied warranty that the adventure insured is a lawful one, and that, as far as the assured can control the matter, the adventure shall be carried out in a lawful manner.'

from a Canadian case of *James Yachts* v. *Thames & Mersey Marine Insurance Co Ltd and Others*[72] where Rutton, J, [73] had no doubt whatsoever that, pursuant to the equivalent to MIA 1906 s 41, the insurers were to be discharged from liability as the plaintiffs had carried out an unlawful business of boat-building contrary to the bye-laws and regulations of the municipality.

6.3.3 Modification of the Provisions of the Marine Insurance Act In Relation to Effect of Breach of Warranty

Most provisions of the MIA 1906 are regulatory[74] and they can be contracted out of, if the parties agree. For example, s 39(1) of the MIA 1906 imposes an implied warranty of seaworthiness in respect of voyage policies, but almost all cargo policies have express provisions waiving this obligation.[75] Due to the fact that s 33(3) has no connection with the notion of public policy, there is nothing preventing the parties from substituting the automatic discharge remedy spelt out by this sub section with a different one. In fact, this is the case in practice particularly when the market is soft and accordingly the assured is in a better position in terms of negotiating the terms of the contract. Selling hard conditions in a soft market is a difficult thing to do and to a certain extent the insurer could sacrifice the automatic discharge remedy afforded by s 33(3).[76]

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[72] [1977] 1 Lloyd's Rep 206

[73] *Ibid*, at p 212.

[74] Some provisions, on the other hand, relate to public policy grounds and cannot be altered even by agreement of the parties. See, for example, s 4 of the MIA 1906 which regulates wagering or gaming contracts. Provisions of this type in the Act are very rare.

[75] See, cl 5.2 of ICC (Type A, B and C).

[76] For instance, such a modification in the remedy afforded by s 33(3) could be seen in *Martin Maritime Ltd* v. *Provident Capital Indemnity Fund Ltd (The Lydia Flag)* [1998] 2 Lloyd's Rep 652, where the policy provided *inter alia*:

'1. The following are warranties that must be complied with to maintain the insurance in effect. If these warranties are not complied with, the insurance will be suspended until the warranties are complied with. Any claims which occur during any period in which the insurance is suspended for failure to comply with these warranties will not be covered by this insurance.'

6.3.4 Application of the Automatic Discharge Remedy in Non-Marine Insurance

Before *The Good Luck*, following the trend in the decisions of Lord Mansfield, it was held in a number of non-marine cases that breach of a warranty entitled the insurer to elect to terminate the insurance contract. The question here is whether a distinction between marine and non-marine insurance has been created by *The Good Luck* litigation? There are two contradicting opinions in the academic field on the effect of *The Good Luck* on non-marine insurance. Professor Merkin[77] suggests that the consequence for breach of a warranty is now different in marine and non-marine insurance, while Clarke[78] and the present editors of *MacGillivray and Parkington on Insurance Law*[79] are of the opinion that the remedy of automatic discharge adopted by *The Good Luck* applies to both marine and non-marine insurance.

It is the personal opinion of the writer that the remedy of automatic discharge applies to both marine and non-marine insurance. It was a long time ago when the courts first held that breach of an insurance warranty had the same effect in marine and non-marine insurance. In *Thomson* v. *Weems*, Lord Blackburn, *obiter dictum*, said[80]:

'In my opinion, as regards the effect of breach of warranty, the same principles apply whether the insurance be marine or not.'

There is nothing in Lord Goff's judgment to support the view that it was intended to create a distinction between marine and non-marine warranties. On the contrary, their Lordships, intentionally used a broad language and implied that breach of an insurance warranty has the same effect in all areas of insurance law. For instance, at one point, he said:[81]

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[77] *Insurance Law*, (loose leafet), 2.3-27-38.

[78] *Insurance Contract Law*, (3rd ed, LLP, 1997), pp 545-7.

[79] *MacGillivray and Parkington on Insurance Law*, (9th ed, Sweet & Maxwell, 1997), p 249.

[80] *Ibid*, at p 684.

[81] *Ibid*, at p 202.

'... if a promissory warranty is not complied with the insurer is discharged from liability as from the date of breach of warranty... the rationale of warranties in insurance law is that the insurer only accepts the risk provided that the warranty is fulfilled.'

Recently, the Court of Appeal, put a full-stop to this discussion in *Printpak* v. *AGF Insurance Ltd*,[82] where s 33(3) of the MIA 1906 was referred to to state the effect of a non-marine insurance warranty in a commercial inclusive policy. Hirst, LJ, stated:[83]

'It must be remembered that a continuing warranty is a draconian term. As I have noted, the breach of such a warranty produces an automatic cancellation of the cover, [under s 33(3) of the MIA 1906] and the fact that a loss may have no connection at all with the breach is simply irrelevant.'

[82] [1999] 1 Lloyd's Rep 542.

[83] *Ibid*, at p 545.

CHAPTER 7

WAIVER OF BREACH OFMARINE INSURANCE WARRANTIES

INTRODUCTION

'Waiver' is a term which is used loosely to describe a number of legal grounds in all areas of commercial law.[1] In the law of insurance, it is generally used to describe an intentional act which relinquishes a right or privilege otherwise afforded to the insurer.[2] Therefore, the notion of waiver comes into play in insurance law in cases where the insurer is afforded a right or defence either by statute or contract. The MIA 1906, for example, requires the assured to disclose all material facts and not to make material misrepresentation at the negotiation stage of the contract, otherwise the insurer is entitled to avoid the policy.[3] The right of avoidance, which is afforded by the MIA 1906, can always be waived by the insurer. The same is true for marine insurance warranties. A warranty, whether implied or express, imposes some obligations on the part of the assured and in case of its breach the insurer is either prevented from coming on risk or discharged from liability automatically.[4] The commercial realities may require the insurer to waive the breach of warranty and accordingly withdraw a right which is afforded by law.[5] This is spelt out in s 34(3) of the MIA 1906 with the following words: ' A breach of warranty may be waived by the insurer.' Such a waiver may take place in different forms. It can either be accomplished by conduct of the

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[1] The word 'commercial' is used in a general sense to cover not only those areas which fall within the jurisdiction of the commercial court, but also those areas which fall outside that jurisdiction but remain 'commercial' in a loose sense of the word. For the effect and application of the doctrine in different areas of commercial law, such as Agency, Banking, Company, Construction, Employment, Insurance, Sale of Goods and Shipping Law, see Wilken, S & Villiers, T, *Waiver, Variation and Estoppel*, (John Willer & Sons, 1998), pp 393-549.

[2] See, *Hoxie* v. *Howe Insurance Co* (1864) 32 Conn 21.

[3] See, ss 18 and 20 of the MIA 1906.

[4] The former is the case for warranties which relate to a period before the attachment of the risk and the latter is the effect of breach for warranties which relate to a period after the attachment of the risk.

[5] Various factors, such as the intensity of the relation between insurer and assured or the climate in the market, might force the insurer to take such a step.

insurer or an express term of the insurance contract before the breach occurs. Waiver of the breach of warranty is also possible after the loss occurs by an unequivocal representation of the insurer. Alternatively, breach of a warranty may be rendered ineffective by the operation of 'held-covered clauses' which prevents the insurer from relying on a particular breach provided that some conditions are satisfied.

These three forms of waiving breach of warranty will be examined respectively in this chapter. It is intended to clarify the law on this point and identify the problematic areas. In particular, the practical difficulties that may arise in relation to 'held-covered clauses' will be considered. Due to the absence of intensive judicial examination of these clauses, such an exercise is believed to be beneficial both from an academic and practical point of view. Finally, towards the end of the chapter, a further concept known as 'estoppel' will be taken into account. Being a contractual concept, which is highly affected from equity, estoppel has a strong interrelation between the waiver of breach of warranty. The distinction between these two concepts and the elements of estoppel will be evaluated in the light of the case law.

7.1 WAIVER OF MARINE INSURANCE WARRANTIES

7.1.1 Waiver of Breach of Marine Insurance Warranties Before the Breach Is Committed

In some cases, the insurer may agree, prior to a breach of warranty, not to take any action against the assured in the event of any breach by him. This is usually the case for implied warranties, as warranties of this type are included in certain policies by the MIA 1906 regardless of the will of the parties.[6] The ways of waiving breach of a warranty before such a breach occurs will be examined next.

[6] However, waiver of this nature is not unique to implied warranties and it is not unusual to see express warranties being subject to a similar treatment.

7.1.1.1 Waiver of Breach by Conduct

Breach of a warranty may be waived in advance either by an act or statement of the insurer. In either case, such conduct must be unequivocal in the true sense of the word. Put another way, the conduct must be of one construction only, namely that a particular breach of warranty during the currency of the policy will not be relied upon by the insurer. It is a question of fact in each case whether the conduct of the insurer is unequivocal enough to prevent him from relying on a future breach of warranty. For instance, in *Sleigh* v. *Tyser*[7] where the insured vessel was lost due to unseaworthiness which existed when the voyage began, the assured contended that the insurer was precluded from relying on breach of the warranty of seaworthiness since an inspection as to the vessel's carrying capability by the insurer's agent prior to the voyage amounted to waiver of the breach of such a warranty. The court held that such an inspection was merely an extra precaution for the insurer and there was no intention and unequivocal act of the insurer to waive breach of the implied warranty of seaworthiness.[8]

Conversely, in *Samuel & Co Ltd* v. *Dumas*[9] a disbursement warranty required the assured not to effect freight insurance under honour policies in excess of £ 13,730. Insurance for a greater sum was obtained by means of a slip which the hull insurer had itself initialled. The House of Lords did not hesitate to conclude that obtaining extra insurance by the hull insurers was unequivocal conduct, in the sense that it demonstrated an intention not to enforce a potential breach of warranty against the assured.[10]

The issue may be complicated in cases where the agent of the insurer performs an unequivocal conduct amounting to waiver of breach of warranty before such a breach is committed. In such a case, the court must examine whether the agent has authority

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[7] [1900] 2 QB 333

[8] Such an inspection was essential under the terms of the insurance policy.

[9] [1924] AC 431.

[10] See also, *Wier* v. *Abendeen* (1819) 2 B & Ald 320 to the same effect. *Cf Burridge & Son* v. *Haines & Sons Ltd* [1918] 118 LT 681. Note that previous waivers of breach of warranty are not, however, to be taken as authorising future disregard of that warranty; see, for instance, *London & Manchester Plate Glass Co* v. *Heath* [1913] 3 KB 411

to bind his principal in that sense.[11] In *Fellas* v. *Continental Insurance Co*[12] the Supreme Court of British Columbia dealt with such a problem. In that case, the insurance policy contained a locality warranty which prohibited the insured vessel from navigating outside certain 'trading limits' as laid down in the policy. The assured approached the agent and advised him that he wished to use the boat outside the limits. The agent said this would be all right. The insurer only became aware of this conduct of the agent after the vessel was damaged in a storm outside the trading limits. The court allowed the claim of the assured finding that the insurer had held out the agent as having the authority to bind it. Berger, J, said:[13]

'...the [assured] was led to believe that [the agent] had the power to waive the warranty. The policy itself said it was not valid *'unless countersigned by the duly Authorised Representative of the company'*. Facsimiles of the signatures of the president of the company and the secretary appear. Then it says, *'Countersigned at Vancouver BC this 28th day of April, 1970'*. Over the words *'Authorised Representative'*, [the agent's] stamp has been imprinted...

In my view, the company cannot issue a policy to an applicant which on its face declares [the agent] to be its authorised representative, which depends for its validity upon [his] signature, and then turn around and say: [He] was not our agent...'

7.1.1.2 Waiver of Breach by An Express Term

It is a common practice in the insurance market to waive breach of certain implied warranties by an express term incorporated in the insurance contract.[14] The language employed in a term of this type must be *'express, pertinent* and *apposite'* in order to preclude the insurer from relying on breach of warranty.[15]

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[11] The agent might have an actual or ostensible authority in this regard. These terms and their application in this context will later be examined in this chapter.

[12] [1973] ILR 558

[13] *Ibid*, at p 713

[14] Breach of certain express warranties are dealt with by 'held-covered clauses', as will be examined later in this chapter. With these clauses, the insurer is precluded from relying on breach of an express warranty provided immediate notice is given to the insurers and any additional premium required by them is agreed. See, cl 3 of ITCH both the 1983 and 1995 versions and cl 2 of IVCH 1995 version.

[15] See, *Quebec Marine Ins Co* v. *Commercial Bank of Canada* (1870) LR 3 PC 234 at p 243.

Waiving breach of seaworthiness and cargoworthiness which are implied in respect of cargo policies, are usually the main object of a term of this nature. The reason behind this is clear. A cargo policy is effected between the cargo interests[16] and the insurer. Insisting on the implied warranties imposed in respect of certain policies creates injustice from the cargo interests' point of view, as they have usually no means of knowing whether the ship carrying his goods is seaworthy or cargoworthy.

Standard Institute Clauses on cargo, accordingly, waive breach of these warranties with the following wording:[17]

'The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.'

As can be clearly seen, the insurer, with an express term, precludes himself from relying on breach of implied warranties of seaworthiness and cargoworthiness provided that the cargo interests and their servants are not aware of that state of the vessel. Formerly, a different language had been adopted for this clause:[18]

'... the seaworthiness of the vessel as between the assured and the underwriters is hereby admitted.'

It is noted by Arnould[19] that there is a practical difference between the two types of clauses, even though they both intend to waive breach of the implied warranty of seaworthiness. The modern form operates by dispensing the insurer from relying on breach of warranty and in this respect creates a consequence only from the insurer's point of view, while the former is binding on the assured just as much as on the insurer. Accordingly, in the former form, the assured may be barred from relying on the

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[16] This person is either the cargo owner or consignee, depending on the terms of the original sales contract.

[17] See, cl 5.2 of ICC (type A, B and C)

[18] Cl 8 of ICC 1967 version.

[19] *Arnould's Law of Marine Insurance and Average* (16th ed,1981), para 709.

unseaworthiness of the vessel as a step in his claim.[20]

It must be borne in mind that a term worded in a different way from the one in Standard Institute Clauses, may be employed to this end. However, an express term which intends to waive breach of an implied warranty must be consistent with the nature of the contract in question and reflect the intention of the insurer to waive.[21]

7.1.1.3 Waiver of Breach of Warranty by Inchmaree Clause?

An Inchmaree Clause[22] significantly expands the hull insurer's undertaking by specifying coverage for a variety of perils in addition to the ones, eg perils of seas, fire, jettision, piracy, specified in the traditional language of the standard form policy. The Inchmaree Clause which appear in Standard Institute Clauses provide cover for perils some of which are excluded by s 55(2)(c) of the MIA 1906.[23] However, under the

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[20] There is authority to suggest that in cases where the *proximate* cause of the loss is unseaworthiness, a clause which admits the seaworthiness of the vessel would have no effect on the liability of the insurer. The vessel's sinking in these circumstances would be *prima facie* evidence of a loss by perils of the sea. See, *Parfitt* v. *Thompson* (1844) 13 M & W 392, the *dicta* of Pollock, CB, at p 396.

[21] See, *McDermott* v. *National Benefit Life Assurance Co* (1921) 7 LlL Rep 97 where a vessel was insured under a voyage policy which on a cargo form and contained *inter alia* the Institute Cargo Clauses, one of which stated that as between the insurers and the assured it was admitted that the vessel was seaworthy. In fact, the vessel was unseaworthy and became a total loss. Claiming for the loss, the assured contended that the implied warranty of seaworthiness had been waived by the insertion of the clause mentioned above. The insurers maintained that it was merely by an oversight that the clause had not been struck out from the form. It was held by the Court of Appeal (Ireland) that the assured's contention failed, because the Institute Cargo Clauses were solely referable to cargo, and were inapplicable in the present case.

[22] This clause has derived its name from the vessel of the same name in the case of *Thames and Mersey Marine Insurance Co* v. *Hamilton, Fraser and Co, (The Inchmaree)* (1887) 12 AC 484. It is sometimes referred to as the 'Liner Clause' or 'Negligence Clause'.

[23] A typical Inchmaree Clause which appears in standard Institute Clauses (cl 4.2 IVCH (1995) and cl 6.2 ITCH (1995) reads as follows:

'This insurance covers loss of or damage to the subject - matter insured caused by

bursting of boilers breakage of shafts or any latent defect in the machinery or hull

negligence of Master Officers Crew or Pilots

negligence of repairers or charteres provided such repairers or charterers are not an Assured hereunder

barratry of Master Officers or Crew

contact with aircraft, helicopters or similar objects, or objects falling therefrom

provided such loss or damage has not resulted from want of due diligence by the Assured, Owners, Managers or Superintendents or any of their onshore management.'

Inchmaree Clause any loss caused by a lack of due diligence on the part of the assured or his servants is excluded from coverage.[24]

The Inchmaree Clause, amongst other perils, provides cover for loss of or damage to the insured property directly caused by latent defect in machinery or hull. Arnould, citing a number of American cases,[25] suggests that in a case where damage was occasioned by a latent defect whose existence also constituted a breach of warranty of seaworthiness, which is implied in respect of voyage policies, the underwriter cannot rely on breach of warranty to deny liability. Put another way, in so far as unseaworthiness is covered by this clause, the express coverage must prevail over the implied warranty and that an underwriter cannot, therefore, rely on a latent defect as breach of the warranty of seaworthiness. An alternative view could be that the Inchmaree Clause and implied warranty of seaworthiness are two distinct concepts with different objects. The former determines the extent of the insurer's liability, while the latter illustrates the obligations of the assured. The way to reconcile these two concepts is allowing the assured to recover in cases where a latent defect, which also constitutes unseaworthiness, causes a loss; provided that such defect comes into operation after the commencement of voyage. In such a case, even though the latent defect renders the vessel unseaworthy, this has no effect on the implied warranty of seaworthiness because there is no continuing duty of maintaining the insured vessel in a seaworthy state after the voyage commences.

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[24] The former version of this clause (1983 version) was worded differently from the present one. Under the 1983 version, only the assured, owners or managers have been made subject to the due diligence provision, while this has been extended to the superintendents and their on-shore managements by the present version. This change could certainly be explained by the insurer's increased concern regarding standards of management in the light of total loss claims in which poor maintenance of the vessel was a contributing factor.

[25] Arnould, *ibid*, para 710. The cases cited in support are: *Ferrante* v. *Detroit Fire & Marine Insurance Co* [1954] AMC 2026; *Tropical Marine Products Inc* v. *Birmingham Fire Ins Co of Pa (The Sea Pak)* [1957] AMC 616; *Saskatchewan Government Insurance Office* v. *Spot Pack Inc* [1957] AMC 655; *Founders' Insurance Co* v. *Rogers* [1963] AMC 116; *Larsen* v. *Insurance Co of N America* [1965] AMC 2576; *Presti* v. *Firemen's Insurance Co* [1972] AMC 1220; *Parente* v. *Bayville Marine Inc* [1975] 1 Lloyd's Rep 333; *Capital Coastal Shipping Corporation* v. *Hartford Fire Insurance Co (The Cristie)* [1975] 2 Lloyd's Rep 100; *Joseph Navigation Corpn* v. *Chester* [1976] AMC 1565. More recently, in *Thanh Long Partnership* v. *Highlands Insurance Co* 32 F 3d 189 (5th Cir 1994), the United States Court of Appeals for the Fifth Circuit, discussed the overriding effect of the Inchmaree Clause over the implied warranty of seaworthiness and reached the conclusion that the Clause could entitle the assure to recover in cases where the warranty is breched provided of course the assured or his employees do not demonstrate a lack of due diligence.

There is, however, evidence to the effect that Arnould's opinion has found support in English courts recently. In *Martin Maritime Ltd* v. *Provident Capital Indemnity Fund Ltd (The Lydia Flag)*,[26] the vessel was insured under a policy incorporating the ITCH which contained an Inchmaree Clause:

' 6.1 This insurance covers loss of or damage to the subject matter insured caused by...
6.2.4 Negligence of repairers...
Provided such loss or damage has not resulted from want of due diligence by the assured...'

Although, the policy in question was a time policy, an express warranty of seaworthiness was included with the following wording:

' 11 Warranted that at the inception of this policy the vessel... shall be in a seaworthy condition and thereafter during the valid period of this policy the insured shall exercise due diligence to keep the vessel seaworthy...'

In August 1996, the insured vessel lost her rudder at Abidjan and sustained damage. It was common ground that the cause of loss was the negligence of ship repairers who had previously dismantled her rudder in dry dock in Piraeus in December 1995 in order to examine the tail shaft. When the assured claimed on the policy under the Inchmaree Clause, the insurers refused liability on the basis that, at the time of the inception of the policy in question, the vessel had been unseaworthy and, therefore, the assured was in breach of the express warranty.

The evidence showed that the vessel was unseaworthy due to negligence of the repairers and this meant breach of the express warranty of seaworthiness. Accordingly, the insurer could only have been liable, had the Inchmaree Clause overridden the express warranty. The judge, Moore-Bick, J, gave judgment in favour of the assured. He was of the opinion that the correct way of interpreting the Inchmaree Clause was that it provided exceptions to the express warranty of seaworthiness and the cover could only have been lost, had unseaworthiness resulted from want of due diligence on

[26] [1998] 2 Lloyd's Rep 652, hereinafter referred to as *The Lydia Flag*.

the part of owners or managers. This was not the case, accordingly the insurers were entitled to recover.[27]

Certain points need to be made in relation to this judgment. First, it is clear that not only latent defect, as suggested by Arnould, but also other perils insured under the Inchmaree Clause have priority over the warranty of seaworthiness. Moore-Bick, J, described the scope of such an Inchmaree Clause in the following way:[28]

'In this case, it is accepted that the loss of the rudder was caused by negligence on the part of the repairers. It could just as well, of course, have been caused by some latent defect in the mechanism securing the rudder to the rudder stock. One would be suprised to find that, having taking insurance of this kind and the vessel being unseaworthy by reason of a latent defect at the inception of the policy, the owners would be completely without cover if the vessel was lost as a result, for example, of a collision with another vessel for which no fault could be attached to the owners of the vessel simply because there was a latent defect which had not in any way contributed to the casualty.'

Second, the warranty in *The Lydia Flag* was specially incorporated into the time policy and accordingly comments of Moore-Bick, J, were made in reference to an express warranty of seaworthiness in a time policy. However, as discussed in earlier parts of the thesis, unless otherwise stated expressly there is no distinction in the rules which apply to express and implied warranties. Section 34(3) which regulates waiver of breach of warranty does not make any distinction between express and implied warranties and apply to both equally. Thus, it can be argued that the judgment delivered in *The Lydia Flag*, which has the effect of waiving breach of warranty, is applicable to the implied warranty of seaworthiness. By the same token, it is possible to argue that breach of other express warranties, eg locality warranty, could be rendered ineffective by the Inchmaree Clause. For instance, if the insured vessel

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[27] Moore-Bick, J, said, *ibid*, at p 656:

' In my judgment the only sensible way in which to read these clauses together is in the way suggested by [the assured] and in those circumstances I am satisfied that cover is not lost in so far as the vessel may be unseaworthy at the inception of the policy as a result of latent defect or negligence, as in this case, of repairers, provided of course that unseaworthiness has not resulted from want of due diligence on the part of the owners or managers.'

[28] *Ibid*, p 655.

navigates to an area in breach of a locality warranty and this is occasioned by negligence of the master, the insurance cover is not affected. The reason for this is that the risk covered by the Inchmaree Clause, negligence of master, is regarded as an exception to the express warranty of locality.

Finally, the author is of the opinion that further legal debate is essential in order to clarify the inter-relation between the Inchmaree Clause and marine insurance warranties. The law, as it stands, suggests that the Inchmaree Clause has the ability of waiving breach of warranty in many cases. This consequence had not been foreseen earlier and surely has an impact on the balance between the assured and insurer. In this respect, it will not be a suprise to see an attempt coming from the insurers in the coming years to restrict the wording of the Inchmaree Clause.

7.1.2 Waiver of Breach of Marine Insurance Warranties After the Breach Is Committed

7.1.2.1 Legal Position in the Light of '*The Good Luck*' (A Dramatic Change in the Law?)

After a warranty is breached, depending on its nature, the insurer is either discharged from liability or precluded from coming on risk. The MIA 1906 s 34(3) gives the insurer an opportunity to waive the breach even after it is committed. In this context, election of the insurer and waiver are intimately linked[29] so that 'the consequence of the election, if established, is the abandonment, eg the waiver, of a right.'[30]

Some selective academics commenting on the issue, support the view that the legal position in relation to waiver by election has been changed dramatically after *The Good Luck*. Both Clarke and the present editors of *MacGillvray and Parkington on Insurance Law*,[31] are of the opinion that the remedy of automatic discharge employed

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[29] *Van Schalkwyk* v. *Griesel* 1948 (1) SA 460, per Tindall, JA, at p 463

[30] *China National Foreign Trade Transportation Corporation* v. *Evlogia Shipping Co SA of Panama* [1979] 1 WLR 1018, per Lord Searmam, at p 1034.

[31] The general editor is Nicholas Legh-Jones and the other editors are: Sir Andrew Longmore, John Birds and David Owen.

in *The Good Luck* by Lord Goff makes it impossible to apply waiver by election in the context of breach of warranty. An assured who wishes to contend that the insurer has waived a breach of warranty, according to these commentators, must establish waiver by estoppel which invariably means equitable estoppel.[32] Both rely on different grounds to support their argument. Clarke argues that waiver by election cannot be applied, as breach of warranty by the assured automatically terminates the contract.[33] It is submitted by the present editors of *MacGillivray and Parkington*, on the other hand, that waiver by election is not applicable in this context simply because by the occurrence of the breach the insurer is automatically discharged from liability and accordingly he cannot be put to any election.[34]

When the judgment of Lord Goff in *The Good Luck* is considered, it can clearly be seen that Clarke's argument cannot be supported by any means. It has been expressly emphasised by Lord Goff on numerous occasions that breach of warranty does not have the effect of terminating the contract.[35]

Being a more consistent one, the writer believes that the argument of the present editors of *MacGillivray and Parkington* can be challenged as well. Admittedly, after *The Good Luck*, the remedy of automatic discharge afforded for breach of warranty, if operated, does not require the insurer to make any election. However, the insurer is still put to an election whether to rely on this defence or not. It is after his decision to rely on this defence that the remedy of automatic discharge bites. Put another way, the subject-matter of a possible waiver by election is a particular defence to a claim against the insurer, namely breach of warranty, which would otherwise be available to him. In this respect, the insurer is still put to an election whether to waive this defence afforded to him by the Act or not. If he elects not to waive this defence, all he has to do is to

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[32] Meaning of this concept and its interrelation between waiver by election will later be discussed, at chapter 7.2 at p 251.

[33] See, Clarke, *Law of Insurance Contracts*, (3rd ed, Sweet & Maxwell, 1997), p 548.

[34] See, *MacGillivray and Parkington on Insurance Law*, (9th ed, Sweet & Maxwell, 1997), at p 254.

[35] See the previous chapter, specially the part on Justification of The House of Lord's Decision in *The Good Luck* at p 201. See also, the *dicta* of Lord Goff on this issue in *The Good Luck* [1991] 2 Lloyd's Rep 191 at pp 202-03. More recently, the Court of Appeal in a non-marine case, *Printpak* v. *AGF Insurance Ltd* [1999] Lloyd's Rep 542, expressed once again that breach of warranty does not terminate the contract but produces an automatic cancellation of cover

state his intention to this end and the law will hold him as 'discharged from liability from the date of breach.' Conversely, he may elect to waive the breach and perform an unequivocal act to this end.

Furthermore, nothing in *The Good Luck* suggests that their Lordships intended to erode the plain words of s 34(3) which states that breach of warranty may be waived by the insurer. Conversely, in his judgment, Lord Goff, referring to this sub-section said:[36]

'When, as s. 34(3) contemplates, the insurer waives a breach of a promissory warranty, the effect is that, to the extent of the waiver, the insurer cannot rely upon the breach as having discharged him from liability.'

To sum up, it is the author's opinion that there is nothing in Lord Goff's judgment which makes it impossible to waive breach of a warranty by election after the breach is committed. The law stands as it was, and the doctrine of estoppel, which will be examined later, remains a distinct but related topic.[37]

7.1.2.2 Elements of Waiver of Breach of Warranty by Election

Lord Goff summarised the elements of waiver by election, in a general sense, *in Motor Oil Hellas (Corinth) Refineries SA* v. *Shipping Corporation of India (The*

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[36] *Ibid*, at p 202.

[37] Recently, in *J Kirkaldy & Sons Ltd* v. *Walker* [1999] CLC 722, Longmore, J, adopting the view advocated in Clarke, *Law of Insurance Contracts*, and *MacGillivray and Parkington on Insurance Law* held that the doctrine of waiver had no application after *The Good Luck* and the assured needed to rely on the doctrine of waiver by estoppel. He said, at p 737, *ibid*,:

' Section 33 of the Marine Insurance Act provides for the insurer to be discharged from liability as from the date of breach of warranty. It is, therefore, apparent that no question of election arises although by s 34(3) the insurers may waive the breach. Since the breach of warranty does not give rise to any election by the insurer, eg to choose to keep the contract on foot, the doctrine of waiver by election has no application.'

The judgment of Longmore, J, simply repeats the views discussed above and adds nothing to the debate on this point. The author believes that this case is wrongly decided and contradicts the *dicta* of Lord Goff highlighted above. Also, when analysing whether the insurer has been estopped from relying on the breach of warranty defence, Longmore, J, focused mainly on the 'lack of knowledge' of breach of the insurer, *ibid*, at p 737. However, as will be examined later, knowledge of breach on the part of the insurer is not an essential element in the application of the equitable doctrine of estoppel.

Kanchenjunga)[38] with the following speech:[39]

'In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him- for example, to determine a contract or alternatively to affirm it- he is held to have made his election accordingly... It can be communicated to the other party by words or by conduct, though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms...'[40]

Applying this to the insurance context, it can be concluded that, breach of a warranty can be waived, after it is committed, with an unequivocal representation of the insurer who has knowledge of such breach. It is important to note that both of these elements must be present. Thus, even if there is a presentation of the most unequivocal kind if there is nothing to suggest that the insurer possessed the appropriate knowledge, there will be no waiver.[41]

7.1.2.2.1 Unequivocal Representation of the Insurer

The first element of waiver of breach of a marine warranty by election is an unequivocal representation made by the insurer to this end. The clearest scenario is that the insurer, after learning of the breach, gives a notice to the assured stating that he has waived the breach or he will not take the breach into account. However, the insurer's waiver does not have to be orally communicated to the assured. Provided that there has been an election, a waiver by election can be implied from the insurer's conduct. Accordingly, in cases where the insurer adopts a course of conduct which is

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[38] [1990] 1 Lloyd's Rep 391.

[39] *Ibid*, at p 398.

[40] A similar analysis was also carried out by Lord Diplock in *Kammins Ballroom Co* v. *Zenith Investments* [1971] AC 850.

[41] See, *Samuel & Co Ltd* v. *Dumas, ibid,* per Lord Sumner, at p 483. In such a case, the assured might allege that the insurer has been estopped from relying on the breach provided some other conditions, which will later be discussed at chapter 7.2 at p 251, exist.

inconsistent with the exercise of the right of automatic discharge, he will be held to have waived the breach.[42]

An attempt to evaluate all the possible conduct of the insurer which may amount to an unequivocal representation is a futile exercise, as it may vary according to the nature of the insurance practice between the parties and the facts of each case. It is, however, quite useful to refer to the case law to see what conduct of the insurer was held to be sufficient by the judges to amount to an unequivocal representation and which was not. Such an analysis may give an idea about the position in legal practice. In this context, first of all, the conduct of the insurer in relation to the premium must be considered. Assessing the premium payable by the insurer after a warranty which relates to a period before the attachment of the risk (eg neutrality) is breached, may amount to such conduct.[43] Similarly, if the insurer accepts the premium which falls due after the occurrence of the breach, this is inconsistent with a wish to treat the breach as discharging his liability and will be regarded as an implied representation that he will not exercise his right of automatic discharge.[44] Note, however, that acceptance of a premium by the insurer which fell due or was earned before the breach should not amount to an unequivocal representation on his part that he waives the breach of warranty. Although there is no authority on this point, it is obvious that such conduct shows no intention that the insurer intended to keep the insurance relation on foot. He is simply collecting a payment which was due at a period when the contract was in force to the fullest extent. In many cases, where a warranty which relates to a period

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[42] The requirements for conduct of this nature has been explored by Phillips, J, in *Youell & Ors* v. *Bland Welch & Co Ltd (The 'Superhulls Cover' case) (No 2)* [1990] 2 Lloyd's Rep 431 at p 450:

'Such a course of conduct will only constitute a representation that he will not exercise the right if the circumstances are such to suggest as either that he was aware of the right when he embarked on the course of conduct inconsistent with it or that he was content to abandon any rights that he might enjoy which were inconsistent with that course of conduct.'

[43] *Beatty* v. *Mutual Reserve Fund Life Association* 75 F 65 and *Phoenix Mutual Life Insurance Co* v. *Raddin* 120 US 183.

[44] *Holdsworth* v. *Lancashire & Yorkshire Fire Ins Co* (1907) 23 TLR 521. For breach of a non-marine warranty, see, *Wing* v. *Harvey* (1845) 5 DEG & M 265; *Hemmings* v. *Sceptre Life Ass Ltd* [1905] 1 Ch 365; *Armstrong* v. *Turquand* [1858] 9 Ir CL Rep 32; *General Accident* v. *Campbell* (1925) 25 LIL Rep 151.

before the attachment of the risk is breached; the issue of the policy by the insurer will be an unequivocal act sufficient to found a waiver.[45]

Conversely, in English law, an insurer's rejection of a claim by the assured under the policy on a particular ground will not generally amount to waiver of his right to resist the assured's claim on other grounds. Accordingly, if an insurer resists a claim on the basis of breach of the duty of good faith, but fails on that allegation at trial, it will be permitted to resist the assured's claim on the basis of breach of a warranty.[46]

Therefore, the insurer must be extremely careful and avoid certain types of conduct after the breach of warranty has occurred, as it may amount to an unequivocal representation which prevents him from relying on breach of warranty. In order to reduce this risk, it is quite common to introduce 'non-waiver clauses' in insurance contracts. Clauses of this type provide that certain conduct of the insurer or in some cases the assured would not mean waiver of a certain right. Clause 17 of the ICC (Type A, B and C) is a clause of this type and provides that measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.[47] 'Non-waiver clauses' can be drafted widely enough to assist the insurer in case of breach of warranty as well. This is usually the case in P&I practice. The following is a 'non-waiver clause' which appears in most Club Rules:

'No act, omission, course of dealing, forbearance, delay or indulgence by the club in enforcing any of the Club Rules or any of the terms or conditions of its contracts with members nor any granting of time by the club shall prejudice or affect the rights and remedies of the club under the Club Rules or under such contracts, and no such matter shall be treated as any evidence of

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[45] See, *Sulphite Pulp Co Ltd* v. *Faber & Another* (1895) 1 Com Cas 143 per Lord Russel, CJ, at p 153. For a more recent authority on this point see, *Svenska Handelsbanken* v. *Sun Alliance and London Assurance plc* [1996] 1 Lloyd's Rep 519 per Rix, J, at p 569. *Cf Morrison* v. *Universal Marine Ins Co* (1872) LR 8 Ex 197, where Honyman J, held that the issue of a policy after the discovery of a non-disclosure did not amount to waiver.

