

UNIVERSITY OF ESSEX
SCHOOL OF LAW

DISSERTATION

LLM/MA IN: International Trade and Maritime Law LLM

STUDENT'S NAME: Mohamed Salim

SUPERVISORS'S NAME: Dr Anna Mari Antoniou

DISSERTATION TITLE

Warranties in Marine Insurance : what effect will the Insurance Act 2015 changes have on the parties to a marine insurance contract and is their position improved? critical examination of the legal consequences to the parties at time of breach of warranties in marine insurance contract.-----

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Name: Mohamed Salim

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Abstract

Warranties are of two types: an affirmative warranty regulates the past or present state of the affairs exist at the time of making the warranty; such a warranty would state for example that a ship has been surveyed in the last 12 months and has complied with the recommendation of that survey. A promissory warranty on the other hand regulates what an insured may or may not do during the currency of the policy so as not to increase the risk undertaken.

The study of this paper does not focus on the difference of the warranties or their type, but rather discuss and analyse the position of the parties in marine insurance contract when breach of contract occurs. The aim of the paper is to assess the current regime with the old law governing the rules regulating breach of warranty, in order to understand if the current regime strike a better balance between the parties of marine insurance contract when a breach of warranty occur. In addition, assess the effect the Insurance Act 2015 can have to the parties of the contract. The position of this paper is that the current regime, after the recent reform which sought the enactment of Insurance Act 2015 introducing Section 9 to 12, abolishing basis of contract clauses, abolishment of the automatic discharge principle and introducing the aspect of causation bettered the position of the parties.

The study has also considered the position of foreign jurisdiction and compare them with the English law. The Norwegian and Australian was choosing for the purpose of this paper. The Norwegian market sought to be growing rapidly because of the friendly assured approach of the law. As a civil law Jurisdiction, the Norwegian law do not recognise warranty term in the marine insurance contract. However, the principle of alteration of risk can be seemed to be of a similar concept or equivalent to the common law notion of warranty term. The English law was reformed due to the inspiration of the reform which took place in the Australian insurance market. Nevertheless, the Australian law left out the Marine insurance industry outdated. A thorough study conducted by Professor Rob Merkin assessing the Australian insurance law experience proved that there are a lot to learn from.

The lack of case law post IA 2015 in this paper is just a symptom of the fact that the new law has only come into force in 2016, therefore the study of this kind is important to provide potential guidance to the parties to study precisely whether the position of the parties improved after the reform of English law in marine insurance law? The paper concluded that the effect of Insurance Act 2015 section 9 to 11 which regulate the breach warranty term was essential to protect the party's interest in marine insurance contract and strike a better balance and end unjust rules against the assured under the Marine Insurance Act 1906.

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Table of content

Title Page.....1

Abstract2

Acknowledgement3

Table of content4

Justification and aim of the study5

Research questions5

Methodology6

Structure of the study7

Introductory chapter8

Justification and aim of the study

It has been noticed a lack of balance between the rights of the assured and the insurer because the old rules of marine insurance warranties term failed to protect the contracting party's legitimate interest in case of breach of warranty term. Due to the marine insurance problems in the statutory and common law rules in English law. In 2006 the UK Law commission statutory body created for purpose of reviewing and reforming the law jointly with the Scottish law commission started a project "insurance contract law". Therefore, it's necessary to examine the proposal made by the law commission into detail regarding the warranty rules in marine insurance contract. The project concludes with the enactment of the Insurance Act 2015 which altered the rights of the assured and the insurer significantly. The Insurance Act 2015 raised several issues which will be looked and studied in this paper.

Questions to ask in this paper: -

- What are the new rights of the parties in marine insurance contract at time of breach of warranties and how they differ to the long-established regime by the Marine Insurance Act 1906?
- Is the current law draw better balance between the right of the assured and the insurer in comparison to the other older warranty regime.
- Has the reform enacted under the new Act drawn the English warranty rule closer to applies regimes of other common law countries or civil law approach?

The methodology

This paper will be written by following the doctrinal/black-letter law approach. It will focus on complex legal issues or problems and relies on interpretation and application of the law using legal precedent, law sources and the work of other academics. The doctrinal study research is a detailed and systematic exposition of the context of the legal doctrine and based on studying the similarities and difference between two legal rules. As the title of this paper suggest, the aim is to compare the rules of marine insurance warranty pre and post Insurance Act 2015, in order to answer whether the current rules exist taken fair and balanced approach to the rights of the assured and the insurer in case of breach of warranty term.

The paper will also consist of using comparative approach which will enable the author of this paper to focus on complex legal issues and relies on interpretation and application of the legal rule as well as interpretations and opinions of legal scholars. It will require critical judgement of existing authorities and analysis and evaluation of relevant debate as well as proposal for legal reform when applicable. Its vital point to note that the study of law in this paper is based on logical conclusion these conclusions are not an exact science nor it's a mystery but rather formed as a judgement which can be influenced by debating the matter. By adopting this methodology, the effect of the Insurance Act 2015 on warranties term to a marine insurance contract in case of breach will be discovered.

The main aim of this paper is to discover the benefit and weakness of the current law in England and Wales marine insurance warranty terms. By looking at the old rules of marine insurance warranties in English law and the existing law in England and wales which consist of both common law and statues will enable the author of this paper to critically evaluate the current legal rules and appropriately establish whether the existing rules of unsatisfactory or unfair to the parties of the marine insurance contract.

The structure of the paper

The main body of this paper will be divided into four chapters

- Chapter 1 will be titled as introduction and background which will consist of detailed description of the warranty regime under the English statutory. It will also discuss the historical background of the marine insurance law and the approach of Lord Mansfield regarding warranty term in the late 18th century to understand the common law principle which lead to the codification of marine insurance Act 1906.
- Chapter 2 will explore the warranty regime under the Marine Insurance Act 1906, with the main purpose of examining the doctrine characteristic of the warranty term under the English law
- Chapter 3 will study compare the differences between the old and the new law in English marine insurance law regarding warranty terms and see if the parties of the marine insurance contract position improved.
- Chapter 4 will critically analyse the warranties regime under English law in comparison to other common law countries and civil law jurisdiction.
- Chapter 5 will summarise the general finding of the study and deal with the general conclusion of the study in the paper.

Introduction:

The marine insurance law plays vital roles in international trade transaction. As matter of fact, it's worth noting that most of the rules governing international trade in the 21 centuries can be traced back to the medieval rules known as the Lex Mercatorian and the Lex Maritime.¹ These rules in large developed by merchant.

Nevertheless, the English marine insurance law governed by the enactment of the marine insurance Act 1906 is widely acknowledged fact to be the source of law in the international arena. In other words, the law adopted by other countries in relation to marine insurance law including civil law jurisdiction are influenced in one way or another by the English marine insurance law. Perhaps the reason for this is because English marine insurance market widely known to be dominated in the international marine insurance market. The globalisation has driven the marine insurance industry to become one of the most important type of insurance in the market. The Marine Insurance Act 1906 was enacted to tackle the issue arising from marine insurance contracts. The Act seem to be controversial after 200 years from its enforcement, it purposes in the 21 centuries became under a great level of security and turn to be subject debatable among legal scholars and academic due to the inevitably defective nature of its provision over time. The Act undertook great deal of reform proposal, but the issue was only settled by the jointed English and Scottish Law commission jointly launched a ten-year reform project in 2006 to reform the provision as provided under the Old Act governing the Marine insurance law. The law commission published "issue paper two" where they proposed recommendation regarding changes in relation to the law of warranties term. After years of discussion and debates the law on warranties terms has been altered by the parliament in 2015 and enacted insurance Act in 2015 which came into force in August 2016 after granted the Royal Assent on February 2015. The purpose of this paper is to draw clear examination of the English law governing the warranties terms under marine insurance contract and seek to analyse the current parties' position at time of breach of marine insurance contract. Therefore, it is vital to this dissertation to define what warranties are and the history of its origin. Briefly warranties are referred to the promises made by the assured to the insurer to doing something or refrain from doing something².

This paper will consist several chapters each discussing different aspect of the current rules governing warranties of the Marine insurance contract.

¹ The law for merchant on lands

² MIA 1906 S.33(1)

The aim of the study is to shed some light on how the new governing rules of so-called warranties law found under the Insurance Act 2015 dealt with the problems existed under the common law and MIA 1906, as well as, what effect will the Insurance Act 2015 changes have on the parties to a marine insurance contract and is their position improved? In addition, the paper will compare the Act with the Australia's insurance Contract Act 1984 and Norwegian insurance law seeking to demonstrate whether the balance between the parties in the marine insurance contract will be better achieved.

1. The history of warranties in English marine insurance law

Chapter 1

The warranties in English marine insurance law had been subject to criticism among legal scholars for many years³. Not a long time ago, in the English marine insurance law refer to the doctrine of warranty as a term of policy which require strict compliance by the insured party and any breach will allow the insurer to be liberated from any legal liability inevitably as from the date of the breach⁴. One can understand this position to be harsh therefore the venue of warranty in marine insurance law require reform or abolishing the doctrine of warranties⁵. However, as a vital doctrine that continued to live in marine insurance law for over 300 years, there must be a good reason for such doctrine to flourish in English law. It's worth noting to review the history of the doctrine and discover the development of the doctrine to understand the reason for its existence and the why there was such invention at first place in the English law? its perhaps not possible to trace the doctrine back to its origin which is buried in antiquity and lost .Yet, a literature review can at least tell us about how the law has been perceived in its early days and provide us with better understanding of the warranty doctrine in English marine insurance law.

1.1 Warranty doctrine in Marine Insurance law - the 18th century

It is known linguistically the derivation of the word insurance is of the Italian language origin and the word policy suggested to derive from "Polizza" as promise⁶. The Lombard were a member of Germanic people who invaded Italy in the sixth century⁷. The Lombard became refugee seeker and came to England in the thirteen centuries to escape the war in Italy, among them were the most affluent in society who left their properties and valuables asset. With their status in society the Lombard were involved in trade and building ships. They

³ Hasson, *The Basis of Contract Clause in Insurance law*, (1971) M.L.R 34. Also, In January 2006, the Law Commission of England and Wales launched a new project in conjunction with the Scottish Law Commission to review the law of insurance contracts. The project identified warranties as an area require reform.

⁴ Section 33 of The Marine Insurance Act 1906 as applied in *Bank of Nova Scotia v Hellenic Mutual War Risk Association Ltd (the Good Luck)* [1992] 1 AC 233

⁵ The Law Commission Report No 104, in 1980.

⁶ Özlem Gürses, *Marine Insurance Law* (2nd edn, Routledge 2017).

⁷ : Simon Hornblower, Antony Spawforth and Esther Eidinow, *The Oxford Classical Dictionary* (Oxford University Press 2012)

became engaged in marine insurance in the fifteenth century, they would lend money to a shipowner who borrowed money to carry out an ocean-going voyage in a respond the shipowner would promise his vessel as a security for the loan. The duty of the shipowner is to repay the loan when the vessel arrives safely, if the vessel is lost or stolen the shipowner duty will be relieved from his obligation⁸. This form of insurance was known as bottomry bond⁹. The insurance on ships and cargos was natural respond to the drastic increase in sea trade and considering the peril of the sea. The earliest form of insurance in English jurisdiction was the type of insurance on life, fire and marine. There is no prohibition found in common law on people who wish to offer Insurance, nor any requirement asked for when people inter into contract which require them to pay big sum of money at time of other party's loss of property. This was witnessed in the case of South Sea company who took part in funding the conflict during the eighteenth-century England wars. The contract gave the south sea company exclusive trading rights in the Americas.

