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Marine Insurance Warranties

Development in England, in comparison with other countries

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1 Introduction

1.1 Marine insurance warranties in the English law

The warranty regime in the English marine insurance law for a long time has been in the center of attention of courts, academics and practitioners. The reason for that are distinctive characteristics of insurance warranties, which make them a unique type of term, sometimes described as “draconian”.¹ Namely, attribution of a warranty status to the assured’s undertaking to act in particular way (to fulfill certain condition, etc.) turns a strict compliance with it into a condition precedent to the insurer’s liability; in case of non-compliance, the issues of fault, materiality of a breach or presence of a causal connection between a breach and a loss are disregarded. Furthermore, a specific remedy of “automatic discharge from liability” makes the warranty regime especially severe for assureds. In the beginning of the XX century, all these traits were reflected in the English Marine Insurance Act 1906 (the MIA 1906) and remained unchanged for many years.

However, it has been widely recognized that warranties constitute a source of potential injustice, as they entitle insurers to rely on minor and non-causative breaches to avoid liability under the policy. Moreover, as the warranty regime is strikingly different from a general civil law approach to alteration of risk, its maintenance may hinder a process of internationalization of the English insurance law and, from the practical perspective, make London market less attractive for new clients. Therefore, English courts and the insurance industry endeavored to mitigate harsh effects of warranties. Various measures of amelioration were adopted, but none of them could be described as a finale solution. The need for legislative reform was gradually becoming apparent.

In 2006, the UK Law Commission, a statutory body created for purpose of reviewing and reforming the law, jointly with the Scottish Law Commission started a project “Insurance Contract Law”. The project concluded with an adaptation of the Insurance Act 2015,

¹ *Hussain v Brown* [1996] 1 Lloyd’s Rep 627, per Saville LJ, 630

which envisages significant changes of the warranty regime. **The recent reform has raised a number of important issues:**

- (1) What particular problems, created by the “classical” warranty regime, were legislators trying to solve?
- (2) What are the differences between the warranty regime under the MIA 1906 and the regime established by the Insurance Act 2015?
- (3) Has the reform brought the English warranty regime closer to practices of other common law countries and/or to the civil law approach to alteration of risk?

A purpose of this thesis is to consider these questions in the light of relevant experience from England and other countries. The answers to them are important for such issues of theoretical and practical significance, as: how the recent reform has affected the existing warranty regime; has it created any potential problems; will the English marine insurance market make a step towards internationalization, and so on. Overall, this thesis aims to study a process of development of the marine insurance warranty regime in England, in comparison with its international surrounding.

1.2 Structure of thesis

The main body of this thesis is separated into three parts:

(1) Chapter 2 is devoted to nuances of the warranty regime under the MIA 1906, with the main accent on characteristics of warranties (the “strict compliance” doctrine, the “automatic discharge” rule, *etc.*). The place of warranties among other insurance contract terms and their inner classification are also discussed;

(2) Chapter 3 refers to the Norwegian approach to general alterations of the risk and to warranty-resembling clauses, as an example of the civil law solution;

(3) Chapter 4 gives an overview of previous attempts to mitigate the warranty regime in England and other common law countries and a detailed analysis of the recent legislative reform.

The final Chapter provides a conclusion on questions of a present development and future perspectives of marine insurance warranties in England.

1.3 Legal sources

Due to the fact that marine insurance warranties are the common law concept, the majority of sources used for preparation of this thesis are of the English origin. They include: statutes (the MIA 1906, the Insurance Act 2015), preparatory work (papers of the Law Commission, draft bills, etc.), standard documents, case law and legal literature. As the concept of warranties is common to marine and non-marine insurance in England, examples from non-marine insurance are used when suitable. References to the legislation, case law, reform projects and legal literature from other common law jurisdictions, such as Australia, New Zealand, the USA and Canada, are also frequently made. Provisions of the Nordic Marine Insurance Plan 2013 and the Commentary to it are used to illustrate the civil law solutions; furthermore, some cases heard before Norwegian courts are also referred to.

1.4 Method

The main method of the research is a comparative analysis of the “classical” warranty regime in England (Chapter 2), its alterations, introduced by the recent reform (Chapter 4) and relevant approaches in other common and civil law countries (Chapters 3, 4). As it would be impossible to embrace all the variety of problems related to marine insurance warranties, some of them are left beyond the scope of this work: for example, a status of “navigation” conditions in the MIA 1906.² Without diminishing a significance of such issues, it should be noted that this thesis is devoted to a more general question of the development of the warranty regime in the English marine insurance.

2 The warranty regime under the MIA 1906

2.1 Alteration of risk and warranty

At formation of the insurance contract, the assessment of the risk insured is made on the basis of presumptions about particular past or present facts, or future events. They constitute a fundament of the policy; if it fails, the principle of fair balance of interests between

² The MIA 1906, ss 42, 43, 54, 46, 48 and 49.

the insurer and the assured may require an amendment, or even a termination of the policy. In order to help the insurer to regulate the risk insured, the English law adopted, *i.a.*, a notion of “**warranty**”.

However, the civil law jurisdictions deal with the same problem without introducing an exhaustive warranty regime. Namely, they provide insurers with an opportunity to control the risk insured through general provisions on **alteration of risk**. Trine-Lise Wilhelmsen, a Professor at the Scandinavian Institute of Maritime Law, have undertaken a comprehensive study of various legal systems and concluded that various definitions of “alteration of risk” seem to be based on four main approaches. Those are, as follows:

(1) The risk must be increased compared to the written or implied conditions of the insurance contract (Norway);

(2) The risk must be altered or increased in such a way that the insurer would not have accepted the insurance at all (Belgium) or would not have accepted the insurance on the same conditions if he had known about the increase (Italy, Greece);

(3) The risk is “substantially” altered (Japan, Slovenia, Croatia);

(4) The last approach is to connect the sanction to circumstances affecting or altering the risk after the contract is concluded without any further definition (France).³

Despite the differences in these methods and in the effects of particular provisions, they are all governed by a basic requirement of “subjective materiality”.⁴ This means that in relation to the circumstances, which were in some way relevant to the insurer when the contract was entered into, a general duty of the assured not to alter the risk could be traced; otherwise, the insurer is not entitled to react against the alteration.

The English law is also acquainted with a concept of **change of risk**; however, it differs in its implications from the continental one. Two types of changes of risk are recognized: (1) alteration of risk; (2) and increase of risk.

Alteration of risk takes place when the subject matter insured is substantially changed, *i.e.*, the insured risk is substituted by a new one. In this case, a general principle

³ Trine-Lise Wilhelmsen, “*Issues of Marine Insurance*” (Oslo: MarJus, 2001), 113-115

⁴ *Ibid*, 115

of the common law is that the insurer is automatically discharged from liability: “There would be no cover where the circumstances had so changed that it could properly be said by the insurers that the new situation was something which, on the true construction of the policy, they had not agreed to cover”.⁵ Other cases, where the risk remains the same in essence, but a loss is more likely to occur – for example, if the ship insured under the war policy sails into areas of enhanced military activity, – are referred to as **increase of risk**.

The civil law concept of alteration of risk embraces both types of situations; hence, the assured’s duty not to alter risk applies to them equally. The striking feature of the English law is that there is no general duty of the assured to prevent the increase of risk during the currency of the policy. Such increase is deemed to be in contemplation of insurers, “since the insurance bargain is one where, in return for the premium, they take upon themselves the risk that an insured peril will operate”.⁶ Therefore, insurers cannot claim that the increased risk goes beyond what they have agreed to cover. As Pollock CB observed in *Baxendale v Harvey*⁷:

“An insured may light as many candles as he please in his house, though each additional candle increases the danger of setting the house on fire”.

In absence of an implied duty of the assured not to increase risk, the English marine insurance law was in need of another way to secure the insurer’s position. Hence, the warranty regime was implemented. Parallel to provisions on alteration of risk in the civil law, warranties serve as an instrument of administration of the risk insured: they circumscribe it, oblige the assured to take suitable precautions, etc.⁸ However, despite the similarity of goals, a closer look on the warranty regime reveals its substantial differences from the civil law approach.

⁵ *Kausar v Eagle Star Insurance Co Ltd* [2000] Lloyds Rep IR 154

⁶ *Ibid.* See also *Swiss Reinsurance Company and others v United India Insurance Company Limited* [2005] EWHC 237 (Comm).

⁷ *Baxendale v Harvey* (1859) 4 H & N 445, 449

⁸ On the purpose of warranties, see the Law Commission Consultation paper No182 (2007) ss 2.1-2.2

2.2 Historical perspective

The English and the civil marine insurance law have common roots: continental practices were brought to England in the XIV century, with establishment of the Hanseatic League of Lombard trading houses in London.⁹ However, the unity broke in the XVII century, when English courts began to acknowledge that some of the assured's contractual undertakings could constitute a condition precedent (*i.e.*, a prerequisite) to the insurer's promise of cover.¹⁰ A breach of these terms, referred to as "warranties", gave the insurer unconditional right to repudiate the policy. By contrast, in civil law jurisdictions a breach of resembling term entitled the insurer to repudiate only if that breach went to the root of the contract and was causative of the loss.¹¹

The appointment of Lord Mansfield as Lord Chief Justice in 1756 led to further breakthrough in the English marine insurance law, *i.a.*, in relation to the warranty regime. First, Lord Mansfield made a clear distinction between a warranty, "which makes part of a written police"¹², and a mere representation. Next, a revolving conclusion followed: "There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered: but a warranty must be strictly complied with[...]".¹³

In quoted case, *De Hahn v Hartley*, the ship warranted to sail with "50 hands or upwards", sailed with 46 hands, but only in a few hours further six men were taken onboard. However, Lord Mansfield's understanding of the "strict compliance" doctrine implied that any immaterial, non-causative, and even rectified breach of warranty entitled the insurer to refuse to pay. Thus, the departure of the English marine insurance law from its continental roots finalized. Since the late XVIII century, a process of codification of the rules, laid down by Lord Mansfield and subsequent case law, began.

⁹ Baris Soyer, "Warranties in Marine Insurance", 2nd edition (London: Cavendish Publishing Limited, 2006), 5

¹⁰ *Jefferies v Legandra* (1692) 4 Mod. 58; *Lethulier's case* (1692), 91 Eng Rep 384; *Gordon v Morley* 93 Eng Rep 1171

¹¹ John Hare, "The omnipotent warranty: England v the world", compendium "Marine insurance at the turn of millennium", vol.2 (Antwerpen, Groningen, Oxford: Intersentia, 2000), 43

¹² *Pawson v Watson* (1778) 2 Cowp 785, 787-788

¹³ *De Hahn v Hartley* (1786) 1 T.R. 343, 345

As the result, the Marine Insurance Act was adopted in 1906, with Sections 33 - 41 devoted to different aspects of the warranty regime. Analogous statutes were implemented throughout the common law world, such as: the Australian MIA 1909, the New Zealand MIA 1908 and the Canadian Federal MIA 1993. Although that resulted in a certain unity of the warranty regime, the majority of common law countries have eventually amended it by various legislative and non-legislative measures.¹⁴ To understand the aims and the content of these alterations, the “classical” warranty regime under the MIA 1906 should be addressed first.

2.3 Definition of warranty

2.3.1 Statutory definition

Section 33(1) of the MIA 1906 provides that:

“Warranty[...] 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”.

According to this definition, warranty status can be attributed to a huge variety of undertakings: (1) as to past or present facts (affirmative warranties); (2) as to future conduct of the assured (continuing/promissory warranties); or (3) that some condition shall be fulfilled, although the inclusion of this middle category was argued to be rather open-ended and creating a basis for litigation.¹⁵ Indeed, the courts occasionally have problems with deciding whether a particular statement is or is not a warranty.

An affirmation of fact, for instance, can constitute either a warranty or a representation, an instrument with its own legal regime.¹⁶ In the XVIII century, Lord Mansfield endeavored to separate these concepts by stating that: warranties make a part of the written policy, whereas representations are made outside of the written contract; and representa-

¹⁴ For further discussion, see Chapter 4, ss 4.2.1.3 and 4.3.2.

¹⁵ The Law Commission Consultation paper No 204 (2012), s 12.6. See, for example, *Switzerland Insurance Australia v Movie Fisheries Pty Ltd* (1997) 144 ALR 234

¹⁶ See the MIA 1906 s 20

tions may be equally or substantially answered, while warranties must be strictly complied with.¹⁷ The third criterion of distinction is that the test of materiality is applicable only to representations. As Lord Eldon LC put it in *Newcastle Fire Insurance v Macmorran & Co*¹⁸:

“It 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... the materiality or immateriality signifies nothing”.