[46] *Welch* v. *Royal Exchange Assurance* [1939] 1 KB 294.

[47] For clauses to similar effect see, Institute War Clauses (Cargo) cl 12 and Institute Strikes Clauses (Cargo) cl 12.

waiver of the club's rights thereunder, nor shall any waiver of any breach by a member of Club Rules or contracts operate as a waiver of any subsequent breach thereof .'

Thus, if the club requires a contribution from its member[48] after one of the vessels owned by him has committed breach of a club warranty, this would not mean waiver of that particular breach in the light of the clause mentioned above. Similarly, in cases where the Club grants a letter of security to release the vessel from arrest, this will not mean that the club has waived its right to rely on breach of a warranty committed by that particular vessel before it was arrested.[49]

There is nothing preventing the insurers from inserting a non-waiver clause in a hull policy which states that certain acts or conduct of the insurer will not amount to waiver of breach of warranty. It must, however, be borne in mind that clauses of this nature must be drafted as clearly as possible and care must be taken to avoid any ambiguity. The reason for this is that in case of an ambiguity the *contra proferentem* rule may require these kind of clauses to be construed against the insurer.

There is authority to suggest that silence or delay to act after a warranty is breached could constitute a sufficiently unequivocal representation so as to found waiver.[50] However, these decisions were delivered at a time when it was thought that a positive act of repudiation might be required before insurers could take advantage of a breach

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[48] In P&I practice, instead of charging a premium a system of levying calls is applied. Each member pays an advance call which is calculated according to the tonnage of his vessels entered in the club. Advance calls, although announced at the beginning of each policy year, are made payable by most clubs by instalments during the year. Club rules, invariably, give the power of levying supplementary, or additional calls, to the committee of directors who also decide upon the percentage to be applied to the advance call which will be the level of supplementary call. The directors ask for supplementary calls from the members, if the claims made by members during that policy year exceed the amount of advance calls which have been collected ahead.

[49] One of the most popular facilities afforded by P&I clubs is their assistance in securing the release of arrested vessels entered in the club. The furnishing of a club letter of undertaking or guarantee is not automatic, nor is it free of conditions. Clubs have adopted certain rules in order to safeguard themselves from having this facility abused. Generally speaking, the following conditions must be satisfied in order to grant a letter of security: *a-* The vessel must be an entered vessel *b-* The claim must be part of the club' s cover *c-* The calls must be paid fully by the member *d-A* counter-security must be provided by the member, if required by the club. For more information on these points, see, Hazelwood, SJ, *P&I Clubs Law and Practice*, (2nd ed, LLP Ltd, 1994), pp 251-265.

[50] See, *Allen* v. *Robles (Compagnie Parisiene de Garantie, Third Party)* [1969] 1 WLR 1193 and *Wahbe Tamari & Sons and Jaffa Trading Co* v. *Colprogenca - Socidade General de Fibras Gabes e Products Colonial Ltd* [1969] 2 Lloyd's Rep 18.

of a warranty.[51] After the adoption of the remedy of automatic discharge *The Good Luck*, it can be concluded that these cases are not good law any more. The insurer is now, at least in theory, automatically discharged from liability in case of breach of a warranty and his silence or failure to act shows that he has elected to rely on the defence afforded to him and has no intentions of waiving this remedy.[52]

In the modern commercial arena, the insurer is invariably a corporate entity which consists of different natural persons in its structure. Further complexities are added when the insurer company appoints another individual or company as its agent to deal with different aspects of insurance practice. In this context, whose act or conduct will be considered as the act or conduct of the insurer? Put another way, if one of the employees of the insurer issues a policy with knowledge of breach of a warranty which relates to a period before the attachment of the risk, will this conduct amount to an unequivocal representation on the part of the insurer? The answer to this question can be given by a close examination of the actual and intended relationship between the insurer and his agent. If the agent has an actual or ostensible authority,[53] he is acting as the insurer when making the unequivocal representation.[54] In other words, the courts are faced with the difficult task of spelling out the extent of the authority of the agent from the facts of the case. In cases, for example, where an agent has authority to receive the premium on behalf of the insurance company, the acceptance of the premium by the agent after a warranty which relates to a period before the attachment

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[51] At that period, breach of a marine warranty was equated with breach of a condition in general contract law.

[52] However, it should be noted that silence or delay to react after breach of a warranty could be costly for the insurer, as he might perform an act, eg accepting payment of a premium which is due after the breach, which amounts to an unequivocal presentation to waive the breach. Accordingly, it is advisable for the insurer to give notice and state his intention of discharging himself from liability, as soon as he becomes aware of the breach.

[53] Ostensible authority is described by Diplock, LJ, in *Freeman & Lockyer* v. *Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at p 503 as: ' a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent authority' so as to render the principal liable to perform any obligations imposed upon him by such a contract.'

Accordingly, the ostensible authority can arise from either an express oral or written representation or by the principal's conduct on which the third party must have relied or have been induced to act to it detriment.

[54] See, *Houghton & Co* v. *Northard Lowe & Wills* [1928] AC 1.

of the risk is breached, will be considered as an unequivocal conduct made by the insurance company.[55] The reason for this is that the assured relies on the ostensible authority of the agent in such a case. By the same token, despite the lack of any authority on this point, an agent who has authority to settle claims may be considered as having ostensible authority to make an unequivocal representation which may amount to waiver of breach of warranty by the insurer.[56]

7.1.2.2.2 Knowledge of the Insurer

The second element for waiver of breach of a warranty by election is the knowledge of the breach by the insurer. The requirement of knowledge is separate and distinct from the need for an unequivocal representation and as a matter of analysis, even the most unequivocal representation will not allow the court to find that there was a waiver by the insurer absent the requisite knowledge.[57]

In certain cases, constructive knowledge of the insurer about the breach will be sufficient and he does not have to be actually aware of the assured's breach. This is the case when the insurer has information which if investigated would lead him to discover the breach.[58] For instance, say the insured vessel in breach of a locality warranty became a constructive total loss and the assured gave a notice of abandonment stating the location where the vessel sustained the damage. In such a case, the insurer is deemed to have the appropriate knowledge of the breach of a warranty and if he makes an unequivocal representation, such as accepting the notice this amounts to a waiver of the breach.

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[55] See, *Wing* v. *Harvey, ibid* and *Ayery* v. *British Legal and United Provident Assurance Co Ltd* [1918] 1 KB 136.

[56] Note that the agent's authority can be restricted by provisions in the policy, such as 'no warranty can be waived except in writing signed by the secretary'. In such a case the assured is put on notice as to the lack of authority of the company's agent to waive breaches of warranty, and he cannot plead ostensible authority when his policy tells him the true state of affairs. See, *O'Brien* v. *Prescott Insurance Co Ltd,* 134 NYS 28; *Levy* v. *Scottish Employer's Insurance* (1901) 17 TLR 229.

[57] As will later examined, in such a case the assured may allege that the insurer has been estopped from relying on the breach provided of course some other conditions are satisfied.

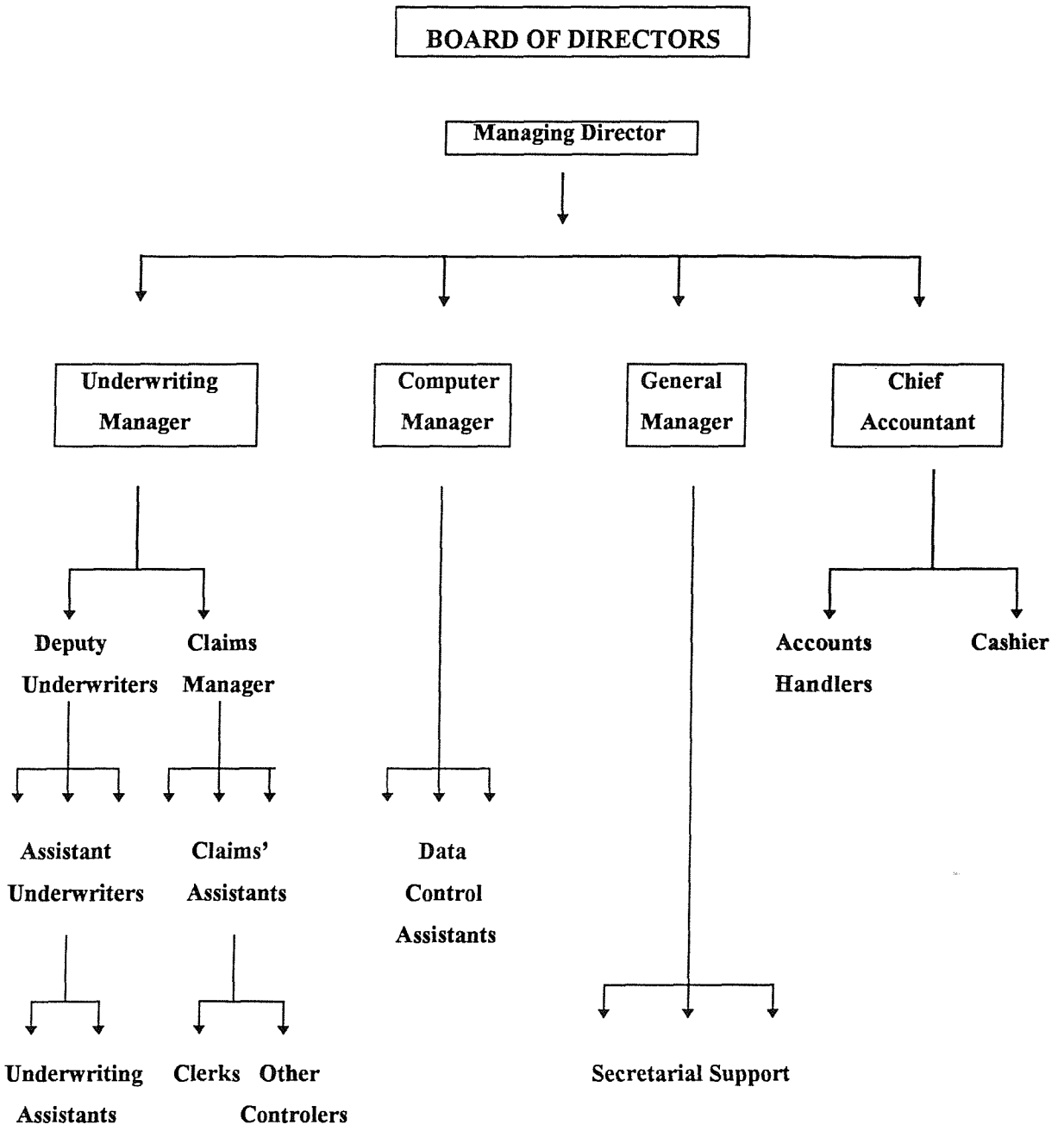
[58] See, *Busteed* v. *West of England Fire and Life Insurance Co* (1957) 5 Ir Ch R 553; *Phillips* v. *Grant River Farmers' Mutual Fire Insurance Co* 46 UCR 334; *Locker & Woolf* v. *W Australian Insurance Co* [1936] 1 KB 408.

Here again, a further problem may arise where the structure of the insurer's corporation is complicated. Whose knowledge within the insurer's organisation will be considered as the knowledge of the insurer? In the light of Lord Hoffmann's *dicta* in *Meridian Global Funds Management Asia Ltd* v. *The Securities Commission*[59] the courts, in each case must fashion a special rule of attribution to determine whose knowledge is for this purpose intended to count as the act of the company. Accordingly, the general principles of agency and company law will be helpful in deciding whether or not the insurer is fixed with knowledge of breach of a warranty.

It is the intention of the rest of this part to evaluate whose knowledge within the insurer's corporation amounts to the knowledge of the insurer. There is no standard company organisational structure for London insurance companies, but one possible structure for a medium sized insurance company will be taken into account and illustrations will be made on this model. Diagram 1, shows the organisational structure of a medium sized insurance company operates in London. This mythical company has been produced as a result of consultation with underwriters and brokers who operate in the London insurance market.

[59] [1995] 3 WLR 413 at p 419.

Diagram 1



Managing director is at the head of the company and reports to the company's board of directors. The underwriting manager is normally responsible for co-ordinating the underwriting and claims function. The underwriting manager has a team, or teams, of individuals who underwrite and administer the underwriting sections. Underwriting

authority is usually delegated to deputy and assistant underwriters. The size of underwriting team(s) is dependent on the amount of premium income being generated within the company. In smaller organisations, the underwriting team may consist of one underwriter who considers all types and classes of business, assisted by one deputy and one underwriting assistant. The claims department is responsible for the agreement or rejection of claims. The computer services department, headed by the computer manager, is involved in underwriting information management, accounts processing and retrocession management. The general manager has a roving brief within a company, with specific responsibility for personnel and legal and secretarial matters. The accounting department not only deals with the co-ordination, control and processing activity of premiums and claims but also handles the financial collection and settlement of technical transactions.

In such an organisational structure, three departments, namely underwriting, claims and computer department, and the managing director are likely to have knowledge of breach of warranty. It is a question of fact to determine in each case whether the individual's knowledge is attributable to the company. There is little doubt that the knowledge of the managing director, underwriting manager and computer manager in relation to breach of warranty is attributable to the knowledge of the company. Under the *dicta* of Lord Hoffmann, knowledge of breach of a warranty of a senior employee who work in any of these departments, eg deputy underwriter, claims manager, assistant underwriters, claims' assistant and data control assistants, could be imputed to the insurer company, unless the company can show that the employee had no involvement with the principal's affairs in that regard[60] or in that transaction[61] or the information was received by the employee or director in another capacity.[62] In other words, the court must examine whether the employee who has knowledge of the breach of a warranty is authorised to deal with a particular transaction and therefore able to appreciate the significance of the information. If answers to these questions are

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[60] See, *Re Carew's Estate Act (No2)* 54 ER 1051; *Bank of Ireland* v. *Cogry Spinning Co* [1900] 1 IR 219.

[61] See, *Re Peruvian Ryls Co* v. *Thames & Mersey Marine Ins Co* [1867] 2 Ch App 617 and *Powles* v. *Page* (1846) 3 CB 16.

[62] See, *Welsbach Incandescent Gas Lighting Co* v. *New Sunshine Incandesent Co* [1900] 2 Ch 1.

positive then knowledge of the individual about breach of warranty is the knowledge of the insurance company.[63] Conversely, in cases where knowledge is passed on to the insurer's clerks[64] or to someone who is unable to 'appreciate its significance', then the insurer will not be fixed with that person's knowledge[65].

In cases where the company appoints agents, eg either individual or companies, to carry out business on its behalf, their knowledge in relation to breach of warranty could also be attributable to the principal company depending on the authority of the agent and its position in the insurer's organisation. The greater general authority that particular agent has, the more likely it is that its knowledge on breach of warranty will be attributable to the insurer company. Accordingly, if the agent is the sole representative of the insurer company in a particular area then there is a high possibility that the insurer company will be fixed with its knowledge.[66] By way of contrast, if the agent does not have authority 'to grant policies', the insurer company will usually not be fixed with the agent's knowledge.[67]

It must be borne in mind that in all the cases mentioned above, once the appropriate person has been fixed with knowledge of the breach of a warranty, a subsequent breakdown in communication will not prevent the insurer from being held to have learned of that breach.[68] Similarly, the insurer will not be fixed with knowledge of the agent's own dishonesty.[69] Nor, will the insurer be fixed with any knowledge of the

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[63] *Evans* v. *Employers' Mutual Insurance Association Ltd* [1936] 1 KB 505.

[64] *Houghton & Co* v. *Nothard Lowe & Wills, ibid.*

[65] *Mahli* v. *Abbey Life Insurance* [1995] Re LR 305, per Rose, LJ, at p 309.

[66] *Farquharson* v. *Pearl Assurance Co Ltd* [1937] 3 All ER 124.

[67] *Lindford* v. *Provincial Horse and Cattle Insurance Co* (1864) 34 Beav 291.

[68] *Blackburn Lowe & Co* v. *Vigors* (1887) 12 App Cas 531.

[69] *PCW Syndicates* v. *PCW Reinsurers* [1996] 1 Lloyd's Rep 241 per Staughton, LJ, at p 254.

agent relevant to the commission of a fraud against the insurer by that agent.[70]

As a final point, it is not necessary that the relevant information as to breach of a warranty should have been received directly by the same employee or official company whose unequivocal representation is relied upon as constituting a waiver.[71] Accordingly, there is waiver of breach of a warranty by election in cases where the knowledge of breach is received by underwriting manager of the insurance company and an unequivocal representation is performed by another unit, say claims' assistants of the company.

7.1.3 Held Covered Clauses

7.1.3.1 Introduction

The reason for incorporating an express warranty into a marine policy is to give the insurer an opportunity to assess the extent of the risk he is insuring. As breach of warranty has the effect of altering this risk, the insurer is discharged automatically from liability in such a case. Due to the commercial necessities, the insurer may be willing to provide insurance cover even after the warranty is breached, provided the essential arrangements as to premium or otherwise are made so that the altered risk may be properly underwritten. This is achieved by the use of held covered clauses, which are usually, but not invariably drafted subject to two conditions: that immediate notice be given to the insurer and that any variation in conditions or additional premium be agreed.[72] Thus, with these clauses, the insurer agrees, prior to a breach of warranty,

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[70] *Belmont Finance Corporation Ltd* v. *Williams Furniture Ltd* [1979] Ch 250, per Buckley, LJ, at p 261-62. Recently, in *Arab Bank plc* v. *Zurich Insurance Co* [1998] CLC 1,351, Rix, J, said, at p 1,376:

' In my judgment, [the managing director's] fault comes within the concept of an agent's fraud on his principal, but, even if it does not, his fault is such a breach of duty to [the company] as in justice and common sense must entail that it is impossible to infer that knowledge or of his own dishonesty was transferred to [the company].'

See also, *Re Hampshire Land Co* [1896] 2 Ch 743; *Group Josi Re* v. *Walbrook Insurance Co Ltd* [1995] CLC 1532 and *Kingscroft* v. *Nissan Fire & Marine Insurance Co Ltd* (unreported, 4 March 1996, Colman, J).

[71] *Evans* v. *Employers' Mutual Insurance Association Ltd, ibid.*

[72] There is no legal ground preventing implied warranties being subject to a held-covered clause, however, this is not the case in practice.

not to take any action against the assured, if he chooses to operate the clause by satisfying the conditions stated above. Put another way, the general object of such a clause is to give the assured the right to elect to maintain cover in circumstances when otherwise it would be terminated by the insurer.

The held covered formula has been in common use since the late 19th century[73] and apart from in case of breach of a warranty, it affords protection for deviation or change of voyage.[74] This part of the work will focus on the held covered clauses which intend to keep the insurance relation on foot despite the breach of a warranty by the assured. It is the general belief amongst the academics that these clauses are not well understood in terms of legal analysis and likely to cause litigation in future.[75]

7.1.3.2 Held Covered Clauses in Practice

The held covered clause, which is designed to provide cover in case of breach of a warranty is identical in any set of Institute Time Clauses on hull published for use with the MAR form of policy[76] and in the Institute Time Clauses previously published by the Institute of London Underwriters for use with the SG form of policy. It provides:

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[73] The earliest cases in the reports date from the 1890s. See, *Simon Israel & Co* v. *Sedgwick* [1893] 1 QB 303; *Hyderabad (Decan) Co* v. *Willoghby* [1899] 2 QB 530.

[74] The best example of what is in effect a held-covered clause with no additional premium or condition be agreed is the 'deviation and delay' clause in ICC (1982) (Type A, B and C). Clause 8.3 provides:

'This insurance shall remain in force... during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.'

'Change of voyage' clause in the same set of rules (cl 10) requires prompt notice but does not require agreement to new terms or premium, merely stating that they are 'to be arranged'. Previous editions of this clause, apart from the change of voyage, held covered any omission or error in the description of the interest in vessel or voyage.

[75] See, the paper delivered by Thomas, R, *Cargo Insurance: Issues Arising From the Standard Cover Provided by the London Institute Cargo Clauses*, at the Marine Insurance Conference organised by the European Institute of Maritime and Transport Law at Antwerp in November 1999. A copy of this paper could be found in, Huybrechts, M & Hooydonk, EV & Dieryck, C (Ed), *Marine Insurance at the Turn of the Millennium*, (Intersentia, 1999), p 325.

[76] See, cl 3 of ITCH (1983); cl 3 of ITCH (1995); cl 4 of ITCF (1995); cl. 3 of ITCH (Restricted Perils).

' Held covered in case of any breach of warranty as to cargo, trade, locality, towage, salvage services or date of sailing provided notice be given to the Underwriters immediately after receipt of advices and any amended term of cover and any additional premium required by them be agreed.'[77]

In Institute Voyage Clauses, this provision is incorporated within the 'change of voyage' clause and it holds covered breach of warranty only 'as to towage or salvage services',[78] this being much more limited than is the scope of the held covered clause appearing in Institute Time Clauses.

7.1.3.2.1 Scope And Nature of the Clause

The clause does not relate to all types of warranties; only breach of certain express warranties is in its scope. Accordingly, the assured is held covered in case of breach of a warranty which relates to cargo, trade, locality, towage, salvage services or date of sailing in hull time policies and towage and salvage services in hull voyage policies[79] provided of course the conditions as to notice and additional premium are satisfied.

Two different theories appear to exist in relation to the nature of held covered clauses.[80] The first is to see them as optional cover within the primary insurance contract. According to this theory, a held covered clause gives an opportunity to the assured to request the variation of the existing contract. The second approach is to see the held covered clause as leading to a distinct and separate contract. Considering the

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[77] Note that a very similar wording has been adopted in American Institute Time Hull Clauses (June 2, 1977). Lines 67-9 read as follows:

' The vessel is held covered in case of any breach of conditions as to cargo, trade, locality, towage or salvage services, or date of sailing or loading or discharging at sea, provided:

(a) notice be given to Underwriters immediately following knowledge thereof by the Assured and

(b) any amendment term of cover and any additional premium required by the Underwriter are agreed by the Assured.'

[78] 'Change of Voyage Clause' in IVCH (1995) reads as follows:

' Held covered in case of deviation or change of voyage or any breach of warranty as to towage or salvage services, provided notice be given to the Underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed.'

[79] These express warranties have been analysed in detail in Chapter 2.3 at p 29.

[80] See, the paper delivered by Thomas, R, *ibid.*

nature of marine warranties credit could be given to the latter argument. The main object of marine warranties is to determine the scope of the insurance contract; accordingly warranties have the role of determining the limits of insurance cover. Therefore, if the assured wishes to be held covered despite the fact that he is in breach of a warranty, the scope of the insurance cover needs to be extended and this would lead to a separate contract.[81] Support for this argument could be drawn from a recent case, *Fraser Shipping Ltd* v. *Colton and Others.*[82] This case concerned a policy incorporating the IVCH[83] for a voyage to Shanghai of a vessel being towed for demolition. On 25 May, the assureds decided to send the tow to Huang Pu, but they did not inform the insurers of the change of voyage until the vessel arrived at Huang Pu on 25 June, by which time the anchorage there was known to be dangerous because of proximity of a typhoon. On 25 June, notice of this change of voyage was given and accepted by the insurers. However, insurers were not told that the tow had already been waiting at anchorage at Huang Pu for 24 hours during which time she had been involved in a minor collision with a Chinese merchant ship, that the port of Huang Pu was congested so that delivery of the tow was likely to be delayed. When the typhoon struck, the towlines broke and the vessel swept 45 miles away and stranded on an island. The assureds claimed on their policy, but the insurers refused payment. Potter, LJ, sitting as a judge of first instance, held that the assured failed to give timeous notice and had not disclosed material circumstances, such non-disclosure inducing the insurers into agreeing the change of voyage. In his judgment, Potter, LJ, applied s 18 of the MIA 1906 to the assured's disclosure obligations under the held covered clause. As will be examined in the following chapter, s 18 deals with the disclosure duty of the assured before the contract is concluded. Clearly, this indicates that Potter, LJ, is of the opinion that held covered clauses, when invoked, lead to a new contract. If he did

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[81] Thomas, R, *ibid*, approaching from a different angle reaches the same conclusion. He argues that:

' The 'held covered' clause gives rise to an unilateral and irrevocable offer by the insurer to provide extended cover on the terms of the clause. By giving notice and at the very least tacitly agreeing to pay a reasonable premium and to agree reasonable terms, the assured is both accepting and giving consideration for the unilateral offer.'

[82] [1997] 1 Lloyd's Rep 586.

[83] Clause 2 provided:

'Held covered in case of deviation or change of voyage or any breach of warranty as to towage or salvage services, provided notice be given to the Underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed.'

not have formation of a new contract idea in his mind, he would have applied s 17 of the MIA 1906, which deals with post-contractual non-disclosure, rather than s 18, which regulates pre-contractual non-disclosure duty of the assured.

7.1.3.2.2 Notice Requirement

Under the held-covered clause, the assured is under an obligation to give notice to the insurer that he intends to breach one of the warranties listed therein.[84] The exact time for this notice has been judicially considered in numerous cases and it was concluded that, in the absence of any specific provision, notice had to be given within a reasonable time after the facts had come to the knowledge of the assured.[85] What is meant by a reasonable time was further explained by Donaldson, J, in *Liberian Insurance Agency Inc* v. *Mosse*[86] in the following way:

'... if the assured learns the true facts whilst the risk is still current, a reasonable time will usually be a shorter period than if it occurs when the adventure is already ended. If the assured learns the true facts when the assured property is in the grip of a peril, which is likely to cause loss or damage, a reasonable time will be short indeed.'

This test, however, has no application anymore since notice requirement has been qualified with the word 'immediately' in the present form of held covered clauses. Thus, the assured is not allowed a reasonable time, but has to give notice 'immediately' to the insurer after he becomes aware or ought to have become aware of the situation.[87] There appear to be no reported cases on the meaning to be given to the

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[84] Note that in some policies notice is not a condition for the operation of the held covered clause. See, for instance, *Anz Bank* v. *Compagnie d' Assurances Maritime Aeriennes et Terrestres (The Northern L)* [1996] IVR 561 where a provision was drafted:

'... continuation and breach of a warranty clause held covered with or without notice.'

[85] See, *Hood* v. *West End Motor Car Packing Co* [1917] 2 KB 38; *Thames & Mersey Marine Insurance Co Ltd* v. *HT Van Laun & Co* [1917] 2 KB 48; *Overseas Commodities Ltd* v. *Style* [1958] 1 Lloyd's Rep 546.

[86] [1977] 2 Lloyd's Rep 560.

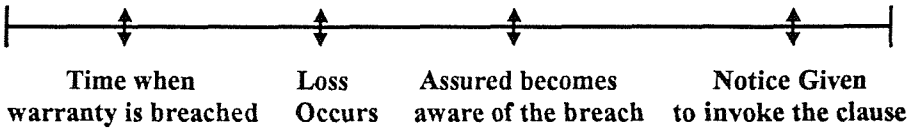
[87] It must be remembered that if the assured notifies his broker in time but the broker does not immediately notify the underwriter, the assured cannot claim benefit of a held covered clause if there is breach of a warranty. In such event, the assured could bring an action for damages against the broker if he could prove that his position had been prejudiced by the broker's negligence, such action being pursued under the law of contract or tort.

word 'immediate' in the context of a held covered clause, but the same expression has been construed in other contexts and its meaning appears well settled. The word implies 'prompt, vigorous action, without any delay' after learning of the relevant facts.[88] Therefore, for the operation of the held covered clause the assured must act promptly after he learns that a warranty is going to be breached or has already been breached, and must give notice to the underwriter.

The rest of this part will examine the potential legal problems that may arise in connection with the 'notice' requirement during the operation of the held covered clauses. During this analysis, different hypothetical scenarios will be considered and they will be illustrated by diagrams, where necessary.

One might wonder whether a held covered clause can be invoked by the assured, even after the occurrence of a casualty, if he was not aware beforehand of the occurrence of the events in which he is to be held covered under the clause. Diagram 2 illustrates such a position.

Diagram 2



The nature of the notice requirement in held covered clauses has been discussed in detail in *Black King Shipping Corporation & Wayang Panama SA* v. *Mark Ranold Massie (The Litsion Pride)*[89] The Litsion Pride was insured on the SG form with Institute War and Strikes Clauses attached. Additional premium were to be paid for visits to various areas, one of them the Arabian (Persian) Gulf. Notice was to be given

[88] *R* v. *Berkshire Justices* (1878) 4 QBD 469, per Cockburn, CJ, at p 476. In other instances, 'immediately' has been said to mean 'with all reasonable speed considering the circumstances of the case', see *Re Coleman's Depositories* [1907] 2 KB 798 at p 807. More recently, in *Fraser Shipping Ltd* v. *Colton, ibid,* it was conceded that a delay in giving notice of change of voyage of just under a month failed the immediacy test.

[89] [1985] 1 Lloyd's Rep 437, hereinafter referred to as *The Litsion Pride*.

of visits to these areas by a special clause which was also a held covered clause, stating:

'1(A) This coverage shall extend worldwide, but in the event of a vessel... insured hereunder sailing for... or being within the Territorial Waters of any of the countries or places described in the Current Exclusions... additional premium shall be paid at the discretion of Insurers...

(B) Information on such voyage ... shall be given to Insurers as soon as practicable, and the absence of prior advice shall not affect the cover...'

Although the assured knew by 2 July that the charterers would direct the vessel to the Arabian Gulf, they did not notify the insurer. The vessel, in fact, entered the area and breached the locality warranty on 2 August. She was hit by missiles launched from Iranian helicopters on 11 August. On 12 August, the assured sent a letter dated 2nd August notifying the insurer that they would enter the additional premium area. The underwriters pleaded that it was a condition precedent that the notice of entry of the additional premium area should be given as soon as practicable. Hirst, J, (as he then was) felt that he could not so hold with the following speech:[90]

'If this were a simply, traditional 'held covered' clause, ..., I should see the very greatest force in this argument, which would, I think, have led me to imply a requirement as to reasonable notice as a condition precedent,...

This, however, is not just a simple 'held covered' clause, with no express provision as to notice, but an extensive and elaborately drawn clause laying down a detailed series of stipulations as to notices for various purposes...

I can find nothing in the words to support [the insurer's] construction. Looking at them in isolation, they make no mention of condition or condition precedent, and give no hint whatsoever that failure to give the information as soon as practicable will result in loss of cover.'

It is crystal clear that the unusual wording of the held covered clause in *The Litsion Pride* was the main reason which led Hirst, J, to decide that giving of notice was not a

[90] *Ibid*, at p 469.

condition precedent to cover. Considering his judgment and case law,[91] one can suggest that as far as the held covered clauses which appear in standard Institute clauses are concerned, giving immediate notice after receipt of advices is a condition precedent for the operation of the clause. When qualifying the notice requirement, no mention has been made to the effect that notice must be given before any casualty arises. In this respect, provided the notice is given immediately and there was no way for the assured to learn about such a breach at an earlier date, the held covered clause could be invoked.[92] It follows from this discussion that in cases where the assured fails to give timeous notice, there is no way of invoking the clause. Thus, in cases where the notice is given late without fraud or negligence, the underwriter can hold fast to the notice requirement to refuse cover.

As discussed above, implementation of the held covered clause leads to a new contract and giving of notice by the assured is the initial step which facilitates the whole process. Accordingly, the assured is expected to be subject to the duties stated in ss 18-20 of the MIA 1906 at the time of giving notice.[93] In this respect, the assured is expected to disclose any material facts and not to make material misrepresentations in relation to the events which will be held covered.[94] Put another way, the process is parallel to the presentation of the risk prior to the formation of the contract and in this respect the doctrine of utmost good faith should apply in a similar way. However, as stated by Bennett,[95] the precise content of the duty attaching to the giving of notice must reflect the fact that the contract is not reviewed *in toto*. All that is being requested is the implementation of cover to which the insurer has already agreed subject to specified conditions. The concept of materiality must be adapted to this

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[91] For instance, in *Thames and Mersey Marine Insurance Co Ltd* v. *HT Van Laun & Co, ibid,* where a held covered clause, which was very similar to the one found in standard Institute Clauses, was evaluated, it was held that giving timeous notice a condition precedent to the liability of the insurer. The clause in question in the case read as follows:

'Held covered in case of deviation or change of voyage provided notice be given and any additional premium required be agreed after receipt of advices.'

[92] *Mentz, Decker & Co* v. *Maritime Insurance Co* [1910] 1 KB 132.

[93] Note that the duties expressed in these sections, disclosure duty and duty not to misrepresent, apply during negotiations and before the contract is concluded.

[94] *Fraser Shipping Ltd* v. *Colton, ibid.*

[95] See, Bennett, H, *Mapping the Doctrine of Utmost Good Faith in Insurance Contract Law*, LMCLQ, pp 165- 222, at p 204.

context. Thus, a circumstance that has arisen since the conclusion of the contract that would be material were the risk being placed for the first time or being renewed but that is not material to the amendment does not require disclosure under a held covered clause. In *Manifest Shipping and Co* v. *Uni-Polaris Insurance Co Ltd and La Réunion Européene (The Star Sea)*,[96] the need to tailor the utmost good faith duty to its context was expressed in the Court of Appeal by Leggatt, LJ:

'... there is force in the argument that the scope of the duty of utmost good faith will alter according to whether underwriters have to make a decision under the policy or the assured decides to make a claim, and may also be affected according to the stage of the relationship at which the scope of the duty becomes material.'

Also, as was illustrated by case law,[97] the post contractual duty of good faith expressed in s 17 has a role to play in cases where held covered clauses are concerned. When giving notice and accordingly invoking the clause, apart from disclosing material facts and avoiding material misrepresentations, the assured is under a general obligation to observe good faith. *Liberian Insurance Agency Inc* v. *Mosse*[98] concerned insurance of enamelware under a policy incorporating the ICC (All Risks), which contained in cl 4 a held covered clause to the effect that a premium to be arranged in case of change of voyage or of any omission or error in the description of the interest vessel or voyage. The assured sought to invoke the clause as an answer to the insurer's defence of misrepresentation and non-disclosure in the presentation of the risk. Donaldson, J, rejected this argument, holding *inter alia* that an assured must act in the utmost good faith to take advantage of a held covered clause, and the assured had invoked the clause without correcting the errors in the presentation of the risk.[99] In a similar sense, Hirst, J, in *The Litsion Pride*, stated:[100]

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[96] [1997] 1 Lloyd's Rep 360, hereinafter referred to as *The Star Sea*, at p 370.

[97] See, *Liberian Insurance Agency Inc* v. *Mosse, ibid,* and *The Litsion Pride, ibid.*

[98] *Ibid.*

[99] *Ibid,* at p 568. The extent of the post-contractual duty of good faith has not been clarified by case law. The issue will be discussed in detail in the following chapter, but at this stage it is sufficient to say fraudulent and intentional acts of the assured will amount to breach of the utmost good faith duty expressed in s 17 of the MIA 1906.