The English government introduced Bubble Act which directed at marine insurance to prohibit carrying on of insurance business by corporation, societies other than those chartered. The charters were only approved to the royal exchange assurance corporation and London assurance corporation. There was no prohibition on an individual to offer insurance, due to the high demand in the market for more flexibility and well-suited insurance types, insurance was provided by individual underwriters at Lloyds and mutual association known as indemnity clubs¹⁰. Due to the rise of the insurance contract, the common law judges were not customary to the nature of the marine insurance contract. During that period there was no record of any trial affecting the question of marine insurance law, however, the Parliament legislated an Act to establish an insurance court but that did not last for long because it lacked to address the special need of the merchant and underwriters preferred to use the commercial court. The merchant class had no remedy in the common law courts since the introduction of the marine insurance contract in late twelfth century, merchants were forced to apply the Lex Mercatorian until the eighteenth century.¹¹

In the eighteenth a major development occurred in marine insurance law with the help of the father of insurance law Lord Mansfield. The main issue the common law judges were facing at this period was the interpretation of the policy wordings. For example, in the case of *Tiernay v Etherington* the judges debated whether the loss of the cargo was covered by the insurance policy wording of "on goods". Lord Mansfield decision established the foundation of English marine insurance law which later was codified in the Marine insurance Act 1906.

⁸ Özlem Gürses, *Marine Insurance Law* (2nd edn, Routledge 2017) p6.

⁹ Bottomry bond is the contract for the loan of money on a ship.

¹⁰ Özlem Gürses, *Marine Insurance Law* (2nd edn, Routledge 2017) p7.

¹¹ Arthur scheriber and Leon Green, 'Lord Mansfield - Father of Insurance Law' (1960) 73 law Journal Library- insurance law Journal.

Chapter 2

2 The nature of a warranty under English law

2.1 The Marine Insurance Act 1906

Warranties are of two types an affirmative warranty regulates the past or present state of the affairs exist at the time of making the warranty; such a warranty would state for example that a ship has been surveyed in the last 12 months and has complied with the recommendation of that survey . A promissory warranty on the other hand regulates what an insured may or may not during the currency of the policy so as not to increase the risk undertaken.¹²

The MSA 1906 govern the relationship between the parties in the contract of marine insurance, when warranties were incorporated insured were in a position of power because they knew material details which related to the marine voyage and could also change the risk once cover had been furnished. Hence it was of common practice for the insurer to enter into contract with the assured by oblige them to do or refrain from any act with harsh consequence in the favour of the insurers. The term warranty used in insurance contract is somewhat different than any commercial contract.

The term warranty has been described as “the most ill-used word in legal dictionary”¹³ . This is because the word used to mean different things in the law of contract. In ordinary commercial contract law, the terms of contract are classified into three types condition, innominate term and warranty; the difference between them are the remedies provided to the innocent party at time of breach of the contract. The beach of condition entitles the innocent party the right to elect to terminate the contract and claim damages¹⁴ ; breach of innominate term enable the innocent party to elect to terminate the contract only if the consequences of the breach go the root of the contract and to claim damages¹⁵; breach of a warranty; this word is understood to mean as a breach which entitle the aggrieved party to a damage and not sufficient enough to treat the contract as a repudiated¹⁶. Sometime the word is used to mean guarantee, for instance when a retailer provides the buyer with a laptop, the seller might agree to provide supply parts free of charge for a certain period, this type of guarantee is called warranty as its binding on the parties and form part of the sale contract. The term “extended warranty” also very common recently with retailers to mean cover for cost of repair for a product in return for a payment. Although theses scheme contains the word warranty, its better described to mean cover or insurance for technical breakdown¹⁷.

¹² Soyer, Baris. (Eds.). (2016) The Insurance Act 2015- A New Regime for Commercial and Marine

¹³ Finnegan v Allen [1943] 1 KB 425, at 430 Lord Greene MR

¹⁴ Poussard v Spiers and Pond [1876] 1 QBD 410

¹⁵ Hong Kong Fir Shipping Ltd v Kisen Kaisha Ltd (1962) EWCA Civ 7

¹⁶ Sale of Good Act 1979 S.11(4)

¹⁷ Digital satellite warranty covers Ltd v FSA [2013] UKSC 7

The importance of the term as been appreciated since the eighteenth century in the case of *Bean vs Stupart*¹⁸ Lord Mansfield defined a warranty to mean “a condition on which the contract is founded”¹⁹. This definition was incorporated into the statute books under section 33 of the MIA 1906 which state that “a warranty by which the assured undertake that some particular thing shall or shall not be done or that some condition shall be fulfilled or whereby he affirms or negative the existence of a particular state of fact”²⁰. The warranty in the policy can be implied or expressed²¹. In marine insurance context the term warranty has technical meaning in a sense that a breach of the term has unique consequences. Breach of warranty will entitle the innocent party to be discharged from any liability, the insurer will be discharged from undertaking any risk from the date of the breach of a warranty clause²². Therefore, a warranty term must be strictly complied with for the purpose of performing the obliged duties under the insurance policy²³. There was no need for any election by the insurer and its regarded irrelevant whether the beach caused any loss. Therefore, the term warranty was referred to in the policy wordings of the contract to amount to strict compliance by the assured, any breach to the term warranty by the assured no matter of frivolous the breach of will amount to discharge of all liability. Inevitably it led to harsh and unfair result to the assured because the balance of rights was not strike fairly, it favoured the insure against the assured. The breach of warranty in case of the *Bank of Nova Scotia V Hellenic Mutual War Risk Association Ltd (Good Luck)*²⁴ made it clear that that automatic discharge of liability was unfair and ill law, the warranty term in marine insurance contract was used as powerful technical defence that the insurer could use against the assured to escape liability and discharge the insured from any claims. The uniqueness of the clause warranties in the policy made it immaterial for the causation of the breach. It was also irrelevant if the breach is capable of being remedied by the assured.²⁵

A warranty term can be used to exclude liability in marine insurance policy, for example, marine insurance contract clause contains the words “warranted free from capture and seizure” the word warranty here intended to mean that the insurer will not be liable for the peril of capture and seizer²⁶, it is irrelevant whether the breach is connected with the loss of the warranty breach. As it was held in the case of *De Habn v Harley*²⁷ , that the insurer was entitled to avoid all risk due to the breach of warranty even though the breach was not

¹⁸ Ibid para 1

¹⁹ Ibid para 1 at789

²⁰ MIA 1906 S.33(1)

²¹ MIA 1906 S.33(2)

²² MIA 1906 s.33(3)

²³ Marine Insurance Act 1906 S.33(3)

²⁴ *The Bank of Nova Scotia v Hellenic Mutual War Risks Association Ltd (The Good Luck)* [1991] 2 Lloyd's Rep. 191

²⁵ MIA 1906 S.34(2)

²⁶ *Morgan v Provincial insurance Co Ltd* [1932] 2 KB 70.

²⁷ [1786] 1 T.R 343

relevant to the subsequent loss. Warranty can be created as express or implied terms²⁸ it's not necessary to use the word warranty in the contract as Lord Neuberger said in *Arnold v Britton*²⁹ " when interpreting a written contract , the court shall identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties of the contract"³⁰. The three criteria which form a warranty term was established in *HIH Casualty v New Hampshire Insurance Co*³¹. Firstly, the term must go to the root of the transaction, secondly; the term bears materially on the risk, thirdly; damage would not be an adequate remedy for the breach. The implied warranty term will be subject to statutory instrument which set out four implied term as the following ; seaworthiness ,cargoworthiness, legality and other cover port environments ³² , The Act also implied six condition to the marine policy such as alteration of a port of departure , change of voyage etc³³.

2.2 Position of the parties in marine insurance under the MIA 1906

This position was heavily criticised by legal scholars and academics such as those whose books and articles are reviewed below, Dr Baris Soyer in *Warranties in marine insurance* provide clear analyses of the marine warranty law in its position under the MIA 1906 and he makes possible recommendation for reform. The Author of the book provides clear examination of the development of express and implied warranties". In addition the chapter titled nature of the marine warranties analyse in depth the English marine insurance law and compare it with other common law jurisdiction and propose possible two type of reforms first abolishment of the "strict compliance doctrine" in warranties clause, secondly the need of casual link between the loss and the breach for any irremediable breach caused by the assured. Dr Baris argue that the warranty term law under the MIA 1906 are unjust and unfair to the assured because the law of breach of warranty no matter how temporary the breach is it allow the insurer to discharge automatically from any liability not taking into account whether the breach contribute to the loss of the insurer. Another invaluable book was written by Francis D Rose, *Marine Insurance; law and Practice*. The book provides clear and general guidance on the law of marine insurance law therefore its appropriate for the purpose of this dissertation, the author argue that the rules under the MIA 1906 governing the warranties terms is defective and illogical, this is because it empowers the insurer with automatic termination of the contract at time of warranty breach as well as allowing the insurer to waive the breach. There is also other article for the purpose of this

²⁸ MIA 1906 S.33 (2)

²⁹ *Arnold v Britton* [2015] UKSC 36

³⁰ *Ibid*

³¹ [2001] EWCA Civ 735

³² Ss.36-41

³³ See Marine insurance Act 1906 ss 40(2), 41,42,43,54,46 & 48

dissertation such as the Omnipotent Warranty; England v the word published by Professor John Hare in Marc Hubrechats Books Marine insurance at the turn of the Millennium pp 37-55

Hence, the old law required involvement from the legislature to modify the law and strike fair balance between the assured and insures in marine insurance contract. The UK law commission and the Scottish law commission³⁴ have also published a significant amount of report on the reform of this area of law which lead to the enactment of the Insurance Act 2015. The main criticism and area of recommendation was the possibility of removing the right of automatic discharge of remedy available to the insure at time when infringement of the warranty occurs. As well as the concerned breach to be of fundamental , if there is way to remedy the breach surely should not give the insurer the right to discharge him from any liability but the right to ask for the breach to be remedied , hence suspend the policy until breach has been adjusted.

Chapter 3

3.1 Compare and contrast the position of warranties in MIA 1906 and IA 2015.

In this chapter the author of this paper aim to examine the provisional under the old rules MIA 1906 governing warrant clauses and compare it with the new rule IA 2015, as well as reviewing the differences and similarities seeking to reveal to what extend the new rules were able to deal with the issues and difficulties of the old rules. This chapter will focus on the reform of the IA 2015 had on the effect of the breach of warranty and specifically the three main areas of reform which are: **The effect of the breach of warranties, causation when breach occurs, abolishment of basis of contract clause**

3.1 The basis of contract clause

When parties intend to create warranty term under the marine insurance policy, there is no specific requirement for the form or shape of the warranty, subject to general rules. Marine insurance warranty terms can be created by the parties to the contract either expressed or implied.³⁵ The vast majority of marine insurance warranty term created expressly. Foster Explain express warranty as “an agreement expressed in a policy whereby the assured stipulate that certain fact relating to the risk are or shall be true or certain acts relating to the

³⁴ Th Law Commission Report No 104, Insurance Law: Non- disclosure and Breach of Warranty, [1980], Law commission Reforming the law and the Scottish Law Commission , Insurance Contract Law; Issue Paper 2Warranties, [2006], The Law Commission Consultation Paper No 182 and The Scottish Law Commission Discussion Paper No 134, Insurance Contract Law: Misrepresentation Non-Disclosure and Breach of Warranty by the insured, [2007], The Law Commission Consultation Paper No 204 and the Scottish Law Commission Discussion Paper No 155, Insurance Contract Law: The Business Insured's Duty Of Disclosures and the Law of the Warranties [2012]

³⁵ Section 33(2) of the MIA 1906

same subject have been or shall be done³⁶". Under the statutory law, "express warranty term may be in any form of words from which the intention to warrant is to be inferred"³⁷. In addition, it must be agreed on and contained in some form of written documents and incorporated to the cover³⁸. Thus, it was held in *Aktielskabet Greenland V Jason* that clauses contain "No mining timber carried" was enough to amount to express warranty because if both parties had the intention to incorporate term that amounted to warranty through the expressed warranty clauses.

