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Reforming the Law on Warranties, Disclosures and Misrepresentation in Cypriot Marine Insurance: Should Cyprus Follow the UK's Insurance Act 2015?

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ABSTRACT

Since the establishment of the first Cypriot insurance company, the country has been relying on English common law in resolving marine insurance disputes. Due to the lack of Cypriot marine insurance legislation and the hap-hazard manner in which Cypriot Courts decide cases, the purpose of this study is to examine both the existing Cypriot Law and the UK equivalent on which it is based to determine the best possible legal development for Cyprus. The main focus of this thesis is the drafting of its own marine insurance legislation that should be considered as a priority because of the country's reliance on the maritime industry. This is important for two main reasons – firstly, legal, so that Cyprus can develop its own legal system for marine insurance and promote certainty for these commercial contracts, both during formation and during disputes. Second, by doing so, providing the parties involved in marine insurance with an up to date and country appropriate regime to rely upon. The reforms that the UK law has undergone will be of core value in the process of establishing the provisions that Cyprus should incorporate due to the historical reliance on UK rules. This will be achieved through focusing on the most controversial areas of the law namely warranties, misrepresentation and disclosure. The thesis focuses on evaluating the UK Insurance Act 2015 (IA) and asks whether Cyprus should follow this legislation or determine its own path. The background hypothesis however stands that Cyprus is in need of its own Marine Insurance Act and therefore the thesis' conclusion and proposed legislation takes into account all aspects of a marine insurance contract. Recommendations are posited towards drafting an Act for insurance contracts specific to marine adventures for Cyprus.

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CHAPTER 1

INTRODUCTION AND OVERVIEW

Introduction of the Research

The volume of maritime activities is an important indicator of a robust, strong economy around the globe, rendering the need for a strong and transparent legal framework for marine insurance law crucial. Insurance has been used for centuries as a means to protect oneself from a loss or damage of an unforeseen event in exchange for a payment; therefore, protecting the assured from losing everything. When dealing with a marine insurance policy, one should look at both the general legal framework and the specific terms of the insurance contract.¹ This is because one will have to interpret the contract terms to determine the extent of the insurance cover among other.² It is for this reason that a country should develop a legal framework of marine insurance that is clear and effective and sets the legal rules that the insurance cover will be based and applied upon.

The UK has been one of the leading countries in marine insurance, having developed the Marine Insurance Act 1906 that has set the example for many countries worldwide including Cyprus.³ The Cypriot marine insurance law is heavily based on the English common law and the judges have, since Cyprus' independence, been relying on English authorities when deciding matters of insurance contracts. The focus of this study is to assess

¹John Dunt, *International Cargo Insurance* (1st edn, Informa Law, Oxon: 2012) [5].

²John Dunt, *International Cargo Insurance* (1st edn, Informa Law, Oxon: 2012) [5].

³ Countries such as Canada, Australia and USA have been influenced by the MIA 1906.

the law governing marine insurance contracts in the island of Cyprus that finds its roots in the former MIA 1906. In assessing the effectiveness of these principles adopted from English law, one should consider the statement made by Anthoni Mandella that the survival of English insurance rules in Cyprus is mainly due to the laxity of Cypriot legislators.⁴ This laxity might explain the absence of a critical assessment of these adopted rules. The need to examine the fitness of these adopted principles becomes more evident when considering that England itself has now reformed its law and introduced new principles of fair dealing under the Insurance Act 2015 (hereinafter IA).

Four years after the reform, Cyprus still relies on principles that the UK has left behind and considered as archaic and imbalanced. Despite these indications the Cypriot legislators have made no efforts to improve the Cypriot law. There have not been any indications as to Cyprus' reaction to the reform while it remains unclear whether the Cypriot Courts will continue relying on the same (and thus out-dated) UK principles or move on to implement the new rules following the UK IA 2015. The crucial question that remains to be asked is: Should Cyprus automatically adopt the new principles introduced under the 2015 Act, leaving the eventual incorporation of the new regime to judges, especially considering the current legislation on the applicability of English law or implement legislation in its law?

Driven by the UK's decision to reform its law and the discussions on the need to reform the former UK MIA 1906 on which Cyprus' law is based, the study will propose that Cyprus should develop its own Act that would be specific to marine insurance and would

⁴Anthony Madella, 'Cyprus Maritime Law: Trends towards a Mixed System of Law' (2005) 58 RHDI 361 [376].

set the backbone for a strong insurance industry. The focus of this study is to reform the law on warranties, misrepresentation and disclosures (the latter two used interchangeably with the emergent concept of duty of fair representation) as they are the most controversial and important aspects of marine insurance and they have been criticised by the UK as being particularly problematic. An essential component of this task is taking a comparative approach with the legal developments in Australia.

Like Cyprus, Australia is a commonwealth jurisdiction that still follows the UK MIA 1906 that, has however, shown clear intentions to reform the law governing warranties, disclosure and misrepresentation. When it comes to insurance law, Australia has achieved an introduction of the Insurance Contract Act (ICA) and a Bill for reforming its Marine Insurance Act 1909 (MIA), which can set the backbone for an effective comparison of the rules. By examining the English MIA and IA and by using Australia as a comparison, suggestions will be posited for improving the law on marine insurance through the development of an efficient Cypriot Marine Insurance Contracts Act. After a detailed examination of the rules the study will conclude that the best solution is the development of Cyprus' Marine Insurance Contracts Act 202X (CMICA) that would address problems specific to marine insurance contracts.

Background to the Study

The current situation

As part of its history, Cyprus has absorbed many foreign influences political, cultural and legal. Since 1960 it has been an independent sovereign state and since 2004 a member of European Union, but even after years of codifications, the Cypriot courts still rely on English legislation. Cyprus has predominantly retained a common law legal system that has been passed on by Britain during the colonial era.

Despite the reliance on the UK law, Cyprus has managed to reform many areas of law and has developed legislation that has attracted a lot of attention. One example is Cyprus' Consumer Protection Regime that was guided by a "European light"⁵. Cyprus did not have any specific legislation on consumer protection until 2000, a thing that, as argued, led to a failure to address the various peculiarities and issues arising with regards to both types of transaction.⁶ Now, Cyprus has implemented the Consumer Rights Law of 2013 that promotes transparency and among other things provision of clearer information.⁷ Likewise, Cyprus has not adopted a comprehensive code specific to marine insurance law. Though generally the Insurance regulatory regime is governed by the Insurance and Reinsurance Services and Other Related Issues Law, ("the 2016 Law"), Cyprus does not have specific

⁵ Marina Himoni, Cyprus: Consumers' Protection Under Cyprus Law (2016) P. N. Kourtellos & Associates LLC

⁶ Marina Himoni, Cyprus: Consumers' Protection Under Cyprus Law (2016) P. N. Kourtellos & Associates LLC

⁷ *ibid.*

legislation that governs marine insurance.⁸ The 2016 Law specifically deals with the operation of insurance companies, which includes and is not limited to rules governing the registration of local insurance companies. The Act fails to incorporate rules governing insurance contracts as it focuses on the regulation of insurance companies⁹ leaving the rules on insurance contracts to be dealt under common law. Although this absence of a Cypriot Marine insurance Act has been acknowledged by a number of authors¹⁰ it seems that not many have questioned this tendency to follow English authorities in regard to insurance contracts nor the possibility of developing a clear insurance code for Cyprus.

British influence

The first insurance company in Cyprus operated during the colonial era, around 1925, where all insurance companies were registered in England under the English Insurance Law. It was not until 1969, after Cyprus' independence, that the country introduced the Insurance Companies law that allowed for the establishment of local insurance companies. Since the principles of insurance were only construed after Cyprus' independence and the Constitution of Cyprus does not retain or incorporate English rules developed after 1960, there is no law requiring the Judges to follow the English rules in the area of marine insurance. Nonetheless, English authorities are of persuasive effect and the Judges may use

⁸ Nigel Brook, *Insurance & Reinsurance, Jurisdictional Comparisons* (1st ed, Sweet & Maxwell, London: 2012)

⁹ Insurance and Reinsurance Services and Other Related Issues Law 2016

¹⁰ Antonis Glykis in Andreas Neocleous, *Introduction to Cyprus Law* (1st ed, Andreas Neocleous & Co LLC, Athens: 2010); Nigel Brook, *Insurance and Reinsurance: Jurisdictional Comparison*, (1st ed, Sweet & Maxwell, London: 201; Andreas Charalambides and Miltiades Miltiadou (ed), *Insurance Law*, (Insurance Association of Cyprus, 2018)

English common law when they deem fit to do so.¹¹ Cypriot Judges turn to English case law and legal texts¹² in resolving marine insurance disputes where no authoritative decision had already been settled by national law.

The old law of English Marine Insurance governed by the Marine Insurance Act 1906 was highly influential for many jurisdictions worldwide. Cyprus is one of the countries that, until today, “relies” on the English Marine Insurance Act 1906. In reality the persuasive effect of English Law exists because Cyprus has not really implemented any legislation on marine insurance contracts. The Constitution provides that the Cypriot Courts will apply the English principles enacted under British dominion when no local rules exist.¹³ This tendency of Cypriot Courts to follow English authorities is evident when looking at cases involving insurance contracts. One can attribute this to either the long-standing tradition to follow British laws, the reluctance of Cypriot legislators to reform basic laws,¹⁴ or both. Hence, in the absence of any legislation in regard to marine insurance, Cyprus’ common law is primarily based on the 1906 Act and subsequent decisions of the English common law with some interpretations from the Courts of Cyprus.

¹¹ *R v Blastland* (1986) AC 41 [58] (Privy Council decision in Ratten’s case, All ER 801 (1971)) (“Not technically binding” but “of the highest persuasive authority”)

¹² *Standard Fruit Co. (Berm.) Ltd. v Gold Seal Shipping Co. Ltd* (1997) 1 C.L.R. 464.

¹³ Courts of Justice Law, article 29(1)b.

¹⁴ Nikitas E. Hatzimihail, ‘Cyprus as a Mixed Legal System’ (2013), *Journal of Civil Law Studies*, Volume 6, Number 1 Article 3 [89] (such as the common law doctrine of privity of contract and third party rights).

The Issue

The varying nature of the Cypriot marine insurance law, being purely based on common law mostly derived from UK law, and the UK's decision to reform its law may lead to the eventual divergence from English law, that can even lead to cases producing different outcomes and therefore inconsistencies between cases. The current status of the Cypriot marine insurance law does not create the conditions for uniformity in decision-making and leads to commercial uncertainty. The decision not to implement any specific legislation along with the absence of critical presentation for Cypriot case law that lacks exhaustive and detailed analysis can often result in inconsistencies on a case-by-case basis and a general lack of clarity of the law. This is more evident when considering the size of the jurisdiction and therefore the limited availability of cases. It could even be disputed that Cyprus' reliance on English law is due to pragmatic reasons¹⁵ rather than going to the very essence of the law and pursuing a detailed analysis to determine the efficiency of the law for the country.

By implementing UK law, the Cypriot courts may automatically adopt the flaws of the law. This is because Cyprus has implemented the UK rules on warranties and non-disclosure and misrepresentation that have often been described as archaic and insurer-friendly that are now left behind by the UK. It is suggested that Cyprus has been following various rules of common law without any improvement in favour of the assureds, which may result in

¹⁵ Many British laws were adopted after the independence of Cyprus as a stage to facilitate a smooth transition until the country develops its own laws.

the assured having no cover without realising it.¹⁶ The need to examine the current law governing the insurance contracts in Cyprus is more pertinent when considering that even after the UK's reform, in Cyprus there exist no discussions or considerations for reviewing the law governing contracts and no relevant codes have been published.¹⁷ On the one hand not adopting the reformed rules would mean that Cyprus would remain in the past but on the other hand the decision to continue relying on English common law might inadvertently lead to the adoption of principles that Cypriot policy makers, might not necessarily agree with while creating further inconsistencies. It is, therefore, important to assess the law Cyprus follows that is heavily influenced by the MIA 1906 and compare it to the reformed English law under the general IA 2015 to find whether there is a legal basis for Cyprus to implement the English law and in doing so expose any legal issues, inconsistencies and obscurities of the current law.

Research Hypothesis

This study builds on the hypothesis that Cypriot Courts have been following English decisions that have not been tested, due to the limited availability of cases to test and interpret such rules, resulting in inconsistencies in legal reasoning and even uncertainty of the law. Cyprus has been following English authorities for decades in resolving issues of marine insurance without giving due consideration to the legal basis of the principles implemented. This study examines this tendency of Cypriot Judges to follow English

¹⁶ Andreas Charalambides, *Insurance Law*, (Insurance Association of Cyprus, 2018) [7/27]

¹⁷ Andreas Charalambides and Miltiades Miltiadou (ed), *Insurance Law*, (Insurance Association of Cyprus, 2018) [7/27]

authorities to determine whether the courts should divert from English Judgments.

The general assumption is that the common law principles that the Cypriot Courts have been following should be tested for a substantive development of the law. The study will conclude that there needs to be an understanding of the law to be able to develop an efficient regulatory regime that is best suited for Cyprus. The Cypriot reliance on the English rules means that in order to address the potential of new legislation for Cypriot law it is necessary and crucial that this thesis assesses the changes brought forward by the current reform of the English law. Given the fact that there is an uncertainty regarding whether or when the courts will adapt to this change and the lack of any enquiries or proposals for reforming the law of Cyprus, this study questions whether Cypriot Courts should proceed with the automatic adoption of the new English rules.

Incorporating the principles contained in the 2015 Act could eventually bring Cyprus in line with the UK law¹⁸ but would also mean the implementation of once again untested rules. Even if the Judges continue with the eventual incorporation of principles it will take years¹⁹ until these take effect and that will do nothing in dealing with the commercial uncertainty, on the contrary it could create further confusion. This is because the size of marine insurance disputes being distinctively small results in a slow development of the law due to the limited opportunities for the judges to express opinions and test doctrines. As a result the application of English decisions might be too gradual to achieve the changes

¹⁸ The UK and Cyprus still share the same common law structure and procedure.

¹⁹ This is because of the limited cases produced in Cyprus and the slow and time-consuming process of solving cases.

required. Considering these along with the reform taken by the UK would mean that legal development based on common law is not a viable proposition and instead a legislative intervention might be better. With the need to develop as an independent industry Cyprus should develop rules that would attract policyholders to insure based on a Cypriot Act. Given the current political realities it might be that the two countries will be looking at different investors with different needs while they share different economic markets and industries.

By assessing the different issues both legislative and legal the study concludes that drafting the Cypriot Marine Insurance Act is a real possibility and in fact a better solution. In the light of insufficient judicial decisions to form local jurisprudence in the area of marine insurance the study suggests the enactment of Cyprus' own legislation in order to counter decades of reliance on English authorities. The best viable way to address the current problem is through the centralised process of legislation that will then be subject to the interpretation by the local legislature. One that could help the country to develop on its own and shape its own legislation based on national, societal, political and economic factors. By developing a clear, well-structured legislation that offers predictability, the law would provide a clear and fair guidance for judges, a reference point for insurance lawyers, and brokers that could help advise their clients with certainty.

Scope and Delimitations of the Study

Legislation to address the uncertainty of the law

The wider scope of this study is a substantive development of the marine insurance law of Cyprus. In doing so the study needs to address legislative and legal issues of the current law along with potential substantive changes to Cypriot legal principles and how these could be implemented. The study will propose the establishment of a national MIA for Cyprus as a necessary development. The thesis aims to identify the legislation suitable for further developing the market in the direction of larger commercial risks. For a successful transplant, the law needs to be developed considering the market it is to serve. In Cyprus there is an ambition to increase the local marine insurance market and create reinsurance businesses to encompass larger international risks, especially post-Brexit in the context of the strong Cypriot business and shipping environment. Cyprus' insurance and shipping industries have shown a strong growth and are key to Cyprus' economy. Cyprus has the potential and the advantages²⁰ "to develop into an even greater pole of attraction for first-rate shipping companies both for countries within and outside the EU".²¹

Developing and improving Cyprus' MI law which is catered for Cyprus' needs and

²⁰ One of Cyprus' attracting points are the economic and fiscal advantages such as the low tax system.

Loizides, Andreas C., "Shipping in Cyprus" (1985), World Maritime University Dissertations, 1074.

²¹ A. Mavros, A.A. Pallis, K. Attikouris, K. V. George Vaggelas, Nikos Gotzias, Ioannis Koliouis, Stavros Patzaris, Kyriakos Christodoulou, "Improving The Competitiveness of The Cyprus' Shipping Cluster", (ECONSHIP, June 2015)
https://www.researchgate.net/profile/George_Vaggelas/publication/279954509_IMPROVING_THE_COMPETITIVENESS_OF_THE_CYPRUS_SHIPPING_CLUSTER/links/559f99b808ae424c1e6a89bb/IMPROVING-THE-COMPETITIVENESS-OF-THE-CYPRUS-SHIPPING-CLUSTER.pdf accessed 20/1/2021

characteristics will create the right conditions for creating a robust and competitive insurance industry. Even though the need for a specific legislation that applies to consumer needs to be addressed the thesis focuses on evaluating and suggesting law that deals with marine insurance disputes due to the fact that it would be impossible to deal with all the different types of risks. The thesis does not limit the application of the Act to consumers but the need for an Act (or parts of the same Act) which incorporates specialised provisions developed specifically for consumers is seen of importance and will be dealt in further research.

Forming an Act for Marine Insurance

Legislation for a Substantive Development

The study suggests collating existing rules by considering the current commercial realities²² and influences from other jurisdictions and codifying them in a statutory form that is in line with international standards.²³ When it comes to Cypriot laws, it has been acknowledged that further efforts need to be undertaken in the area of legislative drafting, and particular attention should be paid to the adequate implementation of the existing and particularly recently adopted legal instruments.²⁴ The study focuses on a substantive

²² “the common law is a living organism that should not be stifled by the past; its principles are intended to serve the ever-changing needs of society and should be interpreted in a diachronic perspective Savvas Theofanous v Cosmos (Cyprus) Insurance Co. Limited and Christodoulos Chrysostomou (1988) 1 C.L.R. 265 per Pikis JJ

²³ “The maritime law is not the law of a particular country but the general law of nations” Lord John Campbell, Lives of the Chief Justices, (1873-76) Vol. 3.

²⁴ European Bank, Commercial Laws of Cyprus, An assessment by the EBRD (2015) (European Bank, July 2015)

<<https://webcache.googleusercontent.com/search?q=cache:0az5HK0gf2MJ:https://www.ebrd.com/documents/legal-reform/legal-reform-in-cyprus.pdf+&cd=1&hl=en&ct=clnk&gl=uk>> [2] accessed 9 February 2019

development of Cyprus' marine insurance contracts law by implementing legislation. Suggestions will be posited towards a codification of a Cypriot Act that will not only promote commercial certainty but also, provide the needed flexibility for the law of marine insurance. It also, simplifies and modernises the law.²⁵ In making the aforementioned suggestions the study will be considering the English example in developing from a country with insufficient feudal laws to a country with the most influential legislation that attracts policyholders from all over the world and in particular the statement made by Adrian Leonard that "the success of English insurance depended considerably upon the certainty of applicable rules, [a] thing that was achieved only when common law managed to fully absorb insurance litigation during the eighteenth century."²⁶

Due to the limited availability of judgements this study suggests that Cyprus should introduce a statutory instrument in the form of a Code²⁷ that considers among others the English MIA 1906 and IA 2015. When the English MIA was introduced "merely reproducing existing law was the only accepted route while if a Bill when introduced proposing to effect changes in the law, every clause was looked at askance, and was sure to encounter opposition"²⁸. Nowadays, legislations in the form of a Code are becoming more popular. Due to the limited availability of cases in Cyprus and the international nature of maritime law Cyprus could do more than merely collating existing common law rules that are insufficient and out of date.

²⁵ Scarman, Leslie George 'Codification and Judge-Made Law: A Problem of Coexistence' (1967), *Indiana Law Journal*: Vol. 42, Issue 3, Article 3, [365]

²⁶ Adrian B. Leonard, *Marine Insurance: Origins and Institutions*, (1st ed, Palgrave Macmillan, 2016) [1300-1850].

²⁷ This is the terminology commonly used in Cyprus when referring about legislation but in essence Code means the same as an Act.

²⁸ Mackenzie Dalzell Chalmers, "An Experiment in Codification" (1886) Vol. 2 No. 6 LQR 125 [128-129].

While common law systems may provide flexibility, not having a statute or prescribed text containing a set of rules governing insurance contracts can lead to uncertainty of the law and injustices where no sufficient cases or analyses of the law are present. It is well accepted that “a strong espousal of commercial certainty is a fundamental principle of insurance law”.²⁹ As stated by Lord Mansfield “in all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon”.³⁰ This does not mean that a defective law should be developed but rather gives gravity to the need of certainty in the area of marine insurance law. This is because certainty³¹ in law provides predictability and consistency while it allows the parties in a contract to make informed decisions and therefore results in less policy disputes. A law needs to be clear, and consistent so that there is predictability.