Aside from the broadness of the MIA s 33(1), problems in defining warranties are numerous. To begin with, the very process of creation of warranties fuels potential uncertainty.

2.3.2 Creation of warranty

According to the MIA s 33(2), a warranty may be either express or implied. Warranties may be implied by statute. The MIA specifies four implied warranties: the warranty of seaworthiness (s 39(1)), portworthiness (s 39(2)), cargoworthiness (s 40(2)), and legality (s 41). In theory, warranties may be implied into a contract of insurance by courts, as in any other contract, for example, for reasons of business efficacy. However, in practice this possibility is of little importance to insurance contracts.¹⁹

The majority of warranties are created expressly by parties: *i.e.*, they are either written into the policy, or incorporated into it by reference. The MIA s 35(1) states that an express warranty may be in any form of words from which the intention to warrant is to be inferred. Consequently, there is no single verbal construction to indicate a warranty. Even the use of the word “warranty” is not decisive. Here, Arnould provides the following example: “The fact that the word “warranted” is used in a policy does not always prove that the term to which it refers amounts to a warranty. Thus, the clause “warranted free from

¹⁷ *Pawson v Watson* (1778) 2 Cowp 785; *De Hahn v Hartley* (1786) 1 T.R. 343

¹⁸ *Newcastle Fire Insurance v Macmorran & Co* (1815) 3 Dow 255, 262

¹⁹ As noted in Consultation paper No 204 (2012), s 12.13

particular average” is not a warranty; it is an exception from the risk undertaken by the underwriter”.²⁰

Courts in England and other common law countries are sometimes prepared to find a clause, labeled as a warranty, not to be one, in order to mitigate the harshness of the warranty regime.²¹ For instance, in *Roberts v Anglo-Saxon Insurance Ltd*²², a statement “warranted: use only for commercial travelling” was held not to be a “true” warranty, because “[...]the parties had used that language as words descriptive of the risk”. Therefore, even if a term apparently seems to be a warranty, it can be construed otherwise by courts.

On the other hand, a warranty may be inferred from any words demonstrating an intention to warrant. The courts have tried not to push this doctrine to extremes²³, yet sometimes it is applicable. In *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co*²⁴, the Court of Appeal held that an undertaking to produce six films in the “pecuniary loss indemnity” policy must be construed as a warranty, because the essence of the risk insured was generation of a certain revenue, and the films could generate it only if completed. Furthermore, Lord Justice Rix listed several tests for identifying a warranty:

“[para 101] It is a question of construction, and the presence or absence of the word “warranty” or “warranted” is not conclusive. One test is whether it is a term which goes to the root of the transaction; a second, whether it is descriptive or bears materially on the risk of loss; a third, whether damages would be an unsatisfactory or inadequate remedy”.

Overall, the approach to creation of warranties is very flexible. For instance, the Law Commission in 1980 Report summarized possible ways of creating warranties as follows²⁵:

(1) By the use of the word “warranty”. It is to be recalled that the word “warranty” is indicative, but not decisive;

²⁰ Arnould, “*On the Law of Marine Insurance and Average*”, 11th ed. (London: Law Publishers, 1924), 829

²¹ For further discussion, see Chapter 4, ss 4.2.1.2-4.2.1.3.

²² *Roberts v Anglo-Saxon Insurance Ltd* (1927) 27 LI L Rep 313, per Bankes LJ 314

²³ See *Clapham v Cologan* (1813) 3 Camp. 382, where the court rejected an argument that a mere description of the ship by English name constituted a warranty of nationality.

²⁴ *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 2Lloyd’s Rep 161

²⁵ “*Insurance Law: Non-Disclosure and Breach of Warranty*” (1980) Law Com No104, s 6.3

(2) By the use of “basis of the contract” clauses – a legal device, typically a statement on a proposal form, that converts the assured’s answers and declarations into contractual warranties;

(3) By an expression of the strict compliance and the right to repudiate for a breach²⁶;

(4) By the use of phrases such as “condition precedent”, from which the court can infer that the parties intended the strict compliance and the right to repudiate for a breach²⁷;

(5) By the use of any other words such that the court concludes that, on true construction of the whole document containing the term, the parties intended the term to possess the attributes of a warranty.

Overall, in order to determine if the term is a “true” warranty, one must consider intentions of the parties revealed by the contract as a whole. Warranties are “an elusive target”, by expression of the Law Commission²⁸; the difficulties in defining them lead to a significant uncertainty in insurance relationships and provide ground for a vast litigation. The problem is enhanced by the fact that the same term may be drawn in different ways – as a definition of risk, an exclusion from liability, or a warranty. Each of options may lead to different consequences for insurers and assureds. For that reason, it is important to draw a line between warranties and other provisions of the insurance contract.

2.3.3 Warranty in hierarchy of contractual terms

Lord Greene MR described the term “warranty” as “one of the most ill-used expressions in the legal dictionary”.²⁹ Indeed, it has a number of meanings: for instance, a warranty in the insurance law is a very different thing from a warranty in the general contract law. In latter, the word “warranty” usually describes a term of minor importance, as opposed to

²⁶ After *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1991] 2 Lloyd’s Rep 191; [1992] 1 A.C 233, it is more correct to speak of an “automatic termination” of insurers’ liability.

²⁷ *Ibid.*

²⁸ Consultation paper No204 (2012), s 11.19

²⁹ *Finnegan v Allen* (1943) 1 KB 425, 430

“condition” – a term that “goes to the root of the contract”.³⁰ If a condition is breached, the non-breaching party may repudiate the contract for the future in addition to damages. If a warranty is breached, damages are the only remedy available. For example, Sale of Goods Act 1979 Section 11(3) states:

“Whether a stipulation in a contract of sale is a condition, the breach of which gives rise to the right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods[...]

In contrast, in the insurance law warranties have a “dominant” position. According to hierarchy of contractual terms, presented by the Law Commission in 2006 Issues paper³¹:

(1) Warranties carry the most severe consequences for the assured, because their breach leads to the insurer’s automatic discharge from liability (*i.e.*, the insurer does not need to make a choice to repudiate the policy). This unique feature of warranties was acknowledged in *The Good Luck* case.³²

(2) Conditions precedent to a claim are mostly procedural requirements: for example, to notify of a claim. As in case with warranties, the insurer may refuse to pay a particular claim even if the breach of such condition is not material or causative to the loss; however, other claims under the policy will stay unaffected.

(3) Clauses “descriptive of the risk” and “excluding the liability” indicate under which circumstances the insurer shall or shall not cover the loss. These clauses are also known as “suspensive” conditions, because in case of breach the insurer’s liability is only suspended until the breach is remedied.

(4) Innominate terms are qualified by the fact that the remedy for their breach depends on its seriousness: it may be either a right to repudiate the contract and damages, or only damages.³³ Notably, in *Alfred McAlpine* case³⁴ it was suggested that a breach of such

³⁰ For further discussion, see Jill Poole, “Textbook on Contract Law”, 12th ed. (Oxford University press, 2014), 301-302

³¹ Issues paper 2 “Warranties” (2006), ss 2.12-2.13

³² *The Good Luck* [1991] 2 Lloyd’s Rep 191

³³ See *Honkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* (1962) 2 QB 26. Existence of innominate terms in insurance contracts was acknowledged in *Phonenix General Insurance Co v Greece SA v Halvanon Insurance Co Ltd* [1985]2 Lloyd’s Rep.599

term might be sufficiently serious to justify a rejection of particular claim, but not the whole contract. However, the idea of a “partial repudiatory breach” was criticized by Court of Appeal in *Friends Provident Life and Pensions v Sirius International Insurance*³⁵ as creating a completely new doctrine. Thus, the law is inconsistent on this point.

(5) **Mere terms** are equal to “warranties” in the general contract law; their breach has no bearing on the insurer’s liability, as it is adequately remedied by damages.

Overall, marine insurance warranties have a unique place among other policy terms, as they envisage the harshest consequences of non-compliance for assureds. A detailed examination of main characteristics of warranties, which make them one of the most powerful and criticized instruments in the English insurance law, is provided below.

2.4 Characteristics of warranty

The following characteristics can be attributed to a marine insurance warranty on the basis of the MIA 1906 provisions and relevant case law:

- (1) It must be exactly complied with;
- (2) It need not be material to the risk;
- (3) Causal link between the breach of warranty and the loss is irrelevant;
- (4) Absolute character of warranty: there is no excuse (no defence) for the breach;
- (5) Specific consequences of the breach: “automatic discharge” of the insurer from liability;
- (6) There is no remedy for the breach.

In complex, these features constitute the traditional warranty regime in the English insurance law. Clearly, such severe rules can lead to striking injustice towards the assured. For that reason, the recent legislative reform has reviewed some of them to various extent. However, to understand modern amendments, the original approach should be analyzed first.

³⁴ *Alfred McAlpine Plc v BAI (Run-Off) Ltd* [2000] 1 Lloyd’s Rep 437

³⁵ *Friends Provident Life and Pensions v Sirius International Insurance* [2005] EWCA Civ. 601

2.4.1 Strict compliance

Warranties in insurance contracts have been occasionally characterized as “conditions precedent” to attachment of the risk, or to liability of the insurer. In *Thomson v Weems*³⁶, Lord Blackburn stated: “In policies of marine insurance[...] the compliance with that warranty is a condition precedent to the attaching of the risk”. In *The Good Luck*³⁷, Lord Goff affirmed: “[...]fulfillment of the warranty is a condition precedent to the liability of the insurer”. The word “condition” here is used in a contingent sense, as “a stipulation of a state of affairs that must be achieved before any contractual liability, or possibly any further contractual liability, will be incurred”.³⁸ The rationale behind is that warranties are indicators of the risk, which the insurer was agreed to indemnify originally.

Yet what constitutes “compliance” with a warranty? Since the times of Lord Mansfield, it was not challenged that warranties require strict (literal) compliance: “[...]nothing tantamount will do, or answer the purpose; it must be strictly performed, as being part of the agreement”.³⁹ In *De Hahn v Hartley*⁴⁰, Ashhurst J reaffirmed: “The very meaning of warranty is to preclude all questions whether it has been substantially complied with; it must be literally so”.

This approach was reflected in the MIA 1906 s 33(3):

“A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not”.

The strict compliance rule has two sides. On the one hand, the insurer cannot demand anything greater than the warranted undertaking: in *Hide v Bruce*⁴¹, a warranty to have 20 guns did not imply sufficiency of the crew to man them. On the other hand, nothing less than literal performance will do. The only potential escape may be offered by the *de minimis non curat lex* rule, which allows courts to overlook extremely minor deviations

³⁶ *Thomson v Weems* (1884) 11 R (HL) 48, 51

³⁷ *The Good Luck* [1991] 2 Lloyd’s Rep 191, 202

³⁸ Jill Poole, “*Textbook on Contract Law*”, 301

³⁹ *Pawson v Watson* (1778) 2 Cowp 785, 787

⁴⁰ *De Hahn v Hartley* (1786) 1 T.R. 343, 346

⁴¹ *Hide v Bruce* (1783) 3 Doug K B 213

(“mere trifles”).⁴² Applicability of this rule to breach of marine insurance warranties was discussed in *Overseas Commodities Ltd v Style*.⁴³ In this case, shipped tins were warranted to be specifically marked by manufacturers; in fact, some tins lacked the marks. McNair J mentioned in his reasoning:

“[p 558] 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[...] I have no option but to hold that the breach of the express warranty affords the underwriters a complete defence in this action”.

Baris Soyer argues that the language adopted makes it clear that had only one tin out of thousands been defective, McNair J would have sidestepped the strict compliance doctrine by applying the *de minimis* rule.⁴⁴ It is hard not to agree. However, the rule is of limited help, as the breach must concern only a trivial part of the whole undertaking.

2.4.2 No requirement of materiality

The MIA 1906 s 33(3) prescribes that a warranty must be complied with, whether it is material to the risk or not. The essence of this principle was formulated by Lord Eldon LC in *Newcastle Fire Insurance*⁴⁵: “[...]when a thing is warranted to be of a particular nature or description, it must be exactly what it is stated to be. It is no matter whether material or not; the only question is, is this the thing *de facto* I have signed?”