Foster also point out that "implied term occurs when warranty terms are created by implication or inference from the nature of the transaction or the circumstances of the parties"³⁹

Statutory law imposes four implied terms to any marine insurance policy; i) seaworthiness of a ship⁴⁰, ii) fit for perils of the port⁴¹, iii) cargoworthiness⁴² iv) adventure insured is a lawful one⁴³. It is perceived to be improbable that implied term will be inferred from the intention of the parties beside the implied warranties enforced by statutory law. Any warranty term created whether expressed or implied will be subject to the agreement of both parties to the contract.

Under the old law, warranties term can also be created by featuring the basis of the contract clauses⁴⁴. The Basis of contract clause allow the insurer to rely on the representation made by the assured to be of fundamental part of the contract and render it to be the basis of the contract. This clause allow the insurer to alter acts or words received from the assured during the period of representation as true and accurate, mere mistake or inaccuracy will allow the insurer to be discharged from all liability under the policy because the clause acts as a warranty which guarantee the promise made by the assured as absolute true.

The case of *Dawson V Bonnin*⁴⁵ illustrate the idea behind basis of contract clause; in this case the policy cover require that the representation made by the assured to an absolute true. The proposal submitted by the assured was intended for a lorry cover. The lorry caught fire and was total loss, the insurance refused to pay for the damage because after investigating the lorry they found that the lorry registered under a different home address to

³⁶ Foster, Nicolas R, *the seaworthiness Trilogy: Carriage of goods, insurance and personal injury*, [2002] 40 Santa Clara L.Rev. 473, p473.

³⁷ Section 35(1) of the MIA 1906

³⁸ section 35(2) of the MIA 1906.

³⁹ Foster, Nicolas R, *the seaworthiness Trilogy: Carriage of goods, insurance and personal injury*, [2002] 40 Santa Clara L.Rev. 473, p22.

⁴⁰ (In a voyage policy) S.39 (1) of the MIA 1906, (in a time policy) s.39(5).

⁴¹ S.39 (2) of the MIA 1906

⁴² S.40(2) of the MIA 1906

⁴³ S.41 of the MIA 1906

⁴⁴ Section 33 of the MIA 1906

⁴⁵ [1922] 2 A.C. 413

the one that the driver submitted, the inaccuracy of the address of a lorry during the representation proposal submitted to the insurer amounted to breach of the basis of contract clause. When the case reached the House of Lords, the delivered judgement explained that the incorporation of such clause meant that

“foundation of a thing that on which a thing stands or lies; thus, if the proposal of fact or presentation declared to be false the risk will not be attached to the assured”⁴⁶

Warranty terms incorporate a basis of contract clause allows insurers to take advantages of the law and discharge themselves from paying any claim due to simple error made by the assured pre- contractual stage either material or otherwise. The intention of the assured will not be considering, therefore the inaccuracy could occur without the knowledge of the assured. It was argued that the importance of the representation to conduct policy cover cannot be undermined after all the insurer cannot be part of the insurance policy without representation made to them and without assessing the risk. Lord Mansfield in *Pawson v Watson*⁴⁷ cleared the difference between a representation and a warranty and he argued that without representation the parties cannot form such contract therefore it's important that any representation amount to warranty made to be strictly complied with since the insurer would not offer the cover without it.

3.1.1 Position of the parties in marine insurance and Basis of contract clauses

The basis of contract clause has received great level of criticism because it weakens the promise made to the assured and make the contract fragile as well as placing the insurer in a position to avoid paying for claim for a mere mistake⁴⁸. Furthermore, common law cases show that the basis of contract clauses result in dipropionate consequent because failure to provide accurate statement would result in discharge of liability of the insurers from the cover for trivial error⁴⁹ or mistakes makes no substantial difference to the policy⁵⁰. There is no defence available to the assured even if he made the statement in good faith. The Basis of contract clauses was described by Lord Green as “trap”⁵¹ because it enables the insurer to be run away from liability even though the assured was not aware of the error made or had nothing to do with him. The mere existence of such inaccuracy is enough to discharge the insurer from all liability under the policy cover. In non-marine case *Genesis v Liberty* (2013)⁵², the assured submitted a proposal with minor error which is misstated the full name

⁴⁶ Ibid at 432 Viscount caves.

⁴⁷ (1778), Cowper, 785

⁴⁸ 1Law Commission, Issues Paper 2, 'Insurance Contract Law: Warranties' (2006)

<http://lawcommission.justice.gov.uk/docs/ICL2_Warranties.pdf> accessed 8 April 2019> accessed 8 April 2019

⁴⁹ *Dawsons Ltd v Bomini* [1922] 2 A.C 413.

⁵⁰ *Zurich General Accident & Liability Insurance Co v Morrison* [1942] 2 KB 53

⁵¹ Ibid

⁵² *Genesis Housing Association Limited v Liberty Syndicate Management Limited and Others* [2013] EWCA Cvi 1173

of the builder. The policy incorporated the proposal as part of the policy, and it contained the basis of contract clause. The insurer rejected the claim made due to the error; the court held that the insurer was exempt from all liability from the date of the breach of the warranty. The outcome appears to be unfair and unjust to the assured because a minor error that had no effect to the risk or loss suffered caused him draconian consequences. The old law seems to operate in favour of the insurer because it offers them the opportunity to be discharge from all liability from simple technical error. This loophole of great importance in marine insurance because warranties are indeed the most unique term and of great significant to the policy since it ensures that the promise under the contract will be fulfilled and met. Marine insurance policy generally involves enormous amount of loss due to the nature of the peril of the sea, it is always disastrous for marine assured to be left without breach because of trivial error that has no effect whatsoever to the loss suffered. Thus, the old law put the insurer in a powerful and advantageous place in comparison to the assured.

Another loophole in regard to a basis of contract clauses is that the insurer over time were able to exploit their power by using distant language when drafting a basis of contract clause to extend their security even when the immaterial error found without negligent or fraud, by incorporating a basis of contract clauses insurers were enabled to alter any statement made by the assured into warranties term, any miscalculation by the assured would result in him breaching warranty term and will be left without cover⁵³.

In another word, over time due to the favouritism in the old law that existed in the insurance industry , insurers were capable of using words that a laymen will not full be aware of the fact that it has the power to compromise their position and create warranty terms . This action by the insurers were described as “a major mischief”⁵⁴ . In the context of marine insurance , usually big business will recruit large legal team for this purpose , therefore its less likely that in the marine insurance industry that large corporation will be deceived by professional obscure language used to draft warranty term for the policy in order to avoid liability for solely reliance on immaterial technical errors.

The IA 2015 changes was needed and embraced in the insurance industry. The old law was founded on marine insurance industry that based on face to face contact and social relationships this has grown into more sophisticated data analysis and type of risk expanded due to the information available in the market. Under section 9 of the IA 2015 abolishes the basis of the contract clause to be used as warranty term from all insurance policies⁵⁵ .In

⁵³ Richard Stead , Insurance Act 2015 Consumer Insurance (Disclosure and Representations) Act 2012 St Johns Chambers, <https://www.stjohnschambers.co.uk/wp-content/uploads/2018/07/Insurance-Act-2015.pdf> accessed at 20/08/2019.

⁵⁴ Law commission Report , Insurance Law: Non-Disclosure and Breach of Warranty report 1980, <https://www.lawcom.gov.uk/project/insurance-law-non-disclosure-and-breach-of-warranty/>. Accessed 20/08/2019.

⁵⁵ Consumer Insurance Governed under The Consumer Insurance Act 2012 s.6

another word, the friendly insurer law that allow them to create clauses which makes immaterial mistake to be incorporated into the policy and such error to carry the burden of breaching warranty terms in order for the insurer to avoid paying for a claim is no longer possible to happen. For instance the insurer will not be allowed to rely on innocent mistake that has no connection to the risk caused such as submitting proposal with wrong personal detail contacts or misstated names of the crewmembers , Section 9 declare that such errors or mistake will not provide the power to discharge the insurer from all liability even if it was incorporated into the policy because the basis of contract clause was deemed to not serve as valid warranty term. The changes brought to the marine insurance industry by enacting Section 9 of the IA 2015 provide for a fairer and more realistic balance between the insurer and the assured because the insurer will no longer be allowed to rely on immoral means which are immaterial breach that has no connection to the loss causes and the assured can do nothing about it . The balance of power between parties to the marine insurance contract is better serviced by restricting such risk prevention clauses.

3 The effect of Breach of marine insurance warranties under the Old Law Vs New Law

3.2 Automatic discharge vs suspensive condition:

The legal consequence of breach of warranty term is found in 33(3) of the MIA 1906 which provide that:

“.. the insurer is discharged from liability from the date of the breach of warranty but without prejudice to any liability incurred by him before that date..”

The meaning and the scope of this provision caused some controversial debate among English courts until the decision of the Bank of Nova Scotia vs Hellenic Mutual War Risks Association Ltd (The Good Luck)⁵⁶ which cleared the consequence when breach of warranty term occurs. The landmark case involved a ship The Good Luck which was insured with the defendant Hellenic Mutual Ltd (Bermuda) and Mortgaged to the plaintiff Bank of Nova Scotia. As obliged by the mortgage the benefit of the insurance was given to the bank and the defendant Bermuda agreed to inform the bank immediately if they had to cease to insure the ship Good Luck. The policy covered contained express warranty term prohibiting the ship from going to certain places during its voyage. the shipowner of Good luck breached the expressed warranty term and was sent to places which was barred from consequently breached the expressed warranty term and the vessel was hit by Iraqi missile and become total loss. Both the bank and the insurer were informed about the event, the insurer found

⁵⁶ Bank of Nova Scotia V Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck) [1992] A.C 233

out about the breach of warranty term. However, the bank did not investigate the matter and thought that the Good Luck ship will be covered by the insurance, with that in mind of the bank the bank decided to extend the loan to the shipowner. The issue is not whether the breach occurred, it is obvious that there is breach of warranty its question of fact. Therefore, the insurer refused to pay for damages and the bank brought an action for failing to provide them with immediate notice that the insurance cover ceases to exist. The debated issue was whether the breach of warranty provide the insurance with automatic discharge of liability under the scope of S.33 of MIA 1906 even if the assured is unaware of the warranty or whether the insurer will be liable to be discharged but will have to take initiative step to rescind or held the contract void as would happen to ordinary course under any commercial contract under contract law when breach of condition term occurs.

When the question appears before the Court, the judge upheld the banks argument and found out that breach of warranty and entitlement to automatically discharge liability was subject to the letter and agreement between the banks and the insurance provider, therefore breach of contractual obligation was found and ruled in favour of the bank⁵⁷. The Court of Appeal held in favour of the insurer after reviewing the cases before the MIA 1906 which brought the common law to codification and did not intended to alter the position of common law rules. The landmark case refers to pre-MIA 1906 was *De Han v Harley*⁵⁸ Lord Mansfield held that warranties must be strictly complied with, the warranty term becomes a condition precedent to the liability of the insurer⁵⁹. Nevertheless, he explained the word condition as codified in the MIA 1906 has nothing to with the conditions term in contract law but rather it used as contingent sense. The House of Lord rejected the Court of Appeal outcome and Lord Goff held that the wordings of s.33(3) MIA 1906 intended to automatically discharge the insurer from liability upon the rise of breach of warranty however, the contract will not come to an end “the contract remain on foot” for other reasons, breach of warranty term will not automatically discharge from responsibility and duty but only from claims thus Lord Goff illustrate what it mean to use the condition as contingency sense in the MIA which is totally different from the principle of condition in ordinary contract law .