Commercial uncertainty in a legal context may appear in two forms, first where some doubt remains unresolved over a substantial period of time³² and second when a “settled view” of the law is subsequently changed by the courts.³³ As Howard Bennet suggests “Businesspeople would rather have a clear rule that might operate harshly and against their

²⁹ Howard Bennett, ‘The Marine Insurance Act 1906: Reflections on a Century’ (2006) 18 SAclJ.

³⁰ *Vallejo v Wheeler* (1774) 1 Cowp 143, [153].

³¹ The need for certainty in commercial law is seen in Lord Mance, Should the law be certain? The Oxford Shrieval lecture (University Church of St Mary The Virgin, Oxford, 11th October 2011) https://www.supremecourt.uk/docs/speech_111011.pdf accessed 9 February, [3]

³² This can appear either because “the doubt is not the subject of litigation before the court or in the process of clarification, testing and interpretation that is represented by case law that does not claim to change the existing law but which carries implications for its reliability” MacNeil, I, Uncertainty in commercial law. EdinLR (2009) Vol 13 [70].

³³ MacNeil, I, ‘Uncertainty in commercial law’ EdinLR (2009) Vol 13 [70].

interests in a particular case than an unclear rule designed to produce a fair and equitable result in each case but that might require a lengthy and costly process to apply.”³⁴ Insurance contract law is one of those branches of the law where the ordinary citizen (eg assured, businessman) requires guidance so that he knows how to regulate his conduct and dealings.³⁵ Developing a prescribed statute means a compact, accessible, and complete formulation of the law³⁶ which involves the whole community (Parliament and Law Commission) rather than the shaping of the law by English lawyers,³⁷ and that is subjected to continuous review and revision.³⁸ It is also suggested that clearly articulated legal principles could potentially obviate the need for the, expense of litigation altogether.³⁹ Whilst certainty is an undeniably necessary component of insurance law, “an unbridled pursuit of certainty regardless of the merits of the particular case can be counter-productive.”⁴⁰ A perfect illustration of this statement is when considering the English rules on warranties, disclosure and misrepresentation as codified under the 1906 Act that, though certain and clear, created injustices when a breach of contract was immaterial.⁴¹ It is therefore, important to balance this need for certainty in commercial law and the fair treatment of cases, by introducing provisions that are clear and proportionate.

³⁴ Howard Bennett, ‘The Marine Insurance Act 1906: Reflections on a Century’ (2006) 18 SAclJ [673].

³⁵ Scarman, Leslie George ‘Codification and Judge-Made Law: A Problem of Coexistence’ (1967), Indiana Law Journal: Vol. 42, Issue 3, Article 3, [364]

³⁶ E. W. Maitland, *The Collected Papers of E. W. Maitland*, ed. H. A. L. Fisher (3 vols., Cambridge University Press, Cambridge: 1911)

³⁷ Hair, Way to Justice 40 (1941) per Judge Stephen; Scarman, Scarman, Leslie George ‘Codification and Judge-Made Law: A Problem of Coexistence’ (1967), Indiana Law Journal: Vol. 42, Issue 3, Article 3,

³⁸ Scarman, Leslie George (1967) “Codification and Judge-Made Law: A Problem of Coexistence,” Indiana Law Journal: Vol. 42 : Iss. 3 , Article 3 [367]

³⁹ Howard Bennett, ‘The Marine Insurance Act 1906: Reflections on a Century’ (2006) 18 SAclJ [671].

⁴⁰ Howard Bennett, ‘The Marine Insurance Act 1906: Reflections on a Century’ (2006) 18 SAclJ [674].

⁴¹ Baris Soyer, Malcolm Clarke, *The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law* (Informa Law from Routledge, 1st edition, Oxon: 2017)

Examining the Cypriot common law further supports that developing an Act is the most vital solution, due to the fact that there has been little development over the years and the rules have not been expanded upon by Cypriot judges while the old English rules are now crystallised in Cypriot law rendering it impossible to leave it to common law to develop. This is particularly true when considering that there will be no further development of those rules from UK as it is embarking on new rules.

Towards a Single Marine Insurance Act

The study questions the idea of creating a general insurance Act following the IA 2015.⁴² Creating an Act that provides rules for all non-consumer insurance may lead to incorporating over-simplistic and generic language that is not specific to marine insurance while allowing for too much flexibility leading to confusion and uncertainty. It would also, be wise to consider this argument in the light of the purpose of creating non-consumer insurances and the relevant subject matter. The general belief that there is nothing legally differentiating the subject matter of marine insurance to that of non-marine insurance⁴³ is based on the argument that there is no difference between ships and any other income-generating asset. This same argument would not apply when considering the case of life insurance. It is evident that the rules on marine insurance and general insurance seem to have some differences⁴⁴ such as the way the losses are classified and the burden of liability

⁴² The UK Insurance Act is not marine specific, nor it is business to business specific, but elements of the Act replace parts of the former UK MIA1906.

⁴³ Howard Bennett, "The Marine Insurance Act 1906: Reflections on a Century" (2006) 18 SAclJ [677].

⁴⁴ This is also, true in the context of consumer and non-consumer/commercial insurance.

of premiums that for marine insurance lies on the broker and not the assured.⁴⁵ The law on marine insurance was developed for the purpose of governing contracts relating to marine insurance but many of its provisions have been used in non-marine cases. The UK reform has introduced the general IA 2015 for addressing all types of commercial insurance but has also, retained many provisions of the former MIA 1906.

The study suggests that the CMIA should be separate to other fields of insurance and only address marine insurance contracts, while unlike the current English law, it should incorporate all provisions in one single Act namely the Marine Insurance Act 20XX. The retention of two different Acts at the same time applying to contracts of marine insurance (as in the case of the UK) might create confusion within the market while implementing legislation that applies to all types of insurance might be too broad leaving too much scope for interpretation. It would also be too risky and demanding to be able to examine in detail all Cypriot insurance law and produce a suggestion that will best serve all insurance contracts. This study focuses on providing a solution by promoting the development of the Marine Insurance Act that contains definitions and rules as implemented by the Courts of Cyprus following the English law but also, considering the reform made under the UK IA 2015 and the proposals made by Australia. There will be nothing in the Act prohibiting application to non-marine policies but the Act should be construed as applying to policies specific to marine insurance. The areas of focus in considering this development are the rules on warranties particularly the basis of contract clause and the lack of causation test and the rules of disclosure and misrepresentation particularly the good faith element. It is

⁴⁵ Howard Bennett, "The Marine Insurance Act 1906: Reflections on a Century" (2006) 18 SAclJ [677].

essential that these two duties form the core of this study as they are the key instruments that govern the rules of insurance contract that have been considered as problematic. To draw the background of this study, it is essential that the current position of Cyprus when looking at it in isolation and in relation to England is demonstrated.

Implementing the IA 2015 directly to Cyprus would no doubt be a less demanding task but drafting its own independent Marine Insurance Act taking into consideration the existing common law cases and international standards would arguably be better. Though the introduction of a MIA for Cypriot law specific to marine insurance cases is the ideal solution, the size of the jurisdiction and hence the limited case law in that area could suggest that for pragmatic reasons Cyprus should implement its own Act using the English example as a stepping-stone and retaining the structure of the UK MIA 1906.

Learning from the English Example

Why the UK

The tendency of Cypriot judges to follow English decisions requires us to analyse and thoroughly assess the 2015 changes to the UK law. Since UK law is the law on which Cypriot law is based it is, therefore, essential that a detailed examination, of the rules as developed by English courts, is undertaken along with any reforms done in order to develop a law that incorporates appropriate elements of legal and practical experience of maritime law. An important aspect of this study is also an examination of the English MIA 1906 that should set the basis for this development. The rationale for the focus on the English law

includes a number of considerations. The main point to be made is that Cyprus' law shares many characteristics with that of the UK. Focusing on English law and implementing an Act that incorporates the MIA structure and layout would mean the source of the law would remain the same rendering the provisions more readily identifiable.

Another consideration for the focus on UK law is that the MIA 1906 is undeniably considered as a highly influential statute⁴⁶ among Commonwealth countries while despite the negative attention given to the Act it still carries many advantages. The rules as set out under the MIA 1906 have been recognised and followed by many jurisdictions particularly the rules on warranties and duty on disclosure and misrepresentation. This is evident when considering countries such as Canada, Australia, Cyprus and some parts of America.⁴⁷ Many of the provisions of the MIA are applicable only in the absence of contrary intention therefore the Act promotes freedom to contract.⁴⁸ The Act promotes commercial certainty by providing clear principles that determine the likely consequences in the event of transgression while the rules governing insurance contracts are clearly articulated. When considering the rules on disclosure and misrepresentation one could not disagree with the fact that the rules were "on the whole framed with great skill, so as to express in very concise language the principles from which most of the law on the subject may be

⁴⁶ Kyriaki Noussia, *The History, Evolution and Legislative Framework of Marine Insurance in England* (2005) *Revue Juridique Neptunus/Neptunus Law Review* 11,1.

⁴⁷ This is evident from the adoption of the rules on warranties and disclosure in Canada and Australia in the MIA 1993 and MIA 1909 respectively; *Standard Oil Co.*, 340 U.S. at 55, 1951 AMC at 2-3; William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1564-69 (1984).

⁴⁸ The Law Commission Consultation Paper No 201 and The Scottish Law Commission Discussion Paper No 152, *Insurance Contract Law: Post Contract Duties and Other Issues*; The Law Commission and the Scottish Law Commission, *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 Disclosure* 2012 [14.51]

deduced’⁴⁹. This is also, indicative of the UK’s decision to retain the MIA and introduce the reformed rules under the IA 2015.

Even though the 1906 Act was carefully crafted in a clear and understandable manner, some of the terms hampered the ability of the Judges to develop the law⁵⁰ leaving it behind the changing commercial realities. The introduction of the IA 2015 attempts to solve this. The English and Scottish Law Commissions worked towards a reform that would bring a number of positive benefits affecting both policyholders and insurers⁵¹ and consequently the marine insurance industry as a whole. The Law Commissions intended for the new law to bring clarity, by developing provisions that are coherent and readily understandable and focused on reforming the pre-contractual duty of disclosure and the effect of warranties.⁵² The reformed provisions were designed to achieve a fair balance between the interests of insurers and policyholders, by ensuring that it meets their reasonable expectations while protecting the legitimate interests of insurers and not imposing undue costs or unnecessary restrictions.⁵³ The UK has reformed its marine insurance in three main areas of law creating the new Insurance Act 2015 that applies to all commercial contracts of insurance and reinsurance and variations to existing contracts of insurance.⁵⁴

⁴⁹ Sir Arthur Cohen, *The Marine Insurance Bill (1903)* 19 *Law Quarterly Review* 367, [372]

⁵⁰ Malcolm Clarke, Baris Soyer, *The Insurance Act, A new Regime for Commercial and Marine Insurance Law* 1st ed (Informa Law from Routledge, London: 2016) [3]

⁵¹ The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment*, Law Com No 353 / Scot Law Com No 238 (2014)

⁵² The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment*, Law Com No 353 / Scot Law Com No 238 (2014)

⁵³ The Law Commission and the Scottish Law Commission, *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment*, Law Com No 353 / Scot Law Com No 238 (2014)

⁵⁴ Generally, the Act applies to non-consumer insurance but parts of the Act can apply to consumers.

Specifically, the Act replaces the duty of disclosure and representation with a revised duty of fair presentation and brings more remedies other than avoidance for a breach of duty of fair presentation. The reformed law changes the element of good faith by directly linking it to misrepresentation leaving the application of the duty on non-disclosure unclear. It renders warranties as suspensive conditions a breach of which will not automatically and entirely terminate the cover and once the breach is remedied prior to the loss then no avoidance of cover will be allowed. An element of causation is now introduced that requires a connection with the loss for termination of the cover. Basis of contract clauses are abolished under the 2015 Act meaning that the parties cannot convert statements at a pre-contractual stage into warranties. The Act failed to address changes for the insurable interest though there were proposals for reform and a draft of an insurable interest bill.⁵⁵

The reform was indisputably a great work and response to develop a recent legal framework that takes into consideration criticisms and issues that have arisen due to the former legislation and the commercial realities of today's world. Instead of forming a UK "Marine Insurance Act 2015" the UK has introduced the Insurance Act 2015 that coexists with the former MIA 1906. The English law of marine insurance is now governed under both the IA 2015 and partially under the MIA 1906 while the Consumer Insurance Act 2012 is used for the definition of insurance contracts. The IA does not specifically address marine insurance issues but extends to apply to other forms of insurance with different risk or

⁵⁵ The Law Commission and the Scottish Law Commission, Reforming Insurance Contract Law Issues Paper 10 Insurable interest: updated proposals (March 2015)

subject matter.

Aim and Objectives of the Study

“A robust, profitable and competitive insurance industry enjoying citizens trust and which consistently upgrades its presence in the European market⁵⁶.”

The thesis finds that the Cypriot rules on warranties, disclosure and misrepresentation are not easily identifiable, while the law is uncertain and characterised with inconsistent application and borrowing of rules and questions how to adjust the rules to tend to this issue and whether following the IA 2015 introduced by the UK would address it. The main focus of the study is to take a legal perspective in addressing areas of improvement for the law of Cyprus in marine insurance to suggest that Cyprus should reform its law and develop a general and cohesive code in the form of a single Act that would incorporate the rules governing marine insurance contracts and would collate restatements, filling of gaps and consideration of principles as enunciated in UK and Australia. The primary consideration would be to examine the English reformed law to assess its adequacy and consider any implications of this change for Cyprus in order to demonstrate that this reform is a step towards the right path but, Cyprus should introduce its own legislation. The key questions stemming from this to be discussed and examined under the thesis are:

1. What constitute warranties, misrepresentation and disclosure under the Cypriot common law?

⁵⁶ Insurance Association of Cyprus (IAC)

2. What are the rules governing warranties, misrepresentation and disclosure under the English MIA 1906?
3. What are the legal remedies for breach of warranty and duty of disclosure and non-misrepresentation for Cyprus?
4. What are the rules governing warranties, misrepresentation and disclosure under the Insurance Act 2015?
5. How can Cyprus learn from the UK approach in introducing the causation test for warranties and proportionate remedies after a breach of the duty of fair presentation?
6. Should Cyprus automatically adopt the new principles introduced under the 2015 Act, leaving the eventual incorporation of the new regime to judges?
7. Should Cyprus abolish the basis of contract clauses?
8. Should Cyprus incorporate the English 2015 Act or implement its own legislation designed in accordance with the market it is to serve?
9. What are the key suggestions for improving Cyprus' marine insurance contract law?

Methodology of the Study

In pursuing answers to the aforementioned questions, the thesis incorporates a qualitative research of doctrinal, theoretical and comparative nature. It primarily takes a doctrinal (or black-letter) methodology. A doctrinal research may be defined as the research which 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts

future developments”.⁵⁷ The thesis undertakes a doctrinal analysis of the marine insurance legal framework and case interpretation in both Cyprus and England and Wales that will set the background of the study and exposes the problems of the Cypriot law through the means of legal reasoning by analogy⁵⁸. It specifically provides a rigorous, critical analysis of the UK law on warranties, disclosure and misrepresentation as codified in the MIA 1906. It then examines the wording and interpretation of the IA 2015 (law of England and Wales) in relation to the rules of warranties, disclosure and misrepresentation to assess their suitability for Cyprus’ marine insurance. The thesis takes a theoretical approach to show the need for reform and determine the set of principles that the Act should be based on. A comparative method⁵⁹ is adopted, in order to compare the rules incorporated under the IA 2015 to the former MIA 1906 and determine if its provisions are more effective and a better fit for Cyprus. It then compares them to the provisions incorporated under the Australian Insurance Contracts Act 1984 and the Australian Bill⁶⁰ (for reforming its marine insurance law), to make suggestions for drafting the rules on warranties and fair presentation for Cyprus.⁶¹ In drafting the Act, attention will be given to the approaches and interpretations taken by the courts of Cyprus but also, the UK and Australian courts. The draft will

⁵⁷ Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ [2012] 17(1) Deakin L. Rev. 83

⁵⁸ A (case-based) analogical reasoning: Keith J. Holyoak and Robert G. Morrison (ed) ‘The Cambridge Handbook of Thinking and Reasoning’ (2005) Cambridge University Press [117]. Ellsworth, Phoebe C. “Legal Reasoning.” In the Cambridge Handbook of Thinking and Reasoning, edited by K. J. Holyoak and R. G. Morrison Jr., 685-704. New York: Cambridge Univ. Press, 2005. [687-688]

⁵⁹ Mark Van Hoecke, 'Methodology of Comparative Legal Research' [December 2015] Law and Method

⁶⁰ A Bill introduced to reform its Marine Insurance Act 1909.

⁶¹ Mark Van Hoecke, 'Methodology of Comparative Legal Research' [December 2015] Law and Method

incorporate a combination of principles-based⁶², goals-based⁶³ and rules-based⁶⁴ regulatory approaches in order to establish a balance between rules and principles.⁶⁵ For instance, in defining terms that have myriad forms such as fraud or the causation test a goals-based approach would be deployed as it would be impossible to draft all the situations causative of the loss. Principle-based rules and goals-based rules allow for flexibility and leave some scope for interpretation by the courts.⁶⁶ Nonetheless, in situations where precision and clarity are needed to avoid flexibility (such as specific requirements or obligations needed to be followed) then a rules-based approach will be taken so that no room for avoiding such obligations is left.

Structure of the Study

The thesis will consist of eight main chapters. Chapter two of this thesis refers to the law of Cyprus and the current situation with regards to insurance contracts and in doing so will expose the link between Cyprus and the UK when it comes to resolving marine insurance cases. The chapter begins with providing a general presentation of the Cypriot law to provide some background to the structure of the law, which is essential in understanding

⁶² Julia Black, “Principle-based rules rely more on high-level, broadly stated rules or principles” Julia Black, Making a success of Principles-based regulation (May, 2007) Law and Financial Markets Review <https://www.lse.ac.uk/law/people/academic-staff/julia-black/Documents/black5.pdf> accessed 20/01/2021

⁶³ Involves broader principles that rely upon outcomes

⁶⁴ Involves more precise rules

⁶⁵ Christopher Decker, Goals-based and Rules-based approaches to Regulation, BEIS Research Paper Number 8 (May, 2018)

⁶⁶ Christopher Decker, Goals-based and Rules-based approaches to Regulation, BEIS Research Paper Number 8 (May, 2018) [9,21] ; Julia Black, The Rise, Fall and Fate of Principles Based Regulation, LSE Law, Society and Economy Working Papers 17/2010 [12]

the current legal framework and therefore, determine the appropriate law development for Cyprus. It briefly refers to the similarities between UK and Cyprus in terms of legal system and procedure and the reason behind these similarities. The chapter unmask the current law of marine insurance in Cyprus by looking at a case-by-case basis and then move onto analysing a number of Cypriot cases in order to show how the law of insurance is applied and interpreted in an attempt to clarify the current rules governing the law on insurance contracts. Due to the limited availability of cases it is important that both marine and non-marine cases are examined to expose legal issues with the current law and provide some clarity. With this in mind, the application of the Cypriot cases will be examined in order to show the extent that the Cypriot courts rely on UK judgments and expose the inconsistencies of the law. The study then exposes a pattern of Cypriot legislators' decisions to rely on English common law that are often based on habitual dispositions rather than looking at the doctrinal bases of the rules in question.

Since English law is the source of Cypriot marine insurance law it is essential to examine the English MIA 1906 along with the reformed IA 2015 so that Cyprus learns from the English example. The third Chapter deals with the development of the English law in the area of marine insurance. It begins by providing a historical account of marine insurance and then refer to the established rules setting out the law governing insurance contracts in order to provide a rigorous understanding of the law on which Cypriot law is based. Due to the wide range of aspects forming marine insurance law the focus of the thesis will be placed on the law on warranties and duty of fair presentation that may be characterised as the most controversial issues of UK Marine Insurance.

The fourth chapter of the study assesses the English provisions on warranties through case interpretation. The law of the warranties as codified in the 1906 Act will be analysed in order to compare it to the reform made in 2016, which brought into the picture the Insurance Act 2015. The chapter begins with identifying warranties by looking at the 1906 Act and the development of warranties through common law. It will then analyse the 1906 Act considering both academic literature and judicial interpretation to expose legal issues and in particular inconsistencies of the law. The main focus will be to assess the rules to show that the Cypriot law on warranties needs to be reformed and examining whether Cyprus should implement the new rules introduced under the IA 2015. Focus will be given on section 11 of the 2015 Act that introduces an element of causation that the author finds necessary and the abolition of basis of contract clause.