[100] *Ibid,* 512.

'Consequently, I hold that the duty of utmost good faith applied with its full rigour in relation to the giving of information of the voyage under the warranty.'

To sum up, in cases where the assured wish to invoke the held covered clause, he is under an obligation to disclose material facts and not to make material misrepresentation by virtue of ss 18-20 of the MIA 1906. On the top of these obligations, he is also under a post-contractual duty of good faith.[101] This duty certainly requires the assured not to get involved in fraudulent acts at the time of giving notice, but the extent of this duty could be altered by the courts and the assured could face a heavier duty.[102] Also, as discussed above, the scope of the good faith duty attaching to held covered clauses need to be tailored considering the fact that the contract is not renewed *in toto*. However, there is a further point which is not clear. The remedy afforded in the MIA 1906 for breach of disclosure, misrepresentation and general good faith duty is 'avoidance'. In this respect, if the assured is in breach of any of these duties when invoking the held covered clause, does it mean that the insurer could avoid the whole contract or should the remedy of avoidance be limited to the endorsement? Put another way, in a case where the assured is in breach of the good faith duty when giving notice in the process of invoking the held covered clause, is it possible to avoid the new part of the contract and require the insurer to indemnify the assured for losses which have occurred before the endorsement of the held covered clause, or should the whole policy be avoided? The answer to this question is not an easy one and arguments for each solution could be advanced. It could be argued that despite the existence of a new contract by operation of the held covered clause, particularly in cases where a post-contractual good faith duty is breached, the whole contract is affected by the wrongful act of the assured. This is the case mainly because the contract is one which is based upon the utmost good faith. Also, it has been held that 'avoidance' under s 17, 18 and 20 of the MIA 1906 solely means avoidance of the

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[101] Section 17 of the MIA 1906 reads:

'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 might be avoided by the other party.'

[102] See, Chapter 8 for a systematic analysis of these issues.

contract *ab initio*.[103] On the other hand, it could be argued that permitting avoidance of the entire contract in the event of non-compliance with the duty of utmost good faith which applies to held covered clauses is not fair. In the absence of a held covered clause, or were the assured to elect not to request extension of cover pursuant to such a clause the consequence of an alteration of risk would be a purely prospective discharge of liability, without prejudice to cover up to that point.[104] The author believes that allowing the insurer to avoid the whole contract *ab initio*, could be a quite disproportionate remedy in certain cases particularly where no fraud on the part of the assured is involved. However, there is a Court of Appeal judgment to the effect that the only remedy in case of breach of good faith duty expressed in the MIA 1906 is avoidance of the whole contract *ab initio*. Accordingly, it is very unlikely that a different remedy will be adopted unless this judgment is overruled.[105]

7.1.3.2.3 Agreement on Any Amended Terms of Cover and Any Additional Premium

For the operation of the held covered clause, after immediate notice is given, the assured must also agree to any amended terms of cover and payment of an additional premium if required by the underwriter.[106] For instance, if the assured is intended to breach a warranty as to towage services, the underwriter might require that the towage operation be supervised by a surveyor appointed by the Salvage Association. In cases where the insurer requires an additional premium, this premium should not be assessed

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[103] See, the *dicta* of two members of the Court of Appeal, Hoffmann, LJ, and Sir Parker, R, in *Orakpo* v. *Barclays Insurance Services Ltd* [1995] 1 LRLR 443. An interpretation of this *dicta* was adopted by Mance, J, in *Insurance Corporation of the Channel Islands Ltd* v. *Royal Hotel Ltd* [1997] LRIR 94.

[104] See, Bennett, H, *ibid*, at p 205. See also, the judgment of the Court of Appeal delivered by Leggatt, LJ, in *The Star Sea*, *ibid*, where he said at p 370:

' In relation to amendment a duty of disclosure of facts material to the amendment will exist but the law is not, we think, as to whether the remedy is avoidance of the whole contract or merely the amendment. Since inducement of the actual underwriter is necessary, there seems much to be said for the point of view that avoidance of the amendment is all that should be permitted, but this is not the place to explore that aspect further.'

[105] As will be examined in the following chapter, *The Star Sea* is expected to be heard in the House of Lords in October 2000 and these issues could be clarified by the highest judicial authority of this country.

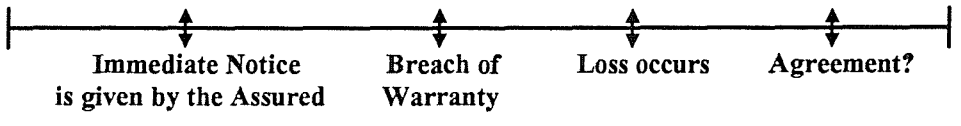
[106] The previous versions of the held covered clauses made no reference to the premium or any other amendments in the policy. See, *Liberian Insurance Agency Inc* v. *Mosse*, *ibid*.

by taking into account any casualty which might have occurred. In principle, the rate of additional premium to which the underwriters are entitled under a held covered clause, is the rate which would reasonably have been calculated and agreed between the parties, if they had known the breach of warranty or other circumstances which is to be held covered at the time when it happened.[107]

Potential legal problems that might arise as to these points, namely amendment of terms and additional premium, will be considered next. Again, some hypothetical scenarios will be created and some assumptions will be made. Where necessary, diagrams will be used.

In the first scenario, the assured gives notice in time and declares that he is ready to pay a reasonable additional premium and accept other conditions, but without waiting for agreement he breaches the warranty and a loss occurs before a consensus on the amended terms or additional premium is achieved. See diagram 3 which illustrates such a situation.

Diagram 3



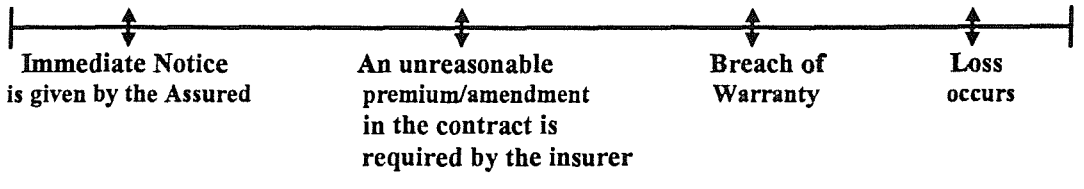
In this case, the insurer may take one of the two alternative routes. He may either require a reasonable premium and reach an agreement or he might ask for an unreasonable premium to avoid an agreement. If he chooses the first, the held covered clause will have a retrospective effect and the breach will be waived, but he can still sue for damages for breach of a condition of the insurance contract. However, it is very difficult for the insurer to be successful in an action for damages. He might only have a remote chance if he can show that he would have insisted on an amendment in the contractual terms, eg a precaution, and this would have avoided the loss.

[107] See, *Greenock SS Co* v. *Maritime Insurance Co Ltd* [1903] 1 KB 367, at p 375; *Mentz, Decker & Co* v. *Maritime Ins Co, ibid,* at p 135; *Hewitt* v. *London General Ins Co* (1925) 23 LIL Rep 243. See also, s 31(2) of the MIA 1906.

Conversely, if he chooses the second option and requires an unreasonable premium the issue is much more complicated. Obviously, since no agreement has been reached the held covered clause will not operate in such a case. However, despite the lack of any authority on this point, in such a case it can be argued that the insurer has breached his obligations imposed by the held covered clause and the assured can bring an action against him for damages. Such a conclusion could be drawn considering the nature of held covered clauses. The clause obliges the insurer to provide the extended cover, if claimed by the assured, providing the stipulated preconditions with regard to notice, premium and conditions are satisfied. Section 31(2) of the MIA requires a reasonable additional premium to be paid in such a case. Accordingly, if the insurer insists on an unreasonable premium he is preventing the operation of the held covered clause and is in breach of the contract. Also, if the assured finds the additional premium unreasonable the parties might agree to go to arbitration or courts in order to fix the rate of the additional premium. It should be borne in mind that in such a case until the premium is fixed by the arbitrator or court, the assured cannot be compelled to pay any additional amount.[108]

In the second scenario, the assured again gives notice but the insurer requires an unreasonable premium or amendment in the contract. While the negotiations going on between the parties, the assured breaches the warranty and a loss is followed. (See diagram 4)

Diagram 4



[108] *Kirby* v. *Cosinart SPA* [1969] 1 Lloyd's Rep 75.

Clearly, in this case, the held covered clause could not be brought into operation, so the assured loses his insurance cover from the moment the warranty is breached. However, in the case where an unreasonable premium is required, the insurer is in breach of the contract as s 31(2) of the Act entitles him only to a reasonable amount. Accordingly, the assured can sue the insurer for damages and it is a high possibility that the assured would be successful in such an action. However, when the insurer requires an unreasonable amendment in the contract, regrettably s 31(2) of the MIA, may not assist the assured to allege that the insurer is in breach of the contract. The current wording of the held covered clauses gives the insurer the opportunity to require 'any amendment in the cover'. Does this mean that in the light of freedom of contract principles the insurer could demand that the assured agree to any terms or only to reasonable commercial terms? This is a matter of construction of the clause in question. It is the opinion of the author that this clause should be interpreted to mean that the insurer could only demand reasonable commercial terms. It is the cardinal rule of construction that the intention of the parties must prevail.[109] In this respect, the intention of parties by inserting a held covered clause is to balance the interests of the parties and this could be achieved by allowing the insurer to demand only reasonable commercial amendments in the cover. An opposite construction gives the insurer an opportunity to preclude the operation of the clause by demanding severe amendments in the cover and this is clearly beyond the intention of the parties.

In the third volume of Arnould, it is submitted that Underwriters can still insist upon payment of an additional premium, where the assured has not sought to invoke the clause.[110] The author is of the opinion that such a construction not only contradicts the nature of held covered clauses, but also creates unfairness. It is clear that despite its ability to extend the cover under the contract, the implementation of a held covered clause is at the election of the assured. There is no obligation to trigger the clause on the occurrence of a 'held covered' event. In this respect, if the assured chooses not to rely on the clause in case of a breach of a warranty all the insurer could do is to state that the warranty has been breached and accordingly he is discharged from liability. If

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[109] See, *Drinkwater* v. *London Assurance Corporation* (1767) 2 Wils 363, per Wilmot, CJ, at p 364.

[110] *Ibid*, at pp 39-40

the Underwriters could demand payment of premium (no loss having occurred), when they were never on risk of having to pay for any loss, this would, as was expressed by Hirst, J, in *The Litsion Pride*, make the bargain one-sided and unfair.[111] Also, such a solution would be against the principles of insurance law. Providing indemnity against insured marine risks in return of a payment called premium is the main idea in an insurance relation. Thus, payment of the premium is the obligation on the part of the assured and in return he receives a promise from the insurer that he will be indemnified if a loss arises as a result of perils insured against. If the insurer is allowed to claim premium in cases where the clause has not been invoked, this would entitle the insurer to a payment although for that part of the risk he has not given any promise of indemnity.

7.2 DOCTRINE OF ESTOPPEL AND ITS APPLICATIONS IN CASE OF BREACH OF A WARRANTY

7.2.1 Different Types of Estoppel

The term estoppel originates from the same root as the word stopped, namely the French 'estoup'. The doctrine was so named, because it originally operated to prevent the party estopped from adducing evidence to contradict its previous representation.[112] Having been characterised as a principle of honesty,[113] common sense[114] and common fairness,[115] the doctrine has found application in many areas of commercial law.

Before analysing the application of the concept in case of breach of a marine insurance warranty, it is essential to identify the different types of estoppel. Such an exercise will be helpful in clarifying the nature of the doctrine as it is used in case of breach of a marine warranty. The following diagram, in a general sense, shows different types of estoppel.

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[111] *Ibid*, at p 470.

[112] *Ibid*, Wilken and Villers, at p 103.

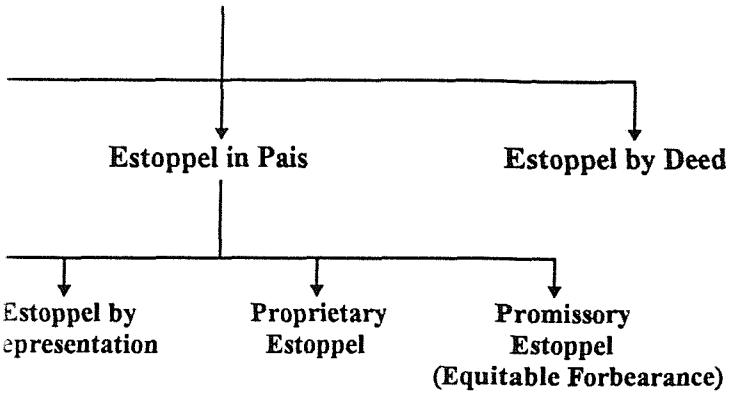
[113] *Re Exchange Securities & Commodities Ltd* [1988] Ch 46, per Harman, J, at p 54.

[114] *London Joint Stock Bank Ltd* v. *Macmillan* [1918] AC 777, per Lord Haldane at p 818.

[115] *Lyle-Meller* v. *A Lewis & Co* [1956] 1 WLR 29, per Morris, LJ, at p 44.

Diagram 5

ESTOPPEL



in civil proceedings and covers the principles of *res judicata* parties will be bound by judgments issued in previous . Estoppel by deed is a rule of evidence[116] whereby parties nambiguous statements contained in a deed which they have elf give rise to a cause of action, but will merely prevent the adicting the statement in issue. Estoppel in pais is further t categories. Estoppel by representation and convention elationship one party leads the other party to believe that a .[118] Both of them operate to set up a state of facts which e between the parties[119] and accordingly are used only as a rietary estoppel operates where the first party leads the at he will obtain an interest or right over the first party's

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156, per Lord Maugham at p 171 (*obiter*); *Re Distributors and* 129, per Walton, J, at p 139.

son [1996] All ER 144, per Ward, LJ, at p 149. For more information *s of England (Volume 12), Deeds and Other Instruments.*

mmon law, while the latter originated in equity and subsequently was See, *Legione* v. *Hateley* [1983] 152 CLR 406 at p 430.

omparative study on these issues, see Bower, B, *The Law Relating to* ed, Butterworths, 1977).

property.[120] This type of estoppel is unique in the sense that it is a source of legal obligation in itself and in some cases may give rise to a cause of action. Finally, promissory estoppel (equitable forbearance) operates where in a legal relationship one party (promissor) leads the other party (promisee) to believe that promissor's rights under a contract or other legal relationship will not be enforced.[121] Three factors appear to be common in all forms of estoppel in pais. First, that one party's conduct led to the second party forming a certain belief or fortified a belief he already held. Secondly, the second party changed his position in reliance on the belief. Thirdly, that change of position will lead the second party to suffer detriment, if the truth of the belief is subsequently denied.

When an insurer is said to be estopped from relying on breach of a warranty, in fact, the doctrine of promissory estoppel (equitable forbearance) is referred to. Here, the insurer either by conduct or words leads the assured to believe that he will not rely on the automatic discharge defence afforded to him by the MIA 1906 to deny coverage. The elements of this doctrine and its application in marine insurance will be examined next.

7.2.2 Application of the Promissory Estoppel Doctrine (Equitable Forbearance) in Case of Breach of A Warranty

When a marine insurance warranty is breached, the insurer may in some cases be estopped from relying on that breach. The doctrine of promissory estoppel resembles the doctrine of waiver by election, in the sense that both of them come into operation after the warranty is breached. There are, however, remarkable distinctions between these two doctrines. First of all, being a concept of equity, the law of estoppel looks

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[120] For more information on the topic, see Pawlowski, *The Doctrine of Proprietary Estoppel*, (Sweet & Maxwell, 1996).

[121] The doctrine was first created by Lord Cairns in *Hughes* v. *Metropolitan Railways Company* (1877) 2 App Cas 439. It was later adopted by Lord Denning in *Central London Property Trust Ltd* v. *High Trees House Ltd* [1947] KB 130, who summarised the doctrine at p 136 in the following way:

'... Where a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted upon by the person to whom it was made and which was in fact so acted on... the promise must be honoured.'

chiefly at the situation of the person relying on the estoppel.[122] Next, as a consequence of the first, the knowledge of the person sought to be estopped is immaterial. Accordingly, in cases where the insurer makes an unequivocal representation to the effect that he intends to keep the contract on foot and there are difficulties in establishing that the insurer or his agents had knowledge of the breach, an estoppel may arise and a waiver may not.[123] Finally, although no knowledge is required, two additional elements, namely reliance and detriment, are essential in order to allege that the insurer is being estopped from relying on the breach. The elements for the application of the promissory estoppel doctrine in case of breach of a warranty will be discussed next.

That the insurer has been estopped from relying on the breach must be pleaded and proved by the assured.[124] The courts will be convinced to grant an estoppel in cases where the three elements, which will be examined below, are satisfied. Firstly, the insurer must perform an unequivocal representation which is sufficient enough to trigger an estoppel. Representations which give rise to an estoppel will be the same as those for a waiver by election.[125] Thus, issuing or renewing the policy,[126] acceptance of further premiums under the contract of insurance[127] and in some cases advice given by the insurer to the assured about loss prevention in future (after the warranty is breached)[128] may amount to an unequivocal representation from the insurer's point of view.[129]

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[122] See, *Craine* v. *Colonial Mutual Fire Insurance Co* [1920] 28 CLR 305, per Isaacs, J, at p 327.

[123] There must still be some concern with the insurer's knowledge, however, for, if the assured believes that the insurer is unaware of his breach of warranty, he will find it difficult to convince a court that he justifiably relied on the insurer's not pleading a breach, of which the insurer was unaware, and that the insurer had been estopped.

[124] *Brook* v. *Trafalgar Insurance Co Ltd* (1947) 79 LIL Rep 365, per Scott, LJ, at p 367.

[125] See, Chapter 7.1.2.2.1, *ibid.*

[126] *Jones* v. *Bangor Mutual Shipping Insurance Sy Ltd* (1889) 61 LT 727; *Sulphite Pulp Co Ltd* v. *Faber & Another, ibid.*

[127] See, *Jones* v. *Bangor Mutual Shipping Insurance Sy Ltd, ibid.*

[128] See, *De Maurier (Jewels) Ltd* v. *Bastion Insurance Co Ltd* [1967] 2 Lloyd's Rep 550, per Donaldson, J, at p 559.

[129] In cases where these conducts are carried out by the agents of the insurer, these agents must possess either an actual or ostensible authority to perform such transactions.

Secondly, in order to establish the existence of a promissory estoppel, it is essential to show that the assured acted in reliance on the promise of the insurer that the legal rights arising from the breach of the warranty would not be enforced.[130] The reliance must also be reasonable. For example, reliance would not be reasonable in cases where the alleged representation was made by an agent of the insurer which lacked both ostensible and actual authority to make it. Whether the reliance is so reasonable will depend on the circumstances of the case.

Pure reliance is not sufficient, as a final element, the assured must prove that he has suffered detriment as a result of the insurer's representation.[131] For instance, not seeking alternative cover was held to be sufficient to establish detriment in *Hargett* v. *Gulf Insurance Co*[132]

To sum up, after a breach is committed the insurer may be precluded from relying on the breach by the operation of the doctrine of promissory estoppel even though he has no knowledge that the breach is committed. Being a concept of equity, estoppel can only be established in cases where the assured has relied on the representation of the insurer and suffered a detriment as a result of this reliance.

Unfortunately, just like in the other areas of contract law, the application of the doctrine of estoppel in insurance law is unnecessarily unclear and complicated. One reason for this is the flexibility afforded to the courts in this context. At the same time, allegations of estoppel are raised by the assured without any detailed consideration[133] whether it is appropriate to make such allegations and this adds further complexities to the overall position.

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[130] *M'Millan* v. *Accident Insurance Co* 1907 SC 484.

[131] *Western Canada Accident &Guarantee Insurance Co* v. *Parrot* (1921) 61 SCR 595.

[132] 55 P 2d 12.

[133] See, for example, *J Kirkaldy & Sons Ltd* v. *Walker*, *ibid*, where the issue of estoppel was raised by the assured without detailed consideration.

7.3 WAIVER AND SPECIAL POSITION OF THE WARRANTY OF LEGALITY

Section 34(3) of the MIA 1906 is designed to apply to all types of warranties and in this sense it can be argued that breach of warranty of legality can be waived just like the other warranties. This view can be supported with the fact that s 41 of the Act, which regulates the implied warranty of legality, does not prevent it from being waived. However, this is not the case. In contract law, a contract which is somehow tainted by illegality cannot be later affirmed by the parties and converted to an enforceable contract,[134] since the issue is one of public policy rather than private contract. Similarly, in this context, if the insurer is discharged from liability due to the illegal nature of the adventure insured, he cannot be made liable with a waiver. Such an act would be contrary to public policy. This was expressly stated in *Gedge & Others* v. *Royal Exchange Assurance Corporation*,[135] only six years before the enactment of the Act. It is the personal opinion of the author that this decision came too late to attract the attention of the draftsman to include it into the Act.[136] However, by virtue of s 91(2),[137] although expressly not stated in the Act, the judgment in *Gedge* v. *Royal Exchange Assurance Corporation* is still good law and breach of warranty of legality cannot be waived. General contract law principles, mentioned above, also support this conclusion.

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[134] See, the *dicta* of Lord Mansfield in *Holman* v. *Johnson* (1775) 1 Cowp 343.

[135] [1900] 2 QB 214.

[136] The MIA 1906 was first drafted in 1894 and several discussions and negotiations went on different provisions in the Parliament and sub-commissions before it was enacted. During this period (1894-1906) little attention was paid to the cases recently decided, as the main concern was to evaluate the accuracy and appropriateness of the sections already drafted.

[137] This sub-section reads as follows:

' The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.'

PART 2

CHAPTER 8

LEADING DEFENCES OF A MARINE INSURER

INTRODUCTION

Breach of warranty defence is one of the leading defences afforded to the insurer and its legal regime has been evaluated from various angles in the previous part of this thesis. The primary object of this part is to define the place of the breach of warranty defence amongst the other defences afforded to the insurer. To this end, other leading defences which are available to the insurer, in case of breach of the insurance contract, need to be classified and examined. Carrying out such an analysis in relation to leading defences of the insurer is the main concern of this chapter. During such an analysis, the provisions of the MIA 1906, the case law and some standard Institute Clauses will be taken into account and different aspects of these concepts will be illustrated.

8.1 DISTINCTION BETWEEN NEGATIVE AND POSITIVE (AFFIRMATIVE) DEFENCES

Lord Evershed, MR, in *Regina Fur Co Ltd* v. *Bossom*,[1] discussing the possible courses which can be taken by insurers when a claim is made on them, stated:[2]

'Now, I have no doubt, whatever that insurers, having a claim of this kind made against them, are entitled to say, by way of defence, 'Prove the case strictly- we require it to be strictly proved'... If such is the nature of the substantial defence made, then, if the [assureds] succeed in establishing a *prima facie* case, the onus in some way shifts to the [insurers], who, if they desire to persist in the defence, must then allege and prove affirmatively some answer to the

1 (1958) 2 Lloyd's Rep 425.

2 *Ibid*, at p 428 (emphasis added).

case which has been *prima facie* established, and they must therefore, by pleading, give proper notice of what that answer is.'

Considering Lord Evershed's remarkable speech, it is possible to classify insurer's defences in two main categories depending on whom the burden of proof lies. In some cases, the insurer simply traverses the allegations in the points of claim and puts the assured to strict proof of the allegation of loss or loss by reason of a peril insured against. Accordingly, in 'all risk' policies the insurer requires the assured to prove that the loss has actually occurred and in 'named risk' policies the assured is asked to prove not only the existence of loss but also that it was caused by a peril insured against.[3] A defence of this nature is referred to as *'negative'*, since the burden of proof lies on the assured (claimant), despite the fact that, if succeeds, the defence precludes the insurer (defendant) from liability. Put another way, in such a case the beneficiary of the defence is not under any burden of proof. However, on some occasions the insurer might allege that the insurance contract or a certain duty of the assured has been breached and for this reason he is precluded from recovery either to some extent or entirely. Such a defence is called *'positive'* (affirmative) since the insurer who will benefit from such a defence is the person under burden of proof.[4]

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[3] In some cases, establishing a *prima facie* case on its own could not be sufficient for the assured to recover. When 'perils of the seas' is pleaded as the *proximate cause* of loss, the burden of proof remains with the assured throughout. This means, even after establishing a *prima facie* case that the loss was caused by a peril of the sea, the onus of continuing to prove his case, whether or not there is evidence to the contrary put forward by the insurer, remains with the assured. If, at the end of the day, the court is doubtful or uncertain as to the cause of loss, the assured's action must fail. See the speech of Brandon, LJ, in *Rhesa Shipping Co SA* v. *Edmunds (Popi M)* [1985] 2 Lloyd's Rep 1 at p 2 where he said:

' ...In approaching this question, it is important that two matters should be borne constantly in mind. The first matter is that the burden of proving, on the balance of probabilities, that the ship was lost by perils of the sea is, and remains throughout, on the shipowners. Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they choose to do so, there is no obligation on them to prove, even on balance of probabilities, the truth of their alternative case.

The second matter is that it is always open to a court, even after the kind of prolonged inquiry with a mass of expert evidence which took place in this case, to conclude, at the end of the day, that the proximate cause of the ship's loss, even on balance of probabilities, remains in doubt, with the consequence that the [assured] have failed to discharge the burden of proof which lay upon them.'

See, also *Lamb Head Shipping Co Ltd & Others* v. *Jennings (The Marel)* [1992] 1 Lloyd's Rep 403 per Diamond, QC, at p 405.

4 The insurer might adopt both courses: to put the assured to strict proof of his case and traverse what is alleged in the points of the claim and to bring an affirmative allegation. By taking both courses, he could strengthen his position.

Certain distinctions between negative and positive defences of the insurer can be drawn by considering their nature. First, in cases where a negative defence is brought, to prove that the loss occasioned or occasioned from a peril insured against rests with the assured. The insurer, on the other hand, can challenge the case which the assured seeks to make good at each point and by proper evidence, where it is admissible, by cross-examination. Conversely, the insurer has the onus of proving his allegation if he chooses to bring a positive defence and it is permissible for him to attempt to lead evidence solely directed to the credit of witnesses.[5] Secondly, there is a diversity as to the effects of these defences. A negative defence, provided that successfully pleaded, prevents the assured from recovery in relation to that particular claim. The validity of the policy, on the other hand, remains unaffected. However, most of the positive defences, if they succeed, not only deny the claim but also affect the validity of the policy either by discharging the insurer from further liability or giving him an opportunity to avoid the policy *ab initio*. Finally, there is a direct connection between a negative defence and a loss. By bringing a negative defence the insurer alleges either that the loss has not occasioned or was not caused by an insured peril. This is, however, not necessarily the case with positive defences. Although in some positive defences there might be a link between the alleged breach and loss, they could be completely independent. Put another way, while the connection between the defence and loss is a distinguishing factor in negative defences, this is not necessarily the case in positive defences.[6]

8.2 LEADING POSITIVE (AFFIRMATIVE) DEFENCES OF A MARINE INSURER

Positive defences can take different forms and may be concerned with different issues. For instance, the insurer might allege that the assured has failed to observe good faith

5 See, *Regina Fur Co Ltd* v. *Bossom, ibid*, per Lord Evershed at p 428 and *Palamisto General Enterprises SA* v. *Ocean Marine Insurance Ltd (The Dias)* [1972] 2 QB 625, per Cairns, LJ, at p 647.

6 It should be borne in mind that while burden of proof criteria has been adopted in this study, it is possible to classify defences available to insurers from various angles. For instance, the defences available to insurers could be classified as defences external to the policy and defences intrinsic to the policy depending on the source of the defence. In such a case, breach of warranty defence would be regarded as a defence intrinsic to the policy.

either at the formation or during continuance of the contract or such a loss is excluded by the contract, eg loss occurred as a result of wilful misconduct of the assured, unseaworthiness of the insured vessel in time policies which the assured is privy when the vessel is sent to sea, inherent vice, ordinary wear and tear, or a term of a marine insurance contract, eg condition, warranty, sue and labour clause, has been breached. As can be seen, positive defences are numerous and to evaluate all of them is beyond the scope of this work. Only the ones which were commonly invoked in the past will be examined and their interrelation between the breach of the warranty defence will be discussed in the following chapter. At this stage, it should be borne in mind that the insurer might rely on more than one positive defence as a response to the assured's claim. Also, the case law suggests that the insurer who resists the claim by the assured under the policy on a particular ground, will not generally waive his rights to resist the assured's claim on other grounds.[7] Therefore, if an insurer rejects the claim on the basis of wilful misconduct of the assured but fails on that allegation at trial, it will be permitted to resist the assured's claim on the breach of a condition of the insurance contract.

8.2.1 Utmost Good Faith

The utmost good faith issue has been the topic of four sections in the MIA 1906, *viz* ss 17-20, which codify for the law of marine insurance principles of law of utmost good faith applicable equally to marine and non-marine insurance and to primary cover and all levels of insurance.[8] Section 17 provides 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. A couple of points in relation to this section should be stressed before any further examination is carried out. First, s 17 adopts the word 'either party' which makes it clear that the duty imposed is reciprocal and not only the assured but also the insurer is under a duty to

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[7] *Welch* v. *Royal Exchange Assurance* [1939] 1 KB 294, per Slesser, LJ, at p 306.

[8] See, *Joel* v. *Law Union & Crown Insurance Co* [1908] 2 KB 863 and *Lambert* v. *Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485. Recently, in *Pan Atlantic Insurance Co Ltd* v. *Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427, the House of Lords re-affirmed that the provisions of the MIA 1906 dealing with utmost good faith constituted a partial codification of the common law which applies by analogy to all forms of insurance.

observe utmost good faith.[9] Accordingly, *in Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck),*[10] both the first instance judge, Hobhouse, J, and the Court of Appeal stated that after the formation of the contract the insurer owed a duty of good faith to the assured but not to a third party such as the assignee.[11] Secondly, 'avoidance of the contract' has been determined as the legal remedy in case of breach of the duty. Finally, due to the broad wording of s 17 which does not impose any time restrictions the duty has not been limited to a pre-contractual stage and it might continue in different forms after the contract is formed.

The cases where the duty imposed by s 17 operates will be examined later, but before such an analysis, attention should be directed to ss 18-20 of the Act where the assured and his agent have been put under specific pre-contractual obligations. Sections 18 and 19 require the assured and his agents to disclose all material circumstances before the contract is concluded. In a similar sense, the assured and his agents must refrain from making material misrepresentations during negotiations by s 20. The legal remedy available in case of breach of these obligations is stated to be 'avoidance'. Section 18(2) and 20(2), respectively, regard a circumstance or representation as material, if it would influence the judgement of a prudent insurer in fixing the premium or determining whether he will take the risk. The notion of 'materiality' which has engendered a great deal of debate in the courts over recent years, was finally settled by the House of Lords in *Pan Atlantic Insurance Co Ltd* v. *Pine Top Insurance Co Ltd.*[12] According to the test adopted by the House of Lords, a circumstance or presentation will be regarded as material if it would denote an effect on the mind of a prudent insurer in weighing up the risk.[13] The House, further, stated that materiality of a circumstance or presentation alone is not sufficient to confer upon the insurer the right

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[9] See, *Banque Financière de la Cité SA* v. *Westgate Insurance Co Ltd* [1990] 2 Lloyd's Rep 377 for an illustration of this principle. Since the object of this chapter is to discuss and evaluate the interrelation between the defences afforded to the insurer, the extent and scope of the utmost good faith duty owed by the insurer to the assured will not be taken into consideration.

[10] [1988] 1 Lloyd's Rep 514; [1989] 2 Lloyd's Rep 238, hereinafter referred to as *The Good Luck.*

[11] A similar approach was adopted by the House of Lords in the *Banque Financière de la Cité SA* v. *Westgate Insurance Co Ltd,* ibid, when the insurer's pre-contractual duty of disclosure was evaluated.

[12] *Ibid.*

[13] *Ibid,* per Lord Goff at p 431 and per Lord Mustill at pp 440-45.

to avoid the contract. In order to be able to avoid the contract, the insurer additionally has to show that he was actually induced to enter the contract on the relevant terms as a result of non-disclosure or misrepresentation.[14] With the adoption of the 'actual inducement test', the House of Lords' intention was to bring insurance contract law in line with general contract law.[15]

As can be seen, the duties imposed on the assured and his agents by ss 18-20 are limited to the period before the contract is formed and relate only to non-disclosure and misrepresentation.[16] Section 17, however, imposes various obligations on the assured and its scope is not limited to the period before the formation of the contract. These duties will be examined next. During this exercise, it must be borne in mind that due to the broad wording of the section, it is virtually impossible to discuss all the possible s 17 situations which might afford a positive defence to the insurer. In this respect, only the ones which have been highlighted and discussed by the courts over the years will be taken into account.

Section 17 might play a crucial role before the contract is formed and in case of breach afford a positive defence to the insurer. This situation has been highlighted in the Court of Appeal by Parker, LJ, in *CTI* v. *Oceanus.*[17] Accordingly, if the assured or his broker, in the course of negotiations, realises that the insurer has made a serious arithmetical mistake or is proceeding upon a mistake of fact with regard to past experience, he would, under s 17, be obliged to draw this to the attention of the insurer. Failure to do so will be the plainest breach of the duty under s 17. Similarly, if

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[14] *Ibid*, per Lord Goff at p 431; per Lord Mustill at p 452 and per Lord Lloyd at pp 465-6.

[15] This intention of the House can clearly be seen in Lord Mustill's speech at p 452 where he said:

'I conclude that there is to be implied in the Act of 1906 a qualification that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract, using 'induced' in the sense in which it is used in the general law of contract.'

For the position in the general contract law, see *Attwood* v. *Small* [1838] 6 Cl & Fin 232; *Redgrave* v. *Hurd* 20 Ch D 1 and *Edgington* v. *Fitzmaurice* (1885) 29 Ch D 476.

[16] In fact pre-contractual duties expressed in ss 18-20 have been regarded as aspects of the overriding duty of utmost good faith mentioned in s 17 ,by Kerr, LJ, in *Container Transport International Inc & Reliance Group Inc* v. *Oceanus Mutual Underwriting Association (Bermuda) Ltd* (hereinafter referred to as *CTI* v. *Oceanus*) [1984] 1 Lloyd's Rep 476 at p 492.

[17] *Ibid*, at p 512.

the insurer shows an interest in circumstances which are not regarded 'material' within the meaning of s 18, s 17 requires the assured to disclose them fully and fairly.