Lord Geff explain this in the following passage:

“certainty it does not have the effect of avoiding the contract nor strictly speaking does it have the effect of brining the contract into an end. It is possible that there may be obligation of the assured under the contract, which will survive the discharge of the insure from liability

⁵⁷ [1988] 1 Lloyd's Rep 514

⁵⁸ *De Hahn v Hartley* (1786) 1 TR 343

⁵⁹ *Bank of Nova Scotia V Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] A.C 233 at pp 262-3

as for example a continuing liability to pay a premium. Even if in the result no further obligation rest on either party, it is not correct to speak of the contract being avoided”

Hence this led the judgement to be logical because it will construe the warranty more as an exception to the risk than as a condition term. Therefore, the effect of judgement meant that for the insurer to bring the lawful effect of the assured breach he would be obliged to reject the contract, until the rejection take place the contract will still be in place.

This was confirmed in *AJ Chapman & Co Ltd V Kadirga Denizcilik vs Ticaret*⁶⁰, the case involves a breach of warranty term which come about due to the assured failure to pay premium instalment one time which amounted to breach of warranty according to the policy expressed terms. The court held that the breach of warranty entitled the insurer to be discharged from liability from the date of the breach as well as grant the insurer to claim damages which arise from the contract i.e force the assured to pay the rest of the premium. Therefore, according to Lord Goff made law on warranty, there are some instances where the insurer will be required to waive the breach because the contract will not be rendered void due to the breach of warranty even that the insurer is discharged from further liability.

However, the above landmark case fails to address the possibility of remedying the breach which create more difficulties and complexity after the judgement of the Good luck case and the effect of the breach of warranty term in such event. In fact, case law plainly overtime ignored the effect of a remedied breach. Under s.34 (2) MIA 1906. Provide that a breach of warranty cannot be remedied. This subsection appears to be redundant after the judgement in Good Luck Case, in addition, s.34 (3) of MIA 1906 grant the insurer the right waive the breach, this is important because in some cases the insurer might be happy to ignore the breach and carry on with the policy this is typically appropriate when making commercial decision according to Soyer⁶¹.

When reviewing a waiver, two doctrines exist: the silent waiver by estoppel or waiver by election⁶². The doctrine of silent waiver by estoppel contradict with decision of the House of Lord in Good Luck Case because Lord Goff said “ as far as the waiver is considered the insurer will not be able to rely on the breach of warranty having discharged him from his liability”⁶³, hence the insurer will have to waive his right by provide a unambiguous representation that proof the other party relied upon such representation thus the insured will be aware of the breach consequently the breach will give the insurer the right to render the policy repudiated if the assured do not reply to the waiver.

⁶⁰ [1998] Lloyds Rep IR 377

⁶¹ P185

⁶² *Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corporation of India (The Kanchenjunga)* [1992] 1 A.C. 233.

⁶³ [1992] 1 A.C 233, at 263

The harshness of the law can be illustrated in the *Kler Knightwear Ltd V Lombard General Insurance Co Ltd*⁶⁴. The assured breached the warranty term by failing to inspect on time. However, the breach was remedied by carrying out the inspection at late time. The breach was not capable of being remedied. The law appears to be ruthless to the assured because the breach was remedied before the loss occurred, yet the insurer was granted the right to be discharged from all liability.

3.2.1 Position of the parties after the abolishment of automatic discharge of liability, IA 2015

The old law is unjustifiably favouring the insurer and the above provision in relation to the automatic discharge of liability at time of breach are now abolished. It should be noted that the aim of the reform did not intend to deny the effect of warranties breach to be powerless, subsequently literal compliance of warranty term required under marine insurance contract, warranties clauses regardless whether it is material to the risk or not preserve the principle of strict compliance in marine insurance contract.

The position of the parties when breach of warranty occur might operate as the following hypothetical example under the new regime. Assuming marine insurance contract contain a warranty term that a chief manager of the crew to be on board at all time. The ship on a laden voyage from London, United Kingdom to Tokyo, Japan. Before the departure of the vessel from the loaded port, chief manager of the crew has a heart attack but the vessel sail without the chief manager with the intention to replace him in Cyprus. After the departure from Cyprus the vessel had replaced a chief manager and he is on board. During the voyage to Tokyo the ship suffers a collision in its route. The position of the parties under the Old law s.33(3) of MIA 1906 will render the breach of warranty term hence will not entitle the assured to claim for any loss suffered after the infringement of warranty term. However, under the new law the position of the parties to the marine insurance contract will differ significantly, the IA 2015 insurer will be liable to pay for the claim because the breach has been remedied before the collision suffered by the assured.

Under section 10 of the IA 2015 it abolishes the automatic right to discharge liability from the date of the breach warranty as a substitute to the common law and statutory rules⁶⁵ it views the breach of warranty term as a suspensory condition⁶⁶. It's worth noting that by the provision of Section 10 of the IA 2015 it removes s.33 (3) of the MIA 1906 from the statutory book, consequently, any law provides the option of automatic discharge at time of breach of

⁶⁴ [2002] Lloyds Rep. L.R 47

⁶⁵ Section 10 (1) of the IA 2015

⁶⁶ Section 10 (2) of the IA 2015

warranty will be nullified hence the law under Good Luck Case⁶⁷ is no longer an enforceable rule. Under the new law, when breach of warranty take place the cover of marine insurance can no longer be automatically discharged but instead from the date and time of the breach, the insurance policy will be rendered as suspended temporarily until the date of the breach has been remedied. Thus, the insurance provider will not be liable for any loss suffered during the suspension term⁶⁸. The liability of the insurer will arise when the breach is remedied. The new law obligates the insurer to pay for claims that warranty breach has been occurred but under the condition that the breach is capable of being remedied. As well as paying to any loss suffered prior to the breach taking place.

Therefore, the new law is in better position to strike fair balance between the assured and the insurer by trying to prevent the insurer from avoiding paying for claims simply because trivial breach of warranty has occurred. This will make the parties in the marine insurance contract in a better position to control the fate of their contract due to the ability of the contract to survive trivial breach.

Nonetheless, this rule fails to deal with the premium payment warranties clauses (PPWs). The aim of this clauses is to ensure that the insurer will receive payment on time and warn their customers that if they do not pay on time they will lose insurance policy and render the cover void. The new Act was designed to deal with draconian effect that other warranties clauses provide (i.e. guarding of premises etc) which have on business and favour the insured in cases of trivial breach of warranties. However, the Act does not differentiate between types of warranties clauses thus the PPWs clauses will be powerless because the breach of the clauses will not render the policy void but suspends it and will be reinstated if the assured pay later. It could be argued that the new Act infringe the right of freedom of contract because the plain words of the contract should be what bind the parties to the contract⁶⁹, however no one preventing the insurer from including conditions which are so fundamental that the breach by the insurer should discharge the insurer from all liability. Another way to deal with this issue will be to contract out the Act for the purpose of the PPWs clauses but state that the Act shall apply to the rest of the policy term⁷⁰.

3.3 Requirement of causal link and defence for breach

Traditionally, the court was not concerned with the causal link when breach of warranty occurs by the assured. In addition, the assured cannot argue that a breach has been

⁶⁷ [1992] 1 A.C 233

⁶⁸ Section 10 (4) of the IA 2015.

⁶⁹ Arnold v Britton and others [2015] UKSC 36

⁷⁰ By Andrew Stevenson 'The Insurance Act 2015 –The Death Knell For Premium Payment Warranties?', (2016), Andrew Stevenson is a partner at Elborne Mitchell LLP, <http://www.elbornes.com/wp-content/uploads/2016/08/The-Insurance-Act-2015-Andrew-Stevenson-12.05.16-rvdsd-1.pdf> accessed at 20/08/2019.

remedied before any loss take place as a defence. This rule was codified under section 34(2) of the MIA 1906 which provides that “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 the loss”

In another word, it cannot serve as an excuse to discharge the assured from any breach that occurs without fault of his own. This unique feature of the warranty under the common law rules meant that it is irrelevant whether the assured is the reason or contributed to the actual loss of the breach of warranty. This rule was first established in the case of *Hibbert v Pigou*⁷¹, a vessel was under an insurance policy, the warranty provided that when the vessel depart it must be done so with a convey because of the high risk of a war. The fact of the case provide that the vessel departed without a convey contrary to the wordings of the beach, hence, breach of warranty occurred. The vessel suffered from a storm that hit it during the voyage. Regardless of the loss which was caused due to the storm and not war as the latest risk was excluded from the policy cover, the insurer was found not responsible for the loss caused by the storm because of the breach of the warranty. It would be reasonable to suggest that the loss would of occur regardless of the convey was deployed or not, the breach of warranty did not contribute to the loss caused, yet the insurer was discharged from any liability and the assured was left without insurance. Chief Justice Erle in the case of *Foley v Tabor* outlined in his judgement speech the similar point by stated the following: “the question depends upon the state of the ship at the time when she sailed upon her voyage”⁷² . Therefore, it’s irrelevant to the court whether the breach caused or contributed to the loss, it is enough for the court to discharge the insurer from any liability from the date of the breach of warranty.

The reason behind this flexible rule were to allow the court to discharge liability without causal link between the breach and the loss to promote transparency and make the assured to understand the seriousness of the promises under the policy⁷³. Hence the insurer would be liable for any loss occurred as the other side kept their promises. In addition, the court does not consider any breach of the policy as a breach of warranty that entitle the insurer to repudiate the contract , for example in cases of breach amount to a representation the insurer will not be entitled to repudiate the contract, in the case of *Pawson V Watson*⁷⁴ the promise was that a British ship during its voyage will be companied with 20 men and 12 guns, the British ship was captured during the American War of independence , the promise was breached as there were only 16 men , however it had 27 crew and various ammunication ,

71 [1783] 3 Doug KB 213

72 [1861] 2 F & F 683 at p672

73 Soyer, Baris, Warranties in Marine Insurance 2nd edn. P161

74 [1778] 2 Cawp 785

the fact that the assured who come forward to provide the information to boast about the security of the ship and the insurer did not make any inquiries nor was this particular information made part of the policy written agreement meant that the promise did not amount to a warranty term but only as Lord Mansfield Held : “a mere representation subject to a materiality test, if the promise was false it will make the contract void only if the breach of the promise amount to the loss but if not it can hardly ever be fraudulent”⁷⁵ .