Chapter five assesses the English rules on disclosure and presentation by analysing the relevant case law. It begins by introducing the main concepts and definitions of disclosure and presentation to provide a general background and explanation of the rules. Subsequent chapters deal with analysing and comparing the former rules on non-disclosure under the 1906 Act with those introduced under the all-inclusive duty of fair presentation by the 2015 Act. The chapter focuses assessing the relation between the duty and the element of good faith in order to assess the effectiveness of the rules for Cyprus' law.

Chapter six of the study introduces the Australian example considering the attempts to reform its marine insurance that is based on English laws and looking at the already

reformed law on general insurance that shifted from the UK laws. The chapter compares the proposals as prepared by the Australian Law Commission for reforming its MIA 1909 to the UK's reformed IA to take a comparative approach that would be core for the drafting of the CMICA. The chapter provides the basis to question what Cyprus should do and whether it would be best for Cyprus to follow the 2015 Act or suggest that there is an alternative route that would be better suited for Cyprus based on the structure of the law and the country's particular system.

Chapter seven advances suggestions for reforming Cyprus' Marine Insurance law based on the deductions from the previous chapters. In proposing legislation, the study will focus on those elements of the English law that are applied by the Cypriot Courts while referring to any different interpretation taken by the courts of Cyprus. The study proceeds to conclude that Cyprus should introduce the Cypriot MICA that would have the English MIA layout with some variations by considering both the English and Australian example. The chapter then incorporates suggestions to forming the CMIA focusing on the law of warranties and duty of fair presentation.

Chapter eight will then provide a draft of what the Cypriot legislation/Act could look like followed by explanatory notes to the draft. The draft introduces a causation test and a number of structured and proportionate remedies following the English example. The study would be incomplete if it does not consider the element of good faith that has not been questioned under the Cypriot jurisdiction. The Cypriot courts have provided the mere definitions of good faith copied from English common law, but the actual test of good faith

has not been tested in practice. There should be clear rules on the extent of the application of this duty and how and to what level it applies.

Contribution and Significance

This study will be influential to the development of marine insurance law in Cyprus as it develops the law on warranties and duty of fair presentation. It will provide a reference point for Cypriot lawyers and brokers regarding the status of Cypriot marine insurance law and guidance as to the current law. The lack of sufficient academic literature alone in the field of marine insurance gives this study originality. It will stress to policy makers the need for clarity and consistency of the Cypriot law of insurance contracts in relation to warranties and disclosure. It then poses the question of whether Cyprus should automatically adopt the IA or continue relying on old law of MI. Following the reforms introduced under the English MIA that is the “mother” legislation for Cyprus’ law questions will be posed as to whether Cyprus should proceed with the automatic gradual adaptation of the common rules as they develop. The main argument of the thesis is the development of local legislation for Cyprus. The gap in the law of insurance will enable the writer to provide solutions to a problem that has not been identified. The study will make contribution in recommending legislative changes on the current law of Cyprus and advancing suggestions regarding the duty of disclosure, misrepresentation and warranties. By looking at similar jurisdictions this thesis provides a draft for Cyprus’ Marine Insurance Act in an attempt to fill the gap in the law created by the lack of a legislation governing the

law of marine insurance coupled with the uncertainty and inconsistency from following untested rules.

CHAPTER 2

CYPRIOT LAW

Introduction

This chapter identifies the general legal system and distinctive characteristics of the Cypriot law, to then provide an understanding of the law governing marine insurance contracts. The chapter exposes legal and judicial issues present in regard to marine insurance providing a practical insight of the current status of the law. An essential component of this study is looking into the absence of a Cypriot legislation governing insurance contracts along with the influence and link with English law to promote an understanding of the current situation. Due to the absence of specific marine insurance legislation and the limited availability of academic literature for Cyprus' marine insurance law, this chapter examines the existent case law in this area.

This chapter's aim is to expose the problematic nature of the current law due to the lack of clear provisions that may lead to inconsistencies in decision-making. At the core of this examination will be the law on warranties and rules on non-disclosure and misrepresentation that form the crucial components governing insurance contracts. One of the findings reached is the existence of an unconstrained discretion given to the Cypriot courts in deciding matters of marine insurance that might have resulted from the flexibility of the current law. The position to be taken is that insurance law should be neither restrictive nor narrow, since resolving contract disputes should be based on finding the real

intentions of the parties but at the same time it should not be too flexible, giving too much discretion to the Courts. The chapter brings to light the need to reform the current law so that a transparent framework governing insurance contracts specific to marine insurance is in place. Implementing fair and clear rules will provide a potential solution to these problems. The main argument for the need to develop an Act is that the law of marine insurance needs to be one that promotes consistency, clarity and predictability while being in line with overseas countries.

General Law

There exist relatively few publications on Cypriot law, and most are limited to the uncritical presentation of basic local case law⁶⁷. When it comes to law, one cannot leave unnoticed that Cyprus has shown little legal innovation over the years.⁶⁸ An obvious point to this argument is that Cyprus has maintained its common law system long after its independence from the British rule. Many can argue that this common law system retention was due to practical and wide considerations that suggested keeping the English legal system in the island would be best.⁶⁹ It could also, be that the common law rules have become and intrinsic part of the Cypriot legal landscape. Along with the common law system, the island retained a number of English laws in force at the time. This is evident when considering the Courts of Justice Law, which states that the legal framework in Cyprus consists of the

⁶⁷ Nikitas E. Hatzimihail, “Cyprus as a Mixed Legal System” (2013), *Journal of Civil Law Studies*, Volume 6, Number 1 Article 3 [57].

⁶⁸ Nikitas E. Hatzimihail, *Cyprus as a Mixed Legal System* (2013), *Journal of Civil Law Studies* Vol. 6, Number 1 [95].

⁶⁹ Yiannos Georgiades, *Cyprus: Introduction To The Cypriot Legal System & Civil Procedure* (2011) Georgiades & Mylonas Advocates 1.

Constitution of the Republic, laws retained by virtue of Article 188 of the Constitution and laws enacted by the House of Representatives⁷⁰.

The Cypriot law specifically states that in the absence of Cypriot national rules, the Courts of Cyprus should follow English laws and rules retained under the Constitution. This provision is contained under section 29(1) b of the Courts of Justice Law,⁷¹ which states that the Courts of Cyprus shall apply the laws which have been retained by virtue of Article 188 of the Constitution, the principles of Common Law and Equity and the English Laws which were applicable during the British dominion⁷² as long as they do not conflict with the Constitution or any laws passed by the Cypriot Parliament. Any legislation enacted in the UK after 1960 does not have any effect in Cyprus.⁷³ It is nonetheless, possible to use reference works and subsequent case law, to convince the Court into accepting that English law as modified by statute constitutes in effect English common law⁷⁴. Hence, even when the law does not say so there is a tendency for Cypriot Courts to follow English authorities. This legal influence by the English courts in matters of law can be explained when looking back at the British Colonial era in Cyprus, that will be further explained below.

English law has indeed played a significant role in the development of Cypriot legal system but is not the only one that left its footprints. There exists the notion that Cyprus is a mixed legal system as many countries have left their footprints while different legal

⁷⁰ Courts of Justice Law 14/60, section 29(1) b.

⁷¹ Courts of Justice Law 14/60, section 29(1) b.

⁷² Courts of Justice Law 14/60, section 29(1) b.; Yiannos Georgiades, *Cyprus: Introduction To The Cypriot Legal System & Civil Procedure* (2011) Georgiades & Mylonas Advocates.

⁷³ Courts of Justice Law 14/60, section 29(1)b.

⁷⁴ Vasilakis & Papasavvas, *Elements of Cyprus Law* (Sakkoulas Pubs. 2002), [50].

transplantations have been noticed over the time⁷⁵. Legal transplantation can be noticed from English as well as Greek laws⁷⁶ and nowadays one can notice that different areas of law follow different models; this can be seen when looking at private⁷⁷ as opposed to public law⁷⁸. One field of law that differs from the English law is the administrative law and this is because the administrative law and in particular the administrative law doctrine in UK has only been developed during 1958-1959.⁷⁹ Thus, Cyprus law did not have much influence from the English judicial review of administrative actions.⁸⁰ On the contrary, Cyprus has moved towards the German “continental administrative system” and now follows the Greek administrative model that was modelled based on the French model.⁸¹ Another area of law that has a continental orientation is that of public law⁸².

Cyprus’ legal system may be characterised as complex as many systems have influenced it, which takes us back to the argument that Cyprus may be seen as a mixed legal system.⁸³ It is also, observed that Cyprus’ judicial approach is characterised by a “traditional reliance on comparative methodology” making direct references to foreign jurisdictions.⁸⁴ This is

⁷⁵ Nikitas E. Hatzimihail, ‘Cyprus as a Mixed Legal System’ (2013), Journal of Civil Law Studies, Volume 6, Number 1 Article 3 [38].

⁷⁶ Nikitas E. Hatzimihail, Cyprus as a Mixed Legal System (2013), Journal of Civil Law Studies, Volume 6, Number 1 Article 3 [38].

⁷⁷ Mostly derived from English Law

⁷⁸ Has continental orientation such as the Greek Civil Code. Nikitas E. Hatzimihail, Cyprus as a Mixed Legal System (2013), Journal of Civil Law Studies, Volume 6, Number 1 Article 3

⁷⁹ Nikitas E. Hatzimihail, Cyprus as a Mixed Legal System (2013), Journal of Civil Law Studies, Volume 6, Number 1 Article 3 [91].

⁸⁰ Nikitas E. Hatzimihail, ‘Cyprus as a Mixed Legal System’ (2013), Journal of Civil Law Studies, Volume 6, Number 1 Article 3 [91].

⁸¹ Nikitas E. Hatzimihail, “Cyprus as a Mixed Legal System” (2013), Journal of Civil Law Studies, Volume 6, Number 1 Article 3 [91].

⁸² Nikitas E. Hatzimihail, “Cyprus as a Mixed Legal System” (2013), Journal of Civil Law Studies, Volume 6, Number 1 Article 3 [41].

⁸³ Nikitas E. Hatzimihail, “Cyprus as a Mixed Legal System” (2013), Journal of Civil Law Studies, Volume 6, Number 1 Article 3 [38].

⁸⁴ Kombos Constantinos, *The Impact of EU Law on Cypriot Public Law*, (Sakkoulas, Athens, 2015); Kombos C., Laulhé Shaelou S. (2019) *The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical*

evident when looking at Cypriot case law.⁸⁵

When looking at Cypriot case law it can be observed that the courts reach decisions without examining the legal basis and legal fundamentals of the rules in questions. In the case of *Paeuropean Insurance Co. Ltd* (2000)⁸⁶ the judge analysing the Australian case of *Esmeralda I* (1988)⁸⁷ derived originally from the case of Privy Council *Canada & Dominion Sugar Co. Ltd*⁸⁸ arrived at the conclusion that in the given case there was no proof that the goods were loaded so as to enable insurance cover. The judge had given no legal basis to this decision other than stating that “we regard the present case as falling within *The Esmeralda I*, since as a matter of interpretation and witnessing the effectiveness of the bill of lading it only proves that the container is loaded without reference to its contents only as alleged as such”⁸⁹. The other party tried to overturn the decision by using the case of *The River Gurara*⁹⁰ to argue that the phrase “said to contain” in the bill of Lading does not affect its probative value and it is a prima facie testimony. The argument was rejected, and the first instance decision was upheld.

Formation. In: Albi A., Bardutzky S. (eds) *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*. T.M.C. Asser Press, The Hague; Nikitas E. Hatzimihail, *Cyprus as a Mixed Legal System* (2013), *Journal of Civil Law Studies*, Volume 6, Number 1 Article 3

⁸⁵ Cypriot courts have not hesitated to refer in their judgements and apply cases from other Common Wealth jurisdictions such as Australia and Canada. *Republic v Alan Ford et al.*, (1995) 2 C.L.R. 232 (referring to “Canadian and American cases” regarding criminal procedure); *Jirkotis & Achilleos Co. Ltd. v Paneuropean Ins. Co. Ltd.*, (2000) 1 C.L.R. 537, citing *The Esmeralda I*, (1988) 1 Ll.R. 206 (Aus.), as well as English treatises (among ordinary civil appeals (three-justice panel))

⁸⁶ *Tzirkotis and Achilleos Ltd v Paeuropean Insurance Co. Ltd* (2000) 1A A.A.D. 537

⁸⁷ *The Esmeralda I*, (1988) 1 Ll.R. 206 (Aus.)

⁸⁸ *Canada & Dominion Sugar Co. Ltd. v Canadian National (West Indies) Steamship Ltd.* [1947] A.C. 46

⁸⁹ *Tzirkotis and Achilleos Ltd v Paeuropean Insurance Co. Ltd* (2000) 1A A.A.D. 537

⁹⁰ *Nigerian National Shipping Line Ltd v Owners Of Cargo Lately Laden On Board Ship “River Gurara”* [1997] 4 All E.R. 498

Cyprus' Reliance on English Laws

During the British dominion in Cyprus between 1921-1960, the British Empire had enacted “colonial laws” in an attempt to import English doctrines into Cyprus such as the common law and equity doctrines⁹¹. After Cyprus’ independence, the Cypriot Constitution held that any legislation enacted after 1960 does not have any effect in Cyprus. Even after Cyprus’ independence, there exists a tendency to follow English common law in many areas of law. Examples form Cyprus Criminal law,⁹² Procedural law and most of private law including Contract⁹³ and Insurance law.⁹⁴ The extent of such reliance can be seen when looking at the individual cases and how the judges solve each case by reference to English rules with no real legal explanation as to the decision to follow that rule. In implementing many of those rules the legislators at the time have not looked into finding a legal basis for implementing those rules but to facilitate the operation of the country’s legal system based on already existing English rules under which control, and resolution of disputes would be achieved. Until today, Cyprus still closely follows the English case law whereas statutes regulating business matters and procedure essentially rely on English legislation⁹⁶. This is

⁹¹ Yiannos Georgiades, *Cyprus: Introduction To The Cypriot Legal System & Civil Procedure* (2011) Georgiades & Mylonas Advocates.

⁹² “It is necessary to point out that the Courts of Criminal Jurisdiction in Cyprus have always since English control adopted the English law of evidence, subject to Cyprus statutory modifications”. *John Gilbert Sutton v The King* (No. 2). (1932) [175] per Stronge, C.J., Sertsios and Fuad, JJ. (Criminal case)

⁹³ Contract Chapter 149 of the Laws (1959) The Act specifically states that “this Law shall be interpreted in accordance the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English law and shall be construed in accordance therewith.”

⁹⁴ Nikitas E. Hatzimihail, *Cyprus as a Mixed Legal System* (2013), *Journal of Civil Law Studies*, Volume 6, Number 1 Article 3 [41].

⁹⁵ (Contract case law) “Our Rules correspond to the provisions of the English Rules of the Supreme Court” *Costas Mavromoustaki v Iacovos N. Yeroudes as Executor of the Will of The Deceased Spyros Michaelides* (1965) 1 C.L.R. 176 per Zekia, P., Vassiliades, Josephides, JJ.

⁹⁶ Yiannos Georgiades, *Cyprus: Introduction To The Cypriot Legal System & Civil Procedure* (2011) Georgiades & Mylonas Advocates.

particularly evident when looking at the retention of the common law system, the rule of law and the principle of judicial precedent.

In explaining the scope and origin of common law and specifically judicial precedent in Cyprus one can refer to the statement of Judge Stavrinides as expressed in his judgment in *Demetriades* case in 1974.⁹⁷ In the judgment it was enunciated that judicial precedent is regarded as source of law and the Courts are bound to follow the ratio decidendi (rule of law) of the decided cases; this binding effect is inherited from the English judicial system⁹⁸. He further explained this by stating that English Courts made a habit of following their previous decisions within more or less well-defined limits, and the part of the case that is said to possess authority is the rule of law upon which the decision is founded⁹⁹. In the judgment it was clarified that same as English Courts, Cyprus Courts are bound to follow their previous decisions and explained the meaning of judicial precedent as understood in England and in Cyprus.¹⁰⁰

The British legal influence can also, be seen when looking at statutory instruments introduced after Cyprus' independence. English laws dominated the reforms done in commercial and business sectors such as shipping law¹⁰¹. Examples that indicate the impact

⁹⁷ *Republic v Demetriades*, (1977) 12 J.S.C. 2102

⁹⁸ *Republic v Demetriades*, (1977) 12 J.S.C. 2102; *In the matter of Article 146 of the Constitution Constantinos Ioannides and Others v the Republic of Cyprus through the Minister of Finance, and the Commissioner of Income Tax* (1979) 3 C.L.R. 295 per Triantafyllides, P., Stavrinides, L. Loizou, Hadjianastassiou, A. Loizou, Malachtos, JJ

⁹⁹ *Republic v Demetriades*, (1977) 12 J.S.C. 2102

¹⁰⁰ *In the matter of Article 146 of the Constitution Constantinos Ioannides and Others v the Republic of Cyprus through the Minister of Finance, and the Commissioner of Income Tax* (1979) 3 C.L.R. 295 per Triantafyllides, P., Stavrinides, L. Loizou, Hadjianastassiou, A. Loizou, Malachtos, JJ income tax law case

¹⁰¹ Nikitas E. Hatzimihail, Cyprus as a Mixed Legal System (2013), Journal of Civil Law Studies, Volume 6, Number 1 Article 3 [38].

of English laws on Cyprus' statutory development include the introduction of the Sale of Goods Act 1994 that effectively copied the English Sale of Goods Act 1979¹⁰², the Trade Descriptions Law 1987 that replicates its 1968 English namesake¹⁰³ and the Copyright Law 1979 that is inspired by the English Copyright Act 1956. These examples show that Cyprus' law is closely linked to the English law in many areas even after Cyprus' independence.

Due to the distinctive nature of Cyprus' common law system, it is important to demonstrate the extent of reliance on English law. Cypriot courts draw a distinction between those rules that have been passed under British administration and are binding on the Courts and the common law rules that are purely of persuasive effect¹⁰⁴. It was clarified in the case of *Antonis Mouzouris*¹⁰⁵ that there was never an assumption that the decisions of the English Courts are binding on the Courts but rather that they are of great persuasive authority as illustrating the common law, which in theory is not changed by particular decisions¹⁰⁶. In reaching its decision the trial Court merely made a comparative analysis of the situation in England and based this on the fact that the English common law rules were the Rules on which the Cypriot Rules were modelled, with occasional changes and various modifications¹⁰⁷. It was then justified that reference to the English authorities is useful

¹⁰² L. 10(I)/94, replacing Cap. 267

¹⁰³ L. 2/87, as subsequently amended between 1987 and 2002.

¹⁰⁴ *In the matter of Article 146 of the Constitution Constantinou Ioannides and Others v the Republic of Cyprus through the Minister of Finance, and the Commissioner of Income Tax* (1979) 3 C.L.R. 295 per Triantafyllides, P., Stavrinides, L. Loizou, Hadjianastassiou, A. Loizou, Malachtos, JJ income tax law case

¹⁰⁵ *Antonis Mouzouris and Another Xylophagou Plantation Ltd* (1977) 1 C.L.R. 287 per Stavrinides, A. Loizou and Malachtos, JJ.

¹⁰⁶ *Antonis Mouzouris and Another Xylophagou Plantation Ltd* (1977) 1 C.L.R. 287 per Stavrinides, A. Loizou and Malachtos, JJ. [19].

¹⁰⁷ *Antonis Mouzouris and Another Xylophagou Plantation Ltd* (1977) 1 C.L.R. 287 per Stavrinides, A. Loizou and Malachtos, JJ. [19].

when construing Cyprus' legislative provisions whose origin is to be found in the English Legal system¹⁰⁸. This shows that English common law is of persuasive guide for Cypriot Judges and is highly influential when deciding cases but it is not binding. It is evident from a number of cases that Cypriot courts refer to English principles and decided cases but at the same time can come to different conclusion.

The extent of reliance on English law can also, be found in *Solomos Stylianou v The Police*¹⁰⁹ where the judge held that “[I] am of the view that, as a general rule, our Court should as a matter of judicial comity follow decisions of the English Courts of Appeal on the construction of a statute, unless we are convinced that those decisions are wrong.” Thus, emphasising the importance of recognising and enforcing UK's decisions as a matter of “judicial comity”. Another obvious example of English influence on Cypriot law is found when looking at the law of Contract and the law of Marine Insurance in its entirety.