“Immateriality” of a warranty can take two forms. First, a warranty may concern the things so random that they could not affect the risk in principle, “however absurd it may appear”.⁴⁶ In *Thomson v Weems*⁴⁷, Lord Blackburn explained this ambiguous approach by respect to contractual freedom of the parties:

“It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to

⁴² See *The "Reward"* (1818) 165 ER 1482

⁴³ *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep 546

⁴⁴ Baris Soyer, “*Warranties in Marine Insurance*”, 134

⁴⁵ *Newcastle Fire Insurance v Macmorran & Co* (1815) 3 Dow 255

⁴⁶ *Farr Motor Traders Mutual Insurance Society Ltd* [1920] 3 KB 669, 673

⁴⁷ *Thomson v Weems* (1884) 9 App Cas 671, 683

the inception of any contract[...]. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract of they had not thought it material, and they have a right to determine for themselves what they shall deem material”.

Next, even if a warranty concerns something that could theoretically affect the risk, whether it does so in fact, is irrelevant. This principle could be traced in *Abbott v Shawmut Mutual*⁴⁸, where the warranty that a mortgage on the property constituted £6,600 was held to be breached because the real figure was £6,684.

2.4.3 No requirement of causation

A general approach to causation in the English insurance law is expressed in *causa proxima* or “the proximate cause” rule; see, for example, the MIA s 55(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[...].”

Previously, there was a doubt about the content of this doctrine. One view was that only the immediate cause of the loss must be regarded.⁴⁹ However, in *Reischer v Borwick*⁵⁰, where the tug sustained damage in a collision, but afterwards was abandoned due to flood, the collision was held to be *causa proxima*, despite not being the last in time. The law remained unclear until *Leyland Shipping* case⁵¹, where Lord Shaw said: “causation is not a chain, but a net[...] the cause which is truly proximate is that which is proximate in efficiency”. Therefore, courts were invited to weight influence of different causes on the particular loss.

In contrast, a causal link between the breach of warranty and the loss has never been relevant in insurance cases. In *Hibbert v Pigou*⁵², a ship was lost in storm, but the under-

⁴⁸ *Abbott v Shawmut Mutual* (1861) 85 Mass 213. See also *Yorkshire Insurance Co Ltd v Campbell* [1917] AC 218

⁴⁹ See Susan Hodges, “Cases and Materials on Marine Insurance Law” (London: Cavendish Publishing Limited, 1999), 336

⁵⁰ *Reischer v Borwick* (1894) 2 QB 548 CA

⁵¹ *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, 369

⁵² *Hibbert v Pigou* (1783) 3 Doug KB 213

writer avoided liability due to the breach of convoy warranty. In non-marine *Dawsons Ltd v Bonnin*⁵³, a lorry was warranted to park at one address, when in fact it parked at another. Although the misstatement about address did not enhance the risk insured, and arguably even reduced it, the House of Lords held that the insurer was discharged from liability.

This feature of insurance warranties is a direct consequence of the strict compliance doctrine and the absence of materiality requirement; indeed, if an undertaking is not material to the risk, it could hardly become a *causa proxima* for the loss. Such disregard to a causal element can lead to results unjustifiable from the civil law courts' eyesight. Not surprisingly, in *Forsikringsaktieselskapet Vesta v Butcher*⁵⁴ it was called "one of the less attractive features of English insurance law".

2.4.4 Absolute character of warranty

Although the XVII century courts viewed an absence of fault as an excuse for non-compliance with warranty⁵⁵, Lord Mansfield ceased this practice by stating that the question of compliance "[...]is a matter of fact; and one that admits of no latitude, no equity of construction, or excuse".⁵⁶ Since then, it is a general rule that "[n]o cause, however sufficient; no motive, however good; no necessity, however irresistible, will excuse non-compliance" with a warranty.⁵⁷ Neither fault, nor knowledge, nor even control of the assured matters. This is sometimes described as an "absolute character" of warranty.

However, the MIA s 34(1) provides two exceptions:

(1) The warranty ceases to be applicable to circumstances of the contract: this provision seems to be quite broad and, at first sight, even resembles materiality requirement. The principle here, however, is *cessante ratione, cessat lex*: the reason for a law ceasing, the law itself ceases. Hence, to claim this exception, the assured must prove that a specific state of things, which had **exclusively** led to introduction of a warranty, has ceased:

⁵³ *Dawsons Ltd v Bonnin* [1922] 2 AC 413. For more recent case, see *Sugar Hut v Great Lakes Re-insurance (UK) Plc* [2010] EWHC 2636, [2011] Lloyd's Rep IR 198

⁵⁴ *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, 893

⁵⁵ *Jefferies v Legandra* (1692) 4 Mod. 58

⁵⁶ *Bond v Nutt* (1777) 2 Cowp 601, 606

⁵⁷ Arnould, "On the Law of Marine Insurance and Average", 834

an example provided by Sir Chalmers, the drafter of the MIA 1906, is intervention of peace, which depreciates a wartime warranty to sail with convoy.

(2) The warranty is rendered unlawful by any subsequent law: it is apparent that a warranty, as any contractual term, should not contradict the public policy. Consequently, if it is rendered unlawful after the formation of the contract, non-compliance is excused.

2.4.5 Automatic discharge from liability

The strict compliance doctrine, discussed above, is not restricted to warranties. Conditions in the general contractual law also require exact compliance and cannot be substantially performed.⁵⁸ Hence, for a long time English courts equated insurance warranties to such conditions.⁵⁹ However, warranties possess one feature, which distinguishes them from all other types of contractual terms – a remedy of “automatic discharge”, contained the MIA 1906 s 33(3):

“[...]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”.

This rule has two applications:

(1) If a warranty relates in time to circumstances at inception of the risk, a breach will result in the contract never coming into existence. Here, a warranty is a condition precedent to attachment of the risk under the whole policy; if “[t]here was a falsehood, in respect to the condition of the thing assured; therefore, it was no contract”.⁶⁰ The premium is, arguably, refundable due to total failure of consideration under the MIA s 84(1).

(2) If a warranty relates to the assured’s future conduct, a consequent breach has no effect on formation of the contract. The risk under policy has already attached; under s 33(3), the insurer will be discharged from liability only from the date of breach. The question is, what does the word “discharged” mean?

⁵⁸ As illustrated by *Hoening v Isaacs* [1952] 2 All ER 176 and *Bolton v Mahadeva* [1972] 1 WLR 1009

⁵⁹ *Pawson v Watson* (1778) 2 Cowp 785; *De Hahn v Hartley* (1786) 1 T.R. 343, etc.

⁶⁰ *Woolmer v Muliman* (1763) 3 Burr 1419

In 1980, the Law Commission stated that a breach of warranty, similarly to a breach of condition in the general contract law, entitled the insurer to repudiate the policy: *i.e.*, to choose whether to continue with the contract or terminate it.⁶¹ However, some years later the House of Lords made a revolving clarification on this point in *The Good Luck*.⁶² In this case, the insurer undertook to advise the mortgagee (bank) promptly if the insurance of the ship would cease. The ship in breach of a warranty sailed to the Arabian Gulf, but the bank was not notified. Without further investigation, it provided loans to the shipowner and afterwards sued the insurer for failure to give prompt notice. In defence, the insurer claimed that it had not exercised the right to repudiate at the time loans were made – hence, the insurance was intact. Lord Goff disapproved this conclusion:

“[p 202] So it is laid down in s 33(3) that, subject to any express provision in the policy, the insurer is discharged from liability as from the date of breach of warranty. Those words are clear, they show that discharge of the insurer from liability is automatic and is not dependent upon any decision by the insurer to treat the contract or the insurance as at an end[...]

What it does is (as section 33(3) makes plain) is to discharge the insurer from liability as from the date of breach. Certainly, it 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”.

***The Good Luck* acknowledged existence of the exclusive remedy for a breach of insurance warranty.** In contrast with repudiation, which requires the non-breaching party to make election about the fate of the contract and communicate it, this remedy operates automatically. Neither party needs to take any steps in relation to it; “the former policyholder is suddenly without cover and often quite unaware of it”.⁶³ The insurer, however,

⁶¹ “*Insurance Law*” (1980) Law Com No104, s 6.3 and others.

⁶² *The Good Luck* [1991] 2 Lloyd’s Rep 1

⁶³ M. A. Clarke, “*Insurance Warranties: The Absolute End?*” (2007) *LMCLQ* 474.

remains liable for losses incurred before the breach, see the MIA 1906 s 34(1); this differs from the remedy for breach of utmost faith obligations, where the contract is avoided *ab initio*.

Lord Goff underlined that in case of automatic termination of the insurer's liability, it is not correct "to speak of the contract being brought to an end, though that may be the practical effect".⁶⁴ This conclusion has peculiar consequences in relation to obligation to pay a premium. In the English insurance law, the premium is deemed to be earned at the commencement of the policy and, normally, is not returnable, because: "[...]if it [adventure] has commenced, though it be only for twenty four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration is returned".⁶⁵ Therefore, the assured is not only automatically left without cover in case of a slightest breach of warranty, but may still be obliged to pay the consequent installments of premium.

It is clear that, even though the onus of proof of non-compliance rests on the insurer⁶⁶, a breach of warranty defence is one of the mightiest weapons in his arsenal. The MIA 1906 envisaged three ways of mitigating the severity of "automatic discharge" doctrine:

(1) S 33(3) provides that the parties can contract out of automatic termination: for instance, by introducing "held covered" clauses into policies;

(2) S 34(1) provides that noncompliance is excused when, by reason of a change of circumstances, the warranty ceases to be applicable, or when compliance with the warranty is rendered unlawful by subsequent law;

(3) S 34(3) provides insurers with right to waive a breach of warranty.

This option has been a topic of considerable academic debates.⁶⁷ *In brevi*, the English law recognizes two types of waiver: by election (1) and by estoppel (2). After *The Good*

Notably, the USA solution is different: the majority view is that breach merely suspends the coverage. For further discussion, see Thomas J. Schoenbaum, "*Key divergences between English and American law of marine insurance*" (Centreville, Maryland: Cornell Maritime Press, 1999), 148-150

⁶⁴ *The Good Luck* [1991] 2 Lloyd's Rep 191, 202

⁶⁵ *Tyrie v Fletcher* (1777) 2 Cowp666. For recent example, see *JA Chapman & Co Ltd v Kadigra Denizcilik ve Ticaret* [1998] Lloyd's Rep IR 377

⁶⁶ *Barret v Jermy* (1849) 3 Exch 535; *Bonney v Cotnhill Insurance Co* (1931) 40 L1L Rep 39, etc.

Luck, the common view is that there is no place for election in the automatic discharge doctrine: “It follows that waiver by election can have no application in such a case and the waiver, therefore, referred to in section 34(3) of the MIA 1906 must encompass waiver by estoppel”.⁶⁸

Essentially, a waiver by estoppel is a promise not to rely on breach of warranty as a defence; the representation to that effect must be unequivocal, and relied upon in circumstances “where it would be inequitable for the insurer to go back on his representation”.⁶⁹ This representation may be either by words or by conduct, but not by silence, as “an automatic discharge which is not required to be perfected by the insurer and inactivity can only favour preservation of that discharge”.⁷⁰ From the practical point of view, waiver by estoppel puts a heavier burden of proof on the assured. Furthermore, being an equitable remedy, it introduces an element of discretion in the already complicated warranty regime.

2.4.6 Later remedy is irrelevant

The MIA 1906 s 34(2) states:

“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”.

Previously, doubts were expressed about general applicability of this rule in marine insurance. The majority of cases recognized irrelevance of the later remedy⁷¹, but in *Weir v Aberdeen*⁷², Abbot CJ stated: “I confess that I was a little surprised at that proposition, because, if true in point of law, I fear we should find many cases indeed where it would turn out that the assured could have no claim upon underwrites[...]”. This inconsistency was

⁶⁷ For extensive analysis of a concept of waiver in the marine insurance warranty regime, see: Baris Soyer, “*Warranties in Marine Insurance*”, 155-177.

⁶⁸ *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 2 Lloyd’s Rep 161

⁶⁹ *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147

⁷⁰ Sarah Derrington, “*The law relating to non-disclosure, misrepresentation and breach of warranty in contracts of marine insurance. A case for reform*” (The University of Queensland, 1998), 308

⁷¹ *DeHahn v Hartley* (1786) 1 T.R. 343; *Forshaw v Chabert* (1821) 3 Br&B 159

⁷² *Weir v Aberdeen* (1819) 2 B.& Ald. 320

brought to an end by *Quebec Marine Insurance Co v Commercial Bank of Canada*⁷³, which criticized the *Weir v Aberdeen* approach as “a proposition of perilous latitude” and confirmed that once a warranty is breached, the later remedy is irrelevant.