When the case law is carefully analysed it is clear that the duty imposed by s. 17 has a post-formation dimension. An area where s. 17 could have application is during the operation of 'held covered clauses'. As examined earlier,[18] the function of a held covered clause is to maintain insurance cover notwithstanding circumstances that would otherwise discharge or prejudice that cover. It was first McNair, J, who indicated the importance of s 17 in the application of held covered clauses in *Overseas Commodities Ltd* v. *Style*[19] where he said:

'To obtain the protection of the 'held covered' clause, the assured must act with the utmost good faith towards the underwriters, this being an obligation which rests upon them throughout the currency of the policy.'[20]

More recently, in *Black King Shipping Corporation* v. *Massie (The Litsion Pride)*,[21] Hirst J, (as he then was) held that s 17 had application in cases where a notice requirement arose under a held covered clause. It is, however, not an accurate assumption that s 17 would find application in all cases where 'notice' has to be given under a clause. This issue has been brought into discussion in *Hussain* v. *Brown (No 2)*[22] where condition 5 of a fire policy on commercial premises provided as follows:

'The Assured shall as soon as possible give notice in writing to the Underwriters of any alteration likely to increase the risk of or any damage to the insured or Underwriter's liability and shall pay such reasonable premium, if any, as may be required by the Underwriters.'

Hegarty, QC, sitting as a Deputy Judge of the High Court, held that the duty of utmost good faith did not attach to the giving of notice under this clause. Reaching this decision, Hegarty, QC, did not feel able to disregard *The Litsion Pride*; he simply

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[18] See, chapter 7.1.3 at p 237.

[19] [1958] 1 Lloyd's Rep 546.

[20] The same principle was later affirmed by Donaldson, J, in *Liberian Insurance Agency Inc* v. *Mosse* [1977] 2 Lloyd's Rep 560, at p 568.

[21] [1985] 1 Lloyd's Rep 437, hereinafter referred to as *The Litsion Pride*.

[22] [1996] unreported.

distinguished the case before the court from *The Litsion Pride* on the ground that the clause there 'identified with clarity and precision' the circumstances in which information was to be provided to the insurers. On the facts, in contrast, a wide-ranging disclosure obligation was imposed in technical language requiring 'permanent vigilance throughout the entire term of the insurance'.[23] It is clear from this judgment that whether the duty attached to any express obligation to give information to an insurer is a matter of interpretation and generally speaking, the post-formation duty of utmost good faith is confined to clauses extending cover, such as held covered clauses or change of voyage endorsement.[24]

Prior to the *dictum* of Evans, J, in *Continental Illinois National Bank & Trust Co of Chicago and Xenofon Maritime SA* v. *Alliance Assurance Co Ltd (The Captain Panagos DP)*,[25] it was thought that s 17 had little practical application in the claims context. In this case, the insured vessel had become grounded and, some days later, was destroyed by fire. Evans, J, held that both the grounding and the fire had been deliberate acts performed with the connivance of the owners, therefore the mortgagees as assignees were precluded from recovery. Evans, J, also considered the possibility (which he rejected on the facts) that had only the grounding been deliberate, the

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[23] Similarly, it was held by the Court of Appeal in *New Hampshire Insurance Co* v. *MGN Ltd* [1997] LRIR 24 that the duty of utmost good faith did not arise when a cancellation clause was in question. Staughton, LJ, summarised the opinion of the Court in the following way at p 61:

'Whilst there are no doubt cases where a defence of non-disclosure is fully justified, there are also, in our experience, some where it is not. We should hesitate to enlarge for scope for oppression [by the underwriter against the assured] by establishing a duty to disclose throughout the period of a contract of insurance, merely because it contains (as by no means uncommon) a right of cancellation for the insurer.'

In this respect, it is fair to say that an insurer has no right to expect disclosure by the assured of any information which he may consider necessary or relevant to assist him in arriving at a determination of whether or not to exercise the right to cancel.

[24] It should be noted that in his rather radical and controversial article, *Mapping the Doctrine of Utmost Good Faith in Insurance Contract Law*, [1999] LMCLQ 165, Bennett, H, suggests that the duty of utmost good faith attaching to held covered clauses, or other contractual modifications, does not fall within s 17 of the Act. He bases his argument on the ground that the only remedy afforded in case of breach of s 17 is 'avoidance' and this might create some freakish results, from the assured's point of view, in some cases. He is of the opinion that removing the held covered duty from s 17 will permit the adoption of a more proportionate remedy confined to the amendment to the cover. This argument, in my opinion, must be read with caution at least until the House of Lords clarifies in *The Star Sea* whether 'avoidance' is the exclusive legal remedy in case of breach of s 17. Furthermore, it is another question whether the 'harshness' of the legal remedy available, on its own, is sufficient to remove the utmost good faith duty attached to held covered clauses from the ambit of s 17.

[25] [1986] 2 Lloyd's Rep 470.

insurer had a right to avoid the policy or reject the claim on the basis of breach of a continuing duty of utmost good faith as set out in *The Litsion Pride*. Accordingly, when submitting details of a loss in order to make a claim, the assured is under a duty of utmost good faith by virtue of s 17. Subsequent case law has also confirmed the existence of such a duty in the claims context.[26]

Despite the fact that the existence of a post-formation continuing duty of utmost good faith has been established by the decisions of high judicial authorities, some question marks still remain around the concept. The main problem is the uncertainty in relation to the scope of the duty imposed by s 17. Hirst, J, in *The Litsion Pride*, stated that the continuing duty of utmost good faith required the assured to refrain from making fraudulent claims and culpable non-disclosure/misrepresentation. However, Hirst, J's statement was later doubted by two cases. In *Bucks Printing Press Ltd* v. *Prudential Assurance Co,*[27] Saville, J, *obiter dictum*, commented that he 'remain unpersuaded' that the continuing duty applied in the absence of fraud or recklessness and in *Royal Boskalis Westminister & Others* v. Trevor Rex *Mountain & Others,*[28] Rix, J, citing a passage from *The Law of Insurance Contracts,*[29] held that fraud on the part of the assured required for the breach of the continuing duty of good faith. The need for fraud appears to have been put beyond doubt by the Court of Appeal in *The Star Sea.*[30] In this case, a refrigerated vessel became a constructive total loss as a result of a fire

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[26] See, *Parker & Heard Ltd* v. *Generali Assicurazioni SpA*, [1988] unreported; *Bucks Printing Press Ltd* v. *Prudential Assurance Co* [1991] unreported; *Orakpo* v. *Barclays Insurance Services & Another* [1995] LRIR 443; *Transthene Packaging Co Ltd* v. *Royal Insurance (UK) Ltd* [1996] LRIR 32; *Manifest Shipping & Co Ltd* v. *Uni- Polaris Insurance Co Ltd & La Réunion Européene (The Star Sea)*, [1997] 1 Lloyd's Rep 360, hereinafter referred to as *The Star Sea*.

[27] *Ibid.*

[28] [1997] 2 All ER 929.

[29] Clarke, M, *The Law of Insurance Contracts*, (2nd ed, LLP Ltd, 1998), at p 708:

'As regards insurance contracts, the duty of good faith continues throughout the contractual relationship at a level appropriate to the moment. In particular, the duty to disclose, most prominent prior to contract, revives whenever the insured has an express or implied duty to supply information to enable the insurer to make a decision. Hence, it applies if the cover is extended or renewed. It also applies when the insurer claims his insurance money: he must make 'full disclosure of the circumstances of the case' [citing *Shepherd* v. *Chewter* [1808] 1 Camp 274, 275, per Lord Ellenborough]... The degree of disclosure, however, varies according to the phase in the relationship. It seems that the level of disclosure appropriate to a claim is different from that at the time of contract: an innocent misrepresentation or non-disclosure in the claim does not defeat a claim; there must be fraud in the sense discussed below.'

[30] Facts of this case has been highlighted earlier in Chapter 3.

on board. The underwriter denied liability, *inter alia*, on the basis that the assured had failed to disclose the full circumstances of the loss and thus was in breach of the continuing duty of utmost good faith. The Court of Appeal, affirming Tuckey, J, at first instance, held that the continuing duty of utmost good faith required proof of fraud on the assured's part, and that, in absence of fraud, the claim could not be denied. This case is expected to be heard in the House of Lords in October. It can be concluded that unless the House of Lords reverse the Court of Appeal's decision and extend the scope of the duty, the continuing duty of utmost good faith in the claims process adds nothing to the general duty of the assured not to make fraudulent claims.

The other unclear point is the legal remedy available in case of breach of the post-contractual duty of utmost good faith. As mentioned earlier, the legal remedy spelt out in s 17 is 'avoidance of the contract'. However, this remedy seems harsh specially if a fleet policy is concerned and the duty is breached when submitting a partial loss claim in relation to one of the vessels in the fleet. Similarly, a failure by the assured under a 'held covered' clause to notify the insurer of a deviation immediately after it had taken place or a failure by the assured to disclose material facts when seeking endorsement to the policy would entitle the insurer to deny that there had ever been a contract between the parties. In order to avoid these unfair results, Hirst, J, in *The Litsion Pride* suggested that the insurer should have an option in cases where the continuing duty of utmost good faith is breached. Accordingly, the insurer can either avoid the policy or affirm the policy and reject the claim.[31] This view, however, was rejected in *The Good Luck* and 'avoidance' was confirmed as the only legal remedy in case of breach of s 17. Similarly, in *Orakpo* v. *Barclays Insurance Services Ltd & Another*,[32] two members of the Court of Appeal, namely Hoffmann, LJ and Sir Parker, R, regarded 'avoidance' as the only legal remedy.[33] The Court of Appeal in *The Star Sea* appears to have been of the opinion that the proper remedy in case of breach of s 17 is 'avoidance'. However,

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[31] Hirst, J's approach, giving an option to the insurer, was also adopted by Evans, J, in *The Captain Panagos DP.*

[32] *Ibid.*

[33] See, the dissenting judgment of Staughton, LJ, at p 451. The judgment of the Court of Appeal in *Orakpo* v. *Barclays Insurance Services Ltd & Another* was later followed by Mance, J, in another non-marine insurance case, *Insurance Corporation of the Channel Islands Ltd* v. *Royal Hotel Ltd* [1997] LRLR 94.

in this case, it was also suggested (without deciding) that the remedies problem might be overcome by regarding as voidable the decision taken by the insurer which had been induced by the post-contractual breach of duty; thus, if a policy endorsement is induced by a failure to disclose, the endorsement can be set aside, and similarly, if an insurer pays a claim which is induced by false information, the claim alone can be set aside. This, additional comment made by the Court of Appeal, indicates that there is a certain degree of reservation, from fairness point of view, in adopting the 'avoidance' as the exclusive legal remedy and the House of Lords in *The Star Sea* is expected to clarify this point as well.

Another doubtful point which has been observed in the application of s. 17 is the refusal of awarding damages to the innocent party, in case of breach of the duty. When reaching this conclusion in *The Good Luck*, the Court of Appeal relied on *Banque Financière de la Cité SA* v. *Westgate Insurance Co Ltd*[34] where the source of the utmost good faith duty was traced to the law of equity. Since damages cannot be awarded in case of breach of an equity concept, it was suggested that the same was true for breach of s 17. The author is not convinced with the contention that the utmost good faith duty is, in origin, an equitable doctrine. The doctrine was first contrued in insurance law by Lord Mansfield in *Carter* v. *Boehm.*[35] In Lord Mansfield's judgement, there is no reference to any previous decisions nor is there any reference to any writer, English or foreign. It is a known fact that Mansfield was both very learned and well acquainted with continental treatises on commercial and maritime law. It appears that the concept of utmost good faith in the formation of and performance of all contracts was already accepted in continental law systems. In this respect, it seems logical to think that Mansfield had adopted this rule from the continental law systems to the English law rather than Equity law. Furthermore, when Lord Mansfield heard *Carter* v. *Boehm* he was sitting as Lord Chief Justice in the King's Bench which was a Common law court and not a court of Equity. There is a possibility that the House of Lords when deciding on *The Star Sea* will consider the

[34] *Ibid.*

[35] (1766) 3 Burr 1905.

accuracy of the Court of Appeal's decision in *Banque Financière de la Cité SA* v. *Westgate Insurance Co Ltd.*

8.2.2 Wilful Misconduct of the Assured

Almost all insurance contracts exclude certain losses from their scope. There are two main reasons behind this practice. First, providing cover to the assured for all losses including the ones he caused deliberately, contradicts the idea of indemnity and might encourage the assured to destroy the subject matter insured completely or inflict damage on it. Furthermore, from a commercial perspective, it is not a realistic approach to expect insurers to provide cover for risks which are likely to cause losses.

In marine insurance, s 55 of the MIA 1906 provides the framework for the losses which are excluded from the policy[36] and any loss attributable to the wilful misconduct of the assured is one of them.[37] Accordingly, the insurer might bring a positive defence that the loss occasioned from the wilful misconduct of the assured and reject the claim, even though the assured manages to establish a, *prima facie*, case.

At this stage, it is crucial to determine the exact meaning of 'wilful misconduct', since the extent of the defence varies according to the meaning attributed to this context. Generally speaking, improper conduct could range from mere negligence, gross or *culpable* negligence, reckless disregard or indifference to deliberate acts. As was indicated by Lord Loreburn, the term 'wilful' clearly imports that the misconduct should be deliberate, not merely a thoughtless act on the spur of the moment.[38] Therefore, deliberate acts fall within the definition of 'wilful misconduct' while negligent ones do not. The point which needs further clarification is the position of reckless acts; an issue which has never been discussed expressly by an English court. In

[36] It must be borne in mind that the parties have the freedom of inserting exclusions into their contract other than the ones stated in s 55 of the MIA 1906.

[37] The other losses which are excluded by s 55 are: any loss *proximately* caused by delay; wear and tear; ordinary leakage and breakage; inherent vice or nature of the subject; rats or vermin; or any injury to machinery not *proximately* caused by maritime perils.

[38] *Johnson* v. *Marshall Sons & Co Ltd* [1906] AC 409 at p 411.

Wood v. *Associated National Insurance Co Ltd*,[39] an Australian case which reached the Appeal Court, the two terms, 'reckless' and 'wilful misconduct' have been equated. It appears that this approach of Australian courts has also found support in English insurance law. When discussing the issue in *National Oilwell (UK) Ltd* v. *Davy Offshore Ltd*[40] Colman, J, has made the following remark:[41]

'I am quite prepared to adopt, with one slight addition, the definition of wilful misconduct given by Johnson J in *Graham* v. *Belfast and Northern Countries Railway Co* [1905] 2 KB 532, p 535 where he says:

> Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission regardless of the consequences.

The addition which I would suggest is, 'or acts with reckless carelessness, not caring what the results of his carelessness may be.'

8.2.3 Sue and Labour Clauses and Duty of the Assured to Minimise or Avert Loss

Section 78 of the MIA deals with sue and labour clauses and introduces two main principles. Section 78(4) puts the assured and his agents under a duty to take all reasonable steps to minimise the loss to the subject matter insured.[42] In other sub-

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[39] [1984] 1 Qd R 507; [1985] 1 Qd R 297.

[40] [1993] 2 Lloyd's Rep 582.

[41] *Ibid*, at p 621.

[42] This sub-section was added to the Act after the introduction of the first Bill to codify the law of marine insurance by the draftsman of the Act, Sir Mackenzie Chalmers; see, Chalmers, MD & Owen, DA, *A Digest of Law Relating to Marine Insurance*, (Butterworth Co Ltd, 1901), at p 101 fn 4 and p 102 fn 4. It appears that Sir Chalmers Mackenzie derived this principle from the rules that a shipowner owes to a cargo owner and a master owes to his shipowner, a duty to avert or minimise loss; see: *Notara* v. *Henderson* (1872) LR 5 QB 346; *Benson* v. *Chapman* (1849) 2 HL Cas 696 and that an assured had to fail to recover for a loss caused not by an insured peril but by his failure to avert or minimise the loss; see: *Currie & Co* v. *Bombay Native Insurance Co* (1869) LR 3 PC 72.

sections, it is expressly stated that expenses incurred to this end are recoverable under the policy subject to certain restrictions; eg expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause and neither are general average contributions and salvage charges.

The scope of the duty imposed by s 78(4) needs to be clarified at this stage. First, the duty is not only imposed on the assured but also on his agents. The meaning of 'agent' in this context has been clearly identified by Buxton, LJ, in *State of The Netherlands* v. *Youell & Hayward & Others*[43] where he said:[44]

'...[the meaning of agency] is certainly made explicit in the very first words of Bowstead and Reynolds [16th edn]:

'Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties.'

In that formulation, I venture to draw attention in particular to the words: 'so as to effect his relations with third parties.'

Accordingly, it was held that a shipbuilder cannot be regarded as the agent of the person who owns the ship since no consent, either expressly or impliedly, has been given to the shipbuilder to act on the other party's behalf and affect the other party's relations with third parties. The same must be true for salvors[45] and re-insurers.[46]

Furthermore, s 78(4) requires the assured and his agents 'to take reasonable steps to avert or minimise a loss'. It has been held that these words impose a duty to act in circumstances where a reasonable man intent upon preserving his property, as opposed to claiming from insurers, would act.[47]

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[43] [1998] 1 Lloyd's Rep 236.

[44] *Ibid*, at p 247.

[45] *Aitchinson* v. *Lohre* (1879) 4 App Cas 755.

[46] *Uzielli* v. *Baston Marine Insurance Co* (1884) 15 QBD 1.

[47] See, the judgment of the Court of Appeal in *Integrated Container Service Inc* v. *British Traders Insurance Co Ltd* [1984] 1 Lloyd's Rep 154, per Eveleigh, LJ, at p 158.

Finally, by evaluating the wording of s 78(4), it is possible to draw the conclusion that the duty arises as soon as the subject-matter of insurance is endangered by an insured peril and probably lasts until the policy terminates somehow.

Both standard hull[48] and cargo[49] clauses contain 'sue and labour clauses' drafted in a very similar way to s 78, so the duty to minimise or avert a loss and right to incur expenses occurred during the performance of this duty have been made an express term of the marine insurance contracts.[50]

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[48] For example, cl 11 of ITCH (1995) states:

'(1) In case of any loss or misfortune it is the duty of the Assured and their servants to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

(2) Subject to the provisions below and Clause 12, the Underwriters will contribute to charges properly and reasonably incurred by the Assured, their servants or agents for such measures. General average, salvage charges (except as provided in Clause 11.5), special compensation and expenses as referred to in Clause 10.5 and collision defence or attack costs are not recoverable under this Clause 11.'

[49] Clause 16 of ICC (1982) (Type (A, B and C) reads:

'It is the duty of the Assured and their servants and agents in respect of loss recoverable hereunder:

(1) to take such measures as may be reasonable for the purpose of averting or minimising such loss,

... the Underwriters will, in addition to any loss recoverable hereunder, reimburse the assured for any charges properly and reasonably incurred in pursuance of these duties.'

[50] At this point, attention should be directed to an academic discussion which can have serious legal impact on practice. In an Australian case which was heard by Supreme Court of New South Wales, *Emperor Goldmining Co Ltd* v. *Switzerland General Insurance Co Ltd* [1964] 1 Lloyd's Rep 348, it was decided that the existence of a 'sue and labour clause' in the insurance contract is not essential to a right of reimbursement. The logic behind this judgment is that s 78(4) imposes a statutory duty on the assured so he is entitled to claim the expenses incurred during the performance of this legal duty regardless of the existence of an express clause to this end. It is doubtful whether the same is true for English law. That s 78(4) imposes no statutory duty on the assured has been stated and confirmed by Colman, J, in *National Oilwell (UK) Ltd* v. *Davy Offshore Ltd, ibid,* and by both first instance judge and the Court of Appeal, in *State of The Netherlands* v. *Youell & Hayward & Others, ibid.* Also, in the Court of First Instance in *Integrated Container Service Inc* v. *British Traders Insurance Co Ltd* [1981] 2 Lloyd's Rep 460, Neill, J, *obiter dictum*, when dealing with a clause containing only a reference to a duty to sue and labour without mentioning any right to reimbursement, stated that he would not follow the Australian decision, *ibid*, at p 465. Neill, J, referred to a statement by Lord Pearson in *Trollope* v. *North West Metropolitan Hospital Board* [1973] 1 WLR 601 where it was stated:

' An unexpressed term can be implied if and only if the Court finds that the parties must have intended that term to form part of their contract: it is not enough for the Court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term, which, though tacit, formed part of the contract which the parties made for themselves.'

Cf Netherlands Insurance v. *Ljungberg & Co (The Mammoth Pine)* [1986] 3 All ER 767.

The insurer might bring two types of defences under a typical 'sue and labour clause'. In some cases, he might allege that expenses which are claimed by the assured under the sue and labour clause are either unreasonable or not incurred when the assured was averting or minimising a loss or they were incurred while a loss caused by a peril not insured against was averted or minimised. In all these cases, the common feature is that the assured is put under a burden of proof to show that the expenses incurred while a loss covered by the policy was averted or minimised and they were not 'unreasonable'. Therefore, if the insurer chooses to bring a defence of this nature, such a defence is a 'negative' one since the insurer simply traverses the allegations and does nothing more. Accordingly, these situations will not be taken into consideration in this part.

Conversely, the insurer might also allege that the assured has failed to avert or minimise a loss, so he is in breach of an express term of the insurance contract. Adopting this course, the insurer, in fact, relies a 'positive' defence since breach of a contractual term has been brought into consideration and the burden of proof lies with the insurer. The legal consequence of breach of a contractual term of this nature has been the topic of numerous debates over the past years. Mainly, two contradicting school of thoughts have dominated this area. According to one view which has been expressed by Hobhouse, J, in *Noble Resources Ltd* v. George Albert *Greenwood (The Vasso)*,[51] s 78(4) imposes a positive obligation owed by the assured to the underwriters breach of which sounds in damages.[52] According to Hobhouse, J, such damages may be set off against the insurer's liability to the assured, so as to be a full or partial defence to the claim.[53] Accepting this approach as accurate will create an inconceivable dilemma specially when hull policies are concerned. Section 55(2)(a) of the MIA 1906 provides that the policy might expressly cover for negligence of the master and crew. Accordingly, loss occasioned from negligence of the Master, Officers, Crew or Pilots is covered under the Inchmaree Clause in all standard hull clauses provided that such loss has not resulted from want of due diligence by the Assured, Owners, Managers or

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[51] [1993] 2 Lloyd's Rep 309.

[52] Two pre-Act cases, namely *Currie & Co* v. *Bombay Native Insurance Co Ltd, ibid,* and *Kidson* v. *Empire Marine Insurance Co Ltd* (1867) LR 2 CP 356, have been cited as authority for this proposition.

[53] *Ibid*, at p 314.

Superintendents or any of their onshore management.[54] In this conjunction, it would seem to follow that whenever agents of the assured, by negligence fail to take necessary steps which would avert or minimise the consequences of an insured peril, underwriters can by defence or counterclaim avoid liability for such consequences. Thus, in effect, the policy would exclude liability for loss attributable to negligence of the assured's agents after, but not before the casualty. Put another way, allowing the insurer to bring a claim for damages in case of breach of s 78(4) by the assured, would mean that s 78(4) prevails s 55(2)(a) and although it is expressly stated in the Inchmaree Clause that the assured can recover for the negligence of his master, in reality he will not be entitled to do so.

The other view which has been advocated by current editors of Arnould,[55] is to treat the issue as one of causation. Adopting this approach, it will be necessary to identify the *proximate cause* or *causes* of the loss and consider the perils insured against in the policy. If, for example, negligence of the master in averting or minimising the loss is found to be the *proximate cause* of the loss, the assured would be indemnified in Institute Hull Clauses due to the existence of the Inchmaree Clause but not under Institute Cargo Clauses (Types B/C) where such a loss is not a peril insured against.

Arnould' s view has recently found judicial support in *National Oilwell (UK)* v. *Davy Offshore Ltd*[56] and later both in the judgement of the first instance judge, Rix, J, and the Court of Appeal in *State of The Netherlands* v. *Youell & Hayward & Others.*[57] In this respect, the author is of the opinion that until the judgment of the Court of Appeal in *State of The Netherlands* v. *Youell & Hayward & Others* is overruled, the consequence of breach of s. 78(4) should be treated as an issue of causation.[58]

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[54] See, cl 6.2 of ITCH (1995) and cl 4.2 of IVCH (1995).

[55] *Arnould's Law of Marine Insurance and Average*, (16th ed,1981), at para 770.

[56] *Ibid.*

[57] [1997] 2 Lloyd's Rep 440 and *ibid.*

[58] Most of the authorities who commented on s 78(4) were of the opinion that this sub-section did not impose a statutory duty on the assured. Some of them blamed Sir Chalmers Mackenzie for the poor drafting of the sub-section and some contended that he was mis-led by *Currie & Co* v. *Bombay Native Insurance Co, ibid,* which was ill reported and susceptible of several interpretations. It is beyond the scope of this work to evaluate all these issues.

CHAPTER 9

CONJUNCTION BETWEEN LEADING POSITIVE (AFFIRMATIVE) DEFENCES OF THE UNDERWRITER AND BREACH OF WARRANTY DEFENCE

INTRODUCTION

Leading defences available to a marine insurer has been classified and their main aspects have been evaluated in the previous chapter. In this Chapter, the interrelation between positive defences which have been highlighted and breach of warranty defence will be discussed. Due to its close connection to the warranty regime, the unseaworthiness defence in time policies (s 39(5)) will also be taken into account and the interrelation between this particular type of defence and other leading affirmative defences will be illustrated. It is the personal opinion of the author that such an examination will increase understanding of the warranty defence in marine insurance and add a different view point to the current discussion.

9. 1 INTERRELATION BETWEEN BREACH OF GOOD FAITH AND WARRANTY DEFENCES

9.1.1 Sections 18/19/20- Section 33(3) of the MIA 1906

It is quite possible that an assured or his agent might make a material misrepresentation or fail to disclose a material fact during the formation of the contract and also be in breach of a marine warranty. The consequences of such a situation vary depending on the nature of the warranty breached; whether it is a warranty which has to be complied with at the inception of the risk, eg an express warranty regarding the flag of the insured vessel or it is a warranty which relates to a future event, eg a navigation warranty. In the former case, when the assured warrants that the vessel insured flies

the flag of a particular state while this is not the case and also a non-disclosure/misrepresentation at the negotiations stage occurs, whichever defence the insurer relies on, the legal consequence will be the same. If, for example, the insurer decides to avoid the policy by virtue of ss 18/19/20, the policy will be regarded as void *ab initio*. Similarly, reliance on breach of warranty will result in the insurer never coming on risk. In both cases, the insurance contracts will be regarded as if never effected and the insurer is under an obligation to return the premium due to total failure of the consideration provided that there has been no fraud or illegality on the part of the assured.[1]

On the other hand, in the latter case, say the assured makes a material misrepresentation at the negotiations stage and also breaches a trading warranty, the insurer has to bear in mind that relying on a certain positive defence rather than the other might be in his favour. If, the insurer, in such a case by giving notice relies only on the breach of warranty defence, by virtue of s 33(3) and the interpretation adopted by the House of Lords in *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd* (*The Good Luck*),[2] he will be discharged from further liability automatically as from the moment the trading warranty is breached. This means that, the insurer, still might have to indemnify the assured for partial losses which occurred before the breach of the warranty. Also, the insurer might keep the whole or part of the premium paid depending on the fact whether the consideration for

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[1] Section 84(1) of the MIA 1906 reads:

'Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.'

Similarly, s 84(3)(a) reads:

'Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured...'

Therefore, if the warranty breached is implied warranty of legality or the assured or his agents are involved in illegal acts or act fraudulently there will be no return of the premium.

[2] [1991] 2 Lloyd's Rep 191, hereinafter referred to as *The Good Luck*.

the payment of the premium is apportionable.[3] Conversely, if the assured relies on ss 18/19/20 and declares the contract void *ab initio*, he is not under an obligation to indemnify the assured for losses which occurred before the breach of warranty. However, by virtue of s 84(3) of the MIA 1906, in such a case the insurer is obliged to return the whole premium unless there is fraud or illegality on the part of the assured. To sum up, the insurer has to consider the circumstances and decide which defence serves his interests best. If there is no claim for a partial loss which has occurred before the breach of warranty, then relying on s 33(3) will presumably be in favour of the insurer, since he will be able to retain some of the premium if the consideration is apportionable and the whole if it is not.[4]

When determining the scope of the disclosure duty of the assured, s 18(3) of the MIA 1906 provides that:

'In the absence of inquiry the following circumstances need not be disclosed, namely:
...(d) Any circumstance which is superfluous to disclose by reason of any express or implied warranty.'

Accordingly, where the assured warrants that the insured vessel will only be used for pleasure purposes, his failure to disclose his intention to use the vessel as a

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[3] As a general principle, the assured is precluded from claiming the return of premium where there has been no failure of consideration. If upon the face of the policy the risk has once attached, and the insurers have become liable to the assured to pay in the event of loss, the consideration for which the premium is paid is performed. Therefore, the assured cannot claim a return of the premium as upon a failure of consideration, although the policy for some reason or another becomes void once the risk has attached. This was illustrated by Lord Mansfield in *Tyrie* v. *Fletcher* (1777) 2 Cowp 666 at p 668 with the following speech:

'Another rule is that if the risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium after. For though the premium is estimated and the risk depends upon the nature and length of the voyage, yet, if it has commenced, though if be for only twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned.'

See also *Moses* v. *Pratt* (1815) 4 Camp 297. However, by virtue of s 84(2) of the MIA 1906, if the contract is not entire and the premium is capable of being apportioned between different risks, some of which never run, the assured may claim a return of that portion of the premium which is referable to the risks never run. It has been observed that determining whether the risk insured and consequently the premium is apportionable is not an easy task and has always been a cause of litigation, see, *Annen* v. *Woodman* (1810) 3 Taunt 299 and *Berman* v. *Woodbridge* (1781) 2 Dougl 781.

[4] It is common to see the insurer relying on more than one positive defences at the same time in order to strengthen his position.

demonstration model does not permit the insurer to bring breach of utmost good faith as a defence.[5] Similarly, where the assured who has insured his vessel under the standard Institute Hull Clauses[6] is not under an obligation during the negotiations to disclose his intentions of entering into a towage contract with a third party.[7] If the assured, after the attachment of the risk, enters into such a contract, he will be merely in breach of the express warranty, provided of course he fails to operate the held covered clause.[8]

The logic behind s 18(3) is clear. The reason of imposing a pre-contractual disclosure duty on the assured is to give the insurer an opportunity to assess the risk he is insuring. If the factors which need to be disclosed are within the scope of a warranty, the object of assessing the risk is achieved in this way. Further, the fact that the factors which need to be disclosed are incorporated into a warranty puts the assured in a disadvantaged position. This is the case because a warrant requires exact compliance while non-disclosure at pre-contractual stage would entitle the insurer to avoid the contract if they are material to the risk.[9] In this respect, in order to balance the interests of the parties the drafter found it appropriate not to afford the insurer the remedy of

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[5] *Iversiones Manria* v. *Sphere Drake Insurance (The Dora)* [1989] 1 Lloyd's Rep 69. See also, *Cantiere Meccanio Brindisino* v. *Janson* [1912] 3 KB 452 and *Greenhill* v. *Federal Insurance Co Ltd* [1927] 1 KB 65. *Cf Foley* v. *Tabor* (1861) 2 F & F 663.

[6] Clause 1.1 of ITCH and IVCH (1995) provides that:

'... it is warranted that the Vessel shall not ... undertake towage or salvage services under a contract previously arranged by the Assured and/or Owners and/or managers and/or Charterers.'

[7] For a non-marine case illustrating the same principle, that matters covered by a warranty need not be disclosed, see, *De Maurier (Jewels) Ltd* v. *Bastion Insurance Co Ltd* [1967] 2 Lloyd's Rep 550.

[8] Arnould, *ibid*, at p 514, fn 90, suggests that it is an interesting academic point whether the assured should disclose matters covered by a warranty when the policy includes a 'held covered' clause, since this clause may be applied so as to defeat any defence based on breach of warranty if invoked in due time. With due respect to the current editors of this valuable work, the author is of the opinion that such a discussion will have no academic value. The existence of a held covered clause in the policy will create no difference in the legal position because such a clause operates only if certain conditions, giving of notice and agreement on additional premium, are satisfied and the assured has a freedom whether to invoke this clause or not. If the assured decides to invoke the held covered clause, breach of warranty, which occurs at one point after the attachment of the risk, will be waived but this should not affect the position of the assured who failed to disclose material facts covered by the warranty during negotiations. At that stage, when the assured failed to disclose material facts, these issues were covered by a warranty and waiver of this warranty later by operation of a held covered clause should not put the assured, who has done nothing wrong at the negotiation stage, in a disadvantageous position.

[9] For the definition of materiality in this context, see the decision of the House of Lords in *Pan Atlantic Insurance Co Ltd* v. *Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427.

avoidance *ab initio* which would preclude the assured from recovery under the policy. Instead, the insurer could rely on an automatic discharge remedy and he is under an obligation to indemnify the assured for losses which occasioned upto the moment the warranty is breached.[10]

However, as stated expressly in s 18(3), the position is different if during negotiations the insurer makes an inquiry in relation to a matter covered by an express or implied warranty. In such a case, the assured must disclose such relevant issues otherwise he might be in breach of s 18. Say, there is a navigation warranty which requires the vessel not to navigate in certain areas. The policy might also include a held covered clause which will oblige the insurer to waive breach of such a warranty provided of course immediate notice is given and additional premium is agreed. For the sake of calculating his potential exposure, at the negotiation stage, the insurer might wonder whether the assured has intentions of navigating in the areas which is under the scope of the navigation warranty and invoking the held covered clause during the continuance of the policy. If the assured despite having such intentions fails to disclose this to the insurer, this will afford a s 18 defence to the insurer and entitle him to avoid the whole policy even though the held covered clause is invoked by the assured and breach of navigation warranty is waived.

Finally, it is needless to state that the assured has to disclose material facts which are within the scope of an implied warranty, if such a warranty has been waived with an express clause in the policy. For instance, if the warranty of seaworthiness in a voyage policy on hull is waived in the policy, the assured is under an obligation by virtue of s 18 to disclose all material facts which might render a vessel unseaworthy. Failure to do so will afford a positive defence to the insurer to avoid the contract *ab initio*.

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[10] One could wonder whether the duty to disclose material facts may be rendered superfluous within the meaning of s 18(3)(d) by s 39(5) which in a time policy excuses the insurer from liability in respect of a loss caused by the insured vessel's unseaworthiness, where the loss is caused by unseaworthiness and the vessel has been sent to sea in that state with the privity of the assured. The author is of the opinion that this could not be the case for two reasons. First, s 18(3)(d) expressly provides that it applies as far as warranties are concerned and s 39(5) does not impose a warranty status. Secondly, the vessel's seaworthiness still be material in that it helps the insurer to rate the risk of loss in cases where there is no privity.