However, it is common-sense to argue that this rule can leave the assured in a difficult situation, the harshness of this rule can be seen in several cases which allowed the assured without any cover even in cases where the assured infringement could not change anything in relation to the loss suffered. The old law also does not allow for any room to remedy the breach to defend a breach. This is important because the assured may not be aware of the breach until loss claim filed. For example, in the case of *De Hahn v Hartley*⁷⁶ a breach of warranty occurred but subsequently was remedied after six hours and continue the voyage of the assured vessel. The judge found that the breach discharged the insurer from any liability because the breach of warranty did not correspond with the wordings of the policy. Another significant case is the *Kler Knitwear Ltd v Lombard General Insurance Co Ltd*, a warranty term tasked inspector to carry inspection on the sprinkler within thirty days of renewal of the contract. The assured infringed the warranty term by carrying the inspection 60 days after the required day. A storm caused loss to the goods, however the insurer refused to pay for the claim due to the breach of the warranty, the court judged in favour of the insurer even though the infringement of the warranty n had no causal link to the loss. The fact that the breach was remedied was not considered. As a result, it could be argued that the old law has the potential to be abused by the insurer because they can avoid paying for claims by relying on breaches that are purely technical are remediable and has no impact to the loss suffered in addition, this rule is not consistence with the general contract law,⁷⁷ because in any commercial contract under the common law innocent parties would only have the right to repudiate the contract if the breach is found to be substantial and would deprives the innocent party to benefit from the contract as a whole⁷⁸

Another important case is *Woolmer v Muilmer*⁷⁹ , the assured was found to be on breach of a warranty because the policy was warranted to a ship described as neutral property, when the assured claimed for damage, the insurer after investigating the ship found out that the ship was not as described neutral property, the ship sank during its

⁷⁵ *ibid* P787

⁷⁶ [1786] 1 T.R 343

⁷⁷ Carl Christian Rdsib, 'Warranties in marine insurance: an unpleasant necessity?' (*Juridisk Publikation*, 2010) <http://juridiskpublikation.se/wp-content/uploads/2014/10/12010_Carl-Christian-Rösö.pdf> accessed 1 April 2019.

⁷⁸ *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* [1962] 2 QB 26

⁷⁹ [1763] 1 Wm B1 427

voyage to London due to the weather condition⁸⁰. The court held in favour of the insurer. He was discharged from all liability even though the breach had nothing to do with the loss, the assured could not foresee the loss, he could not change anything or do anything about the weather, yet he was denied from claiming for the policy cover. In similar case which illustrate the harshness of the rule is the *Oversea Commodities Ltd V Style*⁸¹, policy contained a term as a warranty which promised that all the tins of port must be labelled with the made date. Fast majority of the tins were left without a label; breaching the promise of warranty under the policy, upon delivery many tins were found damaged, even though the labelling would not protect the tins from damages, the court found against the assured and allowed the insurer to be discharged from all liability from the date of the breach⁸² in the case of the *Company V Campbell*⁸³ similar vein a horse was insured during its transportation to the specified destination, the assured inserted the detail of the horse breed incorrectly, it was held that the assured breached warranty term and the contract was void.

In *Forsikringsaktieselskab Vesta v Butcher*⁸⁴ a warranty term contains that the assured would provide someone all the time to watch over the fish farm. Natural events (storm) led the fishes to die while no one was watching them, the insurer refused to pay for the claim as the assured was found in breach of warranty clause as he left no one to watch the fishes. Lord Griffiths said "it is one of the less attractive features of english insurance law that breach of a warranty in an insurance policy can be relied upon to defeat a claim under the policy even if no causal connection between the breach and the loss exist"⁸⁵.

3.3.1 The position of the parties after the new excuses available to the breach of warranty

The study of this paper reflect the nature of the old so-called warranty law which seems to be unfair to the assured, because the insurer can be permitted to avoid pay for any claims after the breach of warranty term even though the loss suffered for the claim took place after the breach has been remedied and in many cases can not alter the position of the loss suffered.

The Old marine insurance law allows no excuse for breach of a warranty, apart from the two-exception stated in s.31(1) of the MIA 1906, a) when change of circumstance make a warranty inapplicable to the circumstance of the contract. This sub section applies in event when the parties to the contract of the policy integrated specific reason for the cover, the

⁸⁰ Francis Hildyard, A Treatise on the Principle of the Law of Marine Insurance', (Rayner and Hodges, 1845).

⁸¹ [1958] 1 Lloyd's Rep. 546.

⁸² S.33(3) of the MIA 1906.

⁸³ [1917] AC 218.

⁸⁴ [1989] 1 Lloyd's Rep 331.

⁸⁵ Ibid 893- 94, per Lord Griffiths.

assured can be exempt for not fulfilling when the specific reason cease to exist⁸⁶. No doubt that this exception has restriction use. This sub section refer to the Latin maxim “Cessante ratione , cessat lex”⁸⁷ , therefore it can be argued that this exemption has no weight as far as implied warranty are concerned because it’s not probable that the cause behind an implied warranty will cease to exist during the time of the insurance cover. The other excuse for breach is b) compliance becomes unlawful. The general legal rule applies here, if a person agrees to do or refrain from doing something legal for specific period but at later stage the parliament create an act to render such duty as illegal, the agreement will be eliminated⁸⁸ . Therefore, both subsections are very rare to force and do not often considered to be enough defence for the assured, hence no defence would excuse a breach of marine warranty.

The approach of strict compliance of the warranty term inevitably lead to leave the assured without cover of the policy for cynical breach of warranties, allowing the insurer to be discharged from all liability even when breach occur without fault, caused by the assured or when the breach do not relate to the loss suffered. Thus, the old law was enormously unfair to the assured. In addition, it would not be enough to excuse the assured even if he acted in good faith or without knowledge of his own. As Arnould has said “no excuse however sufficient; no motive. However good, no necessity however irresistible, will excuse non-compliance with a warranty”.

It seem to be that the old law is unjust and unfair to the assured because it does not take into account that the assured acted in good faith , in another word it is irrelevant for the court whether the assured is actually innocent or has no connection to the cause of the breach as held by Lord Eldon in *Douglas V Scoungall*⁸⁹ he said: “it is no necessary to inquire whether the owners acted honestly and fairly in the transaction I for this it is clear law that however just and honest the intention of the owner may be if he is mistaken in the fact and the vessel is in fact nor seaworthy, the underwriter is not liable”⁹⁰.

As viewed by common law cases, this paper study found that the old law views the compliance of warranty term to be of absolute in nature and no defence is available for breach of warranty term in marine insurance contracts. The old position was argued to be immoral, because it deprived the party from the benefit of the contract there should be

⁸⁶ Soyer, Baris, *Marine Warranties: Old Rules for the New Millennium?*, *The Modern Law of Marine Insurance* Vol 2p 172.

⁸⁷ The principle that when the grounds that gave rise to a law cease to exist, the law itself ceases to exist. A good example of this can be found with regard to the immunity of advocates as discussed by Lord Hoffmann in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 (HL).

⁸⁸ *Brewster v Kitchin* (1698) 1 Ld. Raym. 321.

⁸⁹ [1816] 4 Dow 269, at 276

90

causal link between the wrongdoer and the loss suffered⁹¹. When a warranty term was put in place, the insurer was thinking about the risk that might be caused due to the breach, therefore its theoretically suitable to have causal link between the breach and the risk when judging the infringement of warranty term. Nevertheless, the new Insurance law enacted in 2015 was aimed to address all unjust and unfair consequences and strike fair and balance rule governing insurance law.

S. 34 of the MIA omitted by virtue of IA 2015 S.10(7). In replacement S.10(2) of the IA 2015 Provide the following “ *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*” also in the same act under section 11 (3) it follows that the breach of warranty term will be excused “if the assured 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”.

The aim of section 11 is to allow the assured to effectively claim for an insured loss regardless of a breach of a term if the breach will not increase the risk of the loss. The formulation used under section 11 of the IA 2015 as the following; it does not apply to terms which define the risk⁹², thus section 11 of IA 2015 will not prevent this type of a term to rely on a breach of contract to refuse a claim to the assured. However if the clause does not define the risk as a whole, the question to ask is whether compliance with the term in question would either reduce the risk of one or more of the following – loss of a particular kind⁹³, loss at a particular location⁹⁴ or loss at a particular time⁹⁵. If the answer to any of them yes, then the insurer cannot rely on the breach of the term in question to discharge liability. In another words, its arguably that IA 2015 made it more difficult for the insurer to exclude liability on reliance of a breach of term which fall under section 11 (3) which mean the contractual term breached could not increase the risk of loss. Thus, for the purpose of the new remedy introduced by the IA 2015 marine insurance contract term are classified as the following; firstly, term that define that risk or risk. Secondly; terms which if complied with will reduce the risk of loss and must do so in relation to loss at time, at place of location. The IA 2015 lack to define terms which tend to reduce the risk profile. However, under section 11 (4) it states that this section only applies to warranties.

91 Ray Hodgkin, *Insurance law; Text and Materials* (Cavendish Publishing Limited, 2nd edn, Great Britain, (2002), P 287.

92 Insurance Act 2015

93 Ibid s. (11)(1) (a)

94 Ibid s.11(1)(b)

95 Ibid s.11(1) c)

3.3.1 The position of the parties after the new excuses available to the breach of warranty

the new reform brought by the IA 2015 in warranty law changed the position of the parties when breach of warranty occurs in the area of causation link between the loss and breach of the assured. The Law commission report proposed for the introduction of a causal link between the loss and the breach; the reason for that is simple. The select committee considered the assured position to be harsh, allowing the insurer to refuse paying for a claim based on a breach that has nothing to do with the loss suffered⁹⁶. For example, it was permitted for the insurer to reject a claim for a building that was ruined by a fire due to a warranty breach committed by the assured for not fitting the building with a burglar alarm. Similarly, if the assured breached a warranty term for not employing night watchman, the insurer will be discharged from loss occurring during the day. Although the night watchman cannot prevent the loss during the daytime. This hypothetical example provided by the select committee⁹⁷ illustrate the harshness and the unjust position of the parties in marine insurance contract because when assessing the breach, the court would be satisfied for the technical mistakes, this will result in harsh and unjustifiable outcomes in favour of the insurer and put the assured in disadvantage position.

Therefore, under the new law the unjust position between the parties was remedied, the law commission intended to link the loss suffered with the kind of breach. Section 11 of the IA 2015 provide that breaching a warranty term, which capable of the risk of losing a particular kind at particular location and time would not discharge the insurer from his liability under the policy if the breach did not increase the risk to the loss that took place; the Act shift the burden on the insurer to prove that the breach increased the risk to the loss suffered⁹⁸. Hence, breach of warranty alone will not be enough to avoid claims from the assured, the insurer might claim for other remedies such as restoration, or specific performance to fix the breach but will no longer able to discharge himself from the liability of the contract and the policy cannot longer repudiate just because breach of warranty took place. By virtue of this Act, the insurer will no longer rejects paying for claim without proving that the assured breach has connection with the existing loss suffered. Section 11 of IA 2015 does not apply to terms of warranty that define the risk. Therefore, breach of term defined that the risk as a whole will not trigger section 11 of the IA 2015, It could be argued that this section allows some room for potential intruding of the parties' intention however this notion is new to the

⁹⁶ 8Law Commission, Issues Paper 2, 'Insurance Contract Law: Warranties (2006) <http://lawcommission.justice.gov.uk/docs/ICL_2_Warranties.pdf> accessed 8 April 2019> accessed 8 April 2019

⁹⁷ Ibid

⁹⁸ S.11(3) Insurance Act 2015

English law and has the potential of causing more uncertainty to the enforcement of section 11.⁹⁹

Nevertheless, to trigger section 11 of the IA 2015, the insurer is required to prove an actual causation of the breach to the loss suffered, a mere breach will be enough to find the insurer not liable for the claim. This is because the law does not refer to the actual English law causation test but rather the current law asks whether the breach increased the risk of the loss. This is important in striking the balance between the parties in the marine insurance contract, because if the law was to allow the 'but for test' to apply to assess the breach, the contribution of the breach will be subject to great scrutiny and it will be unfair to the insurer because the mere breach which increased the risk of the loss should not take place in the first place as agreed between the parties of the contract therefore, the law take the view that the mere breach in particular place, time and local that increase risk of the loss is sufficient enough to discharge the insurer liability.