From the assured’s perspective, irrelevance of a remedy of breach could lead to a number of unjustifiable results. First, much depends of a formal construction of a particular clause: if a provision is construed as a descriptive condition, a remedy of breach reinstates the insurer’s liability; but if essentially the same provision is construed as a warranty, the breach results in irreversible discharge. For example, in *Farr v Motor Traders Mutual Insurance*⁷⁴, an obligation to drive a taxi for one shift only was held to be a description of the risk; hence, when the owner ceased using the cab twice per day, the insurer’s liability resumed – but had it been construed as a warranty, the owner would have been left without cover. Moreover, if the policy includes a “payment of premium warranty” – an undertaking that premium installments shall be paid at specified time or rate, and a payment is late, the assured remains without cover, but still liable to pay each future instalment required by the policy.

To draw a conclusion, the warranty regime under the MIA 1906 is based on: (1) the “strict compliance” doctrine, which disregards issues of materiality, causation or fault; and (2) the “automatic discharge” doctrine, which provides the insurer with an exclusive remedy of automatic termination of liability since the moment of breach. Furthermore, the assured is deprived of possibility to remedy the breach of warranty, once it occurred.

2.5 Implied and express warranties

2.5.1 Implied warranties

Warranties may be classified differently⁷⁵; the MIA 1906 s 33(2) distinguishes between implied and express warranties in accordance with their structure. The MIA 1906 names four implied warranties: of seaworthiness (s 39(1)), portworthiness (s 39(2)), car-

⁷³ *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234

⁷⁴ *Farr v Motor Traders Mutual Insurance* [1920] 3 KB 669

⁷⁵ For further discussion, see Baris Soyer, “*Warranties in Marine Insurance*”, 8-10

goworthiness (s 40(2)) and legality (s 41), and six “navigation” conditions of similar effect.⁷⁶ Due to the limits of this work, only two implied warranties (of seaworthiness and legality) are briefly discussed below, in order to demonstrate how their regulation deviates from the general warranty regime.

2.5.1.1 Seaworthiness

The MIA 1906 s 39(1) provides that:

“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”.

According to the MIA s 39(4), a ship is deemed seaworthy “when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured”. Requirement to be fit in “all respects” is far reaching, but does not stand for perfection; the degree of seaworthiness: “[...]varies with the place, the voyage, the class of ship, or even the nature of the cargo”⁷⁷, as well as other factors. Moreover, a warranty of seaworthiness does not impose a continuing duty on the assured. As Arnould puts it, “it is enough to satisfy this warranty that the ship be originally seaworthy for the voyage insured when she sails on it”.⁷⁸

The noteworthy restriction is that this warranty does not apply to time policies. As explained by *Gibson v Small*⁷⁹, it would be too problematic to identify a fair moment for attachment of the warranty; under time policies, the shipowner on many occasions may have no knowledge or control over a state of the vessel. However, the MIA s 39(5) contains the special provision for **time policies**:

“[...]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”.

⁷⁶ See the MIA ss 42, 43, 54, 46, 48 and 49 respectively.

⁷⁷ *Foley v Tabor* (1861) 2 F&F 663

⁷⁸ Arnould, “*On the Law of Marine Insurance and Average*”, 901

⁷⁹ *Gibson v Small* (1853) 4 HLC 353

Notably, the quoted rule is closer to the civil law approach to issue of seaworthiness, as it has regard both to culpability of the assured⁸⁰ and causation; the question is, could these principles be further extrapolated? For instance, the so-called “American rule” applies both to **voyage and time** policies, and consists of two parts: one absolute warranty of seaworthiness at the commencement of the voyage and one continuing “negative warranty”, similar in operation to the MIA 39(5).⁸¹

2.5.1.2 Legality

The MIA 1906 s 41 provides that:

“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”.

Hence, the warranty of legality may be separated in two parts:

(1) **Illegality of adventure insured** relates to the inception of contract. Adventures may be rendered illegal, for example, by public policy⁸²; yet more often they are rendered illegal by statute – either by an express prohibition of a certain type of adventure⁸³, or impliedly. In order to find an implied prohibition, courts must decide: does the statute have an objective to prohibit a particular action? As explained in *Redmond v. Smith*⁸⁴, noncompliance with the statute “passed for a collateral purpose only” does not lead to illegality of the whole adventure.

(2) **Illegality during the performance of the adventure insured** refers to subsequent misconducts of the assured. Not any illegal action constitutes a breach of warranty: if it is completely accidental to the marine adventure itself, the breach of warranty cannot be

⁸⁰ Privity here includes actual knowledge and “turning a blind eye” on truth; see *Compania Maritima San Basilio S.A. v Oceanus Mutual Underwriting Association (Bermuda), Eurysthenes* [1976] 2 Lloyd's Rep 171

⁸¹ See Trine-Lise Wilhelmsen, “*Issues of Marine Insurance*”, 149;

Thomas J. Schoenbaum, “*Key divergences[...]*”, 167

⁸² *Masefield AG v. Amlin Corporate Member Ltd.* [2010] EWHC (Comm) 280

⁸³ *Darby v. Newton* (1816) 128 Eng. Rep. 1146; *Wainhouse v. Cowie*, (1811) 128 Eng. Rep. 297, etc.

⁸⁴ *Redmond v. Smith* (1844) 135 Eng. Rep. 183. See also *St. John Shipping Corp. v. Joseph Rank Ltd.* [1957] 1 Q.B. 267.

claimed.⁸⁵ However, there are hundreds of relevant maritime safety regulations; does violation of each of them constitute a breach of warranty? It seems that the Australian law gives an affirmative answer⁸⁶, in contrast with the English law, which applies here the same test of “implied prohibition” as for establishing initial illegality.⁸⁷ Arguably, the English approach is preferable, as it limits expansion of the warranty regime.

It is worth noting that, in relation to the continuous warranty of legality, the MIA 1906 s 41 envisages a deviation from the general warranty regime. Namely, it denies the absolute character of this warranty: if the adventure was out of control of the assured, a breach is excused. In *Cunard v. Hyde*⁸⁸, the assured in such position was granted recovery even despite the knowledge of illegal actions of the carrier.

Overall, the special rules on seaworthiness and legality modify the general warranty regime to a certain extent, *via* referring to issues of causation, privity or control of the assured. Presumably, this demonstrates that English courts and drafters of the MIA understood that, at least in some circumstances, the general warranty regime was capable of producing unfair outcomes and should be avoided.

2.5.2 Express warranties

The MIA 1906 s 35(2) provides that in marine insurance, 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. There is plethora of various types of express warranties: the MIA 1906 mentions warranties of neutrality (s 36) and good safety (s 38); the Institute Warranties 1/7/76 establish geographical warranties; Institute Time Clauses - Hulls (ITCH) 1/11/95 identify:

- the towage and salvage warranty (ITCH(95) cl.1.);

⁸⁵ *Bird v. Appleton* (1800) 8 TR 562; *Royal Boskalis Westminster N. V. v. Mountain* [1999] Q.B. 674

⁸⁶ *Doak v. Weekes* (1986) 82 FLR 334; *Switzerland Insurance Australia v Movie Fisheries Pty Ltd* (1997) 144 ALR 234

⁸⁷ *St. John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267. For further discussion, see Baris Soyer, “Warranties in Marine Insurance”, 127

⁸⁸ *Cunard v. Hyde* [1860] 121 Eng. Rep. 1

- the disbursements warranty (ITCH(95) cl.22);
- the classification clause (ITCH(95) cl.4.1), which imposes on the assured a duty to ensure that the ship possesses and maintains her class.

Although the Classification Clause is not expressly referred to as “warranty”, the ITCH(95) cl.4.2 implies that conclusion by providing a remedy of automatic termination of liability in case of breach, in full accordance with the MIA s 33(3) and *The Good Luck*⁸⁹ doctrine; though “if the Vessel is at sea at such date the Underwriters' discharge from liability is deferred until arrival at her next port”. In addition, cl.5.1 refers to automatic termination of contract in case of breach of duties under cl.4.1; cl.5.2 envisages the same effect for any change of ownership, flag, management, charter on a bareboat basis, or requisition of the Vessel. Notably, the issues of classification and materiality are so fundamental for insurance contracts, that even some civil law countries introduced the warranty-like regime for them.⁹⁰

Overall, after considering the main characteristics of the warranty regime under the MIA 1906, it is safe to conclude that warranties are the powerful instrument of the risk administration for the insurer. The severity of the warranty regime can even be superfluous, as it does not allow considerations of materiality, causation or culpability to improve a position of the assured. Although there are exemptions and deviations from the general rules (for example, the MIA s 39(5) and s 41), as well as mitigation instruments (waiver, “held covered” clauses, etc.), outcomes of individual cases may still be unjustifiable. However, is it possible to avoid use of warranties completely? Here, experience from the civil law countries could be relevant; a perfect example is Norway, where a comprehensive set of marine insurance rules is embodied in the agreed document, with a balanced approach to interests of assureds and insurers – the Nordic Marine Insurance Plan.

⁸⁹ *The Good Luck* [1991] 2 Lloyd’s Rep 191

⁹⁰ For further discussion, see Chapter 3, s 3.

3 Norwegian approach to alteration of risk

Insurance relationships in Norway are primarily regulated by the general Insurance Contracts Act (ICA) 1989. However, under Section 1-3(c) and (e), the ICA is not mandatory for insurance that relates to ships, which are subject to registration according to the Norwegian Maritime Code 1994, or goods in international transit. Hence, the most significant role in marine insurance is left to marine insurance plans: standardized conditions drafted jointly by insurers, assureds and other interested parties. The latest version of these conditions is the Nordic Marine Insurance Plan (NMIP) 2013, based on the Norwegian Marine Insurance Plan 1996. Although the NMIP is not binding for parties until incorporated into contract, it explicitly illustrates the common practices of the Norwegian insurance market.

3.1 General provisions on alteration of risk

Norway, as the majority of civil law countries, has adopted the doctrine of alteration of risk to regulate a continuing duty of the assured not to undermine fundamental estimations behind the insurance contract. Provisions on alteration of risk in the NMIP are divided into two groups: general regulations, § 3-8 to 3-13, and special rules, § 3-14 to § 3-21. Conceptual definition of alteration of the risk is provided by the NMIP, § 3-8, 1st paragraph:

“An alteration of the risk occurs when there is a change in the circumstances which, according to the contract, are to form the basis of the insurance, and the risk is thereby altered contrary to the implied conditions of the contract”.

Therefore, a “true” alteration of risk is distinguished from irrelevant changes of circumstances by two criteria⁹¹:

(1) There must have been a change of a fortuitous nature. Such “change” may include both the alteration of subject matter insured, and the pure increase of risk; yet, similarly to the English approach, a mere increase of intensity of a peril insured will not constitute an alteration of risk;

⁹¹ See Commentary to the NMIP § 3-8

(2) The change must amount to frustration of the fundamental expectations upon which the contract was based. Here, a construction of the policy in accordance with general principles of the insurance and contract law is needed to decide, whether it would be reasonable to give the insurer opportunity to apply the sanctions provided in the NMIP.

Speaking of sanctions for alteration of risk, professor Trine-Lise Wilhelmsen argues that the civil law jurisdictions normally connect them with the following issues⁹²:

(1) Culpability of the assured;

(2) How the insurer would have reacted had he known about the alteration of risk when the contract was entered into;

(3) How the alteration of risk has influenced the casualty or the extent of the loss.

Hence, the questions of culpability, materiality and causation are taken into account in different proportions, in contrast with the English warranty regime. The civil law approach is reflected in the NMIP § 3-9, which provides that if the assured **intentionally caused or agreed** to an alteration of the risk, further sanctions will depend on the degree of **subjective materiality** of the alteration to the insurer:

(1) If the insurer would not have accepted the insurance, had he known of alteration in advance, the contract is not binding for him. The Commentary to the NMIP § 3-9, with reference to § 3-3, further clarifies that there is no need for the insurer to additionally cancel the contract to avoid future liability⁹³;

(2) If the insurer would have accepted the risk, but on different terms, then it is possible for him to avoid liability only if there is a **causal link** between the loss and the alteration.

Furthermore, the NMIP § 3-10 provides that if an alteration of the risk occurs, the insurer has a right to cancel the insurance for future by giving a fourteen days' notice, whenever the alteration was caused by the assured or by circumstances outside of his control.⁹⁴ Nevertheless, the NMIP 3-12 1st paragraph precludes the insurer from invoking both § 3-9

⁹² Trine-Lise Wilhelmsen, *“Issues of Marine Insurance”*, 117

⁹³ The NMIP § 3-13, however, requires the insurer to give notice of his intentions to invoke § 3-9

⁹⁴ Trine-Lise Wilhelmsen, Hans J. Bull, *“Handbook in Hull Insurance”* (Gyldendal Akademisk, 2007), 156

and § 3-10 if the alteration of the risk has ceased to be material to him. Consequently, the Norwegian approach, as opposed to English one, generally does not allow reliance on immaterial changes of risk.