9.1.2 Section 17- Section 33(3) of the MIA 1906

The probable interrelations between breach of utmost good faith duty embodied in s 17 and breach of a warranty can be best seen by considering a hypothetical scenario. Let us assume that the assured has a hull policy, either time or voyage, which includes a navigation warranty and the held covered clause is not operated in order to retain the cover in case of its breach. After sustaining a partial loss, the insured vessel enters an area in breach of the navigation warranty. Soon after, she is stranded due to negligence of her master and she is re-floated with some bottom damage. The assured submits two claims, one for the partial loss occurred before the breach of the warranty and one for the bottom damage resulted from stranding. The insurer finds out that the assured has fraudulently exaggerated the claim[11] for the bottom damage so he is in breach of utmost good faith duty stated in s 17 when submitting his claim. In such a case, the insurer has two possible defences. He can either rely on s 17 for breach of utmost good faith duty by the assured or s 33(3) for breach of an express warranty. If the insurer chooses the former course, he does not have to indemnify the assured either for the first or for the second partial loss since the policy will be regarded as void *ab initio* and he can also retain the premium due to the fraudulent act of the assured.[12] Choosing the second course, will discharge the insurer from liability as from the date of breach of the navigation warranty so he will be obliged to indemnify the assured for the first partial loss and he might keep the part or whole of the premium.[13] However, there is a further point which is not crystal clear and needs to be considered. As was mentioned in the previous chapter,[14] Hirst, J, in *Black King Shipping Corporation* v. *Massie* (*The Litsion Pride)*[15] stated that in case of breach of s 17 in the claims context, the insurer

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[11] For a similar situation, see *Orakpo* v. *Barclays Insurance Services & Another* [1995] LRIR 443.

[12] The case law suggests that the fraud defence would succeed in cases where the claim is grossly exaggerated. See, the decisions of the Court of Appeal in *Galloway* v. *Guardian Royal Exchange UK Ltd* [1999] LRIR 209 and *Orakpo* v. *Barclays Insurance Services & Another* [1995] LRLR 443. Note, however, Staughton, LJ, in *Orakpo* v. *Barclays Insurance Services & Another,* in his dissenting judgment, seems to have been inclined to the view that a claim which is knowingly exaggerated in some degree should not necessarily as a mater of law disqualify the assured from any recovery, unless the contract contains an express provision to this effect.

[13] Of course, there is nothing preventing the insurer from submitting both of these two defences at the same time to strengthen his case.

[14] See, Chapter 8.2.1 at pp 260.

[15] [1985] 1 Lloyd's Rep 437.

had an option either to avoid the policy or to reject the particular claim and affirm the policy.[16] If the House of Lords in *Manifest Shipping & Co Ltd* v. *Uni-Polaris Insurance Co Ltd & La Réunion Européenne* (*The Star Sea*), agreeing with Hirst, J, declares that 'avoidance' is not the only legal remedy in case of breach of s 17 and the insurer is given an opportunity to reject a particular claim by affirming the policy, then the insurer might have a third alternative in a situation like the above. He can reject the fraudulent claim, the one for the bottom damage, and keep the contract alive. It must, however, be borne in mind that by taking this course the insurer in fact waives breach of navigation warranty since his conduct, rejecting a claim which has arisen after the breach of the warranty, is inconsistent with the exercise of the right of automatic discharge.[17] Consequently, the insurer will be precluded from relying on the breach of warranty defence later.

9.2 INTERRELATION BETWEEN WILFUL MISCONDUCT OF THE ASSURED AND BREACH OF WARRANTY/SECTION 39(5) DEFENCES

9.2.1 Section 55(2)(a)- Section 33(3) of the MIA 1906

In some cases, the assured with a single act might be in breach of two different sub-sections of the Act and accordingly two different positive defences might be available to the insurer. This is the case, for example, when a voyage policy on the hull is effected and the insured vessel is unseaworthy at the commencement of the voyage. If the assured or his managers are aware of the unseaworthy state of the vessel and deliberately or recklessly allow her to commence the voyage in that state, it is very likely that in a case where she sustains a partial loss as a result of her unseaworthiness, the wilful misconduct of the assured is going to be found as the *proximate cause* of the loss. The insurer, then, has to make a decision about the legal remedy he is going to rely on considering a number of external factors. For instance, if another loss which is not occasioned from unseaworthiness of the vessel exists, it is advisable that the insurer relies on breach of warranty defence rather than wilful misconduct defence. In such a case, since breach of warranty has the effect of discharging the insurer from

[16] This view was later rejected in *The Good Luck* by the Court of Appeal.

[17] See, Chapter 7.1.2.2 at p 226 where the elements of waiver of breach of warranty are evaluated.

further liability automatically as from the date of breach and the breach occurs at the commencement of the voyage, the insurer is not under any obligation, eg indemnifying the assured in relation to the second loss, towards the assured. He is also entitled to the whole of the premium unless the risk is apportionable, because the warranty relates to a period, commencement of the voyage, after the attachment of the risk. If, on the other hand, the insurer wishes to keep the contract alive, he can allege that the loss has occasioned from the wilful misconduct of the assured. In such a case, the insurer has to indemnify the assured for the second loss which is not occasioned from unseaworthiness because he can only deny liability for the loss which is attributable to the wilful misconduct of the assured and the second loss is clearly not attributable to such a conduct. Also, by relying on wilful misconduct defence, the insurer waives his right to rely on breach of warranty defence since his conduct, rejecting the claim which has occurred after the breach of the warranty, is inconsistent with the exercise of the right of automatic discharge. There is one potential danger of relying solely on the wilful misconduct of the assured defence. In a case where the insurer relies on this defence but fails to prove the wilful misconduct or wilful misconduct of the assured is not found as the *proximate cause* of the loss; then he will be precluded to rely on breach of warranty defence since he has already waived the breach. Usually, in practice, the insurer in such a case relies on both positive defences in order to strengthen their position.

9.2.2 Section 55(2)(a)- Section 39(5) of the MIA 1906

In time policies, the interrelation between the wilful misconduct defence under s 55(2)(a) and unseaworthiness of the insured vessel defence under s 39(5) is remarkable and will be evaluated in detail here. It is to be observed that under both sub-sections, the applicable rule of causation is to be found in the words 'attributable to'.[18] Thus, any loss attributable to such unseaworthiness to which the assured is privy or any loss attributable to the wilful misconduct of the assured will prevent recovery under the policy.

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[18] As explained in Chapter 3.3.3.2.3 at pp 123-4, this kind of wording is the result of the 'last in time' approach which was the dominant causation theory at the time the act was drafted.

There may be certain situations where the insurer need not rely on either s 55(2)(a) or s 39(5) in order to deny indemnity. This is usually the case where the loss is attributable to a peril not insured against. In a case where the corrosion of the plates which renders the insured vessel unseaworthy is brought to the attention of the assured, but the assured either deliberately or recklessly, allows the vessel to sail in that state, the insurer will not be liable for any loss which occasioned from the unseaworthiness, simply because unseaworthiness is not a peril insured against in modern hull policies. The assured, in this particular case, has been in breach of both s 55(2)(a) and s 39(5), but instead of relying on these positive defences and undertaking the burden of proof; the insurer might allege that the loss is not occasioned from a peril insured against, a negative defence, and leave the burden of proof on the shoulders of the assured.

In some cases, despite the fact that the insured vessel is sent to sea in an unseaworthy state with the privity of the assured and/or wilful misconduct on the part of the assured in sending the vessel to sea in that state can be observed, the insurer might not be allowed to rely on any of them since the loss is not 'attributable' either to the unseaworthiness to which the assured is privy or to the wilful misconduct of the assured. Such a situation can occur when a vessel is insured for a certain period of time against war risks and she is unseaworthy due to a defect in her machinery. If the insured vessel is sent to sea in that state deliberately or recklessly by the assured and she is hit by a missile and becomes a total loss, the insurer is liable under the policy and can rely on neither s 39(5) nor s 55(2)(a). The simple reason for this is that the loss occurred from an insured peril, namely from weapon of war, and there is no causal link between the loss and unseaworthiness or wilful misconduct of the assured.

A literal interpretation would reveal that the 'privity' compared to 'wilful misconduct' is a lesser form of blame or misbehaviour (both words used in the broad sense), and, to that extent, easier to prove. However, this does not necessarily mean that s 39(5) will find application in all cases where s 55(2)(a) applies. These two defences are dependent on the existence of a causal link between the loss and the wrongful act and in some cases the causal link might exist for one while not for the other. Accordingly,

circumstances might arise where the insurer is provided with a wilful misconduct defence but not with a s 39(5) defence. This, for example, might occur where the vessel insured for war risks for a certain period of time is also unseaworthy, say due to a defect in her hull, and the assured who is privy to this unseaworthiness sends her in that state to an area where he knows the presence of hostile war ships. If the vessel is confiscated and the assured claims a constructive total loss, the insurer might refuse payment, on the basis of, *inter alia*, the wilful misconduct of the assured in sending the ship on a voyage where capture was imminent. However, the insurer cannot rely on s 39(5) to deny liability, because the loss is not attributable to the unseaworthiness of the vessel to which the assured is privy. Conversely, in some cases the assured's wrongful act might constitute breach of s 39(5) but not s 55(2)(a). An illustration for such a case can be found in the second volume of Arnould.[19] In time of war, a shipowner fearing an attack upon a naval port may very properly order his vessel to sail at once, although he knows that she is not perfectly seaworthy in all respects. If later, any loss is occasioned from this unseaworthiness the insurer surely will be able to rely on s 39(5) but not s 55(2)(a).

Finally, as was expressed by Lord Roskill,[20] circumstances can be envisaged in which sending a ship to sea in an unseaworthy state to which the assured was privy could be said to amount to wilful misconduct, and, if a loss is followed the underwriter might successfully plead both s 39(5) and s 55(2)(a) by way of defence. In fact, circumstances illustrated by Lord Roskill were observed in an Australian case, *Wood* v. *Associated National Insurance Co Ltd.*[21] There, a vessel was abandoned during the time of gale-force winds and high seas as her engine could not be started and she was dragging her anchor. The insurers sought to defend the claim for a constructive total loss by alleging wilful misconduct and that the assured was privy to the unseaworthiness of the vessel at the beginning of the voyage to which the loss was attributable. Evidence showed that the crew members were not capable of carrying out minor mechanical investigations or repairs in the event of the main engine failing to

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[19] *Ibid*, at para 720, fn 62.

[20] *Compania Maritime San Basilio SA* v. *Ocenus Mutual Underwriting Association (Bermuda) Ltd (The Eurysthenes)* [1977] 1 QB 49 at p 78.

[21] [1984] 1 Qd R 507; [1985] 1 Qd R 297.

start; they were not experienced to care and maintain the ship in adverse weather conditions, incapable of moving her to a safe place if that became necessary because of prevailing weather. The assureds were aware at all material times that because of incompetency of the crew and severe weather conditions and the vessel was at greatly increased risk and at the mercy of the seas, but they recklessly disregarded the probable consequences and did not take any action to remedy the situation. Under these circumstances, the court held that the reckless disregard by the assureds for safety of the vessel and crew constituted wilful misconduct to which the loss was attributable, and further that the insurers were also entitled to repudiate the liability since the vessel was sent to sea in an unseaworthy state at the commencement of the voyage by reason of the incompetency of the crew to which the assureds were privy and the loss was attributable to that unseaworthiness.

9.3 INTERRELATION BETWEEN DUTY OF THE ASSURED TO AVERT OR MINIMISE LOSS AND BREACH OF WARRANTY DEFENCE

As examined in the previous Chapter, s 78(4) of the MIA 1906, which is incorporated almost in all standard clauses, requires the assured to take 'reasonable steps' for the purpose of averting or minimising a loss. Put another way, the assured has been put under a contractual duty and in case of breach of this duty might lose his right to be indemnified under the policy. The interesting question here is that what happens if the assured does not comply with a warranty, another contractual term, while he tries to satisfy his duty to avert or minimise a loss. As a matter of general principle, the assured's obligation to use reasonable measures to avert or minimise loss will not extend to having to take measures which are either illegal or contrary to public policy according to the proper law of contract or *lex fori*.[22] Accordingly, the assured will lose his insurance cover if he breaches the warranty of legality while he attempts to avert or minimise a loss. However, the position might be different if the assured breaches a warranty other than warranty of legality during the time he tries to avert or minimise a loss. Say, for example, the assured directs the insured vessel, which has sustained bottom damage and would have become a total loss without assistance, to a dry-dock

[22] *Parsons* v. *Scott* (1810) 2 Taunt 363.

where she can receive attention. What will happen if the insured vessel by proceeding to this dry-dock, is in breach of a navigation warranty? In such a case, one might be tempted to argue along the lines that s 78(4) and sue and labour clauses in standard Institute Hull Clauses which are drafted similarly, require the assured to take all reasonable steps, including breach of another term of the insurance contract, to avert or minimise a loss. I believe that such an argument can be easily supported when read together with s 34(1) of the MIA 1906 which stipulates that:

'Non-compliance with a warranty is excused when, by reason of change of circumstances, the warranty ceases to be applicable to the circumstances of the contract...'

The wording of this sub-section, in my opinion, should be held sufficient to excuse the breach of the warranty in such a situation. The insured vessel is in distress and will become a total loss, plus the assured will be in breach of his contractual duty to minimise the loss, therefore it can be said that the circumstances have changed dramatically in order to excuse breach of warranty. However, it should also be borne in mind that the drafter of the Act, Sir Mackenzie Chalmers, has adopted a very narrow interpretation to this section.[23]

[23] See, pp 186-187, ibid.

PART 3

CHAPTER 10

LEGAL POSITION IN RELATION TO WARRANTIES IN SOME OTHER JURISDICTIONS

10.1 OBJECT AND EXTENT OF A COMPARATIVE STUDY

Several criticisms have been directed towards the 'warranty regime' adopted by the MIA 1906. Some have focused on the point that the current legal regime does not provide for a fair distribution of rights and obligations between assured and insurer, while others have usually blamed English law for being too formal. Furthermore, the evaluation of the current legal rules on marine warranties in earlier chapters has identified certain deficiencies. All these issues will be taken into account when the need for reform in this area is discussed in the final chapter of this work. However, before questioning the English marine warranties regime, some other legal systems need to be evaluated. It is believed that such a comparative approach will bring an additional dimension to the issue in question and provide the basis for a discussion on possible reform in this area.

The two legal systems chosen for such a comparative study are German and Norwegian. The choice of these two systems is not just a coincidence. German law represents the traditional continental approach together with French law, and its influence can be observed on the law and policies of a great number of countries both in and outside Europe.[1] Also, German marine insurance market is one of the largest

[1] For example, the Greek Code of Private Maritime Law of 1958 (ΚΙΝΔ), chapter 14 contains provisions for marine insurance which were highly influenced by German Law. Similarly, Turkish Commercial Code of 1956 (TTK) which was drafted by a German Professor, Hirsh, contains provisions in relation to marine insurance in its 5th book. Again, the effect of German marine insurance law can be seen in general clauses of hull insurance drafted by Japan Shipping Exchange, Inc, which are quite commonly used in the Japanese marine insurance market.

markets in the world[2] and most of the policies underwritten in this market are subject to German marine insurance conditions and accordingly to German law.

The Norwegian marine insurance plans are regarded as one of the most recent and sophisticated codes in the world. Indeed, the UNCTAD Report recommended the adoption of Norwegian form when considering reform of the documentary aspects of marine insurance.[3] Starting from early 80's, an extensive and far-reaching internationalisation of Norwegian marine insurance market has been observed. Today, for example, foreign owned and/or controlled vessels constitute an essential part of many Norwegian insurers' portfolio.[4] It is submitted that the success of the provisions in marine insurance plans, their ability to create a fair balance between the assured and insurer, played a crucial role in the internationalisation process of the Norwegian marine insurance market.[5] Also, the Norwegian marine insurance plans have through the years to a considerable extent influenced the drafting of corresponding conditions in some other Nordic countries.[6]

The legal regime in relation to marine warranties in these systems will be examined later in this chapter, after the legislative context of marine insurance in these jurisdictions is highlighted. It should be noted that the comparison will be based on hull practice and other types of insurance, eg energy, cargo insurance, insurance for oil rigs, fishing vessels, will not be taken into account. Since most of marine warranties in

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[2] Detailed statistical information in relation to the German marine insurance market will be provided in the final chapter of this work. At this stage, it is sufficient to note that German marine insurance market represents a large proportion of the world's marine business despite the lack of any German P&I or Defence Club operating.

[3] United Nations Conference on Trade and Development, *Legal & Documentary Aspects of the Marine Insurance Contract*, TD/B/C 4/ISL 27, Rev 4, para 226.

[4] In 1992, of 1542 vessels insured in the Norwegian market 63.17 % were owned /controlled by non-Norwegian citizens. Statistics also suggest that the amount of non-Norwegian owned/controlled vessels in the Norwegian market has increased by another 2-3 % in recent years. All the figures are taken from Marine Insurance Report, Issue No 121, 125 and 139 published by DYP Group Newsletters.

[5] This view has been proclaimed by Professor Hans Jacob Bull, who acted as the chairman of the Committee which revised the Marine Insurance Plan of 1964, in Marine Insurance Conference organised by The European Institute of Maritime and Transport Law in November 1999.

[6] The first Swedish General Marine Insurance Plan was introduced in 1891, 15 years after the first Norwegian Marine Insurance Plan. Similarly, Finnish General Hull Conditions for Vessels were adopted in 1968 with the inspiration taken from Norwegian marine insurance plans.

English law appear in hull policies, it is believed that an intensive study on hull insurance will be sufficient to show the main divergences between English law and these legal systems in relation to warranties.[7] One might at this stage wonder why American law, despite the size and importance of American marine insurance market, has been excluded from such an intensive study. The reasons behind this exclusion will be explained next.

10.2 REASONS FOR EXCLUDING AMERICAN LAW FROM COMPARISION

10.2.1 The Wilburn Boat Case: A Turning Point

Prior to Wilburn Boat case,[8] just like the other areas of marine insurance, there used to be a remarkable uniformity between English and American laws in the context of marine warranties.[9] Indeed, there was a tendency amongst the judges of keeping the uniformity between these legal systems.[10] The main reason behind this uniformity was the presumption that federal law would apply in preference to inconsistent state law in an action involving marine insurance and the English law, the legal regime adopted mainly by the MIA 1906, was regarded as the federal law by the majority of the courts. However, great changes with numerous judicial implications have occurred in American law after the Supreme Court's decision in Wilburn Boat case. The facts of this celebrated case can be summarised as follows:[11]

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[7] It should also be borne in mind that hull insurance forms the largest part of English, German and Norwegian marine insurance markets' premium income.

[8] *Wilburn Boat Co* v. *Fireman's Fund Insurance Co* [1953] AMC 284, rev'd [1955] AMC 467.

[9] The main divergence between English and American law seems to be in the application of the implied warranty of seaworthiness. American law has adopted, somehow, a continuing warranty status in respect of voyage policies. See, *McDowell* v. *General Mutual Insurance Co* 7 Louisiana Annual 684. Also American law, in time policies, implies a warranty of seaworthiness if the insured vessel is at port at the time of attachment of the policy. See, *Union Insurance Co of Philadelphia* v. *Smith* 124 US 405.

[10] For instance, in *Queen Insurance Co of America* v. *Globe & Rutgers Fire Insurance Co* 263 US 487, the court felt constrained to say:

'There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business.'

[11] As is commonly the case, the Supreme Court's opinion gives only a bare outline of the facts. More details can be found in some of the lower courts' opinions, The Transcript of Record and in the secondary literature.

In May 1947, Fireman's Fund Insurance Co, issued a marine hull policy on the *Wanderer*, a small houseboat. The policy was issued in Illinois through an Illinois broker to the assureds who also resided in Illinois. The policy, among other things, provided that the vessel could neither be sold or pledged without the insurer's consent;[12] she could only be used 'solely for private pleasure purposes' and could not be 'hired or chartered' without the insurer's permission.[13] In June 1948, three brothers- Glenn, Frank, and Henry Wilburn- purchased the *Wanderer* for $ 9,000. The insurer indorsed the policy in favour of the new owners doing business as a partnership known as 'Wilburn's Boat Company'. The Wilburn brothers, who were from Texas, moved the vessel to Lake Texoma, an artificial lake which lies (as its name suggests) on the border between Texas and Oklohama. A policy indorsement authorised the trip and provided that after the move the *Wanderer* would be confined to Lake Texoma. In September 1948, they sold the *Wanderer* to the 'Wilburn's Boat Company', an Oklahoma corporation that they owned, without the consent of the insurer. On three occasions, the Wilburn brothers or their corporation pledged the vessel to secure promissory notes again without the consent of the insurer. Finally, the owners had leased the vessel on several occasions and had carried passengers for hire. Undoubtedly, these actions of Wilburn brothers breached the policy. On 25 February 1949, a fire destroyed the *Wanderer* while she was moored approximately 90 meters off the Oklahoma shore of the Lake. The origin of the fire could not be identified, but there was no doubt that the breaches of the policy noted above did not cause the loss. The Wilburn brothers made a claim under the policy, but the insurer refused to pay on the ground that several warranties in the policy were breached and the federal law of marine insurance permitted the underwriters to avoid payment for a subsequent loss- even if the breach was unrelated to the loss. The Wilburns, on the other hand, argued that Texas law, rather than the general maritime law, governed the policy. Under Texas

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[12] The Policy provided as follows:

'It is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged without consent in writing of the Assurers.'

[13] The Policy provided as follows:

'Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by endorsement hereon.'

law, the policy breaches relating to the sale and use of the vessel would not defeat coverage unless they had contributed to the loss.

In June 1949, the three brothers and their company sued the Fireman's Fund Insurance Company in a Texas state court claiming over $ 40,000 under the insurance contract. The insurer, Fireman's Fund, managed to have the case removed to the Federal District Court the following month by asserting diversity jurisdiction.[14] In December 1951, the District Court ruled that federal maritime law rather than Texas law governed and due to the 'literal compliance' rule, the Wilburns were not entitled to recovery. The decision of the district Court was later affirmed by US Court of Appeals for the Fifth Circuit.

Due to the importance of the questions involved, the Supreme Court 'granted *certiorari*', meaning that it agreed to hear the case. On 28 February 1955, almost six years after the loss, the Supreme Court reversed the Fifth Circuit's decision and remanded the case to the District Court 'for a trial under appropriate state law'.[15] The Supreme Court's decision, which was written by Black, J, needs to be analysed carefully.[16] The Supreme Court, immediately, held that there was not a judicially established federal admiralty rule governing marine insurance warranties. It was further stressed that in cases where no federal rule existed, state law should be applied. Accordingly, it was decided that the effect of breach of warranties in the Policy would be decided by applying the appropriate state law.[17] Moreover, the Court discussed whether a 'new federal admiralty rule' in this area should be fashioned and concluded that this was not necessary for two principal reasons. First, the regulation of insurance has historically been a matter for the states (even if the federal government does have the power to regulate insurance if it chooses to do so) and Congress has recognised

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[14] Diversity jurisdiction gives the Federal Court the power to hear certain cases when the parties are from different states.

[15] On remand, the litigation odyssey continued for slightly more than seven additional years and finally the case was resolved by applying Texas law. Ironically, the Supreme Court's decision did not help the Wilburn brothers, who were found guilty of eight material misrepresentations and non-disclosures and their claim was denied even on state law grounds.

[16] The most detailed account of the case can be found in Goldstein, JK, *The Life and Times of Wilburn Boat: A Critical Guide*, [1997] Mar L & Com 395.

[17] *Ibid*, at pp 472-3.

and acted upon this diversion of responsibility.[18] Second, even if the Court wished to fashion a new rule, doing so would be a complex and difficult task that courts are poorly equipped to undertake.[19]

Despite the lapse of forty-five years, discussions on the actual impact of the *Wilburn Boat* case are still going on in America. Most commentators criticise the judgment severely on the ground that it has a destructive effect on uniformity and certainty of both American marine insurance and admiralty law.[20] Some, on the other hand, regard the holding in *Wilburn Boat* as a necessary element of the constitutional system of the United States which seeks to balance federal and state power by allowing state law to prevail in certain instances.[21] It is beyond the scope of this work to discuss the correctness and justification of the judgment of the Supreme Court in *Wilburn Boat.* We are only concerned with the conflicts and difficulties arising from the judgment which prevent us from carrying out a healthy comparison between English and American law in relation to warranties and these issues will be explained next. In order to complete the picture, it is sufficient to remark Professor Schoenbaum's view that the real reason for the holding was presumably the Supreme Court majority's perception of the rigidity and formalism of English law and the fear of miscarriage of justice if the English law rule was allowed to prevail.[22] Perhaps, the Court was uncomfortable with the 'harsh' literal compliance rule and did not want to deprive the Wilburn brothers of recovery for breaches of warranties which had no causal link with the loss. Deferring the problem to Congress or the states, with their greater expertise and experience, probably seemed much easier than adopting a new rule to replace it.[23]

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[18] *Ibid*, at pp 473-5.

[19] *Ibid*, at pp 475-6.

[20] See, McGlore, *Marine Insurance and Implied Warranty of Seaworthiness*, [1975] Loyola L Rev, p 960, at pp 969-71; Waesche, AJ, *Choice and Uniformity of Law Generally*, [1991] Tul L Rev, p 293, at pp 303-4; Waddell, G, *Current Issues and Developments in Marine Insurance*, [1993] USF Mar L J, p 185, at p 187.

[21] See, Note, *The General Maritime Law v. State Law in Maritime Cases: Which, When and Why?*, 50 Nw U L Rev, p 677, at p 682.

[22] Schoenbaum, TJ, *Key Divergences Between English and American Law of Marine Insurance: A Comparative Study*, (Cornell Maritime Press, 1999), at p 37.

[23] Professor Goldstein has found considerable evidence in several of the justices' private papers, which have since become available to scholars, that the result in Wilburn Boat was largely driven by the equities of the case. See, Goldstein, *ibid*, at pp 410-7.

10.2.2 Unpredictability of American Law

The judgment of the Supreme Court in *Wilburn Boat* creates problems on many levels, most of which relate to predictability in the law governing marine insurance warranties. The main reason behind this is that the Supreme Court gave virtually no guidance on how to decide whether federal or state law should apply when warranties are concerned, but it at least offered the illustrations of its own analysis concerning the 'literal compliance' rule. In this respect, determining the extent of *Wilburn Boat* is left to the lower courts and inevitably this creates a remarkable degree of uncertainty in law.[24] It is not crystal clear whether *Wilburn Boat* will be applied to all areas as far as marine warranties are concerned or solely when the 'literal compliance' rule is involved. Similarly, whether *Wilburn* rule be applied to all types of warranties or only to the ones dealt in the case, is a mystery. For instance, certain courts despite *Wilburn Boat* are of the opinion that the 'literal compliance' rule applies to warranties as a federal law. Put another way, they insist on the existence of a federal rule specially in cases where 'literal compliance' rule is involved.[25] These courts apparently take the view that *Wilburn Boat* should be confined to its particular facts so that non-Wilburn warranties, such as navigational warranties, are subject to federal law.[26]

10.2.3 Other Practical Difficulties

Even though *Wilburn Boat* decision is interpreted as allowing state law to govern marine insurance warranties, this time further problems, in terms of a comparative study, are likely to arise. Such an interpretation opens the way for potentially fifty

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[24] This situation had been foreseen in a general sense by Professors Gilmore and Black in the first edition of their treatise (Gilmore, G, & Black, CL, *The Law of Admiralty*, (Foundation Press, 1957), § 2-8, at p 63) where they stated:

'Wilburn may mean merely that the States are to have a limited competency to regulate certain terms of marine policies. It could as a matter of cold logic be read to mean that there is no federal maritime law at all. It may very well turn out to mean anything between these extremes.'

[25] See, *Lexington Insurance Co* v. *Cooke's Seafood*, 835 F2d 1364; *Aetna Insurance Co* v. *Dudney*, 595 So2d 238 and *Home Insurance Co* v. *Veron Holdings* [1995] AMC 369.

[26] See, *Lexington Insurance Co* v. *Cooke's Seafood, ibid*, at p 1366.

different rules on marine warranties. For example, Washington law requires a causal connection between breach of warranty and the cause of loss in order for the breach to avoid coverage.[27] Florida law, on the other hand, provides that breach of warranty does not void the policy or contract or constitute a defence to a loss thereon unless such breach or violation increased the hazard by any means within the control of the assured.[28] In the presence of such a complicated legal regime, it is submitted that it will be an unreasonable attempt to generalise American law and compare to the MIA 1906.[29]

Furthermore, the fact that many states explicitly exclude marine insurance from significant proportions of their insurance legislation[30] add further complexities to such a comparative study. In such states, due to lack of a marine insurance precedent, the courts usually resolve marine disputes with reasoning designed for car or homeowners' insurance.[31] Therefore, for those states not only the marine insurance law but other areas of insurance law need to be explored carefully in order to identify the state law on marine warranties and naturally this makes a comparative study not impossible but very difficult.

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[27] See, *Riordan* v. *Commercial Travelers Mutual Insurance Co*, 525 P2d 804; *Port Lynch, Inc* v. *New England International Assurety of America Inc*, [1992] AMC 225 and *Oregon Auto Insurance Co* v. *Salzberg* 535 P2d 816.

[28] See, FLA STAT ANN s 627.409(2) (West 1996) and *Fireman's Fund Insurance Co* v. *Cox* [1990] AMC 908.

[29] The number of contradicting judgments even within the same Circuit makes any generalisation on American law such a difficult task.

[30] See, eg, ALA CODE s 27-14-2(3) (1986) (excepting '[w]et marine and transportation insurance' from the chapter governing insurance contracts); LA REV STAT ANN s. 22:611(A) (West 1995) (excepting 'ocean marine and foreign trade insurances' from part XIV of the Insurance Code, which governs insurance contracts); VA CODE ANN s 38.2-300(1) (1994) (excepting '[o]cean marine insurance other than private pleasure vessels' from chapter governing insurance policies and contracts); WASH REV CODE ANN s 48.18.010 (1984) (excepting 'ocean marine and foreign trade insurances' from chapter governing insurance contracts).

[31] In *Associates Ltd* (5801) v. *Continental Insurance Co* [1993] AMC 1453, for example, a decision involving the sinking of a barge in the open seas off the coast of south Carolina, the federal court felt compelled to look at the law of Missouri. Finding no marine insurance decision on point, it followed an automobile insurance decision.

10.3 GENERAL APPROACH IN RELATION TO ALTERATION OF RISK UNDER GERMAN AND NORWEGIAN LAW

In an insurance relation, it is crucial for the insurer that certain factors affecting the risk will remain unchanged during the currency of the contract since he has based his agreement and rate of the premium on this assumption. In the event that this assumption should not hold true, the insurer requires protection. In English insurance law, the general rule is that if the risk is increased during the currency of the policy, this has no adverse effects on its validity.[32] However, the common law tolerance of post-contractual increases of risk is modified by the MIA 1906 and standard Institute Clauses. Warranties, either express and implied, are the main sanctions used in relation to alteration of risk and in case of their breach the insurer is automatically discharged from further liability.[33]

As examined earlier in the first chapter of this work, the special nature of warranties in English insurance law has been created by Lord Mansfield and for this reason such 'terms' are unknown in most of other legal systems.[34] Being a part of Continental legal system, it is not astonishing to see that there is no concept of warranties either in German or Norwegian marine insurance law. Instead, separate provisions have been provided both in German and Norwegian law for matters which are traditionally dealt with as express or implied warranties in English law. These provisions usually afford the insurer protection against post-contractual alterations of risk by the assured.

There are specific provisions in German and Norwegian marine insurance rules relating to eg seaworthiness, maintenance of class, trading limits, and legal consequences of breach of them have been expressly spelt out in the relevant provision. If breach of the insurance contract does not activate any of these specific provisions, then the insurer

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[32] See, *Shaw* v. *Robberds* (1837) 6 Ad & El 75; *Pim* v. *Reid* (1843) 6 Man & G 1; *Mitchell Conveyer & Transport Co Ltd* v. *Pulbrook* (1933) 45 L1L Rep 239.

[33] The other main sanctions stated in the MIA 1906 for alteration of risk are: change of voyage clause (s 45); deviation clauses (s 46 and 49) and delay in voyage clauses (s 48 and 49).

[34] According to the survey carried out by Prof Wilhelmsen, TL, the concept of warranties, apart from common law countries, seems to be applied only in Portugal, Spain, Venezuela and China. See, *Issues of Marine Insurance: Duty of Disclosure, Duty of Good Faith, Alteration of Risk and Warranties in Civil Law Countries*, in Yearbook 2000 published by Scandinavian Institute of Maritime Law, p 239.

might seek assistance from a general provision which deals with 'alteration of risk'. Put another way, the specific provisions can be seen as an extension of the duty not to alter the risk insured against. This means that as far as these issues are concerned, the general provision regarding 'alteration of risk' will not be applied. However, if a certain breach of insurance contract does not amount to breach of any specific provision in the Codes, it might, nevertheless, be caught by the general 'alteration of risk' clause. In cases where breach of the insurance contract neither activates any specific provision in the codes nor is caught by the general 'alteration of risk' provision, the issue should be resolved by reference to general insurance law principles. Accordingly, such a breach will presumably entitle the insurer to damages but will not give him the ability to avoid liability under the policy.

The rest of this chapter will discuss the specific and general provisions regarding alteration of risk in German and Norwegian marine insurance law which can be regarded as the equivalent of English marine warranties. The issue will be approached from hull insurance point of view. However, before such an examination, information in relation to regulation of marine insurance in each legal system will be provided.

10.4 GERMAN LAW

10.4.1 The Legislative Context of Marine Insurance Law in Germany

The German Commercial Code of 1867 (Handelsgesetzbuch),[35] contains provisions in relation to marine insurance, ss 778-900.[36] However, those legal provisions can be contracted out of and today have nearly totally been superseded by the General Marine Insurance Terms of 1919 (Allgemeine Deutsche Seeversicherungs-Bedingungen,

[35] This Code incorporates the old German Commercial Code of 1861 (Allgemeines Deutsches Handelsgesetzbuch) without amendment.

[36] Insurance Contracts Act of 1908 (Versicherungsvertragsgesetz) s 186 states that the Act applies to non-marine and inland marine insurance but excluding expressly ocean marine insurance, that is hull and cargo.

hereinafter quoted simply as ADS 1919).[37] The ADS 1919 had been drafted in close co-operation of interested commercial circles (shipowners, traders, insurers, brokers and the Chambers of Commerce in Hamburg and Bremen).[38] The ADS 1919 contains both general principles concerning, for example, insurable interest and value, duties of the assured, premium and special provisions for ship's hull insurance and for cargo insurance. Thus, the ADS 1919 provides a complete regulatory framework for marine insurance and is in harmony with the basic provisions in the German Commercial Code. It is fair to say that the ADS 1919 constitute a complete contractual codex for marine insurance on the basis of the German Commercial Code. The ADS 1919 have, in turn, again being largely superseded by newer special standard conditions for hull and machinery as well as for marine cargo insurance. Therefore, the importance of the ADS 1919 today only lies in the fact that they contain the general basic principles of marine insurance.