This paper now illustrates the position of the parties in marine insurance contract considering current law and the new remedies available in section 11 of the IA 2015 to the parties in connection the English common law of the causation test. The English law "but for test" is commonly used to determine the cause of an action. The test asks "but for the existence of X would Y have occurred?" if the answer is yes then the factor X is the actual cause of result Y.¹⁰⁰ The difference in the application of section 11 as follow, for example if a warranty term contains that the assured must guarantee that all combustible materials should be packed by following specified health and safety measures, but then the assured in contrary to the guidance the combustible material were packed by using cheap packaging do not meet the health and safety standards. During the voyage the vessel caught fire and become total loss due to storms. The position of the parties after the beach as follow: even though what caused the vessel to be total loss was down to the weather, breach of the warranty by the assured placed the goods in a vulnerable position therefore the insurer will not be liable for any claim when the breach can increase the risk caused the loss. However, application of section 11 can caused some uncertainty as to the position of the parties when the failure to act caused the risk to increase or not.

This can be illustrated by using the last example, if for instance the warranty term required the assured to provide the vessel with one trained officer on board at all time to deal with emergency caused by fire and the assured failed to have officer on board but instead 50 crewmembers tried everything they can do fight the fire and failed. The position of the parties is not clear and it's debatable whether to have one trained office better or could

⁹⁹ Health and Safety at Work, Insurance Act 2015 H.S.W. 2015, 21(2) 4-5.

¹⁰⁰ Barnett v Chelsea & Kensington Hospital [1969] 1 QB 428

increase the risk than 50 crewmembers fighting a fire. The materiality of the breach turns to be somewhat controversial question at common law and The IA 2015 does not resolve this dilemma in marine insurance contract. However, anticipated outcome of such issue can be drawn from the early case of *Versloot* and how the court dealt with the fraudulent committed which found to have no material effect to the loss or damaged caused. The case was heard before the Supreme court, the vessel in question suffered from damaged beyond repair due to incapacitated by an ingress of water which flooded the engine room, this was a combined result of the crew negligent failing to close the sea intel valve of the emergency fire pump and the negligent of the contractors employed on an earlier stage who failed to seal the engine room. The vessel of was total loss. The insurer undertook the work to investigate and asked the assured for the cause of the damage. The assured lied about what happened to avoid any claim by the insurer which hold them responsible for the loss. The insurer learned about the cause of the loss from expert which identified the cause, the founding would render the insurer liable however due to the lie of the assured the insurer reject the pay arguing for fraudulent claim even though the lie by the assured could not change anything and was rendered to be irrelevant to the merit of the claim. The Supreme court by majority held in favour of the assured and render the insurer liable for the claim because the lie did not amount to any material risk to the loss suffered.

Lord Sumption explained the reason of the judgement in the following passage: -

“The position is different where the insured is trying to obtain no more than the law regards as his entitlement and the lie is irrelevant to the existence or amount of that entitlement. In this case the lie is dishonest, but the claim is not. The immateriality of the lie to the claim makes it not just possible but appropriate to distinguish between them. I do not accept that a policy of deterrence justifies the application of the fraudulent claim rule in this situation”¹⁰¹

The court was prepared to render the lie that has no material risk to the loss as “fraudulent device” not capable to render the claim forfeit. Whether this is possible with the causational link when the assured found in breach of warranty term is yet to be seen. However, what it certain that the enactment of IA 2015 and the introduction of causation link to the breach strike a better balance between the parties of the marine insurance contract, justifiable and fairer assessment of a warranty breach are better achieved under the new regime.

¹⁰¹ *Versloot Dredging BV and another v HDI Gerling Industries Versicherung AG and Others* [2016] UKSC 45, Lord Sumption at 26

Chapter 4

Comparing new warranties regime under the IA 2015 with foreign Common law and civil jurisdiction

The aim of this study is to assess the current rules for breach of warranties in marine insurance law in England and see how can a fair distribution of right and just balance between parties can be achieved? However, before answering this question the English Marine warranty rules will need to be put into test of comparison with other legal system. It is believed that such a comparison will help to bring a different aspect to the study in this paper because it will provide the basis for further discussion on potential improvement of the current rules. In addition, warranties are a contentions aspect of insurance law and remain one of the core differences between marine insurance law in common law and continental jurisdiction and one of the essential matters that will need compromise if international harmonisation of marine insurance is to ever become a reality.

Two different legal system chosen to compare with the current warranty regime in English law, the Norwegian and Australia laws. The two jurisdictions are not selected randomly but for the following reasons. The Norwegian law represent the traditional approach of Scandinavian countries, and its influence can be observed over number of countries. In addition, the Norwegian marine insurance market is one of the fast growing in the world¹⁰², the Norwegian marine insurance law incorporates one of the most sophisticated rules regulating marine insurance law, the United Nation Report recommended its adaptation since 1982¹⁰³, some argue that the rapid growth of the Norwegian marine insurance market

¹⁰² Statistic suggested that the Nordic marine insurance market growing rapidly, 73.4% vessels insured in the Norwegian market were owned by non-Norwegian. All figures are taken from GLOBAL MARINE INSURANCE REPORT 2018, Published by The Nordic Association of Marine Insurers (Cefor) Vice chair, IUMI Facts & Figures Committee.

¹⁰³ United Nation Legal and Documentary Aspect of The Marine Insurance Contract, 1982 para 226

goes down to the ability of the Norwegian plans to strike a better balance between the assured and the insurer¹⁰⁴ .

The Australian marine insurance was in a great extended form based on the English MIA 1906, and incorporated the English marine insurance law into the Marine Insurance Act 1909. However, what makes the Australian experience beneficial for the comparative analysis study is that several attempts were made to reform Australian insurance law before the English law. The Australian government has revised the entire insurance law and enacted Australian Insurance Contract Act 1984 (AICA) after the publication of Report No 20, Insurance Contract which incorporated a drafted Bill produced by Australian Law Reform Commission (ALRC) in 1982¹⁰⁵ , However the act does not apply to marine insurance contract but it was aimed to all types of insurance contract. Therefore AICA 1984 failed to reform the marine insurance law and the rules governing warranties term were left untouched. Another attempt was made to reform the Australian marine insurance law by the ALRC in 2007, the report published acknowledgment of the harshness of the old law based on the English MIA 1906, and recommended in large to diminish the determinantal consequence for breach of warranty , and strike fairer balance between the assured and the insurer. However, the commission report was not enacted and failed to crystallise it into an Act of parliament hence, the current Australian Marine insurance law is governed under the AMIA 1909 and the only reform implemented was by the enactment of the Insurance Contract Act 1984 (ICA) which excluded exclusively marine insurance contract¹⁰⁶. Professor Rob Merkin argues that there is a lot to learn from the Australian experience to reform the Insurance law, the Australian law succeeded to prove that the insurance market adopted quickly to the change when better balance between the insurer and the assured is delivered by the law.¹⁰⁷ The Australian ICA 1984 achieved a better result for the insurer and the assured in contract of non-marine. However, the Australian governing marine insurance law did not change and still governed under the old provision and as a result a comparison between the Australian insurance law and the English marine insurance law will benefit the study of this paper.

4.1 Comparing the different approaches to warranty terms

It is essential for the insurer and the assured to have certain promises kept during the insurance policy because the rate of the premium agreed upon based on the promises made

¹⁰⁴ This was argued by Professor Hans Jacob Bull, who acted as the chairman of the committee that revised the marine insurance plan of 1964 Huybrechts, Hooydonk and Dierych, 1999, PP109- 22

¹⁰⁵ Rob Merkin Ozlem Gurses Reforming Insurance law: Is there a case for reverse transportation? A report for the English and Scottish law commission on the Australian experience of insurance law reform, London UK (2006) Scottish law Commission, 105pp.

¹⁰⁶ S.9(1)(d) Insurance Contract Act 1984

¹⁰⁷ Ibid 106pp

by both parties. In the event of such promise are breached and alteration of risk occurs both the assured and insurers seek protection from the law to reserve their rights. In English law the general rules are that if the alteration of risk occur during the course of the policy, such event has no validity on the liability assumed by the insurer.¹⁰⁸ The common law rules incorporated into section 34 MIA 1906, when parties create promises in a form of warranties (either expressed or implied) and then breached, the insurer is automatically discharged from any liability. However as examined earlier in this paper, this position was reversed lately by the IA 2015. Any rules of law that breach of warranty in a contract of insurance result in the discharge of the insurers liability under the contract is abolished¹⁰⁹. However, when alteration of risk occurs during a policy the insurer has no liability under a contract of insurance in respect of any loss occurring or attribute to something happening after a warranty in the contract has been breached but before the breach has been remedied¹¹⁰. This mean if a breach of warranty occurs during marine insurance policy, the breach will render the policy as suspended, the cover will then resume to run after the breach been remedied.

In case of breach that cannot be remedied the insurer will be discharged from all liability, the view of the warranty under the common law is a condition which must be exactly complied with whether it be material to the risk or not. The unique feature of warranties in English insurance law was formed by Lord Mansfield and is not surprising to know that other legal systems are not familiar with such terms.¹¹¹

4.2 The Australian law

The insurance contract in Australian is governed by the insurance contract Act 1984 (ICA), this will be compared with the IA 2015 to assess the similarities and difference between both rules regulating breach of warranty and understand where a better and fairer balance between the parties can be achieved. The IA 2015 created a new duty of fair presentation. The recent reform in the English law made a new balanced remedy except where the breach of the duty of fair presentation was found to be deliberate or reckless. Now under the English law the insurer is not able to avoid liability under the policy because of the failure from the assured to disclose all information. For the insurer to be discharged from liability he will have to show that will not be part of the contract has such disclosure was not breached. Or would

¹⁰⁸ *Show v Robberds* (1837) 6 Ad& EL 75; *Pim v Reid* (1843) 7Man & G 1; *Mitchell Conveyer & Transport Co Ltd v Pulbrook* (1933) 45 LIL Rep 239.

¹⁰⁹ Section 11 of the IA 2015

¹¹⁰ S.2 of the Insurance Act 2015

¹¹¹ According to report undertaken by Prof Wilhelmsen, the concept of warranties term is applied only in Portugal, Spain China excluding common law jurisdictions. ("Duty of disclosure, duty of good faith, alteration of risk and warranties") published in CMI Yearbook 2000, p239

be part of the contract but under different terms¹¹². It is common practice that the assured should disclose materials they know or ought to know which can affect the decision making of the insurer at pre-contractual stage. The breach of such duty will vary and depend on whether the breach was made deliberately or recklessly. If the breach by the assured was not deliberate or reckless then the policy shall remain valid and the insurer cannot be discharged from liability under the policy terms, but other remedies can be available to the insurer.

For example; the assured can be forced to pay higher premium¹¹³. However, if the breach was made deliberate or recklessly then the insurer will be entitled to terminate the contract if providing he assured with notification. This strike a better balance between the parties of the contract in case of non-disclosure because assured will be aware of the breach of warranty it will available for him to view. At the same time the concept of strict compliance of warranty term can be retained by the law in case of deliberate and reckless breaches. Nevertheless, the marine insurance contract in Australia is governed by the old law MIA 1909. Therefore, the parties of marine insurance contract will be deprived from the benefit of ICA 1984. for example, the Australian law abolished basis of contract clause in non-marine insurance contract.