3.2 Special provisions on alteration of risk

As mentioned above, the NMIP contains special provisions for certain types of alterations of risk in § 3-14 to § 3-21. Previously, § 3-22 of the Norwegian Plan 1996 regulated the duty of the assured to ensure the ship's seaworthiness "at such a time that it would have been possible for him to intervene".⁹⁵ In 2007, in accordance with the newly adopted Ship Safety and Security Act, this rule was avoided. Those defects that previously would have rendered the ship unseaworthy, nowadays will normally represent a breach of safety regulations.⁹⁶ This amendment, however, was not detrimental to the assured's position, as presence of both causation and fault is necessary to invoke the breach of safety regulation.⁹⁷ Arguably, there is also an implied requirement of materiality, because a minor or irrelevant breach is not likely to cause the loss.

The NMIP § 3-16, which addresses illegal activities, also requires culpability of the assured and causal connection between breach and loss to free the insurer from liability. However, the NMIP knows exceptions from these general requirements. First, there are three provisions with a suspensive effect, which resemble "conditions descriptive of the risk" in the English insurance law:

- (1) Sailing in excluded trading areas (§ 3-15, 3rd par.);
- (2) Suspension of the insurance in the event of requisition (§ 3-17);
- (3) Removal of the ship to a repair yard (§ 3-20, 2nd par.)

Furthermore, there are two provisions on loss of main class (§ 3-14) and change of ownership (§ 3-21), which provide a remedy of automatic termination of the insurance without regard to elements of causation or fault. Although they are not expressly called

⁹⁵ Cf. the MIA 39(5)

⁹⁶ The NMIP § 3-22 – 3-28

⁹⁷ See the NMIP § 3-25, 1st sentence

“warranties”, there is little doubt that these provisions were designed under the influence of the warranty regime.

3.3 Warranty-like provisions

The reason for introduction of the warranty-like provisions on loss of the main class and change of ownership in the NMIP § 3-14 and § 3-21 rests in a fundamental character of these issues to marine policies. Presumably, loss of class and change of ownership of the vessel affect the essence of insurance so significantly that, even if the assured were not blameworthy for such alteration⁹⁸, it would be unfair to keep the insurer up to his original promise.

(1) **The NMIP § 3-14** provision on loss of the main class, analogous to the ITCH (95) cl.4.1.1, envisages both:

- The affirmative warranty that the vessel has class at the inception of insurance (§ 3-14 1st paragraph). In case of breach, the insurer never comes at risk under the policy;
- The continuous duty of the assured to maintain the main class (§ 3-14 2nd paragraph). In case of breach, the policy automatically terminates, cf. the ITCH (95) cl.5.1.

(2) **The NMIP § 3-21** provides that “the insurance terminates if the ownership of the ship changes by sale or in any other manner”. The assured’s continuous undertaking to maintain ownership is significantly narrower than the ITCH (95) cl.5.2, and does not embrace situations of requisition (the NMIP § 3-18), change of flag or management (the NMIP § 3-8 2nd paragraph), and so on.

It should be underlined that neither the NMIP § 3-14, nor the NMIP § 3-21 make a difference between “termination of the insurance [contract]” and “discharge from liability”, which is the true remedy for a breach of warranty in the English insurance law.⁹⁹ The difference may be relevant in relation to surviving duties of the assured: for example, to pay the premium. Nevertheless, such aspects of these provisions, as disregard to causation and

⁹⁸ Cf. the general rule in the NMIP § 3-9

⁹⁹ *The Good Luck* [1991] 2 Lloyd’s Rep 191; cf. the ITCH (95) cl.4.2 and 5.1

culpability of the assured, resemble the English warranty regime and represent a huge departure from the general system of the NMIP.

In *travaux préparatoires* for the ICA, legislators expressed considerable skepticism about the place of warranties in the Norwegian insurance; it was noted that in individual cases courts might apply Section 36 of the Contracts Act (Avtaleloven), regarding unreasonable contracts, to set aside warranty clauses.¹⁰⁰ However, such outcome seems rather unlikely: first, courts are reluctant to apply Section 36 to contracts between professional parties, which are the majority of marine insurance policies. Next, the NMIP § 3-14 and § 3-21 in particular are provisions of the agreed document, and courts may not want to disturb its inner balance. The fact that analogous warranties exist in other jurisdictions may also be relevant.

A breach of warranty provision has not been frequently claimed before Norwegian courts. In ND 1981.347 *Vall Sun*, the P&I insurer argued that it was an implied condition for membership in the insurance group – hence, a condition precedent to the insurance cover (warranty) – that the ship had class. As *Vall Sun* was deprived of her class at the time of the casualty, the insurer was free from liability, regardless of causation between the loss of class and the casualty. The court disagreed, on following grounds:

(1) In this particular case, the cancelation of class occurred from a pure misunderstanding between the assured and the classification society, so that the court found it more just to disregard it completely.¹⁰¹ Arguably, the position of English courts would be stricter in this respect¹⁰²;

(2) Even if class was lost, the Norwegian Plan 1964, § 31 2nd subparagraph, expressly stated that such loss was a general alteration of risk, which only entitled the insurer to cancel insurance after notice (§ 33). As the NMIP 2013 § 3-21 provides another solution, nowadays the insurer presumably might have been more successful. For instance, in *Tor Hol-*

¹⁰⁰ “*The use of warranties in Norwegian marine insurance*”, Wikborg Rein’s Shipping Offshore Update 1/2009, 6-7

¹⁰¹ ND 1981.347, 361

¹⁰² See Chapter 2, s 2.4.4

*landia*¹⁰³, the court not only construed a contractual provision as a warranty, but also confirmed that to trigger legal effects of its breach, causal link between the breach and the loss was not required. That could be a step towards recognition of the utility of warranties in the Norwegian insurance.

Overall, apart from few exceptions, the Norwegian approach to alteration of risk is based on notions of materiality, causation and, to some extent, culpability of the assured. This demonstrates that insurers can be provided with a sufficient legal protection without the shelter of the extensive warranty regime. Hence, many minds have searched in the Norwegian experience an impulse for reform of marine insurance in the common law countries.¹⁰⁴

4 Reform of the warranty regime

4.1 Critique and support of warranties

4.1.1 Drawbacks of warranties

The superfluous severity of the warranty regime in the insurance law could not have passed unnoticed. For a long time, it draw critique of academics, market players, and even judicial authorities. In *Hussain v Brown*¹⁰⁵, Saville LJ described warranties as “draconian terms”, because “[t]he breach of such a warranty produces an automatic cancellation of cover, and the fact that a loss may have no connection with that breach is irrelevant”.

In 1980 Report, the Law Commission concluded that the law relating to non-disclosure and breach of warranty was “undoubtedly in need of reform”; in particular, it appeared unjust that¹⁰⁶:

¹⁰³ *Tor Hollandia* (2008) Oslo City Court (Tingrett) 07-139941TVI-OTIR/06

¹⁰⁴ See: Baris Soyer, “*Warranties in Marine Insurance*”, Chapter 7.V; Sarah Derrington, “*The law relating to non-disclosure[...]*”, Chapter 9.3; Consultation paper No182 (2007) s 7.62, etc.

¹⁰⁵ *Hussain v Brown* [1996] 1 Lloyd’s Rep 627, 630

¹⁰⁶ “*Insurance Law*” (1980) Law Com No104, ss 6.9(a), 6.9(b) and 7.2 respectively

(1) An insurer could demand strict compliance with a warranty which was immaterial to the risk (**no materiality requirement**);

(2) An insurer could reject a claim for any breach, no matter how irrelevant that breach to the loss (**no causation requirement**);

(3) In respect of “basis of the contract” clauses, an insurer could avoid the liability upon purely technical grounds.

In 2006 Issues paper, the Law Commission has referred mostly to the same flaws of the warranty regime, adding that it seems unjust that¹⁰⁷:

(1) An insurer may refuse to pay a claim, though the breach has been remedied (**ir-relevance of later remedy**);

(2) An insurer is entitled for the whole amount of premium despite the termination of cover, which appears especially unfair in case of breach of so-called “premium warranties”.¹⁰⁸

Therefore, the typical characteristics of insurance warranties may turn them into a source of striking injustice to the assured, “technical traps for the benefit of the insurer written into the fine print of policies which are *not worth the paper upon which they are written*”.¹⁰⁹ The problem is not merely theoretical: Mactavish, the British research group on insurance governance, in 2014 reported that warranties were the third most common ground for insurance disputes.¹¹⁰

Another reason for concern rests in the process of internationalization of the insurance law. It is viewed mostly as a distant perspective, but the Law Commission agrees that there are European initiatives, which may eventually influence framework of the insurance law. However, many English practices are perceived in the civil law countries as both “un-fair and unusual”.¹¹¹ The warranty regime is especially problematic, as the prospect of leaving the assured without cover for a minor and/or non-causative breach is rather peculiar for

¹⁰⁷ Issues paper 2 “*Warranties*” (2006), ss 5.3 and 7.77 respectively

¹⁰⁸ See discussion in Chapter 2, s 2.4.5

¹⁰⁹ John Hare, “*The Omnipotent Warranty: England v The World*”, 53, with reference to *Zurich Insurance Company v Morrison* [1942] 1 ER 529 and *Anderson v Fitzgerald* (1853) 10 ER 551

¹¹⁰ The Law Commission Report No 353 (2014), s 14.5

¹¹¹ Consultation paper No182 (2007) ss 1.84-1.85

continental systems. Even the common law countries have revised the traditional approach to certain extent.¹¹² Hence, the warranty regime, as codified by the MIA 1906, creates a hindrance for harmonization of the insurance law.

A perfect illustration of collision between the English and the civil law approaches is *Vesta v Butcher*¹¹³, where a Norwegian fish farm was insured against the loss of fish under the Norwegian law, but the risk was reinsured in London. The policy contained a condition of keeping a constant watch, which was never complied with; however, there was no causation between non-compliance and the subsequent loss of fish in a storm. The Norwegian insurer paid, while the English underwriters claimed a breach of warranty. Remarkably, the House of Lords was able to sidestep this defence only by stating that, in this particular case, the reinsurers had agreed to cover all risks embraced by the original policy.

Finally, English insurance companies should also be interested in keeping the London market in accord with international standards, in order to preserve its attractiveness for new clients. For instance, the Association of British Insurers (ABI) confirmed that a reform relating to the consequences of a breach of warranty was necessary, though “in business insurance the guiding principle should be freedom of contract”.¹¹⁴

4.1.2 Benefits of warranties

Nevertheless, some respondents advocated before the Law Commissions in the UK and in Australia that warranties are a necessary feature of insurance contracts. In sum, the arguments presented on this point are¹¹⁵:

(1) Safety: warranties serve as a measure to promote high standards of the assured’s performance in respect of seaworthiness, legality, compliance with class recommendations, and so on. Hence, an abolition of warranties could lead to unwanted relaxation in these

¹¹² See, for example, New Zealand’s Insurance Law Reform Act 1977, s 11; Australian ICA 1984, s 54

¹¹³ *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852

¹¹⁴ Report No 353 (2014), s 14.13

¹¹⁵ *Ibid*, ss 14.17-14.22; “Review of the Marine Insurance Act 1909”, ALRC Report 91 (2001), ss 9.23-9.37

areas. **As counterargument**, it may be said that such public policy issues should not be dealt with through the regulation of private contractual relationships.

(2) **Simplicity**: warranties help to avoid a burdensome process of proving the presence of elements of causation and culpability. However, this advantage has one-sided character, as it primarily benefits the insurer.

(3) **Contractual freedom**: the MIA s 33(3) allows the parties to contract out of consequences of breach envisaged by statute. Yet it should be remembered that shipowners and even brokers have different levels of expertise: they may simply miss a true meaning of the policy clause, especially if it is drafted without the use of the word “warranty”.

(4) **Industry self-regulation**: insurers frequently claim that interference into the warranty regime is not needed, because they already tend to avoid reliance on minor or non-causative breaches. Although such practice exists¹¹⁶, its non-obligatory character exposes the assured to the insurer’s discretion.

However, there is a number of other methods adopted by courts and by actors of the insurance industry in England and other common law countries in order to ameliorate the warranty regime. It is worth examining them prior to a discussion of legislative reforms.

4.2 Attempts to mitigate the warranty regime in the UK and other common law countries by judicial interpretation of policy and introduction of special policy provisions

4.2.1 Construction of policy by courts

There are two main methods of mitigating the harsh consequences of a breach of warranty: the policy itself may contain special provisions to this effect, or it could be done through judicial interpretation of contractual clauses. For that purpose, the common law courts have adopted two approaches:

- (1) Restrictive construction of warranty;
- (2) Construction of warranty as other contractual term.