As regards marine hull and machinery insurance, the most important regulatory framework are the Hull Clauses of the German Marine Insurance Association 1978 (Deutscher Transport-Versicherungs-Verband, hereinafter quoted simply as the DTV 1978)[39] which take precedence over the ADS 1919.[40] The DTV 1978 was further amended in November 1982. Two later amendments have taken place; first in 1984 and then in 1992. First amendment was related to the adoption of new Hull clauses in English marine insurance market and the latter was for the arrangement of a couple of

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[37] Before the adoption of ADS 1919, two local attempts have been made to codify German marine insurance rules. In 1846 General Plan of Marine Insurance (Allgemeiner Plan See-Versicherung) and in 1867 The General Conditions of Marine Insurance (Allgemeine Seeversicherungs-Bedingungen) were adopted. The former was effective in Hamburg and the Baltic Seaports, while the latter had found application in port cities Emden, Leer, Lubeck, Rostock, Stettin and Stralsund. For more information about the development of German marine insurance law, see Anderson, GB, *The Evolution of the Implied Warranty of Seaworthiness in Comparative Perspective*, [1986] Journal of Maritime Law and Commerce, p 1, at pp 23-4.

[38] Enge, HJ, *Transportversicherung*, (3rd ed, 1996), at p 37.

[39] It should be noted that the DTV 1978 has not led to any significant alteration in the original ADS 1919 cover.

[40] Clause 1 of the DTV 1978 reads:

'The Hull Clauses of the German Transport Insurance Association takes precedence over the General German Marine Insurance Conditions.'

technical issues. The amended form of DTV 1978, will form the basis of our examination in this part.[41]

10.4.2 Main 'Specific Provisions' Regarding Alteration of Risk in the DTV

10.4.2.1 Seaworthiness

German marine insurance law regards the act of putting the insured vessel to sea in an unseaworthy condition as a serious alteration of the risk and cl 23 of the DTV 1978 provides that the insurer is not liable for any loss caused by this act.[42] Therefore, causation plays a crucial role in the application of this section and the insurer is under the burden of proof to show the causal relation between vessel being to sea in an unseaworthy state and the loss.

The definition of unseaworthiness has not been made in the DTV 1978, but some guidelines have been provided in cl 23(1). Accordingly, the vessel will be regarded as 'unseaworthy', particularly, if she is not properly equipped, manned, or loaded, or if she sails without the necessary documents required for identification of the ship, crew and cargo or without the highest category of an approved classification society and permission to sail by the Federation of Shipping Employers or, in case of a foreign flag,

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[41] There is no sign in the German Marine Insurance market of discussions on a further amendment in the DTV 1978. The conclusion I reached, as a result of discussions with Dr Klaus Kostka (Attorney at Law- Member of the Bar of Hamburg) during the Marine Insurance Conference at Antwerp, was that both the insurers and assureds in the German Marine Insurance Market are satisfied with the provisions currently in use. The same, however, cannot be said of the General German Marine Insurance Terms-Special Conditions for Cargo Insurance 1973 (Allgemeine Deutsche Seeversicherungs-Bedingungen, Besondere Bestimmungen für die Gülterversicherung) which have recently been changed. The recent change has been the creation of new cargo insurance conditions in 1999, called Cargo 2000 and consisting of a combination of the general part of the ADS, the 1973 Cargo Conditions and those broker clauses which deserved general recognition- partly for market importance.

[42] Clause 23 of the DVT 1978 replaces Art 58 of the ADS 1919 which provides: (author's translation)

'(1) Underwriters are not liable for loss or damage resulting from the vessel having put to sea in a state of unseaworthiness or from her not having been properly equipped, manned, or loaded, or without the certificates necessary for the vessel, crew, or her cargo. If loss or damage occurs prior to the sailing, underwriters are not liable if the occurrence was due to the vessel being unfit for the service in port.

(2) In the event of the vessel being lost or damaged without there being any external event and there being doubt about the courses, the occurrence shall be deemed to have been caused by the circumstances explained in sub-para (1).'

the competent authorities. The wording of this sub-section makes it clear that these guidelines are not restrictive in the definition of 'unseaworthiness'. They are intended to attract the attention of judicial authorities to certain aspects, but the courts have the discretion in deciding whether the vessel in question is 'seaworthy' or not.[43]

Clause 23(2), however, provides that the sanction stated in cl 23(1), not indemnifying the assured for losses caused by putting the insured vessel to sea in an unseaworthy state, will not apply if the assured is not responsible for the unseaworthiness. The term 'responsibility' in civil law system, includes not only deliberate but also all types of negligent acts. In this respect, in order to prevent the insurer from relying on cl 23(1), the assured has to show that he has not acted even negligently in the process of putting the vessel to sea in an unseaworthy state. For example, if the vessel was unseaworthy due to the incompetency of her master, eg the master not knowing how to use the fire fighting extinguisher system, in order to be indemnified for that loss the assured is under an obligation to show that he was not acted in any type of negligence when appointing that particular person as the captain.

10.4.2.2 Change in Management of Vessel

The names of people who are in charge of the management of the insured vessel are quite important for the insurer because this plays a crucial role in assessing the risk. For this reason, just like many legal systems, German law has chosen to make specific provisions in relation to change in management of the insured vessel during the currency of the policy. Accordingly, cl 12(1) of the DTV 1978 puts the assured under an obligation to notify the insurers of a change in the management of the insured vessel, before it occurs. If the assured fails to comply with this obligation, the insurers are discharged from liability by virtue of cl 12(5) unless the assured could prove that the infringement of the notification duty was not deliberate. Therefore, negligence, even gross, of the assured in notifying the insurer of a change in management will not

[43] It will be a fair comment to say that there is no substantial difference in the definition of seaworthiness between English and German law. Both legal systems, set out the general guidelines and give the courts a freedom of determining whether the particular vessel in question is seaworthy or not by evaluating a number of factors, eg the nature of voyage undertaken; the type of cargo carried.

be sufficient to deprive him of the insurance cover. After the notification of such a change the insurer is entitled to terminate the contract within 14 days following the receipt of the notification, subject to a 14 days' notice.[44] Change of management of the insured vessel was treated differently under the Standard Institute Hull Clauses. Clause 5.2 of the ITCH (1995) provides that unless the insurer agree to the contrary in writing, this insurance shall terminate automatically when a change in management occurs.

10.4.2.3 Change of Ownership

In cases where the ownership of the insured vessel changes, the insurance contract terminates automatically by virtue of cl 13 of the DTV 1978. This stringent regulation can be justified on the ground that the risk insured against alters dramatically with change of ownership of the insured vessel. The owners might be engaged in a different type of business or might have a different approach to the safety aspects of the vessel.

This provision resembles cl 5.2 of ITCH (1995 version) in the sense that both afford the remedy of 'automatic termination' in case of change of ownership of the insured vessel. Institute clause, however, is more assured friendly because it provides that if the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, such automatic termination shall if required be deferred, whilst the Vessel continues her planned voyage, until arrival at final port of discharge if with cargo or port of destination if in ballast. Clause 13 of the DVT, on the other hand, does not offer any extended coverage to the assured in case of change of ownership.

10.4.3 General Provision Regarding 'Alteration of Risk' in the DTV

After the attachment of the policy, the risk insured against might be altered by reasons either within or without the control of the assured. The DTV 1978 with a general provision, cl 11, attempts to regulate alteration of risk by the assured or by a third party who is authorised by the assured. As stated earlier, this provision is a general

[44] Clause 12(2) of the DTV 1978.

provision which provide protection for insurer against post-contractual alterations of the risk which are not covered by any other specific provisions examined above. For example, if the flag, class or classification society of the insured vessel is changed during the currency of the policy by the assured or by a third party authorised by the assured, this will be dealt with as an ordinary alteration of the risk under cl 11 of the DTV 1978.

Just like cl 23 which deals with seaworthiness, cl 11 has chosen not to provide a general definition of the term 'alteration of risk', but instead gave examples of acts which will be deemed to be alteration of risk.[45] Accordingly, entering the dock or slipway with a cargo; unusual towing or being towed, except in cases of distress at sea;[46] exceeding the agreed voyage boundaries;[47] transhipment between ships on the high seas; use of the ship for military manoeuvres,[48] are regarded as alteration of risk.

By virtue of cl 11(2) of the DTV 1978, if the assured alters or becomes aware of an alteration of the risk, he is under an obligation to inform the insurer accordingly. In such a case, in case of aggravation of risk, the insurer is entitled to an additional premium. The additional premium will not be afforded to the insurer in cases where the aggravation was caused by the Insurer's interest or by a humanitarian duty, or was necessary due to an insured event threatening the vessel.[49] On the other hand, if the

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[45] See, cl 11(5) of the DTV 1978. This approach, not providing a definition, could be seen as a source of uncertainty. It can, however, be argued that the draftsman wished not to restrict the courts on this point with a 'strict' definition. In my opinion, the draftsman's approach can be supported on the ground that each marine insurance contract is unique and whether the risk has been altered should be determined by considering the facts and circumstances surrounding each contract.

[46] This point is usually regulated with an express warranty in Standard Institute Hull Clauses. See, for example, cl 1.1 of the ITCH (1995) which provides:

'... it is warranted that the Vessel shall not be towed, except it is customary or to the first safe port or place when in need of assistance,...'

[47] In Standard Institute Hull cover, certain navigation warranties are usually inserted which prevent the vessel to navigate outside the stated areas. See, Standard Institute Navigation Warranties (1/7/76) which can be attached to Hull policies.

[48] These acts are regarded as 'war risks' and are expressly excluded from hull cover. Clause 24 of the ITCH (1995), for example, provides:

'In no case shall this insurance cover loss damage liability or expense caused by,

war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power.'

[49] See, cl 11(4) of the DTV 1978.

assured fails to notify an alteration of risk, the insurer will be free of liability if the casualty or the amount of indemnity have been influenced by the alteration of risk. Therefore, the assured will be able to be indemnified despite the fact that he has altered or agreed to alteration of the risk if there is no causal link between the loss and alteration of risk. Clause 11(3) also provides that the sanction will not be applied in cases where the infringement of the notification obligation by the assured was not deliberate. Thus, the insurance cover of the assured will not be jeopardised if he could prove that he has acted negligently and not intentional in failing to report the alteration of the risk. It is clear from the wording of cl 11 of the DTV 1978 that the burden of proof lies with the assured to show that there is no causal link between the loss and alteration of risk or that he did not deliberately infringe the notification obligation, if he wishes to be indemnified despite the alteration of the risk.

10.5 NORWEGIAN LAW

10.5.1 The Legislative Context of Marine Insurance Law in Norway

Just like German law, in Norway the conditions for marine insurance traditionally have been incorporated into extensive private codifications which are published as 'marine insurance plans'.[50] These plans routinely override the provisions of public legislation, apart from the ones which are mandatory. The main public legislation dealing with insurance law is the Insurance Contracts Act of 1989. This Act is compulsory, but s 1(3), sub-para 2, allows insurance of commercial activity performed by ships which have to be registered according to the Maritime Code of 1994 or commercial activity dealing with international trade, to be written on conditions other than set out in the Act. However, two sections of the Act, ss 7 and 8, cannot be contracted out of. Those two provisions mainly allow an injured party direct action against the insurer of large-sized operations, including ships subject to the provisions of the Norwegian Maritime Code. Accordingly, for marine insurance there is complete contractual freedom limited only by general contractual principles against illegal and unfair contracts and mandatory provisions of the Insurance Contracts Act of 1989.

[50] The tradition with such plans dates back to 1876, after which they have been revised with regular intervals.

The marine insurance plans have been drafted in a co-operative effort between insurers, assureds and other interested parties[51] and thus can be described as agreed standardised conditions.[52] They contain comprehensive insurance conditions for different types of marine insurance, and are made applicable by direct reference in the relevant insurance contract.

The current NMIP 1996, which came into force on 1 January 1997, supersedes the 1964 version[53] and will be the main source for the purposes of this chapter. It contains: general provisions which applicable to all types of insurance (Ch 1-9); special conditions for Hull Insurance (Ch 10-13); Total Loss Insurances (Ch 14) War Risks Insurance (Ch 15); Loss of Hire Insurance (Ch 16); Insurance for Fishing Vessels (Ch 17); Insurance For Off-Shore Structures (Ch 18) and Builders Risk Insurance (Ch 19).[54] The NMIP 1996, just like the 1964 version, has been equipped with an extensive 'Commentary' which provides the background to and explanations of the individual provisions. The Commentary, which will be relied on heavily in this chapter, constitutes an integral part of the Plan and could even be referred by the courts.[55]

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[51] For instance, in the drafting process of the 1996 version of Norwegian Marine Insurance Plan (hereinafter quoted simply as NMIP 1996), the Norwegian Shipowners' Association; the Mutual Hull Clubs Committee; the Central Union of Marine Underwriters; the Norwegian Shipowners' Mutual War Risks Association; the P&I Insurers; the Federation of Norwegian Engineering Industries; Det Norske Veritas; the Norwegian Average Adjusters, took active roles. Two professors from Scandinavian Institute of Maritime Law, namely Hans Jacob Bull and Trine-Lise Wilhelmsen, occupied the Chairman and the Secretary posts of the Revision Committee.

[52] See, Falkenger, T & Bull, KJ & Brautaset, L, *Introduction to Norwegian Maritime Law*, (Tano Aschehoug, 1998), at p 509.

[53] For a detailed analysis of the background and substantial provisions of the NMIP 1996, see the paper delivered by Prof Hans Jacob Bull, *Norwegian Marine Insurance Plan of 1996*, at the Marine Insurance Conference organised by the European Institute of Maritime and Transport Law in November 1999 at Antwerp. A copy of this article could be found in Huybrechts, M, (Ed), *Marine Insurance at The Turn of The Millennium*, (Intersentia,1999), at p 109.

[54] In the 1964 version of the Plan, P&I insurance was included in the Plan. During the considerations for 1996 version, two Norwegian P&I insurers, Gard and Skuld, indicated clearly that the highly international aspect of P&I insurance made it inexpedient to regulate shipowners' liability insurance in the Plan and they would continue to effect insurance on their conditions. The Revision Committee accepted this point and P&I section was removed from the 1996 version of the Plan. For more information on this point, see, Professor Bull's paper, *ibid.*

[55] The Commentary of the Plan can be found on the inter-net at the following address: htpp://exchange.dnv.com/NMIP/.

10.5.2 Main Specific Provisions Regarding Alteration of Risk in the NMIP 1996

Specific Provisions dealing with 'alteration of risk' can be found in Chapter 3 of the NMIP 1996 which broadly regulates the duties of the person effecting the insurance and of the assured. It must be borne in mind that the provisions which will be evaluated in this part apply not only to hull insurance, but also to war risks insurance; loss of hire insurance; insurance for off-shore structures and Builder's Risk insurance.[56]

10.5.2.1 Seaworthiness

Section 3-22 of the NMIP 1996 reads:

'The insurer is not liable for loss that is a consequence of the ship not being in a seaworthy condition, provided that the assured knew or ought to have known of the ship's defects at such a time that it would have been impossible for him to intervene.'

For the operation of this defence, therefore, three conditions must be satisfied. First, the insured vessel must be in an 'unseaworthy' condition and by virtue of sub-paragraph 2 of the same section, the insurer has the burden of proving that the vessel is not in a seaworthy condition unless she springs a leak whilst afloat. If, therefore, the insured vessel springs a leak whilst afloat, the burden to show that she was seaworthy is reversed to the assured by the Plan itself.

The term 'seaworthiness' has not been defined in the NMIP, but s 2 of the Seaworthiness Act 1903 (SjØdyktighetsloven) defines seaworthiness in the following terms:[57]

'A ship shall be deemed unseaworthy when, due to defects in the hull, equipment, machinery or crew or due to overloading or faulty overloading or due to some other reason, it is in such

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[56] There is a separate Plan, Norwegian Cargo Clauses: Conditions Relating to Insurance for the Carriage of Goods of 1995 (Cefor Form No 252). This Plan has superseded the 1967 Carriage of Goods Plan. The amendment was mainly as a result of the Insurance Contracts Act of 1989 which is mandatory for insurance concerning national transport of goods. Many clauses of the 1967 Plan had to be amended to conform to the requirements of the 1989 Act.

[57] Torrens, DL, *Marine Insurance for the Northern Sea Route Pilot Study*, (INSROP Working Paper IV 3.3, No 1-1994), 92 n 105.

condition that, in light of the intended voyage or activity, there is greater danger to human life than is normal for the operation in question.'

This definition of 'seaworthiness' is very broad and flexible just like the one provided in the MIA 1906.[58] The main criteria in determining seaworthiness of a vessel is the risk associated with sending the vessel out to sea. The vessel needs to be strong and well-equipped so that the risk will not be greater 'than is normal for the operation in question'. In this respect, whether a vessel is seaworthy will depend on a number of relative factors, such as the time of the year; the voyage undertaken and length of the voyage. By considering the relative nature of definitions provided both in the MIA 1906 and s 2 of the Norwegian Seaworthiness Act 1903, it can be suggested that a vessel which is found to be unseaworthy under English law will also be regarded as 'unseaworthy' under Norwegian law.

In order to free the insurer from liability due to unseaworthiness of the insured vessel under s 3-22 of the NMIP 1996, there has to be a causal link between the loss and such unseaworthiness. It is suggested in the Commentary to the Plan that due to the relative nature of the term 'seaworthiness', the assessment of whether there is a causal connection between the unseaworthiness and the loss will often go no further than the unseaworthiness assessment. If, following a concrete assessment, a court comes to the conclusion that the ship was unseaworthy, there will be little room left for examining the issue of causation because causation-related considerations will have already played a key role in the appraisal of the seaworthiness issue. However, it has to be borne in mind that the assured might still be able to show the lack of causal link between unseaworthiness and the loss. For example, it is crystal clear that in a case where the vessel is found to be unseaworthy due to undermanning and the loss is caused by lightening, the insurer will not be able to rely on the unseaworthiness defence.

Finally, the insurer might rely on the unseaworthiness defence if he could show that the assured knew or ought to have known of the ship's defects at such time that it would

[58] Section 39(4) of the MIA 1906 reads:

'A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.'

have been possible for him to intervene. Accordingly, the assured will be deprived of indemnity not only if he knew about the ship's defects, but also if he had the opportunity to learn about them but deliberately turned a blind eye. In this respect, both actual and constructive knowledge of unseaworthiness will be sufficient to beat the assured's claim. The wording of the section also suggests that it does not matter whether the unseaworthiness arose before or after the vessel left the port. The criteria in the operation of the defence is whether it is possible for the assured to intervene. With the advanced communication systems now available, it is easy to report defects which allow the assured to intervene, eg by giving specific orders to the master, then the assured must take this action. If he remains passive and the unseaworthiness known by him causes the casualty, there will be no claim under the policy.

It should be noted that if the insured vessel becomes unseaworthy for any reason during the currency of the policy, the insurer might terminate the insurance by giving fourteen days' notice by virtue of s 3-27(a) of the Plan.

10.5.2.2 Safety Regulation

A safety regulation has been defined in sub-para 1 of s 3-24 of the NMIP 1996 as 'a rule concerning measures for the prevention of loss issued by public authorities, stipulated in the insurance contract, prescribed by the insurer pursuant to the insurance contract, or issued by the classification society'.[59] Accordingly, a rule can be regarded as a safety regulation within the context of NMIP provided that it concerns measures for the prevention of loss. The fact that a term of the insurance contract imposes an obligation on the assured, therefore, would not necessarily mean that it is a 'safety regulation'.

A literal interpretation of s 3-24 reveals that a safety regulation might arise in a number of ways. It may be issued by public authorities. The section adopts the term 'public authority', accordingly this should mean that not only regulations issued by local

[59] Safety regulation seems to be a Nordic invention, not much used in other civil law countries and surely not in German law. Danish, Swedish and Finish marine insurance law have also adopted the term in the sense Norwegian law has.

government,[60] but also the ones issued by international bodies, eg the IMO,[61] will be regarded as a safety regulation. A safety regulation may also be adopted by the insurer. The insurer may impose this kind of regulation into the contract not only at the time the contract is entered into, but also at a later time.[62] For instance, if it is warranted in a term of the insurance contract that a special type of equipment will exist on board for safety reasons, this will be regarded as a safety regulation. At last but not least, a safety regulation may be issued by classification societies. By virtue of sub-para 2 of s 3-24, periodic surveys required by public authorities or the classification society have been regarded to constitute a safety regulation.

The sanction for breach of a safety regulation has been spelt out in s 3-25 of the Plan. Accordingly, if the assured is in breach of a safety regulation the insurer is not liable for any loss occasioned by such breach. However, the assured, despite the breach, can be entitled to be indemnified if he proves that either there is no causal link between the loss and breach or he is not responsible for the breach. It has been stated in the Commentary of the Plan that the assured will be held 'responsible' even if he has demonstrated error or negligence.[63] Additionally, the insurer might under s 3-27(c) of the Plan terminate the insurance by giving fourteen days' notice if a safety regulation of material significance has been violated 'intentionally or through gross negligence' by the assured. Therefore, the insurer, in case of breach of a safety regulation by the assured, is not entitled automatically to terminate the contract. The right to terminate by giving notice arises only in cases where a significant safety regulation, a regulation

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[60] How a requirement imposed by a government authority has come into existence is of no importance. Accordingly, in the case of *RAMFLØY*, ND 1973, 450, it was held that a requirement issued by a government authority could also include rules set out in legislation.

[61] Thus, a provision of the Safety of Life at Sea Convention (SOLAS) 1974 which requires each vessel to carry on board certain navigation equipment, eg radar, can be regarded as a safety regulation.

[62] The use of the words 'pursuant to the insurance contract' opens the door to the insurer being able to issue safety requirements at a later time.

[63] It should be noted that breach of a safety regulation might also lead to the ship being unseaworthy. For example, if a provision of the SOLAS which requires the insured vessel to carry specific navigation equipment is breached, this will presumably render the vessel unseaworthy. In such a case, the insurer might use both ss 3-22 and 3-25 simultaneously. However, since the sanction system adopted by these provisions is the same, not indemnifying the assured for losses caused by breach, the result should be the same whether the insurer chose to invoke one of the provisions or both.

which is extremely important for the protection of the insured vessel, is breached with either bad faith or gross negligence of the assured.

10.5.2.3 Trading Limits

The function of trading warranties in English law is to prevent the insured vessel from navigating in areas where there is a high risk of loss. The assured warrants that he will not send the vessel to those areas during the currency of the policy. Breach of such a warranty is held covered provided immediate notice is given and additional premium and other conditions required by the insurer is agreed by the assured.[64] The NMIP 1996 attempts to provide a similar sort of protection to the insurer by regulating the navigation limits for the insured vessel. Section 3-15 of the Plan makes a tripartite division amongst ordinary trading limits, conditional trading limits and excluded trading limits.

Sub-paragraph 1 of s 3-15, first sentence, gives a negative delimitation of the ordinary trading limits, which comprise all waters except those which are defined in the Appendix to the Plan as conditional or excluded areas. The vessel is covered against all the named risks when she navigates in the ordinary trading areas. The same sub-paragraph sets out the rule that the assured is under an obligation to notify the insurer whenever the ship is sent beyond the ordinary trading limits. The sanction for failure to notify will depend on which type of trading limit has been exceeded.

Sub-paragraph 2 and 3, deal with navigation of the insured vessel in conditional and excluded trading limits. As stated earlier, conditional and excluded trading limits for each insurance policy are stated in the Appendix attached. If the assured by giving notice enters a conditional trading limit area, the insurer might charge an additional premium and impose other conditions. If, however, the insured vessel enters into a conditional area without giving notice with the consent of the assured, an additional deduction of one fourth is to be made for each casualty, but subject to a maximum of

[64] See, for example, cl 3 of ITCH (1995).

US $ 150,000.[65] Two points need to be clarified as to the application of this rule. First, the deductible in this provision only applies to damage and not total loss. Second, that the assured's consent is a precondition for the application of the deduction. Therefore, in cases where the vessel enters into conditional trading limit area without the consent of the assured, eg as a result of a mistake of the master, any damage occurring will not trigger the extra deductible.

According to sub-paragraph 3, the insured vessel can only navigate in the excluded trading area, provided that advance permission of the insurer is obtained.[66] If the insured vessel enters into an excluded trading limit area despite the lack of permission of the insurer, then the insurance ceases to be in effect while the vessel is in the excluded trading area. Second sentence of the sub-paragraph makes it clear that the insurance shall come into effect as soon as the vessel leaves the excluded trading area. Thus, entering into an excluded trading limit area without the permission of the insurer will in no way have any effect on the validity of the policy. The obligations of the insurer, to indemnify the assured against losses, will be frozen until the vessel leaves the excluded trading area.

10.5.2.4 Loss of Class or Change of Classification Society

Section 3-14 of the Plan spells out the defence available to the insurer in case of loss of class or change of the classification society of the insured vessel. In order to clarify the extent of the insurer's defence, sub-paragraph three sets out what is deemed as a 'loss of class'. Accordingly, loss of class occurs where the assured or someone on his behalf requests that the class be cancelled, or where the class is suspended[67] or withdrawn for

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[65] According to the Commentary, the rationale of this deduction is that the assured would have nothing to lose if there was not any sanction for a failure to give notice. This might lead to the assured being tempted to wait and only report to the insurer in the event of damage occurring.

[66] Nothing has been stated in the provision as to the requirement for such a permission. It is submitted in the Commentary, however, that there is nothing preventing the insurer from making the permission subject to certain conditions, eg payment of an additional premium.

[67] The trend among classification societies is to introduce rules on automatic suspension of class when the assured has failed to carry out one of the three periodic surveys; Renewal Survey (every five years); Intermediate Survey (every second or third year), and the Annual Survey. Therefore, class can be suspended without a formal decision on the part of the administration in the classification society.

reasons other than casualty.[68] In the event of a loss of class or change of classification society, by virtue of sub-paragraph 1, the insurance terminates automatically, although cover would remain in effect until the ship reached port. It has been expressly stated in the same sub-paragraph that the insurance cover will not terminate, if the insurer expressly consents to the change in the vessel's class status.

10.5.2.5 Change of Ownership

Under the NMIP 1996, change in the ownership of the insured vessel during the currency of the policy causes the automatic termination of the insurance cover by virtue of s 3-21. Accordingly, the insurance lapses for casualties which occur after the change in the ownership. The provision is stringent in the sense that no opportunity has been given to the new owner of the vessel to keep the insurance relation alive even by obtaining the permission of the insurer. Also, the provision does not provide protection to the new owner until the insured vessel reaches the port of destination if she is at sea at the time the transfer of ownership occurs.

10.5.2.6 Illegal Activities

Section 3-16 of the NMIP 1996 deals with illegal activities carried out during the currency of the insurance policy. According to the Commentary of the Plan, an activity is regarded as illegal not only when it violates the laws of the flag state but also when it is unlawful under the laws of the state which has authority over the ship in the situation in question. A distinction has been made in s 3-16 between using the insured vessel principally for the purposes of illegal activities and using the insured vessel for illegal purposes on some occasions. In the former case, if the insured vessel is put principally into illegal activities, eg smuggling traffic, with the consent of the assured, the insurance terminates automatically.[69] On the other hand, if the ship is used for illegal

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[68] It was felt necessary by the draftsman to state that the loss of class resulting from a 'casualty which has occurred', is not deemed a loss of class due to the practice of some classification societies to cancel the vessel's class when a casualty has occurred.

[69] See, sub-para 3 of s 3-16. It should be noted that in such a case it does not matter that the insured vessel also carries some legal cargo. The decisive factor is whether she is used principally for the purposes of the illegal undertaking.

purposes occasionally and the assured knew or ought to have known of the facts at such a time that it would have been possible for him to intervene, then the insurer is free from liability for loss that is a consequence of the ship being used for illegal purposes.[70] In this way, the assured is protected if the crew uses the insured vessel for illegal purposes without his knowledge. The causation issue may give rise to difficulty in the application of this provision. In order to discharge the insurer from liability, the loss must, to a certain extent, be a foreseeable consequence of the illegal act.

This provision of the NMIP 1996 varies from the implied warranty of legality imposed by the MIA 1906 in the sense that termination of insurance in case of an illegal activity is conditioned on the assured's knowledge about this situation and/or causation between the illegal activities and the casualty.

10.5.3 General Provisions Regarding Alteration of Risk in the NMIP 1996

Just like the DTV 1978, the NMIP 1996 has adopted provisions, ss 3-8 - 3-13, dealing generally with 'alteration of risk' which occurs during the currency of the policy. These provisions can be regarded as a safety net from the insurer's point of view, because they can be invoked in cases where specific provisions regulating particular types of alteration of risk, the provisions examined above under 10.5.2, cannot be applied. The term 'alteration of risk' has been defined in sub-para 1 of s 3-8.[71] Accordingly, there is an alteration of risk if two conditions are satisfied. First of all, there must have been a change in the factual circumstances which affect the nature of the risk and this change in the factual circumstances must amount to a breach of the implied conditions upon

[70] See, sub-para 1 of s 3-16. By virtue of sub-para 2 of the same section, once the assured learns of the matter, he should intervene promptly. If he fails to do so, the insurer may terminate the contract on 14 days' notice.

[71] According to the Commentary to the Plan, in this sub-paragraph the draftsman has chosen to adopt the expression 'alteration of risk' and not 'increase of risk', because of consideration for situations where there is clearly a change in the risk due to evolving external circumstances, but it is difficult to determine whether the risk has in fact become demonstrably greater.

which the contract was based.[72] It must be, therefore, determined in each case whether these conditions are satisfied. For instance, since there is no specific provision in the NMIP dealing with the issue of the insured vessel undertaking towage services,[73] the practice of the assured of entering into towage contracts without the consent of the insurer could be regarded as an 'alteration of risk' under the scope of s 3-8. Sub-paragraph 2 of the same section declares that a change in the management of the insured vessel, an alteration which is regulated by a specific provision under German law,[74] shall be deemed to be an alteration of the risk.

The sanctions which can be used by the insurer in case of alteration of the risk have been spelt out in s 3-9 - 3-11 of the Plan. Accordingly, in case the assured has intentionally altered the risk; agreed to such alteration or neglected to notify the insurer about an alteration,[75] the insurer is free of any liability, assumed that he would not have effected the insurance had he known at the time the contract was concluded that the risk would have altered. Assumed though, the insurer would have accepted the insurance on other conditions, eg an increased premium, had he known about the possibility of alteration at the time the contract was concluded, he is only liable to the extent that the loss is not caused by the alteration of the risk. In either case, the insurer might terminate the contract by giving fourteen days' notice. It appears from the wording of these sections that the insurer is under an obligation to show either he would not have accepted the insurance or would have accepted it with different conditions, had he known during the formation of the contract that the assured would have altered the risk.[76] The insurer has been prevented from invoking alteration of risk

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[72] There is absolutely no limitation in the Plan concerning what kind of circumstances the insurer may claim to be a basis of the insurance or which alterations may be contrary to the implied conditions of the contract. Therefore, each factual change will be interpreted by considering the surrounding circumstances and intentions of parties.

[73] This issue is regulated with an express warranty in English law. For example, cl 1.1 of the ITCH (1995) reads:

'... it is warranted that the vessel shall not be towed... or undertake towage... services under a contract previously arranged...'

[74] See, 10.4.2.2 at p 298.

[75] By virtue of s 3-11, the assured is not deemed to have altered the risk in cases where there is a justifiable reason for not notifying the insurer.

[76] Proving the actual state of the mind at the time the contract was formed could be quite problematic for the insurer.

when such alteration has ceased to be material to him and if the alteration has occurred for the purpose of saving human life or while salving or attempting to salve ships or goods during the voyage.[77]

10.6 SUNDRY CONSIDERATIONS

The specific and general provisions in relation to 'alteration of risk' in German and Norwegian hull insurance, which can be regarded as the equivalent of English marine warranties, have been examined in this chapter. The findings of this comparative study reveal that the MIA 1906's approach to this issue, from the assured's point of view, is quite severe. In fact, the allegations that the English marine insurance law is directed to protect the insurer's interests and nothing else, is justified to a large extent.

Breach of the specific and general provisions in the DTV 1978 and NMIP 1996, apart from the ones dealing with change of ownership and the ones in the NMIP which are related to class of the vessel and illegal activities, do not have any effect on the validity of the insurance contract. The usual remedy is precluding the assured from recovery in relation to the loss which occurs as a result of the breach of the relevant provision. Even this remedy does not operate automatically. In order to enforce it, the insurer is under an obligation to show that there is a causal link between the breach and loss. Despite the existence of a causal link between breach and loss, the assured in many cases could still be entitled to be indemnified provided that breach has occurred for reasons other than his control.

Thus, German and Norwegian law attempt to keep the balance between the sides of a marine insurance contract. The insurer is protected against 'alteration of risk' during the currency of the policy with a wide range of specific and general provisions. However, in order to activate these provisions and introduce a successful defence the insurer has to show, at least, the existence of a causal link between breach of these conditions and loss.

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[77] See, s 3-12 of the Plan.

By evaluating the solutions offered by these two advanced legal systems against 'alteration of risk', English marine warranties can be criticised on two grounds. First, it looks unfair that breach of a marine warranty, even though it does not lead to any loss, deprives the insurer from further liability. Depriving the insurer from liability in relation to loss which has occurred as a result of breach of warranty seems a fair remedy. Second, leaving the assured unprotected even though breach of warranty occurs for reasons beyond his control, is quite harsh. At least, a chance to prove that the breach has occurred for reasons other than his control and he had no means of intervening, should be given to the assured.

CHAPTER 11

THE CONCLUSION: A CASE FOR REFORM?

11.1 THE NEED FOR REFORM

11.1.1 Introduction: Developments in Non-Marine Insurance in the Area of Warranties

Certain aspects of 'insurance warranties' have been the main topic of numerous academic discussions over the years. Particularly, the pleas of the assured for a more equitable legal regime have activated the Law Commission to prepare a report highlighting defects of the present legal regime and requesting Parliament to adopt legislation in this area which distributes the rights and obligations of parties fairly.[1] The striking point of this Report is the exclusion of marine insurance from the scope of possible reform in this area.[2] According to the Law Commission, it would be clearly undesirable to disturb the basis of legal certainty in English law by making substantial changes to the MIA 1906 in view of London's position as a leading centre for marine insurance in a competitive international market. The Commission was also of the opinion that marine insurance contracts are generally effected by 'professionals' - that is to say, persons whose everyday business dealings involve the making and carrying out of insurance contracts so they can be reasonably expected to be aware of the niceties of insurance law.

Although, a draft Bill was introduced in Parliament for the reform of non-marine warranties and non-disclosure by the assured, it did not come to fruition. In fact, the draft Bill was withdrawn after the government reached agreement with the Association

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[1] The Law Commission, *Insurance Law: Non-Disclosure and Breach of Warranty*, Law Com No 104, 1980, London: HMSO. This was not the first time that the defects of the 'warranty regime' were brought under the spot light. Reference was made to certain problematic areas in *Conditions and Exceptions in Insurance Policies*, prepared by the Law Reform Committee in 1957. A similar development also was observed in Australia where the Law Reform Commission adopted a similar report, *Insurance Contracts*, Report No 20, 1982.

[2] *Ibid*, para 2.8, at p 14.

of British Insurers (ABI) to the effect that it would take up the Commission's recommendations on a self-regulatory basis. This was to be achieved by amendment to the existing Statement of Insurance Practice which had been accepted in 1977 in exchange for exclusion of insurance contracts from the Unfair Contract Terms Act 1977.[3] The nature and features of Statements of Insurance Practice will be examined later in this chapter when they are considered as an alternative to legislative reform. At this stage, it is sufficient to state that they are adopted by the ABI for their members and imply no duty of compliance. They also lack legal force and accordingly cannot be relied upon in court proceedings. They only have the force of their prestige and inherent wisdom.[4]

Section 2(b)(iii) of the Statement of General Insurance Practice 1986 provides that non-marine insurers will not repudiate liability to indemnify a policy holder:

'...- on the grounds of breach of warranty or condition where the circumstances of the loss are unconnected with the breach unless fraud is involved.'