Cyprus and the EU

Following Cyprus's accession to the EU in 2004, the Constitution was amended by the ‘Fifth Amendment to the Constitution Law 127(I)/2006’, which inserted Article 1A providing for the supremacy of EU law over national law¹¹⁰. European directives now harmonize many of Cyprus' laws towards a European integration.¹¹¹ It has been noticed

¹⁰⁸ *Antonis Mouzouris and Another Xylophagou Plantation Ltd* (1977) 1 C.L.R. 287 per Stavrinides, A. Loizou and Malachtos, JJ. [19]

¹⁰⁹ *Solomos Stylianou v The Police* (1962) 2 C.L.R. 152 per Josephides, J., [171] motor traffic case

¹¹⁰ Law No. 127(I)/2006, Official Gazette No. 4090, 28.7.2006, Annex I(I), [1372], available in English at [http://www.olc.gov.cy/olc/olc.nsf/all/EC240D2A9413ABBB4225793A00403484/\\$file/The%20Fifth%20Amendment%20of%20the%20Constitution%20Law%20of%202006.pdf?openelement](http://www.olc.gov.cy/olc/olc.nsf/all/EC240D2A9413ABBB4225793A00403484/$file/The%20Fifth%20Amendment%20of%20the%20Constitution%20Law%20of%202006.pdf?openelement).

¹¹¹ Nikitas E. Hatzimihail, “Cyprus as a Mixed Legal System” (2013), *Journal of Civil Law Studies*, Volume

that legislation adopted between mid-1990s and early 2000s appears to have been oriented towards preparing the country for European integration and implementing the community acquis.¹¹² This is demonstrated when looking at the only insurance legislation in Cyprus, the 2016 Law, which is directly affected by the European law amendments in order to align it with the European legal framework. Specifically, the 2016 Law implements the European Directive 2008/37 of the European Parliament and Council on reinsurance and amending European Directive 2005/68 of the European Parliament and Council on reinsurance and amending Council Directive 73/239 as well as Directive 98/78 and 2002/82¹¹³. Cyprus relies on English and EU legislation as well as International Conventions. Another harmonisation instrument for the transposition of the European Union Acquis includes the Merchant Shipping (Shipowner's Insurance for Maritime Claims) Law of 2012¹¹⁴ that was later replaced by the Merchant Shipping (Shipowner's Insurance for Maritime Claims).¹¹⁵¹¹⁶ Maritime law is after all the law of all nations¹¹⁷ and therefore, an international perspective needs to be taken.

Origins of Insurance Law in Cyprus

When it comes to marine insurance, no specific legislation for insurance contracts is

6, Number 1 Article 3 [61].

¹¹² Nikitas E. Hatzimihail, "Cyprus as a Mixed Legal System" (2013), *Journal of Civil Law Studies*, Volume 6, Number 1 Article 3 [61].

¹¹³ Andreas Neocleous & Co LLC Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides Cyprus, in Nigel Brook, *Insurance and Reinsurance: Jurisdictional Comparison*, (1st ed, Sweet & Maxwell, London: 2012).

¹¹⁴ Law 14(I)/2012 Gazette No. 4321, Supplement I (I), dated 9.3.2012

¹¹⁵ (Replacement of Schedule) Order of 2017 (Gazette No. 5008, Supplement III(I), dated 13.4.2017, P.I. 128/2017 EU Official Journal L 131, 28.5.2009. [128].

¹¹⁶ Cluster Regulation Unit of Directorate A' (Ship Registry, Competitiveness and Regulation) of the Shipping Deputy Ministry List of Cyprus Merchant Shipping Legislation and Related Matters (2019)

¹¹⁷ John Campbell, *Lives of the Chief Justices*, (1873-76) Vol. 3.

currently in place but, the cases are decided on a case-by-case basis following English common law and the English MIA 1906. This chapter's aim is the examination of the law of marine insurance contracts in Cyprus. When it comes to insurance contracts the Cypriot courts have been relying on English rules and until today a strong link between Cyprus and English law exists in the area of marine insurance. Nonetheless, the English rules are not binding and deciding cases may vary where there are pre-existing Cypriot rules as developed by the Courts of Cyprus. Since, nothing separates marine to non-marine insurance cases in Cyprus, the study will identify the general legal framework of insurance law to show the current status of Cyprus' marine insurance law.

The insurance industry in Cyprus was established in 1925. At that time there were three associations representing the insurance industry, namely the Fire Insurance Association, the Marine Insurance Association and the Accident Insurance Association¹¹⁸ yet all insurance companies were still registered in England until 1969 when the necessary law was passed and allowed the establishment of local insurance companies in Cyprus¹¹⁹. All insurance companies that were originally operating in Cyprus, were mainly agents of British companies registered in the UK and operated under English law¹²⁰. This can be explained by the fact that Cyprus had a relatively small jurisdiction with small number of cases. The three branch associations came together in 1976 as one representative body.

¹¹⁸ Andreas Neocleous & Co LLC Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides Cyprus, in Nigel Brook, *Insurance and Reinsurance: Jurisdictional Comparison*, (1st ed, Sweet & Maxwell, London: 2012) [89].

¹¹⁹ Antonis Glykis in Andreas Neocleous, *Introduction to Cyprus Law* (1st ed, Andreas Neocleous & Co LLC, Athens: 2010) [615].

¹²⁰ Andreas Neocleous & Co LLC Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides Cyprus, in Nigel Brook, *Insurance and Reinsurance: Jurisdictional Comparison*, (1st ed, Sweet & Maxwell, London: 2012)

Now, the Insurance Association of Cyprus is the main trade Association and representative body for the insurance industries in the island.¹²¹

Long after its independence, Cyprus established the first regulatory regime for insurance that were the Insurance laws of 1984-1990¹²², which were soon to be reformed in 2002 under the so-called 2002 Law¹²³. The law applied to all insurance companies within or outside the Republic and contained rules on the operation of the companies. The Insurance Services and other Related Issues Law (or 2002 Law) came into force on 1 January 2003, expressly abolished the Insurance Laws 1984-2001 and thoroughly revised the system of insurance administration¹²⁴. In 2008, four years after the country became a member of the EU, another reform brought a change to the 2002 Law that is now referred to as the 2002-2008 Law (Insurance Services and Other Related Issues Law) and was introduced to help the law harmonise within a European framework in implementing the EU Directive 2005/68 on reinsurance and amending the Directives 73/239, 98/78 and 2002/83. The 2016 Law of Insurance Reinsurance Services and other related Issues that came into force in 2016 was later introduced to abolish the 2002-2013 Law that was then amended in 2017 to incorporate the EU directive 2009/138 EC on the taking up and pursuit of the business of Insurance and Reinsurance (Solvency II).

The 2016 Law regulates the issues relating to the taking-up, pursuit and supervision of

¹²¹ Insurance Association of Cyprus <http://www.iac.org.cy/easyconsole.cfm/id/7> accessed 7 February 2019

¹²² Available http://www.mfa.gov.ir/uploads/insu_companies_regulations.pdf

¹²³ 2002 Law, s.230.

¹²⁴ Andreas Neocleous & Co LLC Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides Cyprus, in Nigel Brook, *Insurance and Reinsurance: Jurisdictional Comparison*, (1st ed, Sweet & Maxwell, London: 2012)

insurance and reinsurance services and the taking-up, pursuit and supervision of insurance mediation services and other related issues¹²⁵. All insurance activities in Cyprus are regulated by the general insurance 2016 law that encompasses the rules and regulations that govern and regulate the companies with activities in the field of insurance. Insurance or reinsurance undertaking operating in or from Cyprus need to be licensed under article 14 or 305 of the Insurance and Reinsurance services and Other Related Issues Law of 2016-17. A European undertaking can also operate in Cyprus under the Freedom of Establishment or the Freedom to provide services.

The objects of the 2016 Law are: taking up and pursuing of the private activities in the Republic, the supervision of clubs and business, the consolidation and liquidation of insurance undertaking and the taking up and pursuing of mediation work in the Republic and supervision of natural or legal persons who carry out mediation work¹²⁶. The legislation incorporates rules that govern the taking-up and pursuit of self-employed activities of insurance and reinsurance within Cyprus, rules governing the supervision of insurance and reinsurance undertakings and groups, rules governing the reorganisation and winding-up of direct insurance undertakings, the taking-up and pursuit within the Republic of mediation activities and the supervision of natural or legal persons undertaking mediation activities¹²⁷. Part 1 of the Act incorporates definitions of terms used therein and introductory provisions explaining the scope of the Law. Under article 4 the Law is responsible for supervising the operations of insurance undertakings and the

¹²⁵ 2016 Law

¹²⁶ 2016 Law

¹²⁷ 2016 Law, Part 1

implementation of the Insurance Law and its associated regulations. The Act provides guidance over the rules governing general insurance and reinsurance businesses by defining relevant insurance concepts and providing rules for companies on life and non-life insurance separating and showing the differences between the two.

The Act strictly incorporates rules governing insurance and reinsurance companies and all relevant matters but does not include rules governing insurance contracts. The Act states that “the applicable law for insurance contracts falling within the scope of application of article 7 of Regulation (EC) No 593/2008 on the law applicable to contractual obligations is determined by the provisions of the said Regulation”¹²⁸. Article 7 strictly applies to contracts of direct insurance with the exemption of life insurance and states that a contract shall be governed by the law chosen by the parties in accordance with article 3 of the regulation.¹²⁹ If the law has not been chosen then the applicable law shall be the law of the country where the insurer is located. If the contract is manifestly more closely connected with another country, the law of that other country shall apply. Article 3 of the Regulation states that a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract¹³⁰.

¹²⁸ 2016 Law, s.220; Official Journal of the E.U. L.177. 4.7.2008, [6]

¹²⁹ 2016 Law, section 7(2).

¹³⁰ 2016 Law, section 3(1).

The MIA 1906

The rules governing marine insurance contracts were enacted as a transitory measure upon Cyprus' Independence Day until the country develops its own national laws¹³¹. Until today even after many codifications, the law of Cyprus especially regarding marine insurance is still to a great extent based on English law with some interpretations of the common law cases. This can be observed when looking at the different cases that apply English common law rules when no national provisions are in place¹³².

The English Marine insurance Act was enacted in 1906 during the period that Cyprus was still under British dominion. Cyprus did not have an insurance industry at the time but, even after the establishment of the insurance industry in 1925 no legislation was developed regulating insurance contracts. Evidently, Cyprus has adopted the UK rules of marine insurance on a case-by-case basis and is continuing to do so. This is shown in the fire insurance case of *Andreas Savvides*¹³³, which held that the decision of the case rested on applying one of the two English cases one for each of the parties. The appellant's case rested in the authority of *G. W. Young and Co. (Limited)*¹³⁴ while the respondent's case rested on the general principles of *Levy v Assicurazioni Generali*.¹³⁵ After hearing both arguments and based on English principles of insurance, Judge Zekia came to the conclusion that *Levy's* case was more relevant as it contained provisions almost identical

¹³¹ Anthony Madella, 'Cyprus Maritime Law: Trends towards a Mixed System of Law' (2005) 58 RHDI 361 [376].

¹³² (Discussed below)

¹³³ *Andreas Savvides Kapatais v The London & Lancashire Insurance Co. Ltd.*, (1959) (V24) 1 CLR 66

¹³⁴ *G. W. Young and Co. (Limited) v Scottish Union and National Insurance Company* 24 T.L.R. 73

¹³⁵ *Andreas Savvides Kapatais v The London & Lancashire Insurance Co. Ltd.*, (1959) (V24) 1 CLR 66

to the one into consideration. Relying on *Levy's* case the Court held that the assured is expected to prove positively the cause of fire, or that the abnormal conditions could not in any reasonable probability have caused the fire, and not rely on mere denial to the effect that his case does not fall within the excepted perils.¹³⁶ This is one of the cases¹³⁷ that indicate that Cyprus' marine insurance was developed almost entirely on English principles and rules.

Cyprus' Marine Insurance Law

Cyprus' maritime law is presenting itself to be a mixed legal system. Important maritime law statutes are inspired from international jurisdictions other than British but other areas of maritime law such as marine insurance took a path towards Anglicisation of the law as British influences prevailed overall. According to Anthony Madella, the insurance rules as developed at the time of Cyprus' independence were borrowed from English common law as a transitory measure until Cyprus developed its national laws.¹³⁸

Current Issue

Cyprus retains the English rules but the limited case-law and critical presentation of cases in the country makes it hard to clearly establish the current law. All English common law

¹³⁶ *Levy v Assicurazioni Generali* (1940) 3 All E.R. 427 PC [429-430].

¹³⁷ More cases to be discussed below.

¹³⁸ Anthony Madella, 'Cyprus Maritime Law: Trends towards a Mixed System of Law' (2005) 58 RHDI 361 [376].

rules will apply in Cyprus provided that they do not conflict with the Constitution or any Cypriot rules passed after the independence of Cyprus while common rules prior to Cyprus independence are to be retained¹³⁹.

Currently, Cyprus' marine insurance law is not governed in a comprehensive manner by any statute but questions of marine insurance are resolved on a case-by-case basis by looking at English common law cases for inspiration. To examine whether this creates any legal gap in the law of Cyprus one should look at the current insurance framework along with a number of insurance cases. An attempt will be made to demonstrate the current law regarding insurance contracts for maritime disputes by analysing different Cypriot cases. Considering the small number of cases present the study will do so by referring to other insurance cases, that will be facilitated by the fact that Cyprus has not separated its marine insurance cases from other insurance cases. This is evident from the fact that rules derived from life insurance cases are applied to marine insurance cases¹⁴⁰ and vice versa. The study will assess the problematic nature of the current law that is more evident when considering that the only regulation on insurance namely the 2016 law distinguishes life insurance to non-life insurance. It is important to first identify how Cyprus defines the main concepts of insurance before referring to the different rules governing the law of warranties and duty of disclosure and representation that will form the basis of this study.

¹³⁹ Courts of Justice Law 1960, Number 14.

¹⁴⁰ *Klitos Mavrides v Cannon Insurance Ltd.* (1983) 1 J.S.C. 36

Defining Key Concepts

Prior to examining the Cypriot case law it is important to identify the key principles governing marine insurance contracts. The Law on Insurance Services and other Related Issues of 2002¹⁴¹ defines insurance to be the carrying of an insurance business that include insurance, reinsurance and mutual insurance¹⁴². A more extensive definition provided by Glykis is the effecting and execution by an insurance undertaking of contracts with respect to credit guarantee bonds, execution of contract bonds, administration bonds, release from prison guarantee bonds, custom clearance bonds, or guarantee contracts of a similar nature, as long as these are effected as part of an insurance undertaking's business, in exchange for the payment of a premium and not merely as part of non-insurance business carried on by the party effecting them¹⁴³. By insuring the property, the risk is transferred from the party seeking for insurance onto the person undertaking the insurance in exchange for a payment; that is the premium. Marine Insurance covers the loss or damage of ships, cargo, terminals, and any transport or cargo by which property is transferred, acquired, or held between the points of origin and final destination.¹⁴⁴ The law of marine insurance governs the principles with which the ship-owners and businessmen can insure their goods or ships that would protect them against dangers of the sea and other disasters that could potentially result to damages of goods, ship or even a total loss.

Insurance Contract

¹⁴¹ Insurance Services and Other Related Issues Law 2002.

¹⁴² Insurance Services and Other Related Issues Law 2002, s.2.

¹⁴³ Antonis Glykis in Andreas Neocleous, *Introduction to Cyprus Law* (1st ed, Andreas Neocleous & Co LLC, Athens: 2010), [620]

¹⁴⁴ Birds J., *Modern Insurance Law*, (3rd ed., Sweet & Maxwell, London:1993), [32].

Cypriot common law recognises an insurance contract as a contract of indemnity¹⁴⁵. The 2016 law identifies an “insurance contract” as a contract governed by the Cypriot Contract Law¹⁴⁶, between the insurance company and one or more insured persons, regardless of whether an insurance policy document is issued, relating to the provision of insurance coverage for one or more sectors of those referred to in the two annexes of the Law¹⁴⁷. An insurance policy is the document evidencing the conclusion of an insurance contract that can be issued by an insurance undertaking or by a third-country insurance undertaking¹⁴⁸. An insurer is identified as a Cypriot insurance company or any other undertaking that has as an objective the carrying on of insurance business.¹⁴⁹ Any person capable of contracting may enter into an insurance contract, including an infant if it is for his benefit¹⁵⁰. When entering into an insurance policy for a legally binding agreement to be formed there needs to be an offer¹⁵¹ and an acceptance while consideration to enforce a contractual promise is a necessary component. The prepayment of insurance does not count as an acceptance of insurance.¹⁵² The intention to create a legal relationship is a prerequisite for the drawing up of a binding contract¹⁵³ while the term “subject to contract” is not enough to create a legally binding agreement¹⁵⁴. When acceptance of a contract of insurance is subject to

¹⁴⁵ *Royal Crown Insurance Company Ltd v Trust International Insurance Company (Cyprus) Ltd* (2017) No 3688/16 per J M. Theoklitou

¹⁴⁶ Contract law Act 1959 Cap. Chapter 149.

¹⁴⁷ The Insurance and Reinsurance Services and Other Related Issues Law of 2016 (Law 38 (I) / 2016) EU, Para (I), No. 4561, 11/4/2016

¹⁴⁸ 2016 Law

¹⁴⁹ Insurance Services and Other Related Issues Law 2002, s.2.

¹⁵⁰ International Insurance Law and Regulation (15:8) [612].

¹⁵¹ *Christodoulou Barnaba v Alico* (2015), Pol. Appeal 49/2010.

¹⁵² *Prince v Alico* (2005) 1 CLR 280.

¹⁵³ John Birds, *Modern Insurance Law*, (2nd ed., 1988) [53]; Antonis Glykis in Andreas Neocleous, Introduction to Cyprus Law (1st ed, Andreas Neocleous & Co LLC, Athens: 2010) [727].

¹⁵⁴ *ibid.*

condition there will be no contract until that condition is performed¹⁵⁵.

Another requirement for an insurance contract is included under sections 126 and 127 of the Insurance Law requiring insurance policies to be worded clearly and precisely, in an official language of Cyprus or another official language of a member state of the EU or the EEA, as long as the policyholder has made a written request or as long as the policyholder has a right to choose the law applicable to the insurance contract¹⁵⁶. The detailed matters to be included in each type of policy are determined by the Superintendent and published in the Insurance Regulations. The remedies available for breach of an insurance policy are damages for breach of contract, return of the premiums paid and interest on the premiums.

To determine when the insurance cover starts having effect will depend on the interpretation of insurance terms on a case-by-case basis.¹⁵⁷ In interpreting insurance contracts Judge Nathanael upheld that insurance policies are to be interpreted like any other document in accordance with the rules of interpretation in relation to commercial or consumer contracts.¹⁵⁸ This is to attribute the parties' intentions to the relevant text and words used in order to find the meaning that the text would convey to the reasonable and prudent person who possesses all the information that was reasonably available to the parties in their state when entering into the contract.¹⁵⁹ Where there is ambiguity or doubts

¹⁵⁵ *Takis Xenopoulos v Thomas Nelson (Insurance) Ltd and Others* (1982) 1 C.L.R. 674, 682).

¹⁵⁶ 2016 Law, s.126, 127

¹⁵⁷ *Interamerican Life Insurance Company v Georgiou Ompasi and others* (1992) 1 CLR 369.

¹⁵⁸ *Lipoti, as a property manager of the deceased's property Eleftheriou Georgiou Pountziouri v Ecclesiastical Insurance Office Plc and G.A.P. Vassilopoulos Insurance Agencies Ltd, Alico American Life Insurance Ltd* (2019) 42/2013 per Judge Nathanael D. citing *Investors Compensation Scheme Ltd v. West Bromwich Building Soc.* (1998) 1 W.L.R. 896; *Laiki Asfalistiki Eteria Ltd v Vlachou and Makride* (2019) Pol. Ef. 194/213

¹⁵⁹ *Lipoti, as a property manager of the deceased's property Eleftheriou Georgiou Pountziouri v*

in the terms used then the applicable law would be that the ambiguous terms would be interpreted against the party preparing the text whereas a party seeks to rely on exceptions or conditions containing exceptions can only succeed if the concept emerging is purely the result of a rational interpretation of the term.¹⁶⁰

The focus of this chapter is on two of the most important and controversial components of an insurance contract namely the warranties, the duty to fully disclose all the relevant information and not to misrepresent and good faith. This is because of their power in a contract to render it void ab initio or voidable. For a complete understanding of the rules governing marine insurance contracts the chapter briefly refers to the insurable interest, which will not be examined under this study. The concepts are derived from English common law (because of the political and legal situation of Cyprus when the insurance industry was first created) and are, to this day, very similar if not identical to the English principles.