Under section 24 of the Act “all statement of existing facts is to be treated as representation and not as warranties” therefore the proposal submitted cannot considered as warranty term without them. However, in injustice existed in marine insurance contract because basis of contract clauses can be used under the MIA 1909.

The Australian Insurance Contract Act encompass both aspect of materiality¹¹⁴ and causation¹¹⁵. Therefore, the insurer cannot refuse a claim for mere non-compliance unless the non-compliance can be held to contribute to the loss or contribute the loss in respect of the loss in hand. The assured will need to show that the non-compliance did not contribute or cause the loss suffered which they are making the claim for. However a breach of warranty in Australian’s marine insurance will result to discharge of liability whether the breach is immaterial or not¹¹⁶, Therefore the Australian marine insurance law is outdated and strike a similar result to the old English law, nevertheless the Australian Insurance Contract Act inspired the reform in the English Law but the exemption existed in the marine insurance market is the fear that the Australian law will be left out of competition and lose

¹¹² Section 2(8) IA 2015

¹¹³ Section 11 IA 2015

¹¹⁴ Section 54(2) of the ICA 1984

¹¹⁵ Section 54(3) of the ICA 1984

¹¹⁶ *Kenyon v Berthon* (1779) *Park Ins.* (6TH edn), 436(SC, 1 DOUG,12)

business in comparison with the English law which is the largest in the world , ultimately had law which favoured the insurer interest against the assured.¹¹⁷

4.3The Norway laws

Insurance contracts in Norway are governed by the Insurance Contract Act 1989. The Norwegian Act provide that it is not obligatory to govern on matter related to ships, marine insurances, or goods in international transit¹¹⁸, therefore the major rule governing marine insurance policies in Norway are the standardized conditions drafted jointly by insurers , assured and other interested parties¹¹⁹, Different features governing the term of marine insurance contract is provided under the Norwegian law incorporated into extensive private codification which are published as Norwegian Marine Insurance Plan. The latest version of these conditions is the Nordic Marine Insurance Plan (NMIP) 2013 , based on the Norwegian Marine Insurance Plan of 1996, it is worth noting that the NMIP are not binding on the parties of marine insurance policy till they incorporate it into their contract , these rules are commonly used in the Norwegian insurance market¹²⁰ . Just like other civil law jurisdiction the Norwegian law does not classify term of a contract as conditions and warranties, it replace the warranty term regime with the adoption of the doctrine of “alteration of risk” to regulate the terms of a contract. The provisions provided under the NMIP on alteration of risk are separated into two classes, the general regulations which is found under clause 3-8 to clause 3-13, special rules which if found on clause 3-14 to clause 3-21¹²¹.

Under clauses 3-8 of the NMIP 2013 defines the alteration of risk as the following:

“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 contract¹²²”

The NMIP 2013 provide in its commentary that it is essential to differentiate between an alteration of the risk having the effect of ended the insurance contract by frustration of the contract and an alteration of risk which are not of such type¹²³. Thus, a genuine alteration of risk is set apart from trivial changed of circumstance by two criteria; there must have been a

¹¹⁷ Maritime Law Association of Australian and New Zealand, Explanatory memorandum for a bill to amend the commonwealth Marine Insurance Act 1909(2916) PP2

¹¹⁸ Section 1-3 (c), (e)Insurance Contract Act 1989

¹¹⁹ BARIS SOYER, WARRANTIES IN MARINE INSURANCE (3rd edn, Routledge-Cavendish 2016) p 190.

¹²⁰ Ibid

¹²¹ See commentary on Nordic Marine Insurance Plan of 2013 version 2019, <http://www.nordicplan.org/Commentary/>. Accessed 01/09/2019.

¹²² Clause 3-8, MNIP 2013 Plan.

¹²³ Sub-Clauses 1, Commentary of the Nordic Marine Insurance Plan of 2013.

change of a fortuitous nature, and the change must amount to frustration of the fundamental expectation upon which the contract was based¹²⁴

This could be argued to be of similar approach to the English law because a mere increase of intensity of a peril insured will not render an alteration of risk. However, what render the contract void under the English marine insurance is the breach of warranty instead of alteration of risk¹²⁵.

The second test under the NMIP requires, the change must amount to fundamental promise upon which the contract was based. The general principle of the insurance and contract law is required to determine whether it would be reasonable to render the breach applicable to the rules of the NMIP. Professor Trine Lise Wilhelmsen argues that the civil law jurisdiction normally makes the relation between culpability of the assured and how the insurer would have reacted had he known about the alteration of risk when the contract was entered. How the alteration of risk has influenced the casualty or the extent of the loss¹²⁶. Therefore, it's not surprising to see that it is essential for the NMIP rules to consider whether the assured had the intention to cause or agreed to an alteration of the risk¹²⁷. The intention of the assured will be of highly importance in determining whether the alteration of the risk can amount to a genuine one which provide the remedy to the insurer to cancel the policy, because the question of causation, materiality and culpability will be considered in determining whether the breach of the assured can render the contract into frustration. Under clauses 3-10 the insurer is provided with the right to cancel the insurance, if the alteration of the risk occurs, the insurer can choice to cancel the insurance by providing the assured with the a notice of fourteen day or waving he's right and accept the alteration of risk. There is no similar protection provided to the assured in the English marine insurance law when breach of warranty occurs. The insurer will not be required to inform the assured for his intention to render the contract void. The traditional approach under the English law was that the assured will be left without insurance at the time of the breach of warranty occur, the assured or the insurer may not aware of that, until claim process initiated and investigation to the claim carried out by the insurer. The reformed version of the English marine law under section 11 of the IA 2015, it allows the assured to retain the insurance considering that the breach of warranty is remediable, if it is not then the insurer will be discharged from all liability.

The MINP rules provides if the breach of alteration of risk occurs, some degree of subjective materiality will be considered when assessing the breach of the term. For example, 1)

¹²⁴ Ibid

¹²⁵ Section 11 of the Insurance Act 2015,

¹²⁶ Trine-Lise Wilhelmsen, Hans J. Bull, "Handbook in Hull Insurance" (Gyldendal Akademisk, 2007), 156

¹²⁷ Clause 3-9 MNIP 2013 Plan.

whether the insure would have accepted to be bound by the policy had he known of the alteration of the risk in advance, if the answer is no equivocally, the insure will be entitled to obtain a discharge from liability arising from the policy. The Commentary paper to the NMIP clauses 3-9 explains in Clause 3-3 that there is no need for the insurer to act in order to render the contract avoid, however it requires the insurer to give notice if his intention to invoke clauses 3-9. 2) If it was found that its possible for the insurer to accept the altered risk but on another term, the insurer will be able to render the contract avoid only if there is a causal link between the loss and the breach which caused the alteration of the risk.

In the NMIP clauses 3-10 it affords the insures with the right to avoid liability after the alteration of risk after providing the assured with a fourteen-day notice. However, under MNIIP clauses 3-12 provides that the insure can be excluded from using clauses 3-9 to avoid liability after the alteration of risk if the alteration of the risk stopped to be material to his interest.

The provision adopted by the NMIP 2013 related to alteration of risk can amount to the equivalent to the English concept of warranties in marine insurance law. However, the founding of this comparative study shows that the MIA 1906 approach to warranty term are sever from the assured point of view. Nevertheless, the Norwegian approach look very closer to the English approach after the reform and enactment of the IA 2015, after the introduction of causal link under section 11 of the English Act. The position of the parties after the breach of warranty term are almost similar after the reform of the English insurance law. Previously the usual remedy is to preclude the assured from recovery in relation to loss that occurs as a result of a breach warranty. However, both regimes regard the breach of warranty per say will not render the contract avoid.

Under the English law, it is still difficult to say whether a breach increase the risk or not. But the position of the parties under the NMIP 2013 strike a better balance between the assured and the insurer because in the MINP 2013 there must be a causal link between the breach and the loss. The assured in many cases could recover provided that the breach occurred for reason other than those in his control or whether the alteration of risk ceased to be material to the insurer.

These provisions are somehow like the recent English approach in relation to breach of warranties, because once a reach of non-relevant term occurs the automatic discharge of liability are no longer available to the insurer under the new marine insurance law in England. However the NMIP 2013 strike a fairer balance between the parties of the marine insurance contract because it provide the assured with fourteen days' notice before the cancelation take place while in the case of the IA 2015 if the breach of warranty occurs and

the breach is not remediable, there is no such required to provide the assured with a notice. The traditional law under the MIA 1906 was harsher because it left the assured without notice without him known, therefore the IA 2015 improved the position but not as better as the NMIP 2013. It's worth noting that under the NMIP 2013 rules does not distinguish between the term "termination of the insurance contract" and "the discharge from liability" which from first sight it mirrors the English approach to the remedy provided for a breach of warranty in marine insurance contract¹²⁸.

4.3.1 Special provision on alteration of risk under the NMIP 2013

Some of the special provision on the alteration of risk under the NMIP provided in Clauses 3-14 to clauses 3-21 as mentioned above will be now considered.

Clauses 3-176 establish that the use of the ship for illegal purpose constitute a special alteration of the risk, however this provision also requires the culpability element of the assured and casual connection between the breach and the loss to free the insurer from liability,¹²⁹ Because the consent of the assured is substantially used for furtherance of illegal purposes¹³⁰. Nevertheless, the NMIP provides three events which allow the marine insurance contract to have a suspensive effect, which resembles the remedy available under the IA 2015. They are: i) policy will be suspended if sailing in excluding trading area,¹³¹ ii) suspension of the insurance in the event of requisitions¹³², iii) removal of the ship to a repair yard¹³³. The remedy of automatic discharge under the NMIP 2013 is provided under clauses 3-21 in relation to change of ownership without, which mean the insure will be entitled to be discharged from all liability and terminate the contract without the requirement of causation or fault, if the ownership of the vessel changed by sale or in any other manner. This mirror the English provision although it is not called a warranty. However, it is hardly the case that both parties want the policy to run after change of ownership or at point of sale. The reason for introducing warranty like provision under the NMIP 2013 for change of ownership is the effect it has on the insurance, the change of vessel ownership considered to be of the policy

¹²⁸ Good Luck Case

¹²⁹ **Clause 3-16. Illegal undertakings**

¹³⁰ see also the Commentary on Cl. 2-1 and Cl. 2-8 above. NL 5-1-2, which forbids contracts which offend decency, is based on somewhat different criteria, but leads to substantially the same result.

¹³¹ Clauses 3-15

¹³² Clauses 3-17

¹³³ Clauses 3-20

core element. Even if the assured were not at fault when change of ownership occur, it would be unfair to the insurer to be liable under the new changes.

Nevertheless, there are cases where the insurer may not be able to invoke alteration of the risk, under clauses 3-12 of the NMIP plans are identical to the 1964 Plan, it states the following:

“The insurer may not invoke Clauses. 3-9 and clauses. 3-10 after the alteration of the risk has ceased to be material to him. The same applies if the risk is altered by measures taken for the purpose of saving human life, or by the insured vessel salvaging or attempting to salvage vessels”

The limitation to invoke alteration of the risk caused by measure taken to save human life are nowhere to be seen in English Marine Insurance law. The English law traditionally favoured the insurer and it could be argued that the Nordic plan was far ahead in term of striking a better balance between the parties of marine insurance contract. According to the NMIP 2013 a breach of the assured duty of disclosure will not render the contract as void hence, the insurer will not be allowed to be discharged from liability automatically¹³⁴. However, it provided that if such alteration of risk occurs and it is an innocent breach of duty by the assured. the insurer will be entitled to cancel the insurance within fourteen days' notice of their intention to cancel the policy.