The effect of this clause is that the insurer is prevented from relying on a breach of warranty defence unless there is a causal connection between breach and loss.[5] It should be noted that nothing in the clause prevents the insurer from relying upon a breach of warranty, before a loss has occurred.

In practice, non-marine insurers usually comply with s 2(b)(iii) of the Statement of General Insurance Practice and do not rely on a breach of warranty defence in cases where the breach has not contributed to the loss. It should be stressed that the Insurance Ombudsman Bureau (IOB), an institution formed by insurers to deal with complaints about insurers' handling of claims and 'reliance on the fine print' to avoid

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[3] This Act contains a number of provisions limiting the extent to which it is possible to 'exclude or restrict liability'. Its title is misleading because the Act applies not only to liability arising both in contract and tort, but also to exclusion clauses contained in any contractual term or notice.

[4] Recently, the ABI arranged procedures to monitor the compliance of its members with the Statements.

[5] However, if fraud on the part of the assured is observed, the insurer could rely on the breach regardless of the existence of any causal link.

losses,[6] takes the Statements, especially s 2(b)(iii), into account when deciding on disputes brought to them.[7]

The current position in non-marine insurance, therefore, is that the insurers are precluded from relying on breach of warranty defence in cases where there is no causal link between the loss and breach through a voluntary code, The Statement of General Insurance Practice 1986. The general belief in the market is that the Insurers, despite the lack of its legal force, comply with the requirements of this Statement and in cases where they do not, the IOB has the power to force them to do so. It is a fair comment to say that the insurers by self-regulation have managed to overcome the assured's criticisms in relation to the 'harshness' of the warranty regime to a certain degree and avoid a statute in this area, what they call government 'interference', at the same time.[8]

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[6] The IOB was founded in March 1981 by a small number of leading insurance companies which funded the operation of the Bureau. Since those days, the membership of the Bureau has grown to encompass almost all of the leading insurers in the UK, including Lloyd's. The Ombudsman's jurisdiction now extends to about 70 % of the domestic market. According to the Ombudsman's Terms of Reference, the Ombudsman has jurisdiction over the disputes if the following conditions are satisfied: (a) the assured's main or principal residence is the UK, the Isle of Man or the Channel Islands (b) the complainant must be the assured or assignee (c) the policy must have been effected for a natural person or persons, and not a company (d) the insurer's obligations under the policy must be performed in the UK (e) the claim relates only to a claim under the policy or to the marketing or administration of the policy.

[7] The Ombudsman's Terms of Reference provide that, in making a decision or award, the Ombudsman: (emphasis added)

'... shall have regard to the terms of the contract and act in conformity with any applicable rule of law or relevant judicial authority, with general principles of good insurance, investment or marketing practice, with these Terms of Reference, with *the Statements of Insurance Practice* and Codes of Practice issued from time to time by the Association of British Insurers and with Rules made from time to time by the Boards of Directors of the Life Assurance and Unit Trust Regulatory Organisation Ltd. and the Investment Management Regulatory Organisation Ltd.'

[8] The Australian insurers, on the other hand, were not as lucky as their English counterparts. Partly due to the fact that the Australian insurance market's political strength is not as great as the London market's, the recommendations of the Law Reform Commission, including the ones on warranties, were adopted in the Insurance Contracts Act 1984. This Act, which applies to all insurance contracts apart from marine, has brought a different regime for warranties. Section 54(1) of the Act denies the insurer a right to avoid liability simply by relying on a breach of warranty or some other condition of the insurance contract. Instead this section provides that the insurer is limited to a reduction in liability to the assured by an amount representing the extent to which the insurer's interests were prejudiced. Termination is available under s 54(2) where the breach could reasonably be regarded as being capable of causing or contributing to a loss. Section 54(3) denies the insurer the right to terminate where the act was necessary to protect a person or property or where it was not reasonably possible for the assured to do the act.

How about marine warranties? After carrying out an intensive study on the topic, the author came to the conclusion that certain areas in the regime of marine warranties are in need of urgent reform. The justifications provided in the Law Commission Report for excluding marine warranties from reform are, in my opinion, far from satisfactory. In the rest of this part, 11.1, several justifications for reform in this area will be put forward. Attention will be directed to the form and extent of such a reform in other parts of this chapter.

11.1.2 The Changing Nature of Marine Insurance Relation

In the first chapter of this work it was shown that the current legal status of marine warranties had been developed by Lord Mansfield in the late-18th century.[9] In those days, especially as far as marine insurance contracts were concerned, the assured's promise or undertaking as to a certain event was extremely important for the insurer as the means of communication was very restricted and the insurer had to rely largely on the initial promise of the assured when deciding to accept the risk or even determining the rate of the premium. For instance, if the assured warranted that the insured vessel would sail on a certain day, it would have been very difficult or even impossible considering the efficiency of communication in 18th century to inform the insurer in cases where this promise had not been kept. In such a case, even if the promise was not kept for reasons beyond the control of the assured, the risk insured against would have been altered and the insurer would have been left with a risk which was completely different from the one agreed.

Moreover, at that time the insurer was dependent on the word of the assured, when determining the scope of the risk, more than today since he did not have access to numerous data bases which would have provided him with information about the insured vessel or the nature of the assured. For instance, in a case where the assured warranted that the company which owned the insured vessel had a certain nationality, the insurer would have limited means of checking the accuracy of this statement.

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[9] See, Chapter 1.2.1 at p 7.

Bearing in mind these realities of the 18th century, it could easily be understood why Lord Mansfield adopted such a strict legal character to marine warranties. The 'promise' given by the assured meant a lot to the insurer in assessing the scope of the risk in those days. For this reason, he did not hesitate to discharge the insurer from all liability in cases where the promise is not kept. He expected the assured to comply with the promise literally and afforded no excuse for its breach. The MIA 1906, which was designed to codify the existing case law in marine insurance, did little more than enshrine those doctrines formulated by Lord Mansfield as law, as they existed in the latter part of the 18th century.

Circumstances, however, have changed dramatically since the times of Lord Mansfield. Of course, it is understandable that the insurer in an insurance contract, which is based upon utmost good faith, expects the assured to keep his promises. The remedy of automatic discharge from liability for breach of these promises, on the other hand, seems harsh under the realities of the 21st century for two reasons. First, communications have advanced so much that it is possible to be in touch with the insured vessel all the time during the currency of the policy. The insurer, therefore, can be informed about the recent state of the vessel and if the need to breach certain warranties occurs, the parties might negotiate an amendment in the cover.[10] In this respect, the assured's 'promise' still plays an important role in assessing the scope of the risk but it is not as crucial as it used to be in the 18th century, since the parties in most cases have the opportunity to negotiate an amendment in the cover when it becomes obvious that the assured will not be able to keep his promise.

Also, nowadays the insurer is often in a more powerful position especially with the significant advantages he receives from having access to sophisticated data and information. For instance, the insurers may obtain the inspection records held by different port authorities about the vessels owned by a specific shipowner and identify

[10] As examined in Chapter 7, the use of held covered clauses is quite common in modern marine insurance policies. Under these clauses, as soon as the assured becomes aware of breach of a warranty he gives immediate notice to the insurer. After the receipt of the notice, the insurer waives breach of warranty and keeps the insurance contract alive provided the assured agrees to pay an additional premium.

many points which are relevant to the insurance cover.[11] For this reason, it seems that the presumed equality of bargaining power on the part of the assured and insurer has changed swiftly in favour of the insurer and allowing him to discharge himself from further liability on the occurrence of minor, inconsequential or non-causative breach of a warranty would cause even more injustice for the assured.

11.1.3 Unfairness Arising from the Harshness of Remedy and Further Complexities of Law

The remedy afforded by s 33(3) of the MIA 1906 in case of breach of a marine warranty, automatic discharge from further liability without the need for a causal link between the loss and breach, has been the target of the assured and academics dealing with marine insurance over the years.[12] When the insurance literature is examined, numerous articles criticising the harshness and unfairness of this remedy could easily be spotted. It would be a quite simple task to justify these criticisms with a hypothetical example. Let us assume that hull cover is provided for a vessel for a certain period of time and the policy in its fine print has a clause which reads:

'Warranted that the assured shall exercise due diligence to keep the navigational equipment of the vessel in working condition during the currency of the policy.'

When in port, it is realised that the radar of the vessel is not working. The master contracts with a repairer to have it fixed. The contracted repairer observes that the problem with the radar is more serious than he anticipated and informs the master that he will not be able to sort it out unless certain equipment, which will cost extra money, is provided for his use. In order not to spend more money, the master orders the engineer of the vessel to assist the contractor with the problem. During this period, a

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[11] The significance of Port State Control is increasing and recently an EC Directive which requires the member states to carry out intensive inspections on vessels visiting their ports has been brought into force. This Directive was adopted into English law by the Merchant Shipping (Port State Control) Regulations 1995, SI 1995/3128 as amended by SI 1998/1433. For more information on the topic, see, Kasoulides, GC, *Port State Control and Jurisdiction: Evolution of the Port State Regime*, (Kluwer Academic Publishers, 1993).

[12] For example, this issue has been recently evaluated by Schoenbaum, TJ, *Warranties in the Law of Marine Insurance: Some Suggestions for Reform of English and American Law*, [1999] Tulane Maritime Law Journal p 267.

fire breaks out while the vessel is receiving fuel and in a couple of hours she becomes a constructive total loss. There is no doubt that the express warranty in the policy is breached since the master has failed to exercise due diligence to keep the radar in working condition. Such a warranty, is clearly intended to prevent an increase of risk of casualties whilst the vessel is being navigated and its breach has no effect whatsoever on the occurrence of loss. Put another way, the loss would have still occurred even though the master had exercised due diligence to keep the radar in working condition. However, when the assured makes a claim for constructive total loss, it is likely that he will receive notification from his insurer rejecting his claim upon grounds of breach of warranty.

The unfairness of the remedy afforded by the Act in case of breach of a marine warranty becomes more obvious, after considering the findings of the analysis carried out in the earlier chapter as to the approach of some other law systems to the issue. A similar clause, for example, would have been regarded as a 'safety regulation' under Norwegian law and in case of its breach the insurer would only have been entitled to damages, by way of reduction from liability, and nothing else since breach of this clause did not contribute to the loss.[13] The assured would naturally expect a similar treatment from English law and when he does not receive under the current warranty regime, he would blame English law for not being fair and protecting the interests of the insurer more than anything else.

The harshness of remedy in case of breach of a marine warranty has also led the judicial authorities to seek alternative interpretations to the clauses in question and this adds further complexities to the legal regime. Such an attempt could be observed by the Canadian Supreme Court in *Case Existological Laboratories Ltd* v. *Foremost Insurance Co et al (The Bamcell II)*[14] when the Court held that a clause which read: 'Warranted that a watchman is stationed on board the Bamcell II each night from 2200 hours to 0600 hours with instructions for shutting down all equipment in an

[13] The damages in such a case would presumably be nominal damages, since it is difficult to show that any loss has occurred as a result of breach of the clause in question.

[14] [1983] 2 SCR 47, hereinafter referred to as *The Bamcell II*. This case has been analysed in depth in Chapter 2, when express warranties are identified from other terms of the marine insurance contract.

emergency', was a clause delimiting the risk and not a warranty.[15] When the judgment of the court is carefully analysed, that the 'justice instincts' of the judges led them to decide in that direction could easily be sensed.[16] The author believes that they were fully aware of the fact that the above mentioned clause had a warranty status, but had they declared this the assured would not have been allowed an indemnity under the policy since there was no watchman stationed on board between 10 pm and 06 am the night before the casualty and breach of this obligation would discharge insurer from all liability automatically. In order to avoid this harsh consequence, they preferred to classify the clause as a clause delimiting the risk and allowed recovery since the casualty occurred during daytime when there was no obligation on the part of the assured to station a watchman on board *The Bamcell II.*[17]

Thus, it can be concluded that the justice instinct of the judges in T*he Bamcell II,* motivated them to change the legal character of the clause in question. However, by doing this they have, unintentionally, harmed the fine distinction between express warranties and other terms of a marine insurance contract. Identifying the legal status of certain clauses in marine insurance policies has been a problem, since a weapon has been given to the assured by *The Bamcell II* to challenge the warranty status of certain clauses in question.[18] Without a doubt this situation creates an uncertainty in law and

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[15] As examined in Chapter 2.4.2.2 at p 48, in case of breach of a clause which delimits the risk, the insurance cover is suspended while the breach continues. As soon as the breach terminates, the insurance cover becomes effective.

[16] For instance, in a desperate attempt to show that the clause in question was not a warranty by considering the presumed intentions of the parties Lambert, JA, in the Court of Appeal said, 133 DLR (3d) 727, at pp 740-1:

'[T]he parties cannot have intended that if the watchman was late one night, or even missed a night, then the insurers should be discharged from liability for the remainder of the term of the policy.'

[17] The same attitude, challenging the legal character of a clause in question in order to create justice, could also be observed in a number of non-marine cases. See, *Roberts* v. *Anglo Saxon Insurance Co* (1927) 27 LIL Rep 313; *Farr* v. *Motor Traders' Mutual Insurance Society Ltd* [1920] 3 KB 669; *De Maurier (Jewels) Ltd* v. *Bastion Insurance Co Ltd & Coronet Insurance Co Ltd* [1967] 2 Lloyd's Rep 550 and *CTN Cash & Carry* v. *General Accident Fire & Life Assurance Corp* [1989] 1 Lloyd's Rep 299.

[18] In a recent non-marine insurance case, *Kler Knitwear Ltd* v. *Lombard General Insurance Co Ltd* [2000] LRIR 47, *The Bamcell II* was used by the court to hold that a clause in which the assured warranted that the sprinkler systems would be installed was not an exprees warranty, but a clause delimiting risk. There is no doubt that *The Bamcell II* could also be applied in marine insurance cases particularly where the judges feel that it is not fair to adopt the 'draconian' remedy of automatic discharge.

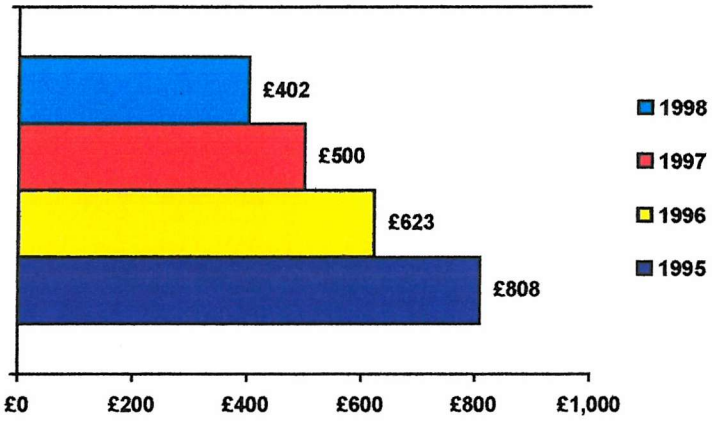
the unfairness of the remedy afforded by s 33(3) in case of breach of a warranty is an accessory to crime who forced the judges to pull the trigger.

11.1.4 Position of London Marine Insurance Market and Some Other Rival Markets: Importance of Legal Rules in Competition

Figure 1, shows the amount of premium written in London marine insurance market[19] between 1995-1998.[20] The figures are expressed in £ m.

Figure 1[21]

Marine Insurance Premiums Written in London Market Between 1995-1998



This basic analysis reveals that the amount of marine insurance premium written in the London Market has gone down by 50.25 % in just four years.[22] There are a number of

[19] The figures include marine insurance business undertaken both by Lloyd's and companies which are the members of the Institute of London Underwriters. Energy, transit insurance and P&I business have not been included in these figures.

[20] These figures were the recent figures available at the time of writing of this dissertation.

[21] The figures have been calculated by the author considering the statistical information obtained from AXCO Insurance Information Services Ltd.

[22] Statistics also suggest that the drop in the amount of premium written has been going on since 1992. During that year the amount of marine insurance premiums written in the London Market was £ 1,278 m; £ 1,249 m in 1993 and £ 969 m in 1994. Aviation and transit insurance business carried out in the London Market have also shown decrease during the same period. The amount of drop has been 41.2 % for aviation and 7.27 % for transit insurance.

factors behind this decline. One reason is that many countries today prevent direct insurance business from being placed outside their own national markets for foreign exchange reasons.[23] This is particularly the case for cargo insurance and as a result of this, more business has been retained by local markets.[24] Another reason is the cautiousness of the underwriters in the London market after the bad underwriting years of the late 80s. Numerous catastrophes which occurred during those years,[25] made the underwriters a bit more selective in accepting insurance. In the early 90s, underwriters in the London market chose not to provide cover for certain types of vessels, usually those which involve high risks. In this way, the market missed the opportunity of expanding its capacity to the developing countries.[26] Also, when commenting on the reasons for the decline in the amount of premium earned in the London Market, one should pay attention to the currency fluctuations. Measured against sterling, the US dollar fell 7.32 % between 1995-1998. This has a great impact on the figures calculated due to the fact that US dollar is used in most of the transactions carried out in the London market. Accordingly, it is natural that there will be a drop in the figures when they are calculated in sterling. However, the main reason for the London market losing its market share is intense competition coming from some other markets. The German and Norwegian markets, whose marine warranty regime in relation to hull insurance has been examined in the earlier chapter, are amongst those markets according to the recent annual Report on the London market published by the ABI[27]

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[23] See the paper delivered by Jenkins, N, *Forecasting Changes in the World's Marine Insurance Market and Predicting London's Place in it in the Long Term*, at a conference on the Marine Insurance Market, organised by IIR Ltd, in 1996.

[24] For instance, in Hong Kong marine insurance market, a country which with strict regulations prevents certain type of insurance being placed in other markets, cargo business has increased by 362.5 HK $ m between 1991 and 1993. The figures are taken from, DYP Group Newsletters, *Marine Business From Around the World*, [1995] Marine Insurance Report No 136, p 125.

[25] The losses of Piper Alpha, Exxon Waldez, Hurricane Hugo, Philips Petroleum and Arca Baker occurred in 1988 and 1989.

[26] For instance, according to the statistics compiled by the UNCTAD secretariat on the basis of data supplied by Lloyd's Maritime Information Services (London), the gross tonnage of vessels owned by developing countries of Asia has increased by 44.8 m (an increase of 279.2 %) in sixteen years, from 1980-1996. During the same period, the gross tonnage of vessels owned by developing countries of America and Europe has shown an increase of 7.2 and 0.5 m respectively. (Source: UNCTAD, *Review of Maritime Transport 1997*, RMT(97/1).

[27] See, Association of British Insurers, *Insurance: Facts, Figures and Trends*, November 1999, at p 32.

and figures 2 and 3 show these markets' progress between 1995-1998.[28] Again all figures are expressed in £ m.

Figure 2

Marine Insurance Premiums Earned in German Market Between 1995-1998

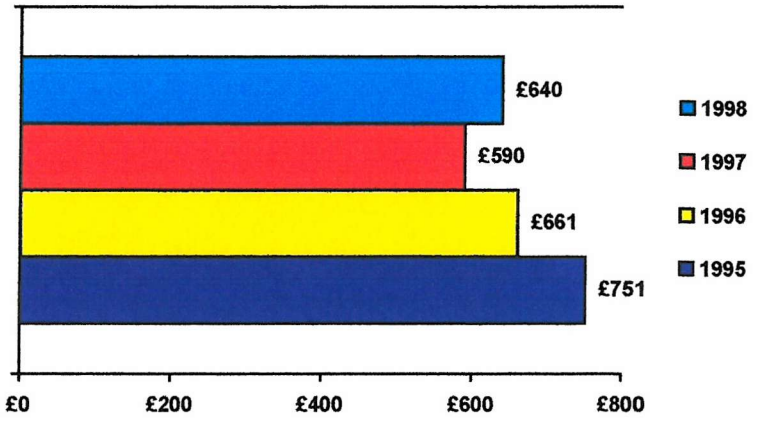
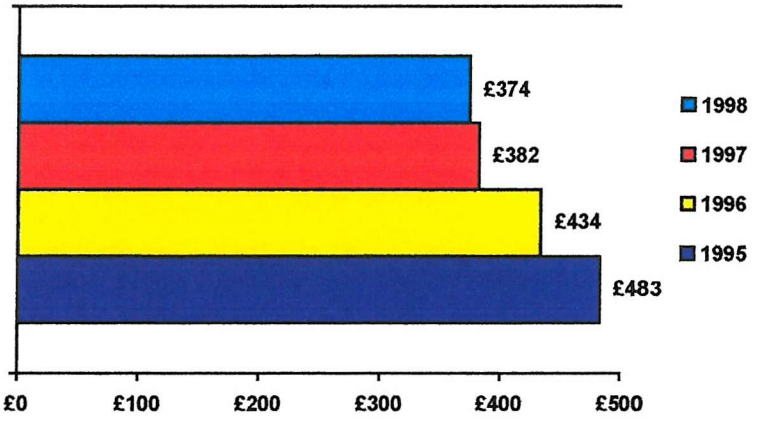


Figure 3

Marine Insurance Premiums Earned in Norwegian Market Between 1995-1998



[28] The figures are calculated by the author by considering the statistical information obtained from AXCO Insurance Information Services Ltd. Last digits have been rounded off for clarity only and do not change the final outcome. Conversions are made according to the figures taken from IMF International Statistics, May 1999.

Things look more stable for these two markets when compared to the London market. There is a slight decrease in the amount of premium written in these markets. To be precise, German marine insurance market has declined by 14.8 % between 1995-1998, while a drop of 22.6 % has been observed in the Norwegian market during the same period. However, when the currency fluctuations are taken into account it could clearly be seen that this drop is rather semantic than real. Between 1995-98, measured against sterling German mark (DM) fell 20 %. Similarly, Norwegian Kron (NOK) lost 22 % of its value against sterling in the same period. Thus, it could be concluded that there is no serious decrease in the amount of business carried out in these markets.[29] The success of these markets[30] lies mainly in the fact that they have succeeded in developing strong links with different interests around the world and attracting a great deal of foreign business.[31] Why were they so successful in attracting foreign business? Without a doubt, the hesitation of the English market in underwriting insurance for high risks in the early 90s played a crucial role in the success of the German and Norwegian markets; however it is submitted that their main advantage was the assured friendly legal rules they adopted in their policies.[32] Marine insurance business has an international character and the figures which compose the demand side of this business are quite flexible in choosing the market in which they will obtain cover from. Their main interest lies in obtaining the lowest available market rate on the best terms possible. In this respect, provided that the premium rate is compatible with other rival markets, insurance conditions are an important element in the competition for market

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[29] For instance, the amount of premium earned in the German market was 1,669 m DM in 1995 while this figure came up to 1,780 m DM in 1998.

[30] It should be noted that the amount of marine business carried out in German market was £ 510.7 m in 1990. Therefore, compared to this figure there has been an increase of almost 147 % in the amount of premium written in German marine insurance market in 5 years (between 1990-95). Similarly, the amount of premium written in Norwegian market was £ 141 m in 1991 and an increase of 342.5 % occurred in four years (between 1991-95).

[31] Marine insurance markets which intend to extend their market share usually attempt to attract foreign business. For example, the French market is examining the ways of attracting more foreign brokers in order to be able to reach different parts of the world. See, the Report on Paris as an International Centre, prepared by a group of experts chaired by Bonnaud, M, Paris, 1994. (original in French).

[32] This point has been stressed on numerous occasions both by Dr Klaus Kostka (for the German market) and Prof Hans Jacob Bull (for Norwegian market), when the author found an opportunity to consult them during the Marine Insurance Conference organised by The European Institute of Maritime and Transport Law at Antwerp in November 1999.

shares.[33] A recent example which shows the relation between insurance conditions and marine business underwritten can be given from hull practice. In 1995, the Institute of London Underwriters has published the new version of ITCH. These clauses contain more stringent provisions, from the assured's point of view, and offer a better regime for underwriters than the 1983 version.[34] However, mainly due to the current soft nature of the London market, these clauses have not been popular. The insurers cannot insist on these clauses because the assured usually threatens to go to an alternative market which offers better conditions. Today, a large number of policies in the London market are still written or renewed on the 1983 version of the clauses. Therefore, it can be concluded that selling harder conditions in a soft market is a difficult thing to do and, by analogy, it could be argued that the nature of insurance conditions are quite significant in marine insurance business. They can, indeed, be used as a tool to attract more business to a market.

After examining the warranty regime adopted by the German and Norwegian hull clauses in the earlier chapter, it has been concluded that they provide a more equitable solution for the assured than English law. The same is true for cargo insurance. Also, the good faith duty of the assured is less stringent in the German and Norwegian clauses than English law.[35] Accordingly, it will not be an ambitious statement to suggest that their marine insurance provisions, the fact that they protect the assured's interest more than English law both in terms of marine warranties and in other areas, helped the German and Norwegian marine insurance market to increase their market share dramatically and retain it over the years. This situation had been foreseen long ago by Antony Diamond, QC, in his lecture delivered at the Third Annual Lecture of

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[33] See, the paper delivered by Prof Hannu Honka, *Harmonisation of Hull Insurance Contracts in Light of Seaworthiness and Safety Regulations*, at Marine Insurance Symposium organised jointly by Comité Maritime International, Norwegian Maritime Law Association and Scandinavian Institute of Maritime Law at Oslo in June 1998. This paper could also be found in the book published by Scandinavian Institute of Maritime Law in 1998, *MarIus 242*, at p 165.

[34] For a detailed analysis of the 1995 version of Institute Time (Hull) Clauses, see Chapman, N & Jaffe, P, *The New Institute Time Clauses-Hull 1/11/95*, [1996] IJOSL, p 202.

[35] See the paper delivered by Prof Trine-Lise Wilhelmsen, *The Marine Insurance System in Civil Law Countries-Status and Problems*, at Marine Insurance Symposium organised jointly by Comité Maritime International, Norwegian Maritime Law Association and Scandinavian Institute of Maritime Law at Oslo in June 1998. This paper could also be found in *MarIus 242, ibid*, at p 15.

the Institute of Maritime Law of the University of Southampton on 31 October 1985 where, after examining the current regime of English marine warranties, he concluded:[36]

'I referred at the beginning of this lecture to the common interest of all three groups, the market-place, the academics and the legal practitioners that the law of insurance should develop so that it meets the needs of the present and future and so that it provides for a fair distribution of rights and obligations as between assured and insurer. If the law fails to do this, then other rival centres of insurance will undoubtedly succeed where we have failed.'

Another point which supports this contention is that in the German and Norwegian markets it is quite common to see insurance underwritten with German and Norwegian conditions and made subject to English jurisdiction. This proves that the assured from around the world has more faith in English jurisdiction than its rules on marine insurance. Accordingly, a reform, either through Parliament or otherwise in the warranty regime will give the English underwriters the weapon required to fight against the competition coming from other markets. The author strongly believes that such a reform is a step which has to be taken in order to keep the London market as one of the leading marine insurance markets. It should be remembered that negotiations for new and improved standard hull clauses have just started in Finland, Sweden and France.[37] Bearing in mind that the new clauses will be ready in a couple of years, it is about time to do something about English law.

11.1.5 Special Nature of Insurance for Pleasure Crafts (Yachts): Changes in Some Other Common Law Jurisdictions and the Role English Marine Insurance Law Should Play

There is evidence to suggest that the 'harshness' of the warranty regime adopted by the MIA 1906, is gradually being softened to a certain extent in certain areas in some common law jurisdictions. This is clearly the case as far as pleasure crafts (yachts) are concerned. Despite the fact that insurance on these vessels is regarded as a type of

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[36] Diamond, A, *The Law of Marine Insurance- Has It A Future*, [1985] LMCLQ, p 25 at p 42.

[37] See, the paper delivered by Prof Trine-Lise Wilhelmsen, *ibid.*

marine insurance and made subject to the Marine Insurance Act, the owners of these crafts are usually non-professional individuals. These people are not aware of the particularities of marine insurance law and, quite rightly so, expect the legal nature of the insurance cover they obtain for their pleasure crafts to be similar to the legal nature of the cover they obtain for their houses and cars.[38]

After numerous debates, Australia has responded to the requests of pleasure craft owners by removing these crafts from the Marine Insurance Act (MIA) 1909 and treating insurance on these crafts as a matter of general insurance.[39] Accordingly, breach of a warranty in a yacht policy does not automatically discharge the insurer from further liability any more.[40] The same result is obtained in Canadian marine insurance market through a different way. When insurance policies are effected for pleasure crafts, certain modifications are made and many provisions of the Marine Insurance Act, including the one on breach of warranty, are contracted out.[41] The same practice could also be observed in America. The consultation with the American Insurer's Association shows that yacht insurers in America deal with the problem in two ways. They either incorporate a clause in the policy to the effect that breach of a warranty will not afford a defence to the insurer unless there is a causal link between the loss and breach[42] or alternatively, they insert a choice of law clause and make the

[38] In fact, it was highlighted in the Report prepared by the Law Commission, *ibid*, at p 15 that a number of policy holders were in need of greater protection than that afforded under current legislation such as the MIA 1906. These persons included persons who own sailing boats and similar pleasure craft. The Commission recommended that the Secretary of State be empowered to exclude certain classes of crafts from MIA 1906, as may appear appropriate following consultation with the industry. Unfortunately, nothing has been done since then and due to the exclusion of marine and aviation insurance from the ambit of the Statement of General Insurance Practice, insurance on these crafts cannot receive the protection provided in the area of warranties and non-disclosure by this Statement.

[39] See, s 9(A) of the Insurance Contracts Act 1984, which applies to contract of insurance entered into on or after 30 April 1998.

[40] See, Insurance Contracts Act of 1984, s 54.

[41] This point has been illustrated by Prof William Tetley, in response to the author's criticisms about the warranty regime in the course of their discussion at Antwerp during the Marine Insurance Conference organised by The European Institute of Maritime and Transport Law in November 1999.

[42] In this way, the effect of breach of a warranty afforded by law has been qualified.

contract subject to a state law where breach of warranty does not automatically discharge the insurer from liability.[43]

This progress in the area of pleasure crafts in Australia, Canada and America, in fact, implies two things. Of course, it shows that, whether a reform in the marine warranty regime is decided to be carried out or not, a better protection for people who effect insurance policies for their pleasure crafts has to be afforded. Certain amendments, including an alteration in the remedy for breach of warranty, have to be made in those policies. By excluding these crafts from the scope of their Marine Insurance Act, Australia has given a lecture to the legal system that they borrowed the law from. Furthermore, the legislative change in Australia could be regarded as a compromise of marine industry in order to delay a reform in marine insurance warranties. This conclusion could be drawn from the fact that in the report prepared by the Attorney-General's Department,[44] apart from exclusion of pleasure crafts from the ambit of MIA 1909, a substantial reform in the marine warranties regime was recommended. The insurance industry's response to this was not quite positive.[45] It seems that the marine insurance market which possesses great political power, by agreeing the changes as far as pleasure crafts are concerned, has managed to convince the government not to take any action in the area of marine warranties, at least for the time being. This chain of events, however, illustrates that there is a great number of apprehensive people in other common law countries who are of the opinion that the marine warranty regime adopted by the MIA creates unfairness and needs to be reformed.

Being the nation who created one of the most impressive codes in the area of marine insurance, the author is of the opinion that England is under a moral obligation to take the first step and correct the parts of this Act which do not comply with the realities of the 21st century and create unfairness. Surely, the marine warranties regime is one of

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[43] As was stated in the earlier chapter, state law of Texas, Florida, Hawaii and Washington do not discharge the insurer from liability automatically in case of breach of a warranty.

[44] *The Marine Insurance Act of 1909; Issues Paper 1997*, prepared by the Institute Trade & Environmental Law Branch, Commonwealth Attorney-General's Department.

[45] In their joint submissions, which were presented to the Attorney- General's Department in response to the issue paper, the International Trade & Business Committee of the Law Council of Australia and The Maritime Law Association of Australia and New Zealand demonstrated a reluctance to have any changes without taking the corresponding steps on other parts of the world.

the areas which are in need of reform. A reform in English law will, without a doubt, be followed by other common law countries since the resistance of marine insurance industry in those countries, which is against a change in law, will be broken. Put another way, a reform in English law in this area will have a dual role. It will not only correct the deficiencies in its legal system but show the way forward to other jurisdictions which adopted its law.

11.2 THE FORM OF REFORM

It has been considered in detail in the earlier part why there is a need for reform in the warranty regime adopted by the MIA 1906. In this part, the possible methods in which such a reform could be carried out will be discussed. First, the possibility of legislative reform and the problems which are likely to occur in this process will be considered. Then, the alternatives to legislative reform will be highlighted. At the end of the part, the author intends to indicate the form in which reform should take in order to achieve the best possible results.

11.2.1 Legislative Reform and Possible Obstacles

The author believes that the defects of the current warranty regime could be best corrected through statutory reform. Such reform would not only balance the relation between the assured and insurer, but also be quite effective in showing the shift in the attitude of English marine insurance law towards the assured to the rest of the marine insurance world. In this way, it would assist English marine insurance law to retain the reputation which it has gained over many years.

There are, however, certain obstacles facing legislative reform. It is a known fact that different elements in the market place, underwriters, assured, brokers, do not like governmental interference in market practice. Every time the possibility of such interference arises, they immediately forget their differences and agree on one thing if nothing else; namely, that parliamentary interference in commercial affairs is likely to

be ill-formed at worst, or irrelevant at best, and is always unjustified.[46] Accordingly, legislative reform in this area is possible only if the market elements change their attitudes and welcome governmental interference. The author is of the opinion that certain market elements, particularly the assured and underwriters, have reasons to accept governmental interference in this case. The assured would surely welcome a reform which will afford them a better position and the underwriters would not wish to lose ground in the competition with other rival markets. There is, however, as indicated by Clarke[47] a further problem which has to be overcome in order to achieve legislative reform in this area. Parliament with members who are subject to re-election prefers to spend time and energy on legislation that is attractive to a significant section of the electorate. Put another way, there is almost no political will to force reform in the area of marine warranties which is seen as something not all that relevant to the person in the street. However, the insurance industry, specially a large group of insurers who see their long term benefit in reform, possesses the political power to inspire Parliament to put such a reform on its agenda.

11.2.2 Alternatives to Legislative Reform

One alternative to legislative reform in the area of marine warranties is to declare a Statement of Practice, just like the one declared for non-marine insurance, and require the insurers underwriting policies in the market to comply with it. Such a statement is regarded as a self-regulatory code, since its designer, namely the insurer, is also the party who is bound by it. A Statement of Practice does not have legal force, but implies a communal obligation of observance for the insurers who operate in the market. With such a Statement, certain alterations to the current marine warranty regime could be imposed.