Duty of Disclosure and Misrepresentation

As in English law, the purchaser of insurance or reinsurance is obliged to disclose information about the risk to the insurer and present the risk fairly¹⁶¹ and a failure to do so

Ecclesiastical Insurance Office Plc and G.A.P. Vassilopoulos Insurance Agencies Ltd, Alico American Life Insurance Ltd (2019) 42/2013 per Judge Nathanael D. citing *Investors Compensation Scheme Ltd v. West Bromwich Building Soc.* (1998) 1 W.L.R. 896 citing Nicholas Legh-Jones, John Birds, David Owen in MacGillivray *on Insurance law* (11th ed., Sweet&Maxwell, UK: 2008) [309-311]

¹⁶⁰ *Lipoti, as a property manager of the deceased's property Eleftheriou Georgiou Pountziouri v Ecclesiastical Insurance Office Plc and G.A.P. Vassilopoulos Insurance Agencies Ltd, Alico American Life Insurance Ltd* (2019) 42/2013 per Judge Nathanael D.

¹⁶¹ Antonis Glykis, Cyprus European Reference Series 87, [90]

on the part of the assured will enable the insurer to terminate the contract¹⁶² while keeping the premium.¹⁶³ The assured is under the obligation to disclose at a pre-contractual stage all material facts within his knowledge that the insurer is deemed to not know¹⁶⁴. Non-disclosure may be defined as the intentional or unintentional failure of a party to disclose to the other party a fact known to him and unknown to the other party, knowledge of which would have influenced the other party's decision in entering into the contract or entering on more favourable terms¹⁶⁵. If the assured is aware of an event or fact that may affect the insurance company's intention to take on that particular risk or the insurance company's intention to charge a specific premium for the insurance coverage, he is obliged to disclose that fact.¹⁶⁶ As adopted by Cypriot courts citing English academic textbooks, for a representation¹⁶⁷ to render the contract void it must be substantially false, material to the risk or an operative inducement to the risk.¹⁶⁸ The actual inducement test was adopted by the case of *PanEuropean v Eretria* case.¹⁶⁹

The case of *Panagiota Panteli v Prime Insurance* holds that facts that the Court would objectively regard as material but not limited to include: all facts suggesting that the subject matter of insurance exposed to more than ordinary danger from the peril insured against, all facts suggesting that the proposed assured is actuated by some special motive, all facts

¹⁶² Antonis Glykis in Andreas Neocleous, *Introduction to Cyprus Law* (1st ed, Andreas Neocleous & Co LLC, Athens: 2010) [730]

¹⁶³ *Koula Paschali v Proodeftiki Insurance Company Ltd* (2008) 1 CLR 69.

¹⁶⁴ International Insurance Law and Regulation (15:8) [612]

¹⁶⁵ Andreas Th. Charalambides, *Legal Aspects of Insurance in Cyprus* (Insurance Institute Cyprus, Nicosia, 1989), [4].

¹⁶⁶ *Panagiota Panteli v Prime Insurance Co Ltd* (2017) DCN 289/2012

¹⁶⁷ Antonis Glykis in Andreas Neocleous, *Introduction to Cyprus Law* (1st ed, Andreas Neocleous & Co LLC, Athens: 2010) [729].

¹⁶⁸ MacGillivray and Parkington on Insurance Law (8th ed 1988) [216]

¹⁶⁹ *PanEuropean Insurance Company Ltd v Eretria Leisure Cruises Ltd* (1998) 1(B) CLR 1072

showing the liability of the insurers might be greater than would normally be expected, all facts relating to the moral hazard and all facts which to the knowledge of the assured are regarded by the insurer as material.¹⁷⁰ If the assured fails to disclose a term, which the Court finds to be material then, the contract of insurance would be voidable enabling the insurer to void it¹⁷¹. Instances where the Courts allowed for the contract to be voided include the non-disclosure of the assured of his previous convictions in a motor insurance case¹⁷², the non-disclosure of previous eye operation for removal of myopia¹⁷³, the non-disclosure of ring placement for weight loss and its removal due to sepsis in a life insurance case¹⁷⁴, the misrepresentation of the real date of birth of the assured¹⁷⁵ and the non-disclosure of previous fire arson conviction.¹⁷⁶

Many non-life policies contain a condition entitling either party to cancel the policy by giving notice to the other party, and a clause permitting immediate cancellation would be valid.¹⁷⁷ Where an insurer alleges that he was induced to issue the policy by reason of fraud, misrepresentation or non-disclosure on the part of the insured, he is entitled to apply to the court, on discovering the facts, for an order that the policy be delivered up to be cancelled.¹⁷⁸ The right of cancellation, whether on the ground of fraud, misrepresentation

¹⁷⁰ *Panagiota Panteli v Prime Insurance Co Ltd* (2017) DCN 289/2012

¹⁷¹ Antonis Glykis in Andreas Neocleous, *Introduction to Cyprus Law* (1st ed, Andreas Neocleous & Co LLC, Athens: 2010) [729].

¹⁷² *Elpida Charalambous v Progressive Insurance Co Ltd* (2015) CLR 4102/2008.

¹⁷³ *Kyriacou Fafalios v Laiki Cyprialife Ltd* (2015) CLR 8794/2007.

¹⁷⁴ *Panagiota Panteli v Prime Insurance Co Ltd* (2017) CLR 289/2012

¹⁷⁵ *Konstantinos Chatzikleanthous v Laiki Cyprialife Ltd* (2013) CLR 5697/08.

¹⁷⁶ *Sylvia Soteriou v PanCyprian Insurance Company Ltd* (2006) CLR 1541/04.

¹⁷⁷ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', *European Lawyer Reference Series* 87 [95]

¹⁷⁸ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', *European Lawyer Reference Series* 87 [95]

or non-disclosure, is based on the fact that the policy is thereby voidable ab initio.¹⁷⁹ The power of the court to declare the contract void and to order cancellation of the policy only exists where the contract is void ab initio by reason of a defect existing when the contract was made.¹⁸⁰ Similarly, where the insured alleges that it was induced to enter into the contract contained in the policy by similar conduct on the part of the insurer or its agents, it is entitled to apply to the court for an order rescinding the contract.¹⁸¹ The burden of proving this rests upon the insured.¹⁸²

For an insurer to have a successful claim under section 15(2) of the Third-Party Insurance Law, he must prove that the policy in question was obtained by non-disclosure or misstatement, that is to say, that the contract, which was obtained would not have been obtained if the non-disclosure or misstatement had not occurred¹⁸³. The misrepresentation must be of a fact known or which ought reasonably to have been known by the insured at the time it answers the questions in the proposal form¹⁸⁴. The burden of proving that the proposer has made a misstatement in the proposal form lies on the insurance company.¹⁸⁵

Utmost Good Faith

¹⁷⁹ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', European Lawyer Reference Series 87 [95]

¹⁸⁰ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', European Lawyer Reference Series 87 [95]

¹⁸¹ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', European Lawyer Reference Series 87 [95]

¹⁸² Andreas Neocleous & Co LLC Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides 'Cyprus', European Lawyer Reference Series 87 [95]

¹⁸³ Andreas Neocleous & Co LLC Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides Cyprus, in Nigel Brook, *Insurance and Reinsurance: Jurisdictional Comparison*, (1st ed, Sweet & Maxwell, London: 2012).

¹⁸⁴ *Commercial Union Assurance (Cyprus) Ltd v Costas Stavrides* (1981) District Court of Nicosia J.S.C. 1-2.

¹⁸⁵ *Commercial Union Assurance (Cyprus) Ltd v Costas Stavrides* (1981) J.S.C. 1-2.

A contract of insurance is a contract of uberrima fides.¹⁸⁶ There is a recognised duty of utmost good faith and fair dealing implied for insurance contracts as established by the English courts and followed by Cypriot law but the issue was not really tested by the courts of Cyprus.¹⁸⁷ In a life insurance case the Judge held that if the assured fails to act in good faith to disclose the essential facts regarding his health then the policy becomes voidable at the choice of the insurance company¹⁸⁸. The insurer may treat the contract as voidable where the assured failed to disclose or misrepresented material facts, because of fraud or any violation of the utmost good faith on the part of the contractor¹⁸⁹. If the insurer breached a term of an insurance contract, he may be liable to pay damages for breach of contract, return of the premiums paid and interest on the premiums.¹⁹⁰ In reality the issue of good faith has never been questioned in a Cypriot Court but the significance of this duty in insurance law is well acknowledged. Since we are unable to test the applicability of the duty by analysing Cypriot cases and since the duty is derived from English laws, one could look at the application of the duty by reference to English cases. The English MIA regarding the duty of utmost good faith has been reformed and a breach of the duty no longer entitles the insurer to terminate the contract.

Warranties

¹⁸⁶ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', European Lawyer Reference Series 87 [90].

¹⁸⁷ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', European Lawyer Reference Series 87 [94].

¹⁸⁸ *Panagiota Panteli v Prime Insurance Co Ltd* (2017) DCN 289/2012

¹⁸⁹ *Mima Sevastos allos Mima Sevastou v Universal Life Insurance Public Company Ltd* 364/2015 [30]

¹⁹⁰ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', European Lawyer Reference Series 87 [91].

Warranties under Cypriot law may be found in three ways, the explicit warranties that are normally explicitly worded in the contract, the implied by law warranties (for marine insurance contracts only) and the ones that exist because of a basis of contract clause¹⁹¹. A warranty is a term of the contract that if in breach by the assured, will automatically discharge the insurer from his obligations.¹⁹² Under Cypriot law where the accuracy of the statements becomes the basis of the contract there will be no need to examine whether the inaccurate fact is material or not or whether the assured knew or not the truth.¹⁹³ Warranties are for insurance contracts an essential part because they are those terms that include a promise, which controls the risk undertaken by the insurer¹⁹⁴. Like in English law the strictness of the nature of warranties can be observed under Cypriot cases by reinstating that a warranty must be strictly complied with.¹⁹⁵ Even if the loss is immaterial to the breach and the breach is waived before the loss occurred the insurer may refuse to continue with his obligations and repudiate the contract.¹⁹⁶ The purpose of the warranty's existence is immaterial.¹⁹⁷ Failure to comply with a warranty would result in the automatic termination of the contract (void ab initio), but the assured may waive this breach of warranty if he wishes.¹⁹⁸ For the assured to prove that the insurer waived the breach of

¹⁹¹ Andreas Charalambides and Miltiades Miltiadou (ed), *Insurance Law*, (Insurance Association of Cyprus, 2018 [8/5].

¹⁹² *Mima Sevastos allos Mima Sevastou v Universal Life Insurance Public Company Ltd* 364/2015 [30]

¹⁹³ *Condogiannis v Guardian Assurance Co* 90 LJPC 168.

¹⁹⁴ *Mima Sevastos allos Mima Sevastou v Universal Life Insurance Public Company Ltd* 364/2015 [30]

¹⁹⁵ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', European Lawyer Reference Series 87 [94].

¹⁹⁶ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', European Lawyer Reference Series 87 [94].

¹⁹⁷ Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, 'Cyprus', European Lawyer Reference Series 87 [94]

¹⁹⁸

contract he needs to show that the insurer had appropriate and complete knowledge of the facts in breach and that he waived his right either by an explicit order to do so, a conduct that indicated his wish to not be discharged from liability, or a delay that affects the assured or any third parties' rights¹⁹⁹. Cyprus still follows the old rules on warranties and no criticisms were made as to the applicability and strictness of the rule. After understanding the application of warranties under Cypriot law that is similar if not identical to that of the older UK law, it will be possible to consider following the English reform to address issues of the law.

Insurable Interest

Another important component of marine insurance contract is that of insurable interest. Under the current law, in the case that the person seeking insurance lacks the necessary insurable interest the contract will be deemed as void due to the fact that is illegal.²⁰⁰ An insurer may refuse to pay the claim where the assured lacks the necessary insurable interest.²⁰¹ For a successful insurance claim the assured needs to have an insurable interest in the insurance property, a requirement that was originally introduced under the English MIA 1746 to prohibit gambling and wagering during a marine adventure. For Cyprus's law, in the absence of specific rule for insurable interest the provisions under the MIA 1906 will take effect and therefore, every person interested in marine adventure will be

¹⁹⁹ *Michalakis Pavlou v Egis Insurance Company Ltd* (2001) Case No 7780/97.

²⁰⁰ Antonis Glykis in Andreas Neocleous, *Introduction to Cyprus Law* (1st ed, Andreas Neocleous & Co LLC, Athens: 2010) [728]; John Birds, *Modern Insurance Law* (2nd ed. 1988) [72]; Marine Insurance Act of 1745, (19 Geo. II), c. 37, § I (Eng.).

²⁰¹ *ibid.*

considered to have an insurable interest. As defined under the MIA 1906, a person is interested in a marine adventure where he stands in “any legal or equitable relation to the adventure”²⁰² or to any insurable property at risk in it, in consequence of which they may benefit by the safe or due arrival of the property, or may be prejudiced by its loss, by damage to it or by the detention of it or may incur liability in respect of it.

Nowadays, there exist criticisms as to the ambiguity of the rule and its importance within marine insurance law. The rule imposes the requirement that the assured is somehow “connected²⁰³” to the insurable property but the extent of this connection still remains unclear. Further confusion around insurable principle was created with the introduction of the Gambling Act 2005²⁰⁴. It is suggested under the English law, that insurable interest was originally intended to define which parties have the right to insure a specific subject matter and not to determine whether or not an insured party would be able to recover²⁰⁵ therefore creating questions as to the necessity of such a principle²⁰⁶. The decision in *Feasey v Sun Life Assurance Corporation of Canada*²⁰⁷ sparked a debate about whether a new approach should be taken when defining or addressing matters of insurable interest²⁰⁸. In the case it was said that the words “legal or equitable relation to the adventure” are “intended to be a broad concept”.²⁰⁹

²⁰² Section 5(1) of the Marine Insurance Act 1906

²⁰³ Graham Douds, 'Insurable Interest in English Marine Insurance Law: Do We Still Need It' (2012) 25 USF Mar LJ 323

²⁰⁴ Law Commission and Scottish Law Commission, Insurance Contract Law: Insurable Interest Extract (2015) LCCP 201 / SLCDP 152 (Post Contract Duties and other Issues)

²⁰⁵ D. Rhidian Thomas, *Marine Insurance The Law in Transition* (15th ed., Informa, London: 2006) [17]

²⁰⁶ D. Rhidian Thomas, *Marine Insurance The Law in Transition* (15th ed., Informa, London: 2006) [17]

²⁰⁷ [2003] E.W.C.A. Civ. 885, [2003] Lloyd's Rep. I.R. 637.

²⁰⁸ Antonis Glykis in Andreas Neocleous, *Introduction to Cyprus Law* (1st ed., Andreas Neocleous & Co LLC, Athens: 2010 [614].

²⁰⁹ [2003] EWCA Civ 885, [2003] 2 All ER 587, [97].

Third Party Insurance

For questions of third-party insurance, Cyprus has implemented the Motor Vehicles (Third Party Insurance) Law 2000²¹⁰, in an attempt to harmonise its law with the European Union Directives. Such questions are addressed in section 4(3)(b) of the Third-Party Insurance Law, which is identical to section 36(4) of the English Road Traffic Act 1930 and states that:

‘Notwithstanding anything in any Law contained, a person issuing a policy under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons.’

Application in Cypriot Cases

Since most of the Cypriot private law remains common law,²¹¹ it is impossible to understand the law of insurance without examining and analysing the relevant cases as developed in Cyprus. Similarly, to the UK, the Cypriot common law shapes in a great extent the country’s legal system.²¹² Due to the absence of a written legislation for marine insurance issues, Cyprus marine insurance law is based on common law, most of which is

²¹⁰ Law 96(i) 2000

²¹¹ Nikitas E. Hatzimihail, ‘Cyprus as a Mixed Legal System’ (2013), *Journal of Civil Law Studies*, Volume 6, Number 1 Article 3 [95].

²¹² Nikitas E. Hatzimihail, ‘Cyprus as a Mixed Legal System’ (2013), *Journal of Civil Law Studies*, Volume 6, Number 1 Article 3 [85]

derived from English common law principles that were codified by the UK in the MIA 1906. As a result, the English Marine Insurance Act 1906 provides the foundation and structure for the Cypriot marine insurance law, but the Cypriot case law actually shapes it with the interpretations and the application of the relevant provisions. This chapter will focus on analysing Cypriot cases specific to the law on warranties and non-disclosure and misrepresentation to expose legal issues and show that there is a substantial gap in the law.

Marine Insurance

When looking at a case-by-case basis one can easily detect the extent of reliance on the English courts. On many occasions, the Judges of Cyprus restate and establish English common law rules as cited by the Judges in English courts. Many English rules that applied in Cyprus law during British dominion still apply even after Cyprus independence in 1960. The Cypriot courts primarily rely on English authorities, with the exemption of some rules or approaches taken by the courts of Cyprus, which means that when there is a pre-existing Cypriot authority, that national rule will prevail.²¹³ In the insurance case of *Savvas Theofanous v Cosmos (Cyprus) Insurance Co. Limited and Christodoulos Chrysostomou*²¹⁴, it was clearly stated that:

“...the Cypriot courts are not strictly bound by decisions of English Courts unless, of course, they reflect a principle of the common law, objectively identifiable by Cyprus Courts, in which case the principle of the common law is applicable in Cyprus as a matter

²¹³ *Charalambos Andreou Mavrides and others v American Life Insurance Co* (1984) 1 C.L.R. 611

²¹⁴ *Savvas Theofanous v Cosmos (Cyprus) Insurance Co. Limited and Christodoulos Chrysostomou* (1988) 1 C.L.R. 265 per Pikis JJ

of statutory law making the common law part of the law of the country²¹⁵”.

The statement emphasises that English common law rules are not generally binding on the courts of Cyprus. An English common law case may be regarded as binding if the decision reflects an existing Cypriot common law rule due to the fact that the Courts of Justice Law holds that the principles of Common Law become part of Cyprus’ law. The case further highlighted that English common law might not have a direct binding effect on the Courts of Cyprus, but they have a highly persuasive effect. Decisions of superior English Courts including the Privy Council are of high persuasive authority in areas of the English common law that find application in Cyprus.

For defining a contract of insurance under Cypriot law one should look at the recent Cypriot case of *Mima Sevastou*. The case identified that insurance contracts have peculiarities, thus distinguishing them from general contracts.²¹⁶ The special nature of insurance contracts comes from the nature of the contract itself and as the case explains they involve “contracts through which one party undertakes the risk of an uncertain event that is outside his/her control that will happen in the future and for which the other party will have benefit and where contractually the first party is obliged to pay a sum of money or something equal if that uncertain event occurs”.²¹⁷ The case then describes those instances that allow an insurer to refuse to pay the insurance claim that are at the centre of the insurance contract law²¹⁸ and therefore, important aspects of the contract.²¹⁹ Instances that allow the insurer

²¹⁵ Courts of Justice Law 14/ 60, s.29(1)(c)

²¹⁶ *Mima Sevastos allos Mima Sevastou v Universal Life Insurance Public Company Ltd* 364/2015 [25].

²¹⁷ *ibid.*

²¹⁸ *Mima Sevastos allos Mima Sevastou v Universal Life Insurance Public Company Ltd* 364/2015 [26].

²¹⁹ *There are also, situations where the contract will be deemed void when the contract was to be used for*

to refuse to pay the claim include where the contract is void, voidable or void ab initio when it involves the initial application of insurance contract such as a breach of warranty from the insurer.²²⁰

The case of *Kyriacos Savva*²²¹ identifies the different terms that exist in a marine insurance contract. The Cypriot common law distinguishes between terms that are related to the validity of the contract, a breach of which results in giving the right to the insurer to cancel the policy from the beginning²²²(e.g. a breach of warranty) and terms related to issues typically arising after the contract, but before any loss occurs a breach of which will render the contract voidable.²²³ There are also terms governing the parties' relations after the loss or damage is caused in relation to the secured property, e.g. an obligation to provide details and evidence to the insurer.²²⁴ It is clear from the English case-law and followed by the Cypriot courts that a breach of such terms, which may be described as 'innominate terms'²²⁵ rather than 'conditions precedent', does not automatically lead to the right to cancel the contract but merely to the suspension of the right to compensation²²⁶. In reviewing the law on insurance contracts, warranties should be at the core of examination.

illegal purpose though this is not very common. Mima Sevastos allos Mima Sevastou v Universal Life Insurance Public Company Ltd 364/2015 [28].

²²⁰ *Mima Sevastos allos Mima Sevastou v Universal Life Insurance Public Company Ltd* 364/2015 [27].

²²¹ *Kyriacos Savva v Laiki Asfaltistiki Eteria Ltd.* (2009) 1B CLR 1609 [1624-1625].

²²² *Kyriacos Savva v Laiki Asfaltistiki Eteria Ltd.* (2009) 1B CLR 1609 [1624-1625].

²²³ *Kyriacos Savva v Laiki Asfaltistiki Eteria Ltd.* (2009) 1B CLR 1609 [1624-1625].