¹¹⁶ For further discussion, see Chapter 4, s 4.2.2.3.

4.2.1.1 Restrictive construction of warranty

For a long time the common law courts have recognized that, due to the severity of the warranty regime, its applicability must be restricted by judicial interpretation: *i.e.*, any ambiguity in a warranty should be construed in accordance with the *contra proferentum* rule. The essence of this rule in marine insurance context was explicitly formulated in *Winter v Employers Fire Insurance Co*¹¹⁷: “[...]marine contracts are strictly construed against the insurer and favorably to the insured, and where two interpretations are possible, that which will indemnify the insured will be adopted”.

Supportive principles of restrictive construction may be summarized as follows¹¹⁸:

(1) If insurers wish a warranty to have draconian consequences, “then it is up to them to stipulate for it in clear terms”¹¹⁹;

(2) If the literal wording of a warranty is inconsistent with a reasonable and business-like interpretation, it is likely that the parties have not intended such result;

(3) A literal interpretation of a warranty must not be inconsistent with other policy terms;

(4) Furthermore, a warranty may be construed as being relevant to only some risks covered in the policy. For example, in *Printpak v AGF Insurance Ltd*¹²⁰, the policy was divided into different sections; the court found that the warranty to install a burglar alarm referred only to the theft section, but not to fire risks. However, this principle has limited application: in *Sugar Hut*¹²¹, the policy covered four nightclubs. The court stated, *obiter*, that as four places were the subject matter of one insurance, the breach of warranty in one club would leave all of them uncovered. Therefore, even restrictive construction of warranty clauses could not always help the assured.

¹¹⁷ *Winter v Employers Fire Insurance Co* [1962] 2 Lloyd’s Rep 320, 323

¹¹⁸ Based on Consultation paper No204 (2012), s 12.46

¹¹⁹ *Hussain v Brown* [1996] 1 Lloyd’s Rep 627, 630

¹²⁰ *Printpak v AGF Insurance Ltd* [1999] Lloyd’s Rep IR 542

¹²¹ *Sugar Hut v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 2636, [2011] Lloyd’s Rep IR 198

4.2.1.2 Construction of warranty as suspensive condition

The second method of mitigation adopted by courts is that a clause may be construed not as a warranty, but as other contractual term – namely, a condition descriptive of the risk. Non-compliance with such condition only suspends the insurance cover, which provides the assured with an opportunity to remedy the breach. English courts have applied this reasoning in a number of non-marine insurance cases.¹²² In the recent *Kler Knitwear v Lombard General Insurance Co Ltd*¹²³, the contract expressly stated that an undertaking to have sprinklers inspected in 30 days was a warranty; non-compliance was described as terminating the cover “whether it increases the risk or not”. Despite the fact that the wording of the policy was so precise, Mr Justice Morland held that the term was a suspensive condition, because it would “be utterly absurd and make no rational business sense” to construe it as a warranty.

Kler Knitwear decision raised considerable criticism.¹²⁴ If the clearest language of the policy may be viewed as not indicative of the parties’ intentions, an uncertainty about legal effects of contractual provisions is created. Moreover, limits of application of this method of judicial interpretation are blurred, as demonstrated by two cases: *The Newfoundland Explorer*¹²⁵ and *The Resolute*¹²⁶. In both cases, the vessels were warranted crewed “at all times”; the loss occurred while they were either berthed or safely tied up. In *The Newfoundland Explorer*, the court construed the clause literally, including time at berth; in *The Resolute*, the warranty was held to refer only to navigation time. Hence, although the courts have benevolent intentions and try to reach fair outcomes in individual cases, they introduce inconsistency into the insurance law.

¹²² See *Farr v Motor Traders’ Mutual Insurance Society Ltd* [1920] 3 KB 669; *Provincial Insurance Company Ltd v Morgan & Foxton Coal* [1933] AC 240

¹²³ *Kler Knitwear v Lombard General Insurance Co Ltd* [2000] Lloyd’s Rep IR 47

¹²⁴ See, for example, Consultation paper No204 (2012), s 12.50

¹²⁵ *GE Frankona Reinsurance Ltd v CMM Trust No 1400 (The Newfoundland Explorer)* [2006] EWHC 429

¹²⁶ *Pratt v Aigion Insurance (The Resolute)* [2008] EWCA Civ 1314

4.2.1.3 Role of courts in other common law jurisdictions

The majority of common law countries share a tendency of “[...]increasingly discarding the more extreme features of English law which allow an insurer to avoid liability on grounds which do not relate to the occurrence of the loss”.¹²⁷ Partially, it is due to attempts of local courts to ameliorate the “classical” warranty regime.

In Canada, courts are inclined to find a term to be a “true warranty” only in “situations where the warranty is material to the risk and the breach has a bearing on the loss”.¹²⁸ This is illustrated by *The Bamcell II* case¹²⁹, where the policy contained a clause “warranted that a watchman is stationed on board the Bamcell II each night”. The court construed it as a suspensive condition, applicable only at night; so, despite the breach, the insurer was liable for the loss, which occurred during daytime. This practice, however, is criticized on the same footing as *Kler Knitwear*: as harming a fine line between warranties and other types of policy terms.¹³⁰

In the USA, a break with the English approach began with *Wilburn Boat* case¹³¹, where The Supreme Court held that marine insurance contracts were governed by state law. As the result, nowadays a status of warranties differs from state to state. For instance, in Texas a causal connection test is adopted, while in New York it is required that warranties must materially affect the risk.¹³²

Overall, judicial authorities throughout the common law world have supported the idea of taking into considerations an immaterial and non-causative character of the breach. It allows to provide justice in individual cases, but on a greater scale, the law becomes more uncertain and unpredictable. Therefore, other ways of amelioration of the warranty regime are required.

¹²⁷ *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and others (The Star Sea)* [2001]1 All ER 743, para 79

¹²⁸ Christopher Giaschi, “Warranties in Marine Insurance”, Association of Marine Underwriters of British Columbia, Vancouver, 10.04.1997

¹²⁹ *Century Insurance Company of Canada v Case Existological Laboratories Ltd (The Bamcell II)* (1980) 133 DLR (3d) 727

¹³⁰ Baris Soyer, “Warranties in Marine Insurance”, 205

¹³¹ *Wilburn Boat Co v Fireman’s Fund Ins* [1955] AMC 467

¹³² For further discussion, see Thomas J. Schoenbaum, “Key divergences[...]”, Chapters 2, 6

4.2.2 Self-regulation of the industry

4.2.2.1 “Held covered” clauses

The harsh outcomes of the warranty regime may be avoided at the stage of formation of the policy. One option for those who wish to contract out of the statutory envisaged consequences of a breach is to use “held covered” clauses.¹³³ The typical effect of such provision is that, in case of a breach of a specified warranty, the insurance cover will continue under two conditions: (1) a notice must be given to the insurer; (2) essential variations to the contract (*i.a.*, concerning premium) must be renegotiated. If there is disagreement between the parties on the last point, the assured may end up uncovered.¹³⁴ Hence, the mitigation offered by “held covered” clauses has certain limits.

4.2.2.2 The International Hull Clauses 2003

In the attempt to ameliorate marine insurance practices, the London market has produced the International Hull Clauses (IHC) 2003. One of the objectives of these Clauses is a more balanced approach to the warranty regime. Primarily, the navigation provisions are not construed as warranties, in contrast with the ITCH(95) cl.1 and the Institute Warranties 1/7/76. Under the IHC 2003 (cl.10-11), navigating outside permitted areas leads only to **suspension of cover**. Moreover, **restriction of cover** is envisaged for a failure to comply with the specified statutory or Class requirements (cl.14.4.1 –14.4.2): *i.e.*, insurers shall not be liable for any loss “attributable to such breach”.

Reduction of a number of warranties and limited introduction of a causation element were welcomed among academics.¹³⁵ Nevertheless, it should be remembered that the Clauses are not obligatory; their incorporation into insurance policies depends on free will of the parties.

¹³³ For example, Clause 3 of the ITCH (95)

¹³⁴ For further discussion, see Baris Soyer, “*Warranties in Marine Insurance*”, 165-166

¹³⁵ Andrew Longmore, “Good faith and breach of warranty: are we moving forwards or backwards?”, *LMCLQ* (2004), 162

4.2.2.3 Non-marine insurance: the Statement of General Insurance Practice 1986

Notably, the Association of British Insurers (ABI) in Section 2(b)(iii) of the Statement of General Insurance Practice (SGIP) 1986 indicated that the insurer should not appeal to a breach of warranty “where the circumstances of the loss are unconnected with the breach unless fraud is involved”. Therefore, insurers were recommended not to rely on technical (non-causative) breaches, except for situations when “they suspect fraud but are unable to prove it”.¹³⁶

Non-compliance with the SGIP 1986 could be detrimental to the insurer’s reputation; however, this document is not supported by legal enforcement. Furthermore, the SGIP 1986 does not concern marine insurance: here, the assured depends on the insurer’s decision to adopt a similar practice independently and adhere to it.¹³⁷

In sum, the fact that marine insurance warranties allow the insurer to rely on any breach, regardless of its relation to the loss, is a widely acknowledged problem. Both judicial authorities and actors of the insurance industry have developed various instruments for amelioration of the warranty regime codified in the MIA 1906. Among them are: mitigating interpretation of policies by courts, adaptation of special provisions by contracting parties, and even insurers’ self-implied restrictions. However, neither of these solutions seem final, as they leave too much to the discretion of courts, or insurers. Therefore, a need for a legislative reform has been recognized in the UK.

4.3 Legislative reform of the warranty regime in the UK

4.3.1 Previous proposals for reform in the UK

In 1980, the Law Commission introduced an ambitious project of revision of the English insurance law. One of its main concerns was unjustified use of warranties to deny cover: (1) when a warranty was not material to the risk; (2) or when a breach of even material

¹³⁶ “*Insurance Law*” (1980) Law Com No104, s 6.10

¹³⁷ *Switzerland Insurance Australia v Movie Fisheries Pty Ltd* (1997) 144 ALR 234

warranty was irrelevant (non-causative) to the loss.¹³⁸ For that reason, the Law Commission recommended that the assured should be able to raise the following defences against a claim that a warranty was breached:¹³⁹

(1) The warranty in question was **not material** to the risk: *i.e.*, it would not have influenced a prudent underwriter's assessment of the risk;

(2) The warranty had **another commercial purpose**: *i.e.*, it was introduced against the risk "which does not include the event which gave rise to the claim";

(3) The breach of warranty **could not have increased the risk** that the event, which gave rise to the claim, would occur in the way in which it did in fact occur. Although this proposal is sometimes referred to as a "causation test", it may be more correct to describe it as an extended materiality requirement. There may be a number of situations where a breach increases the risk in general without causing or contributing to the particular loss.¹⁴⁰

These proposals were not implemented in practice due to resistance of the industry; but even if they were, neither of them related to marine, aviation and transport (MAT) insurance. The Law Commission was of a view that long-established rules worked satisfactorily for MAT and created "a context of certainty of law and practice".¹⁴¹ However, the situation has changed since 1980. The share of the London insurance market on the international scale has decreased, while other markets, such as Norwegian one, have gained attractiveness, partially due to more balanced solutions for issues of alteration of risk.¹⁴² Hence, the need for a thorough reform of the warranty regime was acknowledged, at least in order to bring the English law "closer in line with international standards".¹⁴³

¹³⁸ "Insurance Law" (1980) Law Com No104, ss 6.9(a), 6.9(b)

¹³⁹ *Ibid.* The Draft Bill, clauses 8(1), 10(5)(a) and 10(5)(b) respectively

¹⁴⁰ See, for example, Issues paper 2 "Warranties" (2006), ss. 7.72 – 7.73; *cf.* Report No 353 (2014), s 14.23

¹⁴¹ "Insurance Law" (1980) Law Com No104, s 2.8

¹⁴² Baris Soyer, "Warranties in Marine Insurance", 205

¹⁴³ Consultation paper No204 (2012), s 16.3

4.3.2 Legislative reforms in other common law countries

Although the common law world inherited the English approach to insurance warranties, in New Zealand and Australia it was revised with the help of legislative reforms. The experience of these countries, as well as various attitudes to issues of materiality and causation, were taken into account by the UK legislators during the recent reform.