Chapter 5

5.1The study main findings

In this chapter, the author of this paper will analysis the founding of the study and discuss how the new reform by the introduction of IA 2015 protect the interest of both in marine insurance contract and discuss how the IA 2015 bettered the position of the parties by reforming the remedies available to the parties of the contract. Finally, this chapter will bring the whole of the paper into conclusion and summarise the main argument. The study of this paper argues the current regime of warranty law has improved then before, now the English

¹³⁴ Clauses 3-12

law achieving a better, a fairer and just result to both parties of the marine insurance contract.

5.2 Achieving a better balance

It was not simple to see a country to enact a piece of legislation where the balance between parties of marine insurance contract was in the heart of the reform. Even though the balance ought to be elusive or hard to achieve, it was needed. The imbalance and partial rules in the marine insurance market causes mistrust between the parties of the policy and their interest cannot be served. The mistrust in the marine insurance market is not attractive as the industry may fail to attract business. The rules governing marine insurance law under the MIA 1906 were unfit and outdated in addition it produced great level of imbalance between the parties by favouring the insurer over the assured hence in most cases the assured was left out and their interest was not protected in comparison to the insurer. The imbalance existed under the MIA 1906 rules resulted in a loss of the trust and confidence by the assured when insuring their vessels. It is difficult to retain someone's confidence when been involved in a legal binding agreement and known that the other party can easily find legal loophole which allow him to break their promise and discharge themselves from all liability. Therefore, when rules establish harsh result such as leaving the assured without cover for trivial mistake surely will result in an unamicable and hostile environment. By creating a fair and balanced rule governing the marine insurance contract, both parties' interest will be reserved. After several attempts to reform the long stand law, now the IA2015 which came into force on 12 August 2016, a fairer and just result can be reached for both the assured and the insurer.

5.3 Has the reform improved the party's position?

The lack of case law post IA 2015 is just a symptom of the fact that the new law has only come into force in 2016, therefore the study of this kind is important to provide potential guidance to the parties to study precisely whether the position of the parties improved after the reform of English law in marine insurance law?

The new reform in the area of marine insurance law in England certainty was needed for and right step toward ultimately a notable goal i.e. A fairer and just approach of the law to reserve the interest of both parties of marine insurance policy. The new approach has abolished the basis of contract clauses in relation to business marine insurance covers, this is important step in establishing a balanced approach in marine insurance law. The basis of contract clause permitted the insurer to take advantage over the assured when drafting the

policy, by using obscure language which the assured most likely will not be familiar with and incorporate as warranties terms in some instances without the assured understanding¹³⁵. In addition, such clauses permitted the insurers to evade a morally legitimate claims or bring the whole contract to an end for single simple breach made without intention, has no material effect to the interest of the insurer, it also made the insurer to avoid entire contract for innocent inaccurate statement made without intention by the assured when submitting the proposal during the early stages of contract formation even it was found the misstatement has no effect to the existing contract¹³⁶. The new law in the area of Marine Insurance law no longer allow such loophole to be used against the assured to evade liability. Now the unfair result is produced by the basis of contract clauses no longer powerful and will be useless in the face of the law. For more balanced and fairer law, the abolishment of the contract of basis clauses was necessity. Now it will be impossible to use contract of basis clauses and benefiting from rewording the terms by using obscure language to incorporate into the policy and make them warranties. Irrelevant misstatement made by the assured when submitting proposal to the insurer will no longer be able to transform it to warranties. Thus, the assured will no longer be denied benefitting from the cover or denied making a claim after suffering from a loss because of a breach of warranty that existed without the assured being aware of it.

The abolishment of the basis clauses was necessary to establish a better balance between the parties of the marine insurance contract and protect the assured rights meanwhile the insurer will be also allowed to incorporate warranties term into the contract that he find vital to the formation of the contract. Thus, the abolishment of basis of contract clauses do not restrict the insured right to create warranty term into the main body of the contract, if he makes the assured aware of the terms he will eventually need to consent to. Thus, the principle freedom of contract in marine insurance contract will be preserved and retained. The abolishment of basis of contract clause can only have positive impact to the English law to strike a better balance between the parties of the marine insurance contract, because the end of insurer friendly clause such as this which can only bring more just and proportionate result.

The other fundamental change to the area of warranty in marine insurance law in England is the abolishment of automatic discharge because the assured will be offered the opportunity to remedy his breach considering that the breach is remediable. The traditional law under the case of *Good Luck* established the automatic discharge is now abolished and no longer

¹³⁵ The Law Commission Consultation Paper and The Scottish Law Commission Discussion Paper No 134, Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by The Insured A Joint Consultation Paper (Law Com No 182, 2015)

¹³⁶ *Ibid*

server as a good rule. The insurer will not be allowed to rely on the automatic discharge mechanism which previously allowed them to escape liability if the assured is found in breach of warranty term. This remedy was very powerful. After the abolishment of this regime. When the assured is found to be in breach of warranty term, instead of the automatic discharge to be triggered, a suspension of the policy will be triggered until the breach is remedied. The insurer can still reject liability in case of a breach, however only in relation to loss occurs after the suspension period. The suspension period provides the assured with an opportunity to ratify the breach. If the assured failed to ratify the breach then the insurer will be allowed to reject all liability and render the contract void. But if the breach has been ratified then the insurer cannot deny paying for a claim that occurred before the breach. General warranties will only be remediable if the breach ceases to exist nevertheless, some breaches are not remediable due to the nature of the warranty. However, the Law Commission did not distinctiveness explained which breaches are remediable and which incapable of being remedied. It appears to be that this was left entirely for the courts to decide case by case whether a breach is capable of being remedied by factual analysis. To assess a breach case by case can only result in a fairer and more just result rather than assessing the breach on a harsh and rigged law that considered all breach capable of providing the same remedy automatic discharge of all liability. The position of the parties after the new reformed was bettered, because now the insurer cannot rely on a minor breach of warranty which was remedied to escape liability. However, the case is different in instance of fraud claims. If the claim was made fraudulently, the insurer can render the contract void automatically and cancel the policy, but the insurer will be required to provide the assured with a notification. Although the insurer is entitled to choose to keep the policy running.

Another important improvement is the aspect of causation which effect the position of the parties when breach of warranty occur was introduced by the IA 2015 which bettered the English marine insurance law in relation to rules regulating breach of warranty term. The recognition of causation makes the means of linking an act with the appropriate effect that such act had.¹³⁷ Is an aspect of accountability because under the principle of causation the party who suffer will do so as a direct result of his action and not for trivial mistake that he was not aware of. By having causation test one will be able to understand the cause of a loss hence reaching the appropriate person and holding someone blameworthy is easier under the new law.¹³⁸ The causation test using for the purpose of marine insurance law is not the one which consider the proximate cause test or but for test . Nevertheless, the causation test here is to look for any conduct by the party that contribute to increase the risk

¹³⁷ Francis Rose, *Marine Insurance; Law and Practice*, (2nd edn, Informa Law from Routledge, 2013) pp400

¹³⁸ *Ibid*

of a loss that occurred. This test can help to bring more just and fairer result when assess breach of warranty because it offers the decision maker with a way to link the breach with the loss caused. It is only just and fair for the assured to suffer the harsh consequences for breach of warranty if only he's action contributed the loss caused. Thus, the new law can only better the position of the party in case of breach of warranty. The test cannot be unfair to the insurer because is not asking him to look for degree of misconduct by the assured which caused the loss but mere increase of risk to the loss is enough and will be caught under section 11 of the IA 2015, even if the breach did not directly contributed to the loss. The test might sound to be uncertain and not clear but ultimately the test will turn out to be more just and fairer to both parties. Because what gave an automatic discharge (breach of warranty) now will trigger a thorough and detailed investigation to the cause of the loss and establish if the breach did increase the risk of the loss. For example, if there is a warranty which obliged the assured to ensure that a professional skipper to be present at all time. When the assured fail to comply with this term and the face a problem with the generator and the vessel become total loss after caught in a fire. The breach of warranty certainty did not cause the loss nonetheless, when considering this case in more through and detailed investigation one might concluded that such conduct by the assured can increase the risk which caused the loss to the vessel. But the current law is uncertain if it will consider this breach as enough to fulfil the causation element under the IA2015. Nevertheless, the current rule is certainly a fairer one as opposed to the traditional law which would give the insurer the right to automatic discharge for a breach that is less likely to have anything to do with the loss suffered.

5.4 Conclusion

London is recognised as the leader for the marine insurance market. Considering the recent reform and considering the potential impact of the new in the parties of marine insurance contract when breach of warranty occurs. This study comes to conclude that the enactment of IA 2015 was necessity as well as have positive impact in the marine insurance industry. The current warranty regime was based on the recommendation by law commission. All insurance markets who sought the approach of assured friendly strike a better balance such as the Norwegian standard insurance terms Nordic Plan 2013. The assured friendly approach helped the Norwegian insurance market to become one of the leading in the Scandinavian region. The Australian experience also proved that the market welcomes a better-balanced approach between the parties of the contract. It also showed that the market can adopt to the change of law quickly because the law was fairer, just and strike a better balance when breach of warranty occurs in insurance contracts. Comparing the English law with foreign jurisdiction this study was able to analysis different approaches to regulate

breach warranties. In addition, this paper also compared the current English regime regulating breach of warranty with the old law of marine insurance, the comparison allowed it possible for this study to understand that the recent reforms improved the position of the parties and eliminated the unfairness that existed under the old law MIA 1906. In many cases the old law left the assured with very harsh result and not being able to recover from the loss suffered and their claims will be rejected for minor breach that has nothing to do with the loss. The old law was considered to be insurer friendly because it provided the insurer with various way to avoid liability, as a result the insurer was more powerful than the assured because they were able to avoid liability for a breach that is purely technical and the assured was not at fault sometimes due to lack of causation assessment. The basis of contract clauses empowered the insurer with the ability to use obscure language to create warranty term which eventually the breach of it will lead to the insurer to avoid liability without the awareness of the assured. The term warranties are highly important to the marine insurance contract yet under the old law they seem to be benefiting the insurer only and for the assured resulting in draconian consequences.

The current regime regulating breach of warranty resolved the major problem which arose before. The stiffness of the contract of basis clauses has been abolished, also the automatic discharge principle is abolished, the assured will no longer be left without cover due to breach of warranty instead the contract will be suspended until the breach is remedied. This mean that the assured has the option to go back to the cover and if he ratifies the breach. Furthermore, the causation factor was introduced under the new law, which mean that the insurer cannot reply on non-compliance principle to avoid liability if the non-compliance does not increase the risk of the loss. The reform under the IA 2015 introduce the law to govern substantive matter and try to focus on factual analyses rather than basing court decision on technical mistakes. The New Insurance Act is the biggest shake up of commercial insurance law in over a century, therefore just like any new legislation will create some uncertainties to the application of the law. This is common because new law lack case law hence lack guidance for the court to apply the rules.

The recent reform is more insured friendly than its predecessor which why it's reasonable to assume that the current regime regulating warranty law in English law will preserve the interest of the parties in insurance market better than before. The Enactment of IA 2015 will strike a better balance between the parties if marine insurance contract when breach of warranty occurs. Nevertheless, the study lack cases study to demonstrate the improvement in the industry however, the lack of case law is the symptom of new law as the IA 2015 was only enforced in 2016, at this stage we can only suggest that the current regime improved the position of the parties by analysing the position before the reform and comparing the

rules with foreign jurisdiction. Overall this paper holds the view that the current regime regulating breach of warranty strike a better balance between the parties of marine insurance contract.

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