²²⁴ *Kyriacos Savva v Laiki Asfaltistiki Eteria Ltd.* (2009) 1B CLR 1609 [1624-1625]; Such terms are normally expressed as a pre-condition for compensation or an annulment of the right to compensation.

²²⁵ The principles for innominate terms were set out in the English case of *Introduced Honkong Fir Shipping Co. ktd. V Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

²²⁶ *Kyriacos Savva v Laiki Asfaltistiki Eteria Ltd.* (2009) 1B CLR 1609 [1624-1625]

Warranties and Basis of Contract Clause

As previously mentioned, when it comes to the law on warranties and the duty of fair presentation the Cypriot Courts adopt rules and reinstate positions expressed in English common law cases and textbooks. The study will use examples of Cypriot case law to show this in practice and in doing so demonstrate the current status of the law on insurance contracts. Because of the limited availability of marine insurance cases involving disputes on insurance contracts the paper will refer to judgments from different fields of insurance. This will be facilitated by the fact that the Cypriot law makes no differentiation between marine insurance and general insurance treating all cases the same under the same rules even when it comes to life insurance. The first set of cases will consider the status of warranties in Cypriot law.

To provide a better understanding of insurance warranties and their importance in insurance contracts it is crucial that they are distinguished from those of general contractual warranties. The Cypriot common law provides a clear distinction separating insurance warranties from general warranties under contract law. In a general non-insurance contract terms can be distinguished from essential terms that are the conditions and as simple or non-essential terms or terms of secondary importance that are the warranties.²²⁷ For insurance contracts that are characterised as contracts of utmost good faith there exist more

²²⁷ The term of “secondary importance” has been firstly used in *Lamprias v Chrysos & Sia* (1992) 1A CLR 281

specialised rules.²²⁸ In *Kyriacos Savva v Laiki Asfalistiki Eteria Ltd*²²⁹ the distinction between warranties and conditions when it comes to a general contract and a contract of insurance was further explained. For insurance contracts, due to the risk of making false claims, there are usually terms that tend to protect insurers from fraud. For this reason, insurance policies include terms that impose specific obligations on the assured, so that the insurer is fully aware of the risk it takes, as well as of the event in the event of a claim.²³⁰ Many of these terms in insurance contracts are conditions precedent because of their importance in entering into the contract.²³¹ In the case the court held that a notification clause amounted to an innominate term and not a condition precedent and therefore the insurer's liability for the specific claim should be suspended. The insurer could not repudiate the whole contract. The judge gave the reasoning that a breach of such term should not give rise to the same consequences as a breach of a condition precedent would be due to the fact that it was not deemed as significant²³² (the clause was regarding the passing of information after the incident).

Another case with similar facts was that of *Demco Insurance Ltd*.²³³ In the case, the insurer refused to cover the losses arising from a car accident on the basis that the assured was in breach of a term of the contract²³⁴. The Court was occupied with mainly two questions:

²²⁸ *D.C.R. Discount Car Rentals Ltd (HE185988) v Demco Insurance Limited* (HE 57305) (2018) No 2588/2012

²²⁹ *Kyriacos Savva v Laiki Asfalistiki Eteria Ltd*. (2009) 1B CLR 1609 [1624-1625].

²³⁰ *Kyriacos Savva v Laiki Asfalistiki Eteria Ltd*. (2009) 1B CLR 1609 [1624-1625].

²³¹ *Kyriacos Savva v Laiki Asfalistiki Eteria Ltd*. (2009) 1B CLR 1609 [1624-1625].

²³² The term used was in Greek language and can both be defined as significant or material, thus creating some uncertainty.

²³³ *D.C.R. Discount Car Rentals Ltd (HE185988) v Demco Insurance Limited* (HE 57305) (2018) No 2588/2012

²³⁴ *D.C.R. Discount Car Rentals Ltd (HE185988) v Demco Insurance Limited* (HE 57305) (2018) No 2588/2012

whether the assured was indeed in breach of term 4 of the contract for not notifying the insurer immediately after the accident and whether that term amounted to condition precedent or an innominate term. In this case as opposed to the case of *Kyriacos Savva*²³⁵, the court decided that the insurer was discharged from his liability to pay the claim. The court held that such term was characterised as significant and a condition precedent in that it would allow the proper investigation of the incident from the insurers, thus allowing the insurer to refuse to pay the claim. The reasoning behind the decision to divert from the judgment in *Kyriacos Savva*²³⁶ was that according to the judge, the wording used in the latter case stipulates strict compliance.²³⁷

The same case clarifies that interpreting legal documents is primarily the work of the Court.²³⁸ The Courts of Cyprus will apply the “*verba fortius accipitur contra preferentem*” interpretation principle that applies only in cases where there is ambiguity²³⁹. This principle, which is adopted by the Cypriot case law as set out in the MacGillivray on Insurance Law²⁴⁰, applies where there is ambiguity in the language used in an insurance policy. In such a case the contract is interpreted more strongly against the contracting party, that is most commonly the insurance company²⁴¹. The principle was firstly adopted in the case of *Xenopoulos v Thomas Nelson*²⁴². The reasoning behind the decision is that a party

²³⁵ *Kyriacos Savva v Laiki Asfalistiki Eteria Ltd.* (2009) 1B CLR 1609 [1624-1625].

²³⁶ *Kyriacos Savva v Laiki Asfalistiki Eteria Ltd.* (2009) 1B CLR 1609 [1624-1625].

²³⁷ *D.C.R. Discount Car Rentals Ltd (HE185988) v Demco Insurance Limited* (HE 57305) (2018) No 2588/2012

²³⁸ *D.C.R. Discount Car Rentals Ltd (HE185988) v Demco Insurance Limited* (HE 57305) (2018) No 2588/2012 Also, see. *Halfdan Grieg v Stirling Coal Corpn* [1973] 1 All E.R. 545 (Kerr, J.); *Panayiotou v. Island Beach Development* (1985) 1 C.L.R. 623; *Karaoli and others v Laouri* (2008) 1A CLR 225.

²³⁹ *PanEuropean Insurance Company Ltd v Christinas Glyki*, (1998) 1 CLR 1639.

²⁴⁰ Evan James MacGillivray, *MacGillivray & Parkington on Insurance Law* (2nd edn), [1029]

²⁴¹ *PanEuropean Insurance Company Ltd v Christinas Glyki*, (1998) 1 CLR 1639

²⁴² *Xenopoulos v Thomas Nelson (Insurance) Ltd A.O.* (1982) 1 C.L.R. 674.

drawing up a document cannot be allowed to use vague words in the hope that the other side will perceive them in a specific way, and that the Court, which will ultimately have the duty of interpretation will give them a different meaning.²⁴³ The general rule holds that when the wording is unclear it needs to be interpreted in a manner in which a diligent and reasonable man on the opposing side would understand it,²⁴⁴ but such rule cannot be used to create ambiguity where it does not exist.²⁴⁵ Where the wording is neither ambiguous nor unclear then the intention of the parties as it was expressed with the wording used prevails.²⁴⁶

In *Kyriacos Agathangelou*²⁴⁷ the issue of warranties in insurance policies was applied in practice. In the case the assured was in breach of the warranty contained in clause 13 limiting the time for enforcing rights thereunder. The Judge turned down the assured's argument that the contract should not be cancelled because the clause was merely a warranty and not a condition.²⁴⁸ Citing *Colinvaux*,²⁴⁹ the court held that "a warranty in a policy of insurance corresponds with a condition in any other contract, and breach of it entitles the party aggrieved to repudiate his liability under the rest of the contract"²⁵⁰. Looking at this, one can conclude that a breach of warranty for the purpose of Cypriot law entitles the insurer to be discharged from his liability and has an effect identical to that of

²⁴³ *PanEuropean Insurance Company Ltd v Christinas Glyki*, (1998) 1 CLR 1639

²⁴⁴ *PanEuropean Insurance Company Ltd v Christinas Glyki*, (1998) 1 CLR 1639

²⁴⁵ See *MacGillivray & Parkington on Insurance Law*, 6th ed, [494], par. 1175.

²⁴⁶ *Takis Xenopoulos v Thomas Nelson (Insurance) Ltd and Others* (1982) 1 C.L.R. 674, [682].

²⁴⁷ *Kyriacos Agathangelou v The Motor Union Insurance Co. Ltd.*, (1984) 1 C.L.R. 1

²⁴⁸ *Kyriacos Agathangelou v The Motor Union Insurance Co. Ltd.*, (1984) 1 C.L.R. 1

²⁴⁹ Raoul Colinvaux, *The Law Of Insurance*, (5th ed, Sweet & Maxwell, London: 1984) [375-376]; Raoul Colinvaux, *The Law Of Insurance*, (4th edn) [106].

²⁵⁰ *Kyriacos Agathangelou v The Motor Union Insurance Co. Ltd.*, (1984) 1 C.L.R. 1 [12]

UK law. The reasoning given by the court was that:

“Rightly or wrongly clauses of that kind are usually inserted in policies of insurance for the protection of the business interests directly involved, namely that all claims of the kind ought to be made at the earliest possible day and in any case while they are still fresh, if the insured and the insurers agree that the insured is entitled to sue within three months of the rejection of his claim by the insurers, then it is quite clear that the Courts do not possess the discretion to extend the period so fixed and substitute for it any other period which they may deem reasonable”.²⁵¹

When looking at this statement, one can conclude that when a term is incorporated into a contract as warranty and therefore reflects what the parties agreed upon, then the court should respect the intention of the parties even when it does not consider such term as being completely reasonable. This emphasizes the need for strict compliance and the importance of warranties in an insurance contract. The Cypriot case law also, holds that a warranty in a marine insurance contract need not be material to the risk²⁵² and needs to be complied with.²⁵³ If the assured is in breach of a warranty the insurer will be entitled to avoid the whole cover even if the breach did not cause the loss or the breach was waived before the loss happened.²⁵⁴ A breach of warranty will enable the insurer to avoid the insurance claim

²⁵¹ *Kyriacos Agathangelou v The Motor Union Insurance Co. Ltd.*, (1984) 1 C.L.R. 1 [12]

²⁵² *PanEuropean Insurance Company Ltd. v Eretria Leisure Cruises Ltd* (1998) 1(B) CLR 1072 [1080]

²⁵³ *American Life Insurance Company Ltd vs Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A C.L.R. 593; *Condogiannis v Guardian Assurance Co.*, 90 L.J.P.C. 168 Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, *Cyprus*, European Lawyer Reference Series 87 [94]

²⁵⁴ *Kyriacos Agathangelou v The Motor Union Insurance Co. Ltd.*, (1984) 1 C.L.R. 1 [12]; Antonis Glykis, Constantinos Kourides & Paraskevas Pavlides in A. Neocleous, *Cyprus*, European Lawyer Reference Series 87 [94]

and it will be irrelevant if the breach did not cause the loss or the breach was waived before the loss happened.

The Cypriot courts also, implemented the English rules on basis of contract clause.²⁵⁵ In insurance law a basis of contract clause is a declaration in an insurance contract²⁵⁶ which states that a representation made by the assured is true and accurate rendering the representation as a warranty a breach of which enables the insurer to avoid the policy. Where the veracity of the statements forms the basis of the contract the materiality of the statement would be immaterial, and the court won't need to examine whether or not the assured had the actual knowledge.²⁵⁷ In *PanEuropean Insurance Company Ltd. v Eretria Leisure Cruises Ltd*²⁵⁸ when identifying such a clause the court held that a term could make the accuracy of all statements made during the negotiation an essential condition of the contract. The introduction of such terms creates no differentiation between material and immaterial statements, unless the term explicitly refers to material statements only.²⁵⁹

In *Klitos Mavrides v Cannon Insurance Ltd*,²⁶⁰ the Court reinstated and applied the English principle of basis of contract “it was stated that the proposal, by an express agreement, is made part of the insurance agreement and forms the basis of the contract”.²⁶¹ This means that the truth of the statements contained in the proposal is a condition precedent to the

²⁵⁵ *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303

²⁵⁶ *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303

²⁵⁷ *Condogiannis v Guardian Assurance Co.*, 90 L.J.P.C. 168

²⁵⁸ *PanEuropean Insurance Company Ltd. v Eretria Leisure Cruises Ltd* (1998) 1(B) CLR 1072 [1080]

²⁵⁹ *PanEuropean Insurance Company Ltd. v Eretria Leisure Cruises Ltd* (1998) 1(B) CLR 1072 [1080]; *Dawsons Ltd. v Bonnin* [1922] 2 A.C. 413

²⁶⁰ *Klitos Mavrides v Cannon Insurance Ltd.* (1983) 1 J.S.C. 36, [39]

²⁶¹ *Klitos Mavrides v Cannon Insurance Ltd.* (1983) 1 J.S.C. 36, [39]

liability of the insurers. The case reinstated the law as expressed in the English case of *De Hahn*²⁶² and held that the answers contained in the proposal constitute a warranty, in that it is expressly agreed to be so, and a breach of warranty avoids the contract.²⁶³

In the case the proposal form contained a question regarding: “How much time do you work in the...” and there follow three parallel columns each with the words: “office, workshop, outside work”. The answer put in by the assured was “100%” in the “office” space. The assured was in fact engaged in the ordinary manual work in his workshop that is positively a more hazardous one. The Proposal, by an expressed agreement on it, was made part of the insurance agreement and formed the basis of that contract.²⁶⁴ After citing *Mac Gillvray on Insurance Law*²⁶⁵ *Pawson v Watson*²⁶⁶ and *De Hahn*²⁶⁷ the court decided that the defendants are entitled to avoid the policy. The assured claimed that the insurance agent saw him at his workshop when filling the proposal form²⁶⁸ but the judge held that the evidence that the agent of the insurer had knowledge of what he was actually doing is quite unsatisfactory and that its contents cannot impart knowledge on the insurers on the actual work the plaintiff was doing so as to waive their right to avoid the policy.²⁶⁹ The insurers had the explicit description by the plaintiff himself of the work he was doing, which it was agreed between them to be part of their contract, in fact forming the basis of it and only quite explicit evidence of waiver could militate against the contents of the contract.²⁷⁰

²⁶² *De Hahn v Hartley* (1786) 1 T.R. 343.

²⁶³ *Klitos Mavrides v Cannon Insurance Ltd.* (1983) 1 J.S.C. 36, [40] per Judge Artemides

²⁶⁴ *Klitos Mavrides v Cannon Insurance Ltd.* (1981) Action So. 5440/79 per Artemides S.D.J.

²⁶⁵ *Mac Gillvray on Insurance Law* (5th edition) [386]

²⁶⁶ *Pawson v Watson* (1778) Cowp. 785,

²⁶⁷ *De Hahn v Hartley* (1786) 1 T. R. 343, 345

²⁶⁸ *Klitos Mavrides v Cannon Insurance Ltd.* (1981) Action So. 5440/79 per Artemides S.D.J., [42]

²⁶⁹ *Klitos Mavrides v Cannon Insurance Ltd.* (1981) Action So. 5440/79 per Artemides S.D.J.

²⁷⁰ *Klitos Mavrides v Cannon Insurance Ltd.* (1981) Action So. 5440/79 per Artemides S.D.J.

In the *De Hahn* judgment Lord Mansfield held that unless a warranty is performed there is no contract, and it is even immaterial for what purpose the warranty was introduced.²⁷¹ The effect from a breach of warranty was soon to be made clear in the case of *Good Luck* by Lord Mansfield who held that the insurer must be discharged from liability as from the date of the breach.²⁷² The Cypriot court gave the remedy of avoidance as a consequence for a breach of warranty which does not reflect the consequence of the breach under English law.²⁷³ Since avoidance under English law is the remedy for a breach of the duty of disclosure²⁷⁴ it is possible to question whether the outcome could have been premised on disclosure/misrepresentation issues in the proposal form.

In *Charalambos Andreou Mavrides* it was held that:

“the proposal, by an express agreement, is made part of the insurance agreement and forms the basis of that contract. That means that the truths of the statements contained in the proposal are made a condition precedent to the liability of the insurers. The answers contained in the proposal constitute a warranty, in that it is expressly agreed to be so, and a breach of warranty avoids the contract”.²⁷⁵

In the afore-cited case the court held that by means of the basis of contract clause all terms

²⁷¹ *De Hahn v Hartley* (1786) 1 T.R. 343, [345].

²⁷² Section 33(3), Marine Insurance Act 1906; *De Hahn v Hartley* (1786) 1 T.R. 343, [345]; *Bank of Nova Scotia v Hellenic War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233 (HL) [262-263].

²⁷³ It is clear from English common law but also the MIA 1906 that a breach of warranty results in an automatic discharge of the insurer's liability. Section 33(3), Marine Insurance Act 1906; *De Hahn v Hartley* (1786) 1 T.R. 343, [345]; *Bank of Nova Scotia v Hellenic War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233 (HL) [262-263].

²⁷⁴ Section 18(3), Marine Insurance Act 1906

²⁷⁵ *Charalambos Andreou Mavrides and others v American Life Insurance Co* (1984) 1 C.L.R. 611

in the proposal form are made into warranties, a breach of which entitles the insurer to avoid the contract. In the case the insurance policy included a clause stating that: “All of the above answers are full, complete and true; are a continuation of, and form a part of the application for insurance of my life to American Life Insurance Co...” The assured failed to disclose information about the poor condition of his health, but the court held that since those questions were not asked, there could be no warranted answers by the assured.

In the motor insurance case of *Proodeftiki Insurance Company*²⁷⁶ the assured falsely answered a question of whether the vehicle was bought or imported second hand. The statements were rendered into warranties by means of a basis of contract clause and therefore a breach of them would make the contract void ab initio. The insurance company had in their possession the car deeds, which could answer the question. The assured has also, inaccurately disclosed the value of the car. The court held that whether or not the car was new or second hand was of importance for the insurer but the insurer should have investigated it and failure to do so means a disclaimer of that right.²⁷⁷ The Court cited the textbook *General Principles of Insurance Law*.²⁷⁸ In the considering the accuracy of the answers, regard must be given not only to the statements contained in the answer itself, but also to any other information in the possession of the insurers. An answer, which when taken by itself is insufficient, may not be inaccurate when read with other answers in the proposal. Consequently, the whole of the proposal must be taken into account; and where

²⁷⁶ *Proodeftiki Insurance Company Ltd. v Andrea Prodromou* (2003) 1(A) CLR 600

²⁷⁷ *Proodeftiki Insurance Company Ltd. v. Andrea Prodromou* (2003) 1(A) CLR 600; *American Life Insurance Company Ltd v Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A CLR 593 [606].

²⁷⁸ E.R. Hardy Evamy, *General Principles of Insurance Law* (Butterworths Law, 6th ed, 1993) [191-192].

the assured submits at the same time a number of proposals relating to different properties, but referring to each other, they are all to be read together, and the accuracy of the answers determined accordingly²⁷⁹. The case reaffirms the principle that:

“When the answers which the proposer gives are inconsistent or unsatisfactory, and no further inquiries are made by the insurance company and a policy is issued, the company cannot repudiate liability on the ground that there has not been a full disclosure, for it will be held to have waived its rights. If his answer is hesitating or unsatisfactory, the insurers are put upon their guard, and have the option of declining the assurance, or seeking information from other sources, or of charging a higher premium.”²⁸⁰ This means that a failure by the insurer to make follow up questions when the answers given by the assured are unsatisfactory would amount to a waiver of his right to avoid liability based on the content of that answer. On the basis of this the Judge held that the insurer had access to the information and could very easily make further enquiries to find the truth, thus, the insurer could not repudiate liability.

A similar case is that of *American Life Insurance Company*.²⁸¹ In the case the Court have agreed with the judgment of first instance that when the accuracy of the statement form the basis of the contract, there is no need to examine whether that inaccuracy of the statement is material or not or whether the assured knew the truth.²⁸² Instead the insurer is able to

²⁷⁹ E.R. Hardy Evamy, *General Principles of Insurance Law* (Butterworths Law, 6th ed, 1993) [191-192].