4.3.2.1 New Zealand

In New Zealand, the warranty regime has been reformed by Section 11 of the Insurance Law Reform Act 1977. It is a complicated provision, which relates not only to warranties, but also to conditions descriptive of the risk or excluding liability. In sum, if there was an event or a change in circumstances of **subjective materiality** to the insurer, he remains liable, “if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances”.

This formula is broader than mere causation requirement, especially in light of the *causa proxima* doctrine, and more lenient towards insurers. However, Section 11 has drawn criticism as too insured-friendly: in 1998, the New Zealand Law Reform Commission (NZLRC) proposed that a causal connection test should not apply to a provision which:

- (1) defines the age, identity, qualifications or experience of a driver, a pilot, or an operator of a chattel;
- (2) defines the permitted geographical area;
- (3) excludes loss for use of a vehicle, aircraft or other chattel for commercial purposes.¹⁴⁴

The possible rationale behind this proposal is that the listed circumstances actually mark the scope of the risk indemnified under the policy, so that every change of them equals going outside of this scope. Even the civil law countries know examples of special provisions, comparable in effect: see, for instance, the NMIP 3-15, 3rd paragraph, on suspension of cover during the sail in excluded trading areas. The question is, however, what

¹⁴⁴ “*Some problems of insurance law*” (1998) NZLRC No 46, Ch1

exceptions from the causation test are justified? Some of the proposals of the NZLRC might seem rather arbitrary; this problem was taken into account during the recent reform in the UK.¹⁴⁵

4.3.2.2 Australia

In contrast with the NZ Act 1977, the Australian Insurance Contract Act (ICA) 1984 does not govern marine insurance. Nevertheless, it is worth mentioning that Section 54 of the ICA 1984 introduces both materiality and causation requirements for non-compliance with terms that exclude or restrict cover. The insurer may not refuse to pay if:

(1) The insured's act could not **reasonably be regarded as being capable of causing or contributing to the loss** (Section 54(2)); or

(2) The insured proves that the loss (isolated part of it) **was not caused** by its act (Sections 54(3) and 54(4)).

The Australian Law Reform Commission (ALRC) found Section 54 generally unsuitable for marine insurance, but acknowledged that “[i]t is not equitable to allow an insurer the right to avoid liability where there is only a minor or immaterial breach”; hence, a causal link between the loss and the breach of warranty should be required in form of the *causa proxima*, “a well understood insurance law concept”.¹⁴⁶ Although this proposal was not applied in practice, it demonstrates willingness of the Australian market to introduce an element of causation into the warranty regime.

4.3.3 2006-2015 reform process in the UK

Despite extensive non-legislative and legislative attempts to mitigate the warranty regime, for a long time the relevant MIA 1906 provisions have remained a source of potential injustice.¹⁴⁷ Therefore, in January 2006, the UK Law Commission and the Scottish Law Commission started a joint project devoted to reformation of the English insurance law. Their aim was to review its most unfair and outdated traits, including the legal effects of

¹⁴⁵ See Chapter 4, s 4.3.3.1.

¹⁴⁶ “*Review of the Marine Insurance Act 1909*”, ALRC Report 91 (2001), ss 9.120-9.127

¹⁴⁷ See discussion in Chapter 4, s 4.1.1.

warranties. According to a content of the Commissions' proposals, they can be separated into two groups:

4.3.3.1 2006-2007 proposals

At the first stage of work, the UK Law Commission prepared Issues Paper 2 "Warranties" (November 2006) and Consultation Paper No182 "Misrepresentation, Non-disclosure and Breach of Warranty by the Insured" (July 2007). Their distinguishing feature was the proposal to introduce **a causation element** into the warranty regime. That, according to the Law Commission, was the necessary step to defeat "the greatest and most obvious problem with the law on warranties" – *i.e.*, a termination of cover "for technical breaches that have nothing to do with the loss in question".¹⁴⁸

Originally, the Law Commission was prepared to adopt the New Zealand "purposive approach" and introduce the causation test not only for warranties, but also for other terms "that enable the insurer to refuse to pay a claim for events or circumstances that add to the risk of loss" (descriptive conditions).¹⁴⁹ However, in 2007 the proposal was limited to warranties "in the narrow sense".¹⁵⁰ This decision was partly inspired by New Zealand theory that the causation element is unfit for terms defining age, experience, etc. Therefore, it was feared that the causation test, common to both types of terms, would require a blurry list of exclusions.

The other question was, what degree of causation must be sufficient to discharge the insurer from liability? Again, the Law Commission considered experience from the UK and other common law countries. The 1980 Report's proposal that the relevant breach of warranty should "**increase the risk**", was considered to be too unfavorable to the assured. In contrast, the Australian approach that required the loss to be "**caused**" by the breach was considered too generous, because it implied that the breach must be "a dominant or major cause of the loss".¹⁵¹

¹⁴⁸ Issues paper 2 "*Warranties*" (2006), ss 7.66-7.67

¹⁴⁹ Issues paper 2 "*Warranties*" (2006), s 7.88

¹⁵⁰ Consultation paper No182 (2007) ss 8.4, 8.39

¹⁵¹ *Ibid*, ss 7.71-7.75

The Law Commission stated that to discharge the insurer from liability, it should be enough that the breach contributed “in any way to the accident”; hence, it adopted the formula, which was closer to New Zealand approach:

“[T]he policyholder should be entitled to be paid a claim if it can prove on the balance of probability that the event or circumstances constituting the breach of warranty **did not contribute** to the loss”.¹⁵²

By comparison, the NMIP, in cases of combination of perils, distinguishes between relevant and non-relevant causes; as Commentary to § 2-13 1st par. indicates, the lower limit required for an effect of a cause to be “relevant” is circa 10-15%. Apparently, the rule envisaged by the Law Commission sets a lower limit: from the literal wording of the Papers, it follows that even a breach of warranty with 1% contribution to the loss terminates insurance cover. However, those are only theoretical speculations, as English courts did not have a chance to apply the rule in practice.

The 2006-2007 proposal to introduce the causation test into the warranty regime triggered a mixed reaction. In academic circles, this idea received an extensive support; as Sir Longmore (Lord Justice of Appeal) noted, “most commentators appear to think that it would be sufficient if the law were reformed to allow insurers only to rely on breach of warranty if the breach is a cause of the loss”.¹⁵³ Several consultees related to the industry were also supportive: for instance, AIRMIC (the UK association for risk and insurance management professionals) called such reform an “essential change to insurance contract law”.¹⁵⁴

On the other hand, many respondents presented arguments against the proposal, namely¹⁵⁵:

¹⁵² Consultation paper No182 (2007) s 8.45

¹⁵³ Andrew Longmore, “*Good faith and breach of warranty*”, 163. See also Baris Soyer, “*Warranties in Marine Insurance*”, 215; Sarah Derrington, “*The law relating to non-disclosure[...]*”, 346

¹⁵⁴ Consultation paper No204 (2012), ss 14.20-14.58, s 14.37

¹⁵⁵ *Ibid*, 14.39-14.50

(1) **Causation is a difficult principle to apply in practice**, because it requires a closer assessment of a chain of events. What is more, insurers might try to compensate increased investigation costs through higher premiums;

(2) **The causation test is not appropriate for all terms**, because some warranties may be relevant to the risk without being causative to the loss (for example, those that concern past claims to the assured, relevant to assessment of possibility of future claims);

(3) **Undue formalism**. As mentioned above, the Law Commission proposed the causal connection test only for warranties, but in practice, a similar term may be formulated as a descriptive condition. Hence, effect of a particular provision would depend only on formalistic approach to its construction.

These arguments do not seem fully persuasive. First, the experience of civil law countries evidences that it is possible to apply the causation test in practice, without disproportionate escalation of costs or premiums. Second, in situations where an undertaking generally affects the risk, but the particular breach is purely irrelevant, the causation test could allow achieving fairer results.¹⁵⁶ Third, it is certainly preferable to treat warranties the same way as suspensive conditions; yet it does not necessarily mean a complete abandonment of the causation test. In 2006, the Law Commission was prepared to introduce it for both types of terms; although the industry and courts would have required a longer time to adapt to that solution, it seemed as a huge step towards modernization of the English insurance law.

However, heavy critique of the causation requirement demonstrated that the industry was not prepared for such a striking reform. Concerns about complexity of investigation and proof, as well as uncertainty and potential formalism of outcomes *en masse* persuaded the Law Commission to abandon the causal connection test. Hence, other instruments were needed to ameliorate the warranty regime.

¹⁵⁶ Cf. *Abbott v Shawmut Mutual* (1861) 85 Mass 213, discussed in Chapter 2 s 2.4.2

4.3.3.2 2012-2014 proposals

On the next stage of work, the Law Commission prepared Consultation paper “Insurance Contract Law: The Business Insured’s Duty of Disclosure and the Law of Warranties” (June 2012) and Report “Insurance Contract Law: Business Disclosure; Warranties; Insurers’ Remedies for Fraudulent Claims; and Late Payment” (July 2014). In sum, both documents named three main proposals in relation to the warranty regime¹⁵⁷:

(1) To treat warranties as suspensive conditions. This proposal goes to the root of the warranty regime, as it abolishes the “automatic discharge” doctrine, established by the MIA 1906 s 33(3);

(2) To introduce the rule that terms designed to reduce the risk of loss of a particular type (or at a particular time or place) should not affect losses of a different kind. Notably, this proposal was designed as an alternative for the causal connection test;

(3) To abolish “basis of the contract” clauses. This measure was envisaged primarily for non-marine commercial policies, where such clauses allowed the insurer to rely on minor mistakes in proposal forms. Due to the fact that the MIA s 35(2) sets out strict requirements for introduction of an express warranty into the marine policy, such clauses are of minor relevance for the marine insurance.¹⁵⁸

In July 2014, the Insurance Bill, based on the work of the Law Commission, was introduced into Parliament; it received Royal Assent on 12 February 2015 and became the Insurance Act 2015.¹⁵⁹ The Act reflects all abovementioned proposals (Sections 9 – 11); therefore, it embodies a cardinal reform of the “classical” warranty regime.

4.3.3.3 The Insurance Act 2015

A few points about application of the Insurance Act 2015 should be mentioned. First, the majority of provisions of the Act, including those relevant to warranties, enter into ef-

¹⁵⁷ Consultation paper No204 (2012), s 11.22; Report No 353 (2014), s 12.6

¹⁵⁸ See, for example, Arnould, “*On the Law of Marine Insurance and Average*”, 827.

For that reason, Section 9 of the Insurance Act 2015, abolishing “basis of the contract” clauses, is not discussed further.

¹⁵⁹ See the official site of the UK Parliament (as of 23.10.2015):

<http://services.parliament.uk/bills/2014-15/insurance/documents.html>

fect from August 2016.¹⁶⁰ Until that time, the MIA 1906 continues to apply. Next, the Insurance Act 2015 provides that **in non-consumer insurance the parties may contract out** of statutory provisions and introduce a term “which would put the insured in a worse position” (for instance, a warranty clause with a remedy of automatic termination of liability), if the requirement of transparency is satisfied. Namely:

(1) The insurer must take sufficient steps to draw the disadvantageous term to the assured’s attention before its incorporation into the contract. Alternatively, the insured must have actual knowledge of the term;

(2) The disadvantageous term must be clear and unambiguous as to its effect.¹⁶¹

Thus, the use of warranties in their present form will not be completely abolished, but restricted to situations where the parties have implemented express and unequivocal provisions to that effect into the policy. For instance, standard clauses frequently include terms with the effect of automatic termination of liability and/or contract.¹⁶² Nevertheless, the “default” warranty regime is significantly amended.

4.3.3.3.1 *Suspensive character of warranties*

Section 10 of the Insurance Act 2015¹⁶³ provides that insurance warranties will no longer possess the specific remedy of “automatic discharge from liability”.¹⁶⁴ Henceforth, a breach of warranty will have the effect of **suspension of liability**, which means that the insurer shall not cover two types of losses:

(1) Occurring in the period between the breach and its rectification;

(2) Attributable to something happening during that period, even if the loss occurred later.