There are certain advantages of carrying out a reform in this area through a Statement of Practice. Since such a document does not require the approval of Parliament, it can

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[46] See, Diamond, A, *ibid*, at p 28.

[47] See, the paper delivered by him, *The Marine Insurance System in Common Law Countries- Status and Problems*, at Marine Insurance Symposium organised jointly by Comité Maritime International, Norwegian Maritime Law Association and Scandinavian Institute of Maritime Law at Oslo in June 1998. This paper could also be found in *Marlus 242*, *ibid*, at p 63.

be updated more easily. Also, it can be argued that the industry itself is the best to spot breaches of the code and to take effective enforcement action against recalcitrant members.[48] However, such a method is not free from problems. It has been observed that monitoring whether the provisions of a self-regulatory code are adhered to by insurers in practice, is a very difficult thing to do.[49] Furthermore, certain doubts as to the effectiveness of a reform which will be inserted in a self-regulatory code could arise. In an international business like marine insurance, will it be satisfactory for the foreign assured if the insurers, with a voluntary code which has no legal effect, declare that certain provisions of the MIA 1906 in relation to warranties will not be relied on or will be modified? Will a reform which will be carried out in this way be sufficient to protect the interest of the assured and more importantly attract more foreign business to the market? The problem here is not that the insurers will not comply with such a Statement of Practice. It is a known fact the reputation of insurers is a significant factor in the market. However, the doubtful point is whether their promise which is not supported by any legal instrument will be sufficient for the foreign assured.

Another alternative to legislative reform, is to amend Standard Institute Clauses in a way in which all the agreed reforms in the area of marine insurance are covered. For instance, it could be stated in the Standard Clauses that the sections of the MIA 1906 which regulate marine warranties, are replaced with the provisions[50] provided in another part of the Clauses.[51] The Technical & Clauses Committee of the London market could, surely, be engaged in such a task and this Committee, by wearing the shoes of the Parliament, could achieve a reform through amendment in Institute

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[48] See, Hamilton, J, *The Duty of Disclosure in Insurance Law- The Effectiveness of Self-Regulation*, [1995] Australian Business Law Rev, p 359, at pp 363-4.

[49] See, Hamilton, J, *ibid*, at p 366.

[50] As discussed in chapter 7, s 41 of the MIA 1906 which imposes implied warranty of legality cannot be contracted out.

[51] It is not uncommon to contract out of certain parts of an Act with express provisions added to the policy. For instance, as was examined in the earlier chapter, ss 778-900 of the German Commercial Code of 1867, which regulate marine insurance have nearly been superseded by the General Marine Insurance Terms of 1919.

Clauses.[52]

Without a doubt, a reform which will be carried out in this way will be quite effective in attracting the attention of foreign assured. However, such a process could take more time than it is expected because a large amount of clauses need to be evaluated and modified. Also, the pressure of drafting a huge amount of clauses in a short period, could increase the possibility of litigation in the long term.

11.2.3 The Way Forward

As stated at the beginning of this part, the author is of the opinion that the most convenient form of reform in this area is through legislation. He acknowledges the fact that political will for such a reform could be lacking in Parliament, but he also believes that a desirous market could activate the Parliament to take necessary steps by using the political force it has. In case of failure of this option, the best alternative to legislative reform is an amendment in the Standard Institute Clauses. This method is, at least, as effective as legislative reform. The market might prefer this option, because in this way it does not lose the initiative in determining the extent of the reform to Parliament. A reform through a voluntary code, Statement of Practice, should be at the bottom of the list. A reform which will be based on an agreement without any legal force, is bound to be an ineffective one. When the extent of a possible reform in this area is considered in the final part of this chapter, all the discussions will be based on the assumption that legislation shall be the form of such a reform.

[52] When the Technical & Clauses Committee is instructed to draft clauses, legal advice on specific matters is usually sought from solicitors in London and America. However, the representation of the assured in this Committee is very limited. The author believes that if a reform in this area is decided to be carried out in this way, the views of the assured need to be taken. It should be remembered that the success of the Norwegian Marine Insurance Plans lies in the fact that the full participation of the assured is secured during the drafting process.

11.3 THE EXTENT OF REFORM

11.3.1 Scrapping The Warranty Regime from the Marine Insurance Act: An Extreme Solution?

Certain authorities regard the warranty regime adopted by the MIA 1906 as 'toxic' and suggest that it should be removed from English marine insurance law completely.[53] The author is of the opinion that a reform to that extent is out of the question not only because the notion of warranty has come to underpin the London insurance market but also such a movement would add further complications to law and perhaps create more unfairness for the assured than today.

If the warranty regime is scrapped from marine insurance law, the gap which will arise could be filled by different means. There is no doubt that the insurers would, initially, attempt to fill such a gap by incorporating certain clauses to the standard policy form. These clauses will take the role of express and implied warranties and the legal consequence for breach of them would also be provided. Under the freedom of contract principles, there is nothing preventing the insurer to adopt a legal consequence which has the same legal effect as the current warranty regime or is even harsher.[54] For instance, in the absence of an implied warranty of seaworthiness in voyage policies on hull, it would be not suprising to see a clause in Standard Clauses which reads:

'The assured warrants that the vessel shall be seaworthy at the commencement of the voyage and all reasonable steps shall be taken to keep her in that state during the performance of the voyage. In case of breach of this undertaking, the insurer shall be discharged from all liability under the contract automatically.'

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[53] See, the paper delivered by Prof Hare, J, *The Omnipotent Warranty: England v. The Rest of the World*, at Marine Insurance Conference organised by The European Institute of Maritime and Transport Law at Antwerp in November 1999 and the PhD thesis submitted to the University of Queensland, *The Law Relating to Non-Disclosure, Misrepresentation and Breach of Warranty in Contracts of Marine Insurance*, by Derrington, SC, in 1998.

[54] It should be borne in mind that the insurer's views and concerns will be taken into account more than anything else when drafting new clauses due to the insurer dominated nature of the London Market.

As can be observed, a provision of this nature, compared to s 39(1) of the MIA 1906, extends the obligation of the assured in relation to seaworthiness. The assured is expected not only to have the vessel seaworthy at the start the voyage but also is under a duty to show due diligence to keep her in that state during the performance of the voyage. Also, the legal effect of breach of this duty is harsh. Under the wording of this clause, the insurer shall be discharged from all liability even if a breach occurs at a late stage of the voyage. Therefore, in case of abolishing the whole warranty concept there is a danger of leaving the assured to face a regime which is even harsher than today.

If, on the other hand, the insurer incorporates a clause into the contract, which would have been regarded as an express or implied warranty under the current regime, without stating the effect of breach of such a clause, this time finding out the legal consequence of breach of a clause of that nature would be a difficult task. For example, if the contract contains a clause which reads:

'It is warranted that the flag of the vessel shall remain the same during the currency of the policy.'

There is little doubt that under the current regime such a clause will be considered as an express warranty and in case of breach the insurer will be discharged from liability by virtue of s 33(3) of the MIA 1906. However, if the whole warranty regime is abolished what will be the legal consequence in case of breach of such a clause? Will it be regarded as a condition subsequent?[55] If this is the case, then what is the proper remedy in case of its breach? Can we, adopting a general contract approach, conclude that due to the significance of the clause its breach entitles the insurer to terminate the contract as from the date of breach. Or, would it be possible to conclude that in cases where the breach of the term is relatively less, its breach should give rise only to damages. As can be seen, scrapping marine warranties from the legal regime, potentially might leave us with a number of rather complicated legal questions. There is no doubt that such a practice will harm the 'certainty' in law which is the central element in a highly international commercial arena.

[55] The definition and particularities of condition subsequent have been examined in Chapter 2.4.1.3 at p 45 when express warranties are compared to other express terms of the contract.

The danger of 'uncertainty' in marine insurance law together with the possibility of the underwriters filling any gap which might arise in a way which will serve their interest most, make the option of scrapping of marine warranties from the current legal regime almost impossible. Such an option could be possible, if substantial modifications are made in the MIA 1906, and provisions which could be regarded as the equivalent of warranties are brought. It is submitted by different authorities that this is a very slim possibility.[56] Therefore, according to the author, there is one logical and direct way which need to be taken and that is identifying the deficiencies of the current warranty regime and reforming them so as to meet the needs of the assured and the realities of the marine insurance business in the 21st century. Also, since this reform will require amendment of some provisions of the MIA 1906, the other provisions in this area which are poorly drafted and have caused litigation should also be considered and re-drafted by taking the judicial views into account. The details of such a reform will be examined next.

11.3.2 Provisions of the MIA 1906 Which Are in Need of Modification

11.3.2.1 The Effect of Breach of A Marine Warranty (s 33)

The second sentence of s 33(3) of the MIA 1906 regulates the effect of breach of a marine warranty. Accordingly, in such a case, regardless of the type of warranty breached, the insurer is discharged from further liability automatically whether the breach has any causative effect on the loss or not.[57] The author is of the opinion that most of the criticisms made to the current warranty regime could be avoided, provided the insurer is not allowed to rely on this affirmative defence in cases where there is no causal link between the breach and loss. This could be achieved by inserting a new sub-section to s 33 providing that in cases where breach of a warranty is followed by a loss,

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[56] For example, it has been expressed by Patrick Griggs, the Chairman of the CMI, in the lecture he delivered, *The Role and Work of the CMI*, in the Institute of Maritime Law of the University of Southampton, in April 1999 that to expect the removal of the whole warranty regime from the scope of the Act and drafting of new provisions to substitute them would be too ambitious.

[57] The exact meaning and effect of this sub-section has been clarified by the House of Lords in *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd, (The Good Luck)* [1991] 2 Lloyd's Rep 191. See, Chapter 6 for a detailed analysis of the decision of the House of Lords.

the insurer is precluded from relying on s 33(3), if the assured on a balance of probabilities proves that the loss in respect of which he seeks to be indemnified was not caused or contributed to by the breach.[58]

The author believes that such an amendment in s 33 will distribute the rights and obligations of the parties fairly. The insurer, in cases where the breach of warranty has caused or contributed to loss, will be discharged from further liability and in this way will be protected against serious alterations of the agreed coverage. The assured, on the other hand, will be given an opportunity to be indemnified, despite the breach of the warranty, in cases where he could show that there is no causal link between the breach and loss. It has been submitted that in practice, specially in hull insurance, insurers have a tendency of waiving breaches of warranty where the breach has not affected the claim.[59] Therefore, the new sub-section will bring a legal ground to this practice and accordingly protect the interests of the assured by means of legal rules.

It should be noted that the proposed amendment to s 33 has no impact on cases where the breach of warranty does not cause any loss. Accordingly, in such a case, the insurer could still rely on s 33(3) to discharge himself from further liability automatically as soon as a warranty is breached. This situation could be justified by the fact that the insurer, quite rightly, might not wish to continue covering an assured who has already been in breach of a certain warranty. This solution does not create any 'unfairness' from the assured's point of view, because after he receives notification from the insurer stating that he wishes to terminate the insurance relation the assured has time to arrange new insurance cover.[60] That the insurer is entitled to discharge himself automatically from liability in cases where no loss follows breach of a warranty is self evident and needs not to be re-stated in s 33(3).

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[58] A similar solution has been adopted by s 11 of New Zealandian Insurance Law Reform Act of 1977 which applies to non-marine insurance.

[59] See, Brown, RH, *Marine Insurance: Hull Practice (Volume 3)*, (2nd ed, Witherby & Co Ltd, 1993), at p 427.

[60] It must be borne in mind that in a case where a warranty is breached and no loss has occurred as a result, the insurer, if he wishes to rely on s 33(3), has to act quickly. Otherwise, he runs the risk of waiving the breach by being involved in an act which clearly contradicts his intention of terminating the insurance relation, eg by accepting a further payment of the premium. This issue has been discussed in detail in Chapter 7.1.2.2.1 at p 227.

The suggested modification of s 33 could be criticised on two grounds. It could be argued that such an alteration would cause further complexities in law and prolong the cases since the courts will be asked to identify the causal link between breach and loss. Admittedly, this will impose an extra task on the parties and the courts; however, the author is of the opinion that such a price is not too high considering the fact that it will lead to a fairer warranty regime. Furthermore, case law suggests that in the application of some other affirmative defences, eg s 55(2)(a) and 39(5), where the courts are asked to determine whether the loss is attributable to a certain act, wilful misconduct of the assured, or state, unseaworthiness, the courts have not experienced any serious difficulties in sorting out the causation issue.[61]

At the same time, one could argue that since the assured is under the burden of proof to show that breach has not caused or contributed to loss in order to preclude the insurer from relying on s 33(3), this will cause a flood of litigation because the insurer will deny liability even in cases where the loss is not connected to the breach. Anybody who brings such an argument is completely unaware of the realities of the market practice. The marine insurance market is a place where the insurer's reputation is largely dependent on the way he treats the assured. Without a doubt, any insurer who prefers to adopt such a course of action will not be approached again by many brokers. Also, there is evidence to suggest that a flood of litigation has not resulted in New Zealand from the passage of the Insurance Law Reform Act 1977 which adopted a similar solution.

11.3.2.2 Further Clarification of Section 33 of the MIA 1906

When defining the nature of a marine warranty, first sentence of s 33(3) provides:

'A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not.'

[61] For example, in the application of s 39(5), the main problem is proving that the assured had knowledge about the unseaworthiness, identifying whether that particular unseaworthiness has caused loss is usually more straightforward.

The use of the term 'condition' has led to confusion simply because it has different meanings both in general contract law and insurance law and it is not clear in which sense it has been used in this sub-section. It is clear after the judgment of Lord Goff in *The Good Luck* that this term has been used in the contingent sense because the liability of the insurer has been made subject to the compliance with the warranty by the assured.[62] The author is of the opinion that in a possible reform in this area, the confusing drafting of this sub-section should be corrected in order to reflect the judgment of Lord Goff and avoid further disputes regarding the nature of warranties. It is suggested that this part of s 33 should be amended in the following way:

'A warranty, as above defined, is a condition precedent to the attachment of risk or to further liability of the insurer,...'

Such a provision would reflect the nature of marine insurance warranties accurately. If a marine warranty is a type of warranty which needs to be complied with before the risk attaches, then it is a condition precedent to the 'attachment of risk' and in cases where it is breached the insurer never comes on risk. Conversely, if a warranty, like most of the warranties, need to be satisfied at one point after the attachment of the risk, it is a condition precedent to the 'liability of the insurer'. It should be borne in mind that the new sub-section which will be added to s 33 to give an opportunity for the assured to show that there is no causal link between the loss and breach, does not change the nature of marine warranties. Still, breach of a warranty has the effect of discharging the insurer from liability automatically when it is relied on by the insurer, however the new sub-section gives the assured a life-line against insurers who rely on this defence in cases where there is no causal link between the breach and loss.

Some further modifications need to be made in s 33(3) in order to clarify the law on this point and accommodate the causal link requirement which is brought by the subsequent sub-section. Section 33(3), as it stands, requires exact compliance with a warranty whether it be material to the risk or not. It has been examined earlier that the

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[62] See, Lord Goff's judgment, *ibid*, where at p 202 he said:

'In the case of conditions precedent, the word 'condition' is being used in its classical sense in English law, under which the coming into existence of (for example) an obligation, or the duty or further duty to perform an obligation, is dependent upon the fulfilment of the special condition.'

words 'material to the risk' imply two things.[63] First, they imply that the facts warranted by an express warranty may be of a sort which could not affect the risk in any manner. They, also, suggest that even though the warranted event concerns things which could be material in a general way, whether the particular breach by the assured has material effect on the case in question is irrelevant in invoking the warranty defence. The author believes that the latter implication of these words will have no effect once the causal link requirement is introduced. If the particular breach by the assured has no material effect on the case in question, then it can not, surely, be causative of the loss or contribute to it.

It is also believed by the author that this sub-subsection is not the proper place to accommodate the first implication of these words. Section 33(3) regulates the nature of marine warranties, whether express or implied, and a rule which gives freedom to the parties to adopt an express warranty even though it could not affect the risk in any manner, should be placed somewhere else in the Act. For instance, s 35(1), which regulates express warranties is appropriate for this purpose and it could be altered to read:

'An express warranty may be in any form of words from which the intention of warrant is to be inferred and it needs not be material to the risk insured against.'

Thus, after emphasising the first implication of the words 'whether it be material to the risk or not' in s 35(1), a further amendment needs to be made in s 33(3) and accordingly the words 'whether it be material to the risk or not' should be removed from its scope. Such a modification will not only serve the purpose of clarifying the meaning of this sub-section but also is a step which will put this sub-section into line with the new sub-section added.

11.3.2.3 Repeal of Section 34(2) of the MIA 1906

Section 34(2) of the MIA states that once a warranty is breached, it is not a defence to the assured that the breach has been remedied before loss. There is no doubt that this

[63] See, Chapter 5.2 at p 183.

provision is in harmony with the automatic discharge rule adopted by s 33(3). However, once the automatic discharge rule is modified to the extent that insurer is precluded from relying on it in cases where there is no causal link between the breach and loss, it is obvious that s 34(2) is going to be redundant. In a case where breach of warranty is remedied before loss, the assured will be able to recover in the absence of a causal link between remedied breach and loss. In this respect, adoption of causal link requirement requires the repeal of s 34(2).

11.3.2.4 The Position of the Implied Warranty of Legality

The *sui generis* nature of the implied warranty of legality has been the topic of a detailed examination earlier in Chapter 4. Since this warranty has the notions of public policy, it has been stressed in the light of case law[64] that its breach could not be waived, although this has not been stated expressly in the Act. This situation should be clarified by inserting a new sub-section to s 34.

Also, for the same reason, the implied warranty should be excluded from the suggested modification of s 33. It is an established contract law principle that a contract which is tainted by illegality cannot be modified to provide a benefit to the party who is involved in this illegality.[65] In order to achieve this end, a final sub-section should be added to s 33. Accordingly, if a loss occurs on a voyage which, with the consent of the assured, is carried out in an unlawful manner, the insurer should be discharged from liability regardless of a causal link between breach and loss.

11.3.2.5 The Seaworthiness Obligation in Time Policies (S 39(5))

Finally, the author believes that a reform in the area should also be extended to s 39(5) which occasionally creates problems due to its complicated nature. The justification behind s 39(5) and the reason for not incorporating an implied warranty of seaworthiness into time policies has been examined earlier. However, the alternative

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[64] *Gedge & Others* v. *Royal Exchange Assurance Corporation*, [1900] 2 QB 214.

[65] *Holman* v. *Johnson* (1775) 1 Cowp 341,

defence to an implied warranty of seaworthiness, which is stated in s 39(5), is far from being convincing. A careful analysis of this sub-section reveals that this provision, in practice, is very difficult to operate. The insurer has to show not only that the vessel was sent to sea in an unseaworthy state, but also that the assured had, either actual or constructive, knowledge about this unseaworthiness and furthermore that the loss was attributable to the unseaworthiness of which the assured had knowledge. Particularly, showing that the assured had knowledge about the unseaworthiness which caused the loss, has been problematic.[66] Also, identifying whose knowledge within the company structure of the assured will be attributable to the knowledge of the assured is another difficult task specially in cases where numerous individuals are involved in the decision making process.[67] It has been submitted that, proving the assured's knowledge in relation to a particular unseaworthiness, is going to be easier after the ISM Code but the way in which courts will interpret this Code has to be seen in order to confirm the correctness of such a statement.[68]

In addition to the problems that might arise in the application of s 39(5), it could be argued that especially after the insured vessel has returned to the control of her owner or manager or of those who are in other respects acting as his agents in her management, it is unfair for the insurer to be deprived of the protection which he would enjoy if the vessel were insured voyage by voyage. It should be borne in mind that even in time policies the assured, through his agents, is in a position to access the requirements in order to render the vessel seaworthy for each voyage which will be carried out after the attachment of the risk.[69]

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[66] For instance, recently at the Court of Appeal, in *Manifest Shipping & Co Ltd* v. *Uni Polaris Insurance Co Ltd & La Réunion Européene, (The Star Sea)* [1997] 1 Lloyd's Rep 360, the insurer had failed to show that the assured had knowledge about the factors which rendered the vessel unseaworthy, incompetence of the master, despite the fact that two of the assured's vessels had been lost in the same fashion and due to the similar defects earlier.

[67] See, *Meridian Global Funds Management Asia Ltd* v. *The Securities Commission* [1995] 3 WLR 413, where the courts are asked to fashion a special rule of attribution to determine whose act or knowledge will be attributable to the act of the assured.

[68] See, Chapter 3.4.2.3.3 at p 139 where the potential implications of the ISM Code on s 39(5) have been discussed.

[69] It is quite common in practice to see that an express warranty of seaworthiness has been incorporated into time policies. Usually, in such a case the remedy available to insurer in case of breach of this warranty is modified. For example, in *Martin Maritime Ltd* v. *Provident Capital Indemnity Fund Ltd (The Lydia Flag)* [1998] 2 Lloyd's Rep 652, an express warranty of seaworthiness had been imposed into the policy in the following way:

The author is of the opinion that an implied warranty of seaworthiness could be imposed on time policies in a way that the interests of both the assured and insurer is protected. In this respect, attention should be directed to the suggestion made by one of the most celebrated authors of the early 20th century, namely William Gow.[70] He suggests that the assured may be subject to an implied warranty of seaworthiness in time policies with a wording like this:

'A time policy shall be subject to the same warranty of seaworthiness as if the vessel were insured separately for each voyage.'[71]

By this, the owner of a vessel which has commenced the voyage in a seaworthy condition on which his old policy lapses and the new one begins is effectually protected to the end of that voyage. This point can be highlighted with a couple of hypothetical examples. Let us assume a vessel commences a journey in a seaworthy condition and while she is at sea her insurance policy lapses and a new one commences; but just after the commencement of the new policy she becomes unseaworthy. In this case, the assured will be able to be indemnified in respect of the losses occurred during the first policy as she commenced the voyage in a seaworthy state. The assured will also be able to recover in respect of the losses occurred during the second policy as she commenced the voyage in a seaworthy state and the unseaworthiness occurred after the commencement of the voyage does not have any effect on the implied warranty of seaworthiness. On the contrary, if the vessel was unseaworthy at the commencement of the voyage and the first policy lapses and the second commences when she is at sea,

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'Warranted that at the inception of this policy the vessel.. shall be in a seaworthy condition and thereafter during the valid period of this policy the insured shall exercise due diligence to keep the vessel seaworthy.'

However, the remedy afforded in case of breach of this warranty was the suspension of the cover until it is complied with. This indicates that the assured is prepared to have an express warranty of seaworthiness in time policies, provided, of course, the remedy available in case of its breach is not 'draconian'.

[70] Gow, W, *Sea Insurance*, (Mac Millan & Co Ltd, 1914) at p 272.

[71] It is clear that each marine adventure carried out, whether the vessel is in ballast or carries cargo or performs a particular task, during the currency of the policy is regarded as a separate voyage within the meaning of this regulation.

the assured will not be protected for losses which occurred either during the first or the second policy.

It is obvious that this kind of warranty status in respect of time policies serves the interests of both the assured and insurer. The assured is only precluded from recovery for something which was in his control. He is not expected to guarantee the seaworthy state of the vessel during the continuation of the voyage. Similarly, the insurer is assured of the proper information and control of the owner or manager at the close of that voyage by means of an implied warranty of seaworthiness.

The re-wording of s 39(5) and imposing a warranty status in respect of time policies assuming that the vessel is insured separately for each voyage, as suggested by Gow, is a reform which will bring a degree of certainty to this area. Also, the assured could not allege that he is put in a worse position with this amendment, considering that under the new warranty regime a causal link between the breach and loss will be required in order to deny liability.[72]

11.3.2.6 The Marine Insurance Act After The Reform: The Draft Provisions

In this final part of the work, the author wishes to formulate the suggested reform by re-drafting the provisions of the MIA 1906 which will be affected. Provided a reform in this area, as suggested by the author, is carried out, ss 33, 34, 35 and 39 of the MIA 1906 shall read as follows:[73]

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[72] There have been a number of criticisms of adopting a warranty status to seaworthiness obligation in marine insurance. The author believes that the harshness of the remedy afforded by the MIA 1906 in case of breach of a warranty was the main reason behind these criticisms and provided that this remedy is modified by adopting a causal link requirement there is no reason to consider a chance in the legal status of implied warranty of seaworthiness. The adoption of causal link requirement in case of breach of warranty will bring the law on this point in line with other jurisdictions and distribute the rights and obligations of the parties fairly.

[73] The parts in bold are the parts which have been inserted or altered.

33. Nature of Warranty

(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) **A warranty, as above defined, is a condition precedent to the attachment of risk or to further liability of the insurer, and must be exactly complied with.** If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of breach of warranty, but without prejudice to any liability incurred by him before that date.

(3A) When breach of a warranty is followed by a loss, the insurer is precluded from relying on s 33(3) if the assured on a balance of probabilities proves that the loss in respect of which he seeks to be indemnified was not caused or contributed to by the breach.

(3B) The previous sub-section does not apply when the implied warranty of legality is breached.

34 . When breach of warranty excused

(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(3) A breach of warranty may be waived by the insurer.

(3A) The previous sub-section does not apply when the implied warranty of legality is breached.

35. Express warranties

(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred **and it needs not be material to the risk insured against.**

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

39. Warranty of seaworthiness of ship

(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) A time policy shall be subject to the same warranty of seaworthiness as if the vessel were insured separately for each voyage.

APPENDIX

Marine Insurance Act 1906

An Act to codify the Law relating to Marine Insurance. [21 December 1906]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

MARINE INSURANCE

1. Marine insurance defined

A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

2. Mixed sea and land risks

(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

3. Marine adventure and maritime perils defined

(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where—

(a) Any ship, goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";

(b) The earning or acquisition of any freight, passage money, commission, profit. Or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures,

restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

4. Avoidance of wagering or gaming contracts

(1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(b) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

5. Insurable interest defined

(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or damage thereto, or by the detention thereof, or may incur liability in respect thereof.

6. When interest must attach

(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:

Provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

7. Defeasible or contingent interest

(1) A defeasible interest is insurable, as also is a contingent interest.

(2) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.

8. Partial interest

A partial interest of any nature is insurable.

9. Re-insurance

(1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it.

(2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.

10. Bottomry

The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.

11. Master's and seamen's wages

The master or any member of the crew of a ship has an insurable interest in respect of his wages.

12. Advance freight

In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.

13. Charges of insurance

The assured has an insurable interest in the charges of any insurance which he may effect.

14. Quantum of interest

(1) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.

(2) A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.

15. Assignment of interest

Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not affect a transmission of interest by operation of law.

INSURABLE VALUE

16. Measure of insurable value

Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:—

(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance:

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole:

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.

DISCLOSURE AND REPRESENTATIONS

17. Insurance is *uberrimae fidei*

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

18. Disclosure by assured

(1) Subject to the provisions of this section, 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. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:—

(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer.
The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

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

19. Disclosure by agent effecting insurance

Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

20. Representations pending negotiation of contract

(1) 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. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

21. When contract is deemed to be concluded

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 covering note or other customary memorandum of the contract,...

ANNOTATION:
Words omitted repealed by the Finance Act 1959, s.37(5), Sch.8, Part II.

THE POLICY

22. 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.

23. 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:

(2)-(5) ...

ANNOTATION:
Words omitted repealed by the Finance Act 1959, ss.30(5), (7), 37(5), Sch.8, Part II.

24. 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.

(2) Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.

25. Voyage and time policies

(1) Where the contract is to insure the subject-matter "at and from", or from one place to another or others, the policy is called a "voyage policy", and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy". A contract for both voyage and time may be included in the same policy.

(2)...

ANNOTATION:
Sub-s.(2): repealed by the Finance Act 1959, ss.30(5), (7), 37(5), Sch.8, Part II

26. Designation of subject-matter

(1) The subject-matter insured must be designated in a marine policy with reasonable certainty.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) 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.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

27. Valued policy

(1) A policy may be either valued or unvalued.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

28. Unvalued policy

An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner hereinbefore specified.

29. Floating policy by ship or ships

(1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.

(2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

30. Construction of terms in policy

(1) A policy may be in the form in the First Schedule to this Act.

(2) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

31. Premium to be arranged

(1) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable.

(2) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.

DOUBLE INSURANCE

32. Double insurance

(1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.

(2) Where the assured is over-insured by double insurance—

(a) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(b) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;

(c) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;

(d) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

33. Nature of warranty

(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

34. When breach of warranty excused

(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

35. Express warranties

(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

36. Warranty of neutrality

(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

(2) Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

37. No implied warranty of nationality

There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

38. Warranty of good safety

Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

39. Warranty of seaworthiness of ship

(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

40. No implied warranty that goods are seaworthy

(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

41. Warranty of legality

There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

42. Implied condition as to commencement of risk

(1) Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

(2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

43. Alteration of port of departure

Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.

44. Sailing for different destination

Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.

45. Change of voyage

(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

46. Deviation

(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the policy—

(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

47. Several ports of discharge

(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

(2) Where the policy is to "ports of discharge", within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.

48. Delay in voyage

In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

49. Excuses for deviation or delay

(1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

(a) Where authorised by any special term in the policy; or

(b) Where caused by circumstances beyond the control of the master and his employer; or

(c) Where reasonably necessary in order to comply with an express or implied warranty; or

(d) Where reasonably necessary for the safety of the ship or subject-matter insured; or

(e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable dispatch.

ASSIGNMENT OF POLICY

50. When and how policy is assignable

(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by indorsement thereon or in other customary manner.

51. Assured who has no interest cannot assign

Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:

Provided that nothing in this section affects the assignment of a policy after loss.

THE PREMIUM

52. When premium payable

Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions and the insurer is not bound to issue the policy until payment or tender of the premium.

53. Policy effected through broker

(1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

(2) 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.

54. Effect of receipt on policy

Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.

LOSS AND ABANDONMENT

55. Included and excluded losses

(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular,—

(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

56. Partial and total loss

(1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

(4) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.

57. Actual total loss

(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given.

58. Missing ship

Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

59. Effect of transhipment, etc.

Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and re-shipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment.

60. Constructive total loss defined

(l) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss—

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

61. Effect of constructive total loss

Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

62. Notice of abandonment

(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6) Where a notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

63. Effect of abandonment

(1) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

(2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

PARTIAL LOSSES (INCLUDING SALVAGE AND GENERAL AVERAGE AND PARTICULAR CHARGES)

64. Particular average loss

(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

65. Salvage charges

(1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

66. General average loss

(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

(7) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

MEASURE OF INDEMNITY

67. Extent of liability of insurer for loss

(1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity.

(2) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

68. Total loss

Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured,—

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy:

(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.

69. Partial loss of ship

Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty:

(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above.

(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

70. Partial loss of freight

Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

71. Partial loss of goods, merchandise, etc.

Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows:—

(1) Where part of the goods, merchandise or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy:

(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss:

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value:

(4) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges. and duty paid beforehand, provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers.

72. Apportionment of valuation

(1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act.

(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.

73. General average contributions and salvage charges

(1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

(2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.

74. Liabilities to third parties

Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.

75. General provisions as to measure of indemnity

(1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case.

(2) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

76. Particular average warranties

(1) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

(2) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

(3) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

(4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.

77. Successive losses

(1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss:

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

78. Suing and labouring clause

(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

RIGHTS OF INSURER ON PAYMENT

79. Right of subrogation

(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

80. Right of contribution

(1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

81. Effect of under insurance

Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

RETURN OF PREMIUM

82. Enforcement of return

Where the premium or a proportionate part thereof is, by this Act, declared to be returnable,—

(a) If already paid, it may be recovered by the assured from the insurer; and

(b) If unpaid, it may be retained by the assured or his agent.

83. Return by agreement

Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured.

84. Return for failure of consideration

(1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

(3) In particular—

(a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable;

(b) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable:

(c) Provided that where the subject-matter has been insured "lost or not lost" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival.

(d) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering;

(e) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable;

(f) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable;
Subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable:

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable.

MUTUAL INSURANCE

85. Modification of Act in case of mutual insurance

(1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.

(2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.

(3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

SUPPLEMENTAL

86. Ratification by assured

Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.

87. Implied obligations varied by agreement or usage

(1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract.

(2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

88. Reasonable time, etc., a question of fact

Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact.

89. 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.

90. Interpretation of terms

In this Act, unless the context or subject-matter otherwise requires,—

"Action" includes counter-claim and set off;

"Freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money;

"Moveables" means any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents;

"Policy" means a marine policy.

91. Savings

(1) Nothing in this Act, or in any repeal effected thereby, shall affect—

(a) The provisions of the Stamp Act 1891, or any enactment for the time being in force relating to the revenue;

(b) The provisions of the Companies Act 1862, or any enactment amending or substituted for the same;

(c) The provisions of any statute not expressly repealed by this Act.

(2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

92. Repeals

The enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in that schedule.

93. Commencement

This Act shall come into operation on the first day of January one thousand nine hundred and seven.

94. Short title

This Act may be cited as the Marine Insurance Act 1906.

SCHEDULE 1 (s.30)

The S.G. Form

Form of policy

BE IT KNOWN THAT..... as well in.....own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all doth make assurance and cause.....and them, and every one of them, to be insured lost or not lost, at and from.....

Upon any kind of goods and merchandise, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the ..... whereof is master under God, for this present voyage, ... or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship.

upon the said ship, etc.

and so shall continue and endure, during her abode there, upon the said ship, etc.

And further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever shall be arrived at .....

upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, etc., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever.

without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at .....

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of .....

IN WITNESS whereof we, the assurers, have subscribed our names and sums assured in London.

N. B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded.

Rules for construction of policy

The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require:—

1. Lost or not lost

Where the subject-matter is insured "lost or not lost," and the loss has occurred before the contract is concluded, the risk attaches, unless at such time the assured was aware of the loss, and the insurer was not.

2. From

Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured.

3. At and from [Ship]

(a) Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately.

(b) If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.

(c) Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.

(d) Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches pro rata as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.

4. From the loading thereof

Where goods or other moveables are insured "from the loading thereof," the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to ship.

5. Safely landed

Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.

6. Touch and stay

In the absence of any further licence or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.

7. Perils of the seas

The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

8. Pirates

The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.

9. Thieves

The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.

10. Restraint of princes

The term "arrests, etc. of kings, princes, and people" refers to political executive acts, and does not include a loss caused by riot or by ordinary judicial process.

11. Barratry

The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.

12. All other perils

The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

13. Average unless general

The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges."

14. Stranded

Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board.

15. Ship

The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.

16. Freight

The term "freight" includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.

17. Goods

The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

SCHEDULE 2 (s. 92)

Enactments Repealed

Session and Chapter	Title or Short Title	Extent of Repeal
19 Geo 2 c.37	An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandizes or effects laden thereon.	The whole Act.
28 Geo 3 c.56	An Act to repeal an Act made in the twenty-fifth year of the reign of his present Majesty, intituled 'An Act for regulating Insurances on Ships, and on goods, merchandizes, or effects,' and for substituting other provisions for the like purpose in lieu thereof.	The whole Act so far as it relates to marine insurance.
31 & 32 Vict c.86	The Policies of Marine Assurance Act 1868	The whole Act.

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