²⁸⁰ E.R. Hardy Evamy, *General Principles of Insurance Law* (Butterworths Law, 6th ed, 1993) [191-192] in *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

²⁸¹ *American Life Insurance Company Ltd v Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A CLR 593; *Condogiannis v. Guardian Assurance Co.*, 90 L.J.P.C. 168

²⁸² *American Life Insurance Company Ltd v Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A CLR 593; *Condogiannis v. Guardian Assurance Co.*, 90 L.J.P.C. 168

deem the contract void (void ab initio)²⁸³. The case involved the life insurance of a 33-year-old that died from a stroke while playing football. In the case²⁸⁴ the assured failed to disclose information regarding his health. The insurance company argued that the assured did not accurately disclose the whole truth regarding his health and the contract should be voided. The Court upheld that since the statements are rendered as warranties by means of a basis of contract clause there is no need to assess the materiality of those statements or whether the assured knew the truth, therefore reinstating the English position that a warranty need not be material to the loss, therefore non-disclosure of the previous health incident would have resulted to the contract being void ab initio. Nonetheless, since there was contradictory information regarding his health the insurer could ask for enquiries or investigate further in order to verify the accuracy of the statements.²⁸⁵ Failure to do so and the decision to proceed with the contract would mean that the insurer has waived his right to do so and therefore cannot treat the contract as void ab initio,²⁸⁶ thus agreeing with the judgment in the case of *Proodeftiki Insurance Company*.²⁸⁷

The case *Kyriacos Iacovou* involved a proposal form that was filled in by the insurer's agent on information supplied by the assured. The plaintiff then claimed under the insurance policy in respect of damage to his car. The insurance company argued that the written proposal contained untrue statements and the assured failed to disclose material

²⁸³ *American Life Insurance Company Ltd v Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A CLR 593 [599]; *Condogiannis v Guardian Assurance Co.*, 90 L.J.P.C. 168

²⁸⁴ *American Life Insurance Company Ltd v Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A CLR 593

²⁸⁵ *American Life Insurance Company Ltd v Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A CLR 593

²⁸⁶ *American Life Insurance Company Ltd v Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A CLR 593

²⁸⁷ *Proodeftiki Insurance Company Ltd. v Andrea Prodromou* (2003) 1(A) CLR 600

facts.²⁸⁸ A declaration in the proposal form declared the accuracy of the statements as a precondition to the validity of the contract. Thus, by means of the basis of contract clause the misstatements contained in the proposal form are converted into warranties, and a breach of warranty repudiates the insurer's liability. In the case an agent from the insurance completed the proposal form on behalf of the assured due to the fact the questions were in English, a language not known to the assured. Since the assured at the agent's request left the proposal form blank and left it to the agent to complete it, the agent was exceeding his authority as an agent of the company and filling in the proposal form in this irregular way will mean he was acting as the agent of the applicant, so as to render the applicant responsible for the proposal as completed.²⁸⁹

To address this issue the Judge based his finding on the blind or illiterate²⁹⁰ rule under English law. The rule states that a failure from the insurance agent to read the proposal form to the assured would mean that the insurer could not rely on any misstatements contained therein.²⁹¹ It was stated that since the assured did not know the language in which the proposal form was written, he should be considered as an illiterate person. Consequently, there was an implied request by the proposer that the agent reads it over to him.²⁹² The Judge decided against the defendant's argument (insurer) on the basis that he was not satisfied that the proposal form was read to the assured,²⁹³ but held that: "I would have no hesitation in finding for the defendants on the issue of misstatements; but my mind

²⁸⁸ *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

²⁸⁹ *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

²⁹⁰ MacGillivray On Insurance Law, (4th Ed, Sweet&Maxwell), [932]

²⁹¹ MacGillivray On Insurance Law, (4th Ed, Sweet&Maxwell), [932]

²⁹² *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

²⁹³ *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

is exercised by the statement of a proposition in MacGillivray with regard to blind and illiterate proposers”.²⁹⁴ The judge clarifies that had the language of the proposal form been in Greek (the assured’s language), he would have decided for the insurers, therefore leaving the assured without cover.

Duty of Disclosure and Misrepresentation

Cyprus’ law on disclosure and misrepresentation is based on the principle of good faith that needs to prevail amongst the two parties entering into the contract, which is based on section 18(2) of the English Marine Insurance Act 1906²⁹⁵. Consequently, a contract of insurance is a contract of the utmost good faith, which is commonly described, in a convenient way, as a, contract of “uberrimae fides”.²⁹⁶ The term “uberrimae fides” (utmost good faith) has been characterised as not precise²⁹⁷. The Cypriot Courts recognise and uphold the duty cast upon an intending assured to disclose to the insurer any fact which he actually knows, and which is material and that failure to discharge such duty can avoid the policy.²⁹⁸

In the case of *Mavrides* the Court held that the general principles upon which an assured is required to disclose all material facts within his knowledge and which are applicable to all branches of insurance whether marine, life or other non-marine insurances, are well known

²⁹⁴ *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

²⁹⁵ *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611.

²⁹⁶ *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611 per Savvides JJ [625-626]

²⁹⁷ *Seaton v Heath* [1899] 1 Q.B. 782

²⁹⁸ *Charalambos Andreou Mavrides and others v American Life Insurance Co* (1984) 1 C.L.R. 611

and have been stated and restated time and again in a long line of case²⁹⁹. The Cypriot Courts recognise a duty from the assured to disclose facts that are both in his actual knowledge and material that if in breach may lead to the repudiation of the contract. This would be true even if the non-disclosure did not involve fraud but was made in error because as a result of this the insurer was misled and the insurance risk would differ to the one contemplated³⁰⁰. In the case of *Eretria*³⁰¹, it was attested that since the non-disclosure of information induces the insurer to enter into the agreement, the contract is rendered void, even if that non-disclosure was made without any fraudulent intentions because the insurer was deceived. The contract is therefore considered void due to the fact that the risk undertaken is different to the one the insurer realised and desired to undertake at the time of the agreement.³⁰² In the case of *Costas Stavrides* the court referred to two instructive English cases³⁰³ at the time and held that the burden of proof of misrepresentation lies on the insurers.³⁰⁴

In the case of *Kyriacos Iacovou*³⁰⁵ the insurer refused to pay the insurance money based on the argument of non-disclosure of material information by the assured. The judge highlighted that to prove non-disclosure and avoid the policy the insurers need to be able to show that (i) an alleged circumstance did exist at the time when the negotiations between

²⁹⁹ *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v. American Life Insurance Co* (1984) 1 CLR 611 per Savvides JJ [625-626]

³⁰⁰ *Charalambos Andreou Mavrides and others v American Life Insurance Co* (1984) 1 C.L.R. 611

³⁰¹ *PanEuropean Insurance Company Ltd. v Eretria Leisure Cruises Ltd.* (1998) 1(B) CLR 1072

³⁰² *PanEuropean Insurance Company Ltd. v Eretria Leisure Cruises Ltd* (1998) 1(B) CLR 1072 [1079]

³⁰³ *Adams v. London Insurance Co.Ltd.*, (1932) 42 Ll.L. Rep. 56; *Zurich Insurance Co. v. Morrison* (1942) 1 All E.R. 529, [533]

³⁰⁴ *Commercial Union Assurance (Cyprus) Ltd., v Costas Stavrides* (1981); *Commercial Union Assurance (Cyprus) Ltd., v Costas Stavrides and Another* (1976) Action No. 4880/76

³⁰⁵ *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

the assured and the insurer had not been completed, (ii) that the assured knew or should have known of the existence of that circumstance, (iii) that the circumstance in question was material and (iv) that the circumstance was not disclosed to the insurer.³⁰⁶ All four conditions need to be satisfied for the insurer to be able to avoid the policy. In the case the Judge found that the circumstance of the previous car insurance that were not disclosed were both known to the assured and material consequently the insurance company could refuse cover and void the policy.³⁰⁷ The Judge referred to the English MacGillivray, *Insurance Law* on the blind and illiterate rule³⁰⁸ and as the Judge described the very instructive case of *Newsholme Brothers*³⁰⁹ and based his judgment accordingly.

Under the common law of Cyprus, the assured is under an obligation to disclose any material fact and the materiality of each fact is an objective one.³¹⁰ In *Mavrides*³¹¹ case by citing the textbook of McGillivray&Parkington³¹² the court clarified that questions of materiality are in fact to be decided by the judge or jury in each case.³¹³ Exclusively it should reach the conclusion that if the assured answered a question posed by the insurer in error it does not mean that the non-disclosure of that fact is a material one that will give the right to the insurance company to avoid paying the claim.³¹⁴ Where the one party is in position of knowledge of the material facts that it is impossible for the other party to

³⁰⁶ *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

³⁰⁷ *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

³⁰⁸ MacGillivray On Insurance Law, (4th Edition), [932]

³⁰⁹ *Newsholme Brothers v. Road Transport and General Insurance Co.* (1929) 2 K.B. 356 per Scrutton, L.J.

³¹⁰ *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611

³¹¹ *Charalambos Andreou Mavrides and others v American Life Insurance Co* (1984) 1 C.L.R. 611

³¹² McGillivray&Parkington, *Insurance Law* (6th.Edition), para. 754, p. 313

³¹³ *Charalambos Andreou Mavrides and others v American Life Insurance Co* (1984) 1 C.L.R. 611

³¹⁴ *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611

discover the first one will be under obligation to not misrepresent but also, to disclose in good faith those material facts.³¹⁵

In formulating the test for materiality, the Court has considered and applied a number of English common law cases and decided that the mere fact that the insurer states he would personally believe it to be material does not render it material.³¹⁶ As a general rule for questions of materiality the insurer would need to prove that any reasonable insurer would consider the specific fact as material.³¹⁷ Every fact that in the knowledge of the assured is considered by the insurer as material tend to be the rule that they are.³¹⁸ The Court held that, whether the insurer considers something as material is normally indicated by the difference in the insurance payment and in practice from the posing of specific questions.³¹⁹ But, the imposition of the question alone does not render a fact as material.³²⁰

Even though English cases are of persuasive effect for Cypriot Judges they are not binding. Though the Judges choose in many instances to apply rules taken from English leading cases to the extent that the whole law is based on the MIA 1906, they do not always agree with the result taken in the particular case while the decision of the UK to reform its law will lead to further inconsistencies. It may be suggested that the law allows for much

³¹⁵ *Carter v Boehm* [1766] 3 Burr. 1905

³¹⁶ *Bates v Hewitt* (1867) L.R. 2 Q.B. 595 in *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611

³¹⁷ *Girdlestone v North British* [1870] L.R. 11 Eq.197 in *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611; *PanEuropean Insurance Company Ltd. v Eretria Leisure Cruises Ltd.* (1998) 1(B) CLR 1072

³¹⁸ Ivamy, *General Principles of Insurance Law*, (4th edition), [142, 147]

³¹⁹ *Glicksman v London and General Assurance Co Ltd* [1925] 2 K.B. 593, 609, C.A. in *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611

³²⁰ *Babatsikos v Car Owners' Mutual Insurance Co Ltd* [1970] 2 Lloyd's Rep. 314

flexibility and a lot discretion is left to the Judges to decide cases on a case-by-case basis creating inconsistencies and uncertainty.

In *Kyriacos Iacovou*³²¹ the court held the non-disclosure was material and that there is not sufficient evidence to show that the insurer knew or should be presumed to have known of the previous insurance of plaintiff's car or the cancellation of his policy, hence could not be considered as having waived the breach.³²² The assured failed to disclose that he had been previously insured with another Company, that he had an accident or loss to his car and that, thereupon, that Company cancelled his previous policy. The court did not provide sufficient reasoning and did not explain how they decided that such term was material. It was not until the case of *Mavrides*³²³ that the Cypriot court incorporated rules on materiality. It is suggested that the Cypriot test of materiality provides for much flexibility that creates legal uncertainty and inconsistencies in judgments. The test also, provides an all or nothing remedy that may lead to unfair and disproportionate consequences due to the fact that the assured could lose the whole cover for a breach of term that would influence the premium price but not the decision of the insurer to enter into the contract. There should be more specialised rules that introduce proportionate remedies according to the severity of each breach.

In order to contextualise the above it is important to refer to this issue by analysing Cypriot case law. The two cases that we will be dealing with are those of *Eretria* and the life

³²¹ *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303

³²² *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

³²³ *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611

insurance case of *Mavrides* which is one of the leading cases for Cypriot law. It will be demonstrated that in dealing with the case the Judge has in many instances applied English common law cases both for defining concepts and setting rules. In deciding the case of *Panuropean Insurance Company Limited v Eretria Leisure Cruises Limited*,³²⁴ the court applied the English case of *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co. Ltd* and have come to the conclusion that the misstatement was not material.

Specifically, in the case of *Eretria Leisure Cruises* the insurers refused to pay the insurance cover on the basis of non-disclosure of the fact that the ship «Eretria» had a previous incident of fire and the misrepresentation of the real value of the ship that was less than the amount stated³²⁵. The Court found that the non-disclosure of the fire incident three years ago was not material as it happened before the contract and was limited extent fire and low value damage. The Judge added that the assured might have even forgotten it or omitted to include it due to the non-severity of the incident³²⁶. The reasoning given by the court for reaching this decision was that the previous incident was not material within the law and that the knowledge of that incident would not have changed the mind of the insurers in ensuring the ship³²⁷, therefore, the insurers could not use this to evade paying the insurance cover.

In doing so the court applied the case of *Pan Atlantic*. The insurance company brought an

³²⁴ *Panuropean Insurance Company Limited v Eretria Leisure Cruises Limited*, (1998) 1 CLR 1072 per Fr. Nikolaides, D.

³²⁵ *Panuropean Insurance Company Limited v Eretria Leisure Cruises Limited*, (1998) 1 CLR 1072

³²⁶ *Panuropean Insurance Company Limited vs Eretria Leisure Cruises Limited*, (1998) 1 CLR 1072

³²⁷ *Panuropean Insurance Company Limited vs Eretria Leisure Cruises Limited*, (1998) 1 CLR 1072

appeal on the basis that there is a pre-existing rule in that regard and according to Cyprus' Consitution where there is a pre-existing Cypriot rule, that rules prevail over the foreign law. Therefore, the Mavrides case that outlines the pre-existing Cypriot rule should have prevailed.³²⁸ The case of *Pan Atlantic* set out that the non-disclosure must be material and operate as an inducement to enter into the contract³²⁹ referring to both the decisive influence test and inducement test.³³⁰ In the case the court followed the literal interpretation of s.18(2) and allowed for the insurer to avoid liability. In the *Mavrides* case it was decided that the real test of whether or not something is material is a pragmatic issue and needs to be decided according to the real facts of each case by the court³³¹, thus taking a more flexible approach. This means that the decision of whether something is material or not will be based on the Judge's consideration of the materiality of the fact with the object of insurance.³³² Judge Nikolaides then added that the test to be applied regarding knowledge by the assured of material facts appears to be that of 'a reasonable man'.³³³

The court highlighted the fact that the principle under Mavrides case is not opposed to that of Pan Atlantic and that the case of Pan Atlantic simply examines the matter further by determinnng what means material. The court then stated that they disagree with the assertion that the Cypriot case law points in any way to direction that the *Pan Atlantic* principles

³²⁸ *Paneuropean Insurance Company Limited v Eretria Leisure Cruises Limited*, (1998) 1 CLR 1072

³²⁹ Concerning non-disclosure of figure of true losses as opposed to the disclosed losses.

³³⁰ *Pan Atlantic Insurance Co. Ltd. and another v. Pine Top Insurance Co. Ltd.* [1994] 2 ALL E R 581.

³³¹ *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611

³³² *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611

³³³ *Charalambos Andreou Mavrides and another as Administrators of the Estate of Deceased Andreas Mavrides v American Life Insurance Co* (1984) 1 CLR 611

cannot be applied in Cyprus. Based on *Pan Atlantic*³³⁴, the question to be asked is if knowing about the fire incident the insurer would still proceed with the contract or if it would affect the premium price. The judge held that since the fire incident was found not to be material, there was no need to apply the inducement test rule. No further clarification was made as to the position of the law regarding the test of materiality after the case.

In the *Akritas Insurance Company* case the insurers refused to accept the claims on the basis that the insurance contract was void due to false and / or inaccurate statements regarding the deceased's place of residence and his professional status while claiming that the "alleged death" of the deceased was not exclusively caused by an accident and therefore had no responsibility.³³⁵ The Court based its Judgment on the case of *Hamlyn v The Crown Accidental Insurance*³³⁶, while the textbook of the Law Of Insurance, Raoul Colinvaux³³⁷, was used for the purpose of identifying the terms "violence", "external" and "visible"³³⁸. In regard to the argument of the deceased's death, the court decided that there were no false statements on the part of the deceased that would affect the validity of the contract taking into consideration the allegation of the forensic person. In the security proposal the deceased stated that he was a flying engineer in the second document stated "entrepreneur" while in third document (claim for damages) his spouse declared him "retired".³³⁹ In regard to the argument of false statements of the deceased's stay and occupation the Judge agreed

³³⁴ *Pan Atlantic Insurance Co. Ltd. and another v. Pine Top Insurance Co. Ltd.* [1994] 2 ALL E R 581.

³³⁵ *Akritas Insurance Company ltd, v Andoni Michaelide, as property administrator of the deceased's Trevor Arthur James Norris*, (2009) 1 CLR 1124 per Nicolaides, Photiou, Erotokritou JJ

³³⁶ *Hamlyn v The Crown Accidental Insurance Co. Ltd* [1893] Q.B.D. 750.

³³⁷ Raoul Colinvaux, *The Law Of Insurance*, (5th ed) [375-376], [17-15 and 17-16]

³³⁸ *Akritas Insurance Company ltd, v Andoni Michaelide, as property administrator of the deceased Trevor Arthur James Norris*, (2009) 1 CLR 1124 per Nicolaides, Photiou, Erotokritou JJ

³³⁹ *Akritas Insurance Company ltd, v Andoni Michaelide, as property administrator of the deceased Trevor Arthur James Norris*, (2009) 1 CLR. 1124 per Nicolaides, Photiou, Erotokritou JJ

with the first tribunal in not accepting that the deceased made a false and inaccurate statement.³⁴⁰ The court did not refer to the test of materiality as they thought there was no need to. The court seemed reluctant to apply the principles of materiality and found in favour of the assured on the basis that there were no false statements to start with.

In *Michalakis Pavlou v Egis Insurance Co. Ltd*³⁴¹ the assured failed to disclose in the proposal a column of previous convictions even though he had been given a speeding ticket and allowed for the insurance policy to be voided. In the appeal the court examined the facts and decided that the finding that the appellant failed to disclose in the insurance proposal a “column of previous convictions”, is due to a fallacy of the court since there was neither such column nor a similar question that should have been answered.³⁴² The insurance proposal included the general statement: “please state any other material facts concerning the vehicle and drivers to be insured”. The court also, held that the criterion of whether a particular event is material is objective and it should be shown that a reasonable insurer would regard this fact as material.³⁴³ What the particular insurer says he would have regarded, as material does not necessarily mean is material. The court held that the speeding ticket was considered as immaterial to the car insurance policy, on the basis that it would not have any effect on the conclusion of the contract.³⁴⁴ In deciding whether or not that non-disclosure was material the judge referred to the materiality test as stated in *Mavrides*; that is whether a reasonable insurer would consider it material. The case did not refer to

³⁴⁰ *Akritis Insurance Company Ltd, v Andoni Michaelide, as property administrator of the deceased Trevor Arthur James Norris*, (2009) 1 CLR1124 per Nicolaides, Photiou, Erotokritou JJ

³⁴¹ *Michalakis Pavlou v Egis Insurance Co. Ltd* (2004) 1B CLR 1124

³⁴² *Michalakis Pavlou v Egis Insurance Co. Ltd* (2004) 1B CLR 1124

³⁴³ *Michalakis Pavlou v Egis Insurance Co. Ltd* (2004) 1B CLR 1124

³⁴⁴ *Michalakis Pavlou v Egis Insurance Co. Ltd* (2004) 1B CLR 1124 per Judge Krambis.

the rules of *Pan Atlantic*³⁴⁵, as discussed in the previous judgment of *Eretria*³⁴⁶, hence leaving an uncertainty of the law in regard to what is material.

The Cypriot case law provides for much flexibility when it comes to deciding whether or not a breach of the duty of non-disclosure and misrepresentation is material; one that would allow the insurer to avoid the policy. This can be seen by both the uncertainty that exists as to the application of the test of materiality and the reluctance of the court to apply the rules. This is evident from the case of *Bankers & Trader's Insurance*,³⁴⁷ where the assured had falsely answered the question as to whether he or any of his drivers had been convicted for any road traffic accident, as both he and his driver Andreas Chrysanthou had previous convictions.³⁴⁸ The court held that the claim failed, and that the insurer is liable to pay the claim on the basis that the insurers failed to prove that misrepresentation. Another case is that of *Commercial Union Assurance*.³⁴⁹ The Court acknowledged the fact that if the assured states in the proposal form that he is the owner of a vehicle and he is not then it amounts to a material misrepresentation.³⁵⁰ The insurance company attempted to avoid the claim on the ground that the assured stated that he was the sole owner of the vehicle when in reality the owner and exclusive user of the vehicle was another person. The claim failed due to the fact that the insurers failed to substantiate allegations of misstatement, as the

³⁴⁵ *Pan Atlantic Insurance Co. Ltd. and another v. Pine Top Insurance Co. Ltd.* [1994] 2 ALL E R 581.

³⁴⁶ *Pan European Insurance Company Limited v Eretria Leisure Cruises Limited*, (1998) 1 CLR 1072

³⁴⁷ *Bankers & Traders' Insurance Co. Ltd. v Avraam Chirodontis and Another*, DCN Action No. 5733/69 per Stavrinakis, P.D. C, Evangelides Ag. D.J.

³⁴⁸ *Bankers & Traders' Insurance Co. Ltd. v Avraam Chirodontis and Another*, DCN Action No. 5733/69 per Stavrinakis, P.D. C, Evangelides Ag. D.J.

³⁴⁹ *Commercial Union Assurance (Cyprus) Ltd v Costas Stavrides* (1981) District Court of Nicosia J.S.C. 1-2.

³⁵⁰ *Guardian Assurance Co. Ltd. v Sutherland*, (1939) 2 All E.R. 246; *Commercial Union Assurance (Cyprus) Ltd v Costas Stavrides* (1981) District Court of Nicosia J.S.C. 1-2.

only witness present at the trial was the managing Director of the insurers while the evidence was insufficient. It is however, not clear what the result would have been had the insurers proven that there was a misrepresentation by the assured.

Good Faith

Like English law, for Cypriot marine insurance law an insurance contract is one of «uberrima fidei» in which the non-disclosure of material information would void the contract³⁵¹. This was decided in the leading case of *PanEuropean Insurance Company Ltd* (1988). The case directly linked the duty of good faith with that of disclosure of material facts by stating that the duty of the assured to disclose material facts is based on the principle of good faith that needs to prevail among the two parties.³⁵² In the same case the Judge implemented the principle of utmost good faith as identified in *Carter v Boehm* (1766) 3 Burr 1905. The Court of Cyprus has not yet dealt with a case of good faith and therefore, the law is unclear in regard to that. No clear provisions are present in regard to the duty of good faith and its application. It is important that there are clear provisions to show whether the duty of good faith existed only when the policy was being negotiated or continued thereafter, whether it related only to matters of disclosure or also related to the presentation of claims and whether it applies mutually. In determining the real effect of the good faith element, the Law Commissions has argued that the good faith principle has a potential impact in three possible ways to interpret the duty of fair presentation³⁵³, to

³⁵¹ *Seaton v Heath* (1899) 1 QB 782.

³⁵² *PanEuropean Insurance Company Ltd. v Eretria Leisure Cruises Ltd.* (1998) 1(B) CLR 1072 [1079]

³⁵³ Good faith is recognised as a way to interpret legal obligations. The Law Commission and the Scottish

inform the need to imply contractual terms into the policy and to leave some room for judicial flexibility³⁵⁴. Though in theory it is important that a contract of insurance is one of good faith so that both parties are informed of the need to imply to the contractual relationships, in practice the good faith element only gives room for judicial flexibility. In an ideal scenario both parties would enter into the contract based on a retrospective duty of good faith knowing that both will keep their promises; the one to accurately and truly disclose the information relevant to the insured and the other to follow with his promise to cover the insurance risk.

Conclusion

The main aim of this thesis is the drafting of a Marine Insurance Act for Cyprus law that would address issues that cannot be solved through case law. The current law of Cyprus governing warranties, non-disclosure and misrepresentation is uncertain and may lead to disproportionate decision-making. This can be seen by the fact that in the limited cases dealt by the courts of Cyprus despite the fact that the judges applied English principles, the Courts have diverted from English Judgments. On many occasions the Courts seem to decide for the assured giving no consequences to them even if they were in breach of their duty of disclosure while no proportionate remedies or consequences were available for a breach of warranty. By looking at different insurance cases and the application of insurance

Law Commission, 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 Disclosure

³⁵⁴ Law Commission, Insurance Contract Law, Business Disclosure, Warranties, Insurer's remedies, Fraudulent Claims and late payment, N° 353, Scot Law N° 238 (summary) July 17, 2014, [6.8 ref.LC 353], 17 July 2014, executive summary [6.8]

rules it can be suggested that there are inconsistencies in decision-making and an uncertainty of the law that can only be dealt with introducing an Act.

It is evident that there is a great flexibility and a lot of discretion given to Judges when deciding issues of materiality while the Courts have not adequately applied the duty to act in good faith. There is also, an uncertainty and vagueness of the law as to what would satisfy the issue of materiality that may lead to unfairness. There is also, a general reluctance of the courts to decide against the assureds even in cases where the assured was in breach of warranties. In order to solve problems in the current law, there needs to be a development of an Act. The UK's decision to reform its law and the fact that Cypriot courts still apply English common law rules will in the future create further inconsistencies. To better address the problem, one should go to the root of the problem that is the law from which the principles are derived. It is therefore, important that the English principles of marine insurance in relation to the law on warranties and the duty of disclosure and representation are examined in detail. Examining the English rules of marine insurance as applied to English Courts and comparing them to the reformed law will facilitate the assessment of the English rules to suggest whether Cyprus should model its own legislation on the 2015 Act.

CHAPTER 3

UK LAW DEVELOPMENT

Introduction

This chapter refers to the development of the English marine insurance law for reasons of completeness and to provide an understanding of the law on which Cyprus' law is based. The rationale behind the decision to examine and base the reform on English law is because it is what Cyprus has been following. The English law of marine insurance was one that influenced many countries worldwide. A distinctive feature of the UK is the development from an early stage of the common law principles for marine insurance that serves the foundations for all types of insurance. The principles of marine insurance were crafted and developed in common law until their codification of the MIA1906 that sets the example for many countries. Insurance law is particularly of persuasive effect as the English legal system has been recognised as one of the first to develop a concise legislation governing marine insurance. When it comes to marine insurance, England is known for its MIA 1906 Act but also, for having one of the biggest insurance market industries globally that is Lloyd's of London.

Lloyd's of London started as a small coffee house by Edward Lloyd's where many ship-owners and underwriters met and negotiated insurances. Nowadays, Lloyd's of London is considered one of the biggest marine insurance markets worldwide rendering the UK's policies one of the most attractive insurance policies. Despite, the success of the English

Marine Insurance Act 1906, years after its development, there sparked discussions and criticisms regarding the nature of the rules incorporated therein. The suggestion to reform the law governing contracts of insurance created arguments for both sides. The dominant view suggested that a reform of the archaic law of marine insurance was a much-needed change so that the English marine Insurance keeps in line and responds to the changing realities of the 21st century³⁵⁵. On the other hand, it was suggested that the reform was an unnecessary change that would displace existing judicial precedents of interpretations of the law³⁵⁶. Even considering the possibility of creating confusion and uncertainty from the introduction of new principles, addressing legal issues in regard to warranties and duty of disclosure was a much more needed task. The UK reformed its law and focused on reforming the rules only where necessary trying to make no unneeded change to the existing case law³⁵⁷.

This chapter first refers to insurance contracts and relevant key concepts that outline the law and then identify warranties and rules on non-disclosure and misrepresentation. It then briefly demonstrates how the law on warranties and fair presentation changed under the recent reform of the 2015 Act. It examines the development of English law regarding marine insurance that sets the background of this chapter and helps reach an understanding of some key concepts as developed by English law and followed by Cyprus courts. It is

³⁵⁵ Law Commission and Scottish Law Commission, Insurance Contract Law, Business Disclosure, Warranties, Insurer's remedies, Fraudulent Claims and late payment, Law Com No 353, Scot Law No 238, July 17, 2014 [57-60].

³⁵⁶ Law Commission and Scottish Law Commission, Insurance Contract Law, Business Disclosure, Warranties, Insurer's remedies, Fraudulent Claims and late payment, Law Com No 353, Scot Law No 238, July 17, 2014 [57-60].

³⁵⁷ Law Commission and Scottish Law Commission, Insurance Contract Law, Business Disclosure, Warranties, Insurer's remedies, Fraudulent Claims and late payment, Law Com No 353, Scot Law No 238, July 17, 2014 [63].

essential to reference the historical development of Marine Insurance, as we know it today and how it came to exist in England and the current structure of the marine insurance contract. Understanding the origins of marine insurance and the situation in the UK, where its Marine Insurance Act is considered as the mother-legislation for Cyprus and many other countries such as Australia, will allow for a better analysis of the law. The practices of the merchants in the City of London led to the creation of the English Insurance market. This chapter will provide a brief introduction on the origins of marine insurance referring to both a historical and legal development to show how the English marine insurance as we know it today was created. Awareness of the history of marine insurance will help us understand the purpose of insurance and will set the basis of this chapter. When looking at the origins of marine insurance one can see its international nature.

Development of Marine Insurance

Origins of Marine Insurance

The international nature of marine insurance is best seen when looking at the origins of insurance. The practice of marine insurance as we know it today started to develop around the 13th century in Italy.³⁵⁸ But, the very first traces of marine insurance came to existence before that when the ancient Greeks or Romans were protecting their selves from financial losses against maritime risks by the means of different systems of insurance such as

³⁵⁸ Baris Soyer, *Warranties in Marine Insurance*, (2nd ed., Cavendish Publishing Limited, London: 2006), [5], Solomon Huebner, 'The Development and Present Status of Marine Insurance in the United States', (1905) *The Annals of the American Academy of Political and Social Science* Vol. 26, 241-272 [244]

maritime loans and mutual guaranties.³⁵⁹ In the UK the development of a marine insurance market started with the help of the so-called Merchants of “Stilliard³⁶⁰” who immigrated to London from Bruges and Germany around the 13th century³⁶¹. Other foreign associations merged with the Merchants of Stilliard, the Merchants of Staples³⁶² and the “Lombards.”³⁶³ “Lombards” engaged in trade or lending the valuables that they brought along and were the first to bring proper rules and regulation for marine insurance rendering it acceptable to trading community at large and remained that way for 400 years³⁶⁴. The Hanseatic League of the Steelyard enjoyed many privileges, and their corporation was acknowledged being of enormous help to England bringing marine insurance and aiding them with having international intercourse.³⁶⁵

As soon as England’s trade became important and self-dependent the Hanseatic League was expelled from the country leaving the trade in the hands of Englishmen.³⁶⁶ The first statute regarding marine insurance issues came into existence soon after the Merchants of Stilliard left England and was called: “An Act concerning matters of Assurances amongst

³⁵⁹ Frederick Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876) [1]

³⁶⁰ Merchants of Steelyard had the greatest part of commerce in their hands along with their Teutonic predecessors Frederick Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876) [2]

³⁶¹ Frederick Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876) [1]

³⁶² Walter Besant, *A History of London*, (1st ed, Longmans Green, Brighton: 1894) [140-141]

³⁶³ “During the second half of 13th century England received the first immigrants from Northern and Central Italy the Lombards” Walter Besant, *A History of London*, (1st ed, Longmans Green, Brighton: 1894) [140-141]

³⁶⁴ Frederick Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876) [31]

³⁶⁵ Frederick Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876)

³⁶⁶ Frederick Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876) [10]

merchants (1601).”³⁶⁷ Around the 17th century coffee houses in the city of London welcomed men engaged in common business and proved to be convenient for the conclusion of their business. The establishment of a coffee house by Edward Lloyd in 1688 marked the beginning for something big for the development of marine insurance in England. Lloyd’s of London soon became a resort for persons that were linked with shipping³⁶⁸ which dominated the English marine insurance market by the mid 19th century.³⁶⁹

The ongoing wars of the 18th century resulted in the country incurring a national debt. The South Sea Company funded the conflict and assumed a great portion of England’s National Debt in exchange of shares as well as exclusive trading rights in the Americas.³⁷⁰ After the success of the South Sea Company other joint stock company “bubbles” took advantage of the need for speculative investment to raise capital from fraudulent and speculative overseas ventures. In an attempt to control these “bubbles”³⁷¹ Parliament introduced the Bubble Act of 1720.³⁷² Section 12 of the Bubble Act only allowed the carrying of business of companies, partnerships and societies that were chartered. At that time the English marine insurance flourished under the authority of the two-chartered insurers Royal Exchange Assurance established in 1579 in Lombard Street³⁷³ and London Assurance.

³⁶⁷ Frederick Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876) [11]

³⁶⁸ Frederick Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876) [60]

³⁶⁹ Christopher Kingston, ‘Marine Insurance in Britain and America, 1720-1844: A Comparative Institutional Analysis’ (2007) *The Journal of Economic History* Vol. 67, No. 2, 379-409 [379]

³⁷⁰ Frederick Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876)

³⁷¹ Defined as extravagant and unwarrantable practices Bubble Act 6 Geo.I., c. 18

³⁷² Robert M Merkin, *Colinvaux’s Law of Insurance* (11th edn, Sweet & Maxwell, UK: 2016) [1-001]

³⁷³ Robert M Merkin, *Colinvaux’s Law of Insurance* (11th edn, Sweet & Maxwell, UK: 2016) [1-001]

With the need of further insurance services, individuals such as Lloyd's underwriters and other ship owner's mutual associations contributed to the development of marine insurance.³⁷⁴

The Marine Insurance Act

The major development of English marine insurance law was made during the 18th century with the help of Lord Mansfield (1756-1788). In describing the status of English law prior to Lord Mansfield developing the rules on maritime law, Lord Campbell described it thus: "the legislature had literally done nothing to supply the insufficiency of feudal laws to regulate the concerns of a trading population: and the common law judges had, generally speaking been too unenlightened and too timorous to be of much service in improving our code by judicial decisions".³⁷⁵ Lord Campbell criticised the lack of rules regulating issues of marine insurance that sparked concerns among the trading population, whereas the law reports on commercial matters were insufficient to deal with those concerns.³⁷⁶ The political reality of the day was that proposed legislation that went beyond existing law (in the form of a Code) was unlikely to be passed by Parliament.³⁷⁷ Chalmers has stated: "when the principles of the law are well settled, and when the decided cases that accumulate are in the main mere illustrations of accepted general rules, then the law is ripe for codification".³⁷⁸

³⁷⁴ Özlem Gürses, *Marine Insurance Law*, (1st ed., Routledge, Oxon: 2015) [2]

³⁷⁵ John Campbell, *Lives of the Chief Justices*, Vol. III., (1873-76) [299]

³⁷⁶ John Campbell, *Lives of the Chief Justices*, Vol. III. (1873-76)

³⁷⁷ Howard Bennett, "The Marine Insurance Act 1906: Reflections on a Century" (2006) 18 SAclJ [671]

³⁷⁸ M D Chalmers, "Codification of Mercantile Law" (1903) 19 LQR 10 [11]

The MIA was a codification of existing common law principles developed by the Courts. In drafting the MIA 1906 Sir Mackenzie Chalmers focused on stating established common law filling any gaps of the law or conflicting cases with reference to commercial practice, comparative law, or logical extension of existing precedent³⁷⁹. The purpose of the Act was to promote clarity and in doing so serve the commercial community by eliminating the need for litigation to determine the relevant legal principles before applying those principles to the facts of the dispute, therefore reducing costs.³⁸⁰

During the time that Lord Mansfield presided in the Court of King's Bench the learning relating to marine insurance had been "rapidly and so extensively cultivated."³⁸¹ The first cases of marine insurance were addressing issues regarding the interpretation and understanding of policy wordings,³⁸² which started the creation of the rules on seaworthiness. The Marine Insurance Act 1745 was originally introduced to stop wagering by prohibiting policies from including clauses stating, "without interest" or "without further proof of interest than the policy"³⁸³. The Marine Insurance Act 1788 then introduced a direct obligation for the interested parties in an insurance contract to have a valid insurance interest. The Act applied to any Policy or Policies of Assurance upon any Ship or Ships, Vessel or Vessels, or upon any Goods, Merchandises, Effects, or other Property whatsoever. The Act was then repealed by the Marine Insurance Act 1906 to

³⁷⁹ Howard Bennett, "The Marine Insurance Act 1906: Reflections on a Century" (2006) 18 SAclJ [670]

³⁸⁰ Howard Bennett, 'The Marine Insurance Act 1906: Reflections on a Century' (2006) 18 SAclJ [670]

³⁸¹ Sir William Blackstone, *Commentaries on the Laws of England*, (Vol 2) [1765-1769].

³⁸² Frederick Martin, *The History of Lloyd's and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876) [123-124]

³⁸³ Marine Insurance Act 1745 c. 37 (19 George II).

affect marine insurance policies but without restricting its application to other insurance matters.

The Marine Insurance Act was an attempt to codify the common law relating to marine insurance and was primarily designed to cover insurance contracts regarding the international carriages of goods³⁸⁴ but, some provisions of the Act came to apply to all contracts of insurance. After decades of application the 1906 Act was criticised as being archaic and unfair and many attempts at reform were made until the introduction of the Insurance Act 2015, which came into force in 2016. The Act brought a change to two main areas of law governing insurance contracts: the law on warranties and duty of disclosure and non-misrepresentation.

Insurance Contract

The first recorded form of insurance contract (*lex mercatoria*) was developed by Italian merchants after the prohibition of the maritime loan by the Pope.³⁸⁵ The contracts started as simulated³⁸⁶ sale contracts and then developed to the particular contracts for the assumptions of risk against a payment of a price (premiums).³⁸⁷ These contracts accommodated rules of premium insurance.³⁸⁸ They spread to England with the help of the

³⁸⁴ The Explanatory Memorandum to the Insurance Laws Amendment Bill 1997 (Cth), 1997

³⁸⁵ J. Hare, "The Omnipotent Warranty: England v. The World" in Marc Huybrechts, Eric Van Hooydonk and Christian Dieryck (eds.), *Marine Insurance at the Turn of the Millennium*, (1999) vol. 2, 37 [40]

³⁸⁶ Contracts that the parties intent to impose no obligations

³⁸⁷ J. Hare, "The Omnipotent Warranty: England v. The World" in Marc Huybrechts, Eric Van Hooydonk and Christian Dieryck (eds.), *Marine Insurance at the Turn of the Millennium*, (1999) vol. 2, 37 [40]

³⁸⁸ J. Hare, "The Omnipotent Warranty: England v. The World" in Marc Huybrechts, Eric Van Hooydonk and Christian Dieryck (eds.), *Marine Insurance at the Turn of the Millennium*, (1999) vol. 2, 37 [40]

Lombard merchants of Italy that immigrated to London's Lombard Street and was supported by Henry IV.³⁸⁹ The document, which embodied the sea insurance in England was called a policy³⁹⁰ of insurance and was a contract of indemnity.³⁹¹ A contract of indemnity is an agreement by which the one party to the contract promises to the other that he will protect him from a conduct of himself or another person. The purpose of a contract of indemnity of an assured is not to make a source of profit out of the contract by over insuring the property but to merely indemnify him for any losses he would encounter in the event of a loss.

In England the first insurance policy can be traced back to one written in Italian during 1547, under which the vessel Santa Maria Venetia was insured with subscribing English underwriters.³⁹² The first policy found in English was for insuring the vessel Santa Cruz in 1555 while the first recorded marine insurance case was decided in 1588 by Wray CJ who held that the court had the jurisdiction to hear a claim of insurance affected in London regarding a vessel that was detained in France.³⁹³ In the 15th century the UK employed various forms of policy in forming a contract³⁹⁴.

³⁸⁹ Frederick Martin, *The History of Lloyd's and of Marine Insurance in Great Britain*, (Macmillan and Co, London: 1876)

³⁹⁰ The word policy derives from the Italian word “polizza” meaning a list or schedule, a bill or an obligating document serving an evidentiary purpose. Italians referred to them as “instrumentum” if concluded before a notary and “apodixia” if concluded by a broker. Polizza means a promise or undertaking.

³⁹¹ Sir Joseph Arnould, *Arnould on the Law of Marine Insurance, Volume 1* (Nabu Press, 2011) [513]

³⁹² Robert M Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell, UK: 2016) [1-001]

³⁹³ J.A. Park, *A System of the Law of Marine Insurance*, edited by Hildyard, (1842), pp.lxxxiv–lxxv. The earliest traced claim was filed in the Court of Admiralty in 1524: see R.G. Marsden, *Select Pleas in the Court of Admiralty*, Vol.II, [47–49].

³⁹⁴ Sir Joseph Arnould, *Arnould on the Law of Marine Insurance, Volume 1* (Nabu Press, 2011) [220]

In the London Market the broker³⁹⁵ used to make the offer by taking the “slip” to different underwriters at Lloyds of London or the London Company Market and the insurer who wished to insure the risk would “scratch” his stamp on it as a form of acceptance³⁹⁶. The slip normally contained little information for the contract terms and upon the contract formation a policy was issued that contained all the details. This procedure of “deal now detail later” led to discrepancies between the wording of the slip and the policy³⁹⁷. The English marine insurance policy was based upon a document (standard form of policy) called the Lloyd’s Ship and Goods policy (SG).³⁹⁸ The SG form was adopted by Lloyds in 1779 and formed part of the 1906 Act.³⁹⁹ The SG form was replaced with the Institute Cargo Clauses