At the moment of **rectification of a breach**, the insurer’s liability will reattach. Rationale behind this rule is clear: if warranties are instruments of circumscribing the risk the

¹⁶⁰ The Insurance Act 2015, s 22(3)

¹⁶¹ The Insurance Act 2015, ss 16, 17(2), (3) and (5)

¹⁶² For example, ITCH (95) cl.4.1-4.2 and cl.5.1

¹⁶³ For the full text of Section 10, see Appendix I

¹⁶⁴ The MIA 1906, s 33(3); *The Good Luck* [1991] 2 Lloyd’s Rep 191

insurer agreed to indemnify, and this risk remains/becomes the same, the insurer cannot deny cover. In particular, Section 10 envisages following situations:

(1) Subsection 10(5)(b) refers to breaches of “**general warranties**”, which are deemed remedied “if the insured ceases to be in breach”;

(2) Subsection 10(5)(a) refers to breaches of “**time-specific warranties**”: undertakings to do something or to fulfill specified conditions “by an ascertainable time”. Such breaches cannot “cease” if a deadline is already missed, but they can be “functionally” remedied¹⁶⁵, which means that the risk insured must “become essentially the same as that originally contemplated by the parties”;

(3) Subsection 10(4)(b) recognizes a third situation, **when a breach of warranty is incapable of remedy** (for example, when a statement under a warranty of past or present facts was inaccurate). In such case, the insurance cover either never commences, or remains indefinitely suspended after a breach.¹⁶⁶

Notably, the practice of construing warranties as suspensive conditions is already familiar to English courts¹⁶⁷: despite being helpful in individual cases, it has also led to uncertainty about a status and an effect of particular contractual terms. The recent reform will not only make it easier for courts to reach fairer outcomes, but also to reduce a number of disputes concerning construction of policies. Furthermore, assureds will get a new stimulus to keep the marine adventure under control and rectify any discrepancies as prompt as possible.

4.3.3.3.2 *Terms designed to reduce a particular risk*

Section 11 of the Insurance Act 2015¹⁶⁸ provides that, if **a term tends to reduce a particular risk** (loss of particular kind, or at particular time or place), a breach of that term should not release the insurer from liability for loss caused by other type of risk. To determine whether a policy provision fits this description, **objective construction is required:**

¹⁶⁵ Report No 353 (2014), s 17.43. For further discussion, see ss 17.30-17.50

¹⁶⁶ *Ibid*, s 17.50

¹⁶⁷ See discussion in Chapter 4, s 4.2.1.2.

¹⁶⁸ For the full text of Section 11, see Appendix I

i.e., a normal effect of compliance with the term should be assessed, not what the parties subjectively intended it to be.¹⁶⁹

On the one hand, Section 11 embraces not only warranties, but also other types of terms: conditions precedent, definitions of risk and exclusion clauses. On the other hand, not all warranties relate to particular risks. They may: (1) address more general issues, as warranties concerned with the assured's criminal record; (2) have no bearing on the risk at all, as premium warranties; or (3) define the whole risk insured under the policy, as warranties of (non)commercial use of a vehicle.¹⁷⁰ Hence, an objective of each warranty should be analyzed individually.

It should be underlined that Section 11 **does not introduce a causation test**: for the insurer to rely on a breach of warranty, it is not required that it actually caused or contributed to the loss. It is sufficient that the warranty in principle relates to the risk, which resulted in the loss. Consequently, the causation test prevents reliance on **irrelevant breaches**, while rule in Section 11 prevents reliance on **irrelevant warranties**, "where the type of loss which occurred is not one which compliance with the warranty or condition could have had any chance of preventing".¹⁷¹ Undoubtedly, this approach is more favorable for the insurer than the causation test.

According to Section 11(4), if the term in question is a warranty, Section 10 of the Insurance Act 2015 applies jointly. It means that in case of breach of a warranty that tends to reduce a particular risk, liability of the insurer will be suspended only in relation to losses caused by that risk. It is a major improvement of the assured's position in comparison with the situation under the MIA 1906.

Nevertheless, a number of possible problems with a practical application of Section 11 have already been noted¹⁷²:

¹⁶⁹ Report No 353 (2014) ss 18.12-18.17

¹⁷⁰ *Ibid*, s 18.6

¹⁷¹ *Ibid*, ss 18.7, 18.38-18.40

¹⁷² Baris Soyer, "Beginning of a new era for insurance warranties?", *Lloyds Maritime and Commercial Law Quarterly*, Issue 3 (August, 2013), 392-394

(1) It might be challenging to identify whether a warranty tends to reduce a particular risk. As mentioned above, some warranties have a more general implication;

(2) Even when it is evident that a warranty is not of a general character, identifying its precise objective may be problematic.

Therefore, Section 11 may become a source of extensive litigation concerning objectives of warranties. The Law Commission recognized this problem, stating that: “There is undoubtedly a degree of uncertainty relating to how the courts will interpret a “type of loss”, a “loss at a particular place” and “a loss at a particular time”[...].”¹⁷³ It is argued that “in determining what particular risk the warranty aims at, it will be inevitable to be drawn into an inquiry involving causation”; hence, “the proposed change to a certain extent introduces causation by the back door”.¹⁷⁴ This is especially striking, as the legislators intended to avoid the causation test. Moreover, the reform may lead to a costly review of standard clauses in order to contract out of the default statutory regime, or to specify aims of warranties.

Overall, the Insurance Act 2015 introduces a significant reform of the “classical” warranty regime, embodied in the MIA 1906. First, Section 10 abolishes the remedy of “automatic termination of liability”, which was a unique feature of warranties. From 2016, warranties will be equaled in effect with suspensive conditions. Hereof, the second amendment follows: the assured will normally have an opportunity to remedy a breach of warranty, so that the insurer’s liability will reattach. Furthermore, Section 11 has introduced a new requirement for the insurer’s reliance on a breach, which could be characterized as the test of “objective materiality of a term to a particular risk”. Together, Sections 10 and 11 of the Insurance Act 2015 provide the assured with significant protection from the insurer’s discretion. However, the Insurance Act 2015 still leaves a room for situations where the non-causative breach of warranty will allow the insurer to avoid the liability.

¹⁷³ Report No 353 (2014) ss 18.49-18.67

¹⁷⁴ Baris Soyer, “Beginning of a new era for insurance warranties?”, 394

What is more, concerns were expressed about potential difficulties of interpretation of Section 11 by courts.

5 Conclusion

5.1 Summary of the development process. Outlook on future perspectives

In conclusion, it must be said that the development of the status of marine insurance warranties in the English law has been a lengthy process. Since the XVIII century, the warranty regime was governed by such rigid rules, as: the “strict compliance” doctrine, the absolute character of warranties, disregard to materiality or causative character of a breach and irrelevance of a future rectification. The unique remedy of “automatic discharge from liability”, introduced by the MIA 1906 s 33(3), made the warranty regime even more beneficial to insurers and detrimental to assureds. In practice, this disproportion resulted in **the following problems:**

- (1) The insurer could refuse to pay a claim for any breach of warranty, no matter how irrelevant (minor or non-causative) that breach was to the loss;
- (2) The insurer could refuse to pay a claim, though the breach of warranty has already been remedied;
- (3) In case of breach of warranty, the insurer generally was entitled for the whole amount of premium.

Another reason for concern with the warranty regime under the MIA 1906 was that international practices were inclined towards more balanced solutions. The civil law approach to alteration of risk normally implies requirements of subjective materiality and causative character of an alteration, as well as some degree of culpability of the assured. What is more, even the common law countries have departed from the traditional warranty regime to various extents.

Although there were attempts to mitigate the harshness of the warranty regime either through judicial interpretation of warranties, or through drafting of insurance contracts, these solutions were not sufficient. In order to keep in line with international standards, and to provide fairer outcomes for assureds, the English marine insurance law was in need for a legislative reform. As the result, the new Insurance Act 2015 was adopted. **The main dif-**

ferences between the marine insurance warranty regime under the MIA 1906 and the Act 2015 are that:

- (1) The remedy of “automatic termination of liability” is abolished. Under Section 10 of the Act 2015, warranties are given a suspensive character: *i.e.*, if a breach of warranty is remedied, the insurer’s liability will reattach;
- (2) Section 11 of the Act 2015 introduces a new rule that if a term (*i.a.*, warranty) tends to reduce a particular risk, the insurer is not entitled to rely on a breach of that term to deny liability for the loss caused by another risk.

The recent reform has significantly mitigated the default warranty regime in the English marine insurance law. However, there is still **one major difference** from approaches adopted in the civil law countries, New Zealand, Canada and, to some extent, Australia and the USA: namely, this reform has **not introduced a causation test**. Although the rule in Section 11 of the Insurance Act 2015 may sometimes provide similar results, it still allows the insurer to rely on non-causative breaches. Moreover, the complexity of the rule in Section 11 is likely to lead to numerous disputes about objectives of a particular warranty. Hence, a significant element of uncertainty is introduced into the English marine insurance law.

Therefore, a question arises – was it really a justified step to avoid the causation test? Not only is it familiar to English courts; introduction of a causation element would have been a huge step towards internationalization of the English marine insurance market. It is possible that the upcoming development of the marine insurance warranty regime in the English law will be focused on a further recognition of a causation element, in order to avoid the limits set out by the Insurance Act 2105. Overall, a reaction of courts and the industry on the recent reform remains to be seen.

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6.5 Table of abbreviations

ABI Association of British Insurers

AC Appeal Cases

AIRMIC Association of Insurance and Risk Managers

All ER All England Law Reports

ALR Australian Law Reports (1983 –)

ALRC Australian Law Reform Commission

AMC American Maritime Cases

App Cas Appeal Cases

B & Ald Barnewall & Alderson’s King’s Bench Reports (1817-22)

Br & B Broderip & Bingman’s Common Pleas (1819-22)

B & S Best & Smith’s Queens Bench Report (1861-65)

Bur Burrows’ King’s Bench Reports (1757-71)

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Cowp Cowper’s King’s Bench Reports (1774-78)

DLR Dominion Law Reports (Canada)

Dougl KB Douglas’ King’s Bench Reports (1778-85)

Dow Dow's House of Lords Cases

Eng Rep English Reports Full Print (1210-1865)

EWCA Civ Court of Appeal Civil (England & Wales)
EWHC (Comm) High Court of England and Wales Decisions (Commercial Court)
Exch Exchequer Law Reports (1865-1875)
F&F Foster & Finlanson's Nisi Prius Reports (1858-67)
FLR Federal Law Reports (Australia)
HLC House of Lords Cases (Clarke's) (1847-66)
H & N Hurlstone and Norman's Exchequer Reports
IHC International Hull Clauses (2003)
ICA Insurance Contract Act
ITCH Institute Time Clauses - Hulls (1995)
KB King's Bench Law Reports (1866-78)
LR PC Law Reports, Privy Council Appeal Cases
Lloyd's Rep Lloyd's List Law Reports (1951-)
LMCLQ Lloyds Maritime and Commercial Law Quarterly
MAT Marine, Aviation & Transport
MIA Marine Insurance Act
Mod Modern Reports
ND Nordiske Domme I Sjøfartsanliggender (law report containing maritime law decisions from the Scandinavian countries). (Oslo 1900 –)
NMIP Nordic Marine Insurance Plan (2013)
NZLRC New Zealand Law Reform Commission
P&I Protection & Indemnity
QB Queen's Bench Law Reports
R (HL) Rettie, Crawford and Melville Session Cases (Scotland)
SGIP Statement of General Insurance Practice (1986)
TR Durnford & East's Term Reports (1775-1800)
WLR Weekly Law Reports

APPENDIX I

Insurance Act 2015

2015 CHAPTER 4

An Act to make new provision about insurance contracts; to amend the Third Parties (Rights against Insurers) Act 2010 in relation to the insured persons to whom that Act applies; and for connected purposes. [12th February 2015]

(EXTRACTS)

PART 3

Warranties and other terms

9 Warranties and representations

(1) This section applies to representations made by the insured in connection with—

- (a) a proposed non-consumer insurance contract, or
- (b) a proposed variation to a non-consumer insurance contract.

(2) Such a representation is not capable of being converted into a warranty by means of any provision of the non-consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).

10 Breach of warranty

(1) Any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.

(2) An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.

(3) But subsection (2) does not apply if—

- (a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,
 - (b) compliance with the warranty is rendered unlawful by any subsequent law, or
 - (c) the insurer waives the breach of warranty.
- (4) Subsection (2) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening—
- (a) before the breach of warranty, or
 - (b) if the breach can be remedied, after it has been remedied.
- (5) For the purposes of this section, a breach of warranty is to be taken as remedied—
- (a) in a case falling within subsection (6), if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties,
 - (b) in any other case, if the insured ceases to be in breach of the warranty.
- (6) A case falls within this subsection if—
- (a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and
 - (b) that requirement is not complied with.
- (7) In the Marine Insurance Act 1906—
- (a) in section 33 (nature of warranty), in subsection (3), the second sentence is omitted,
 - (b) section 34 (when breach of warranty excused) is omitted.

11 Terms not relevant to the actual loss

- (1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following—
- (a) loss of a particular kind,
 - (b) loss at a particular location,
 - (c) loss at a particular time.
- (2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).

(3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

(4) This section may apply in addition to section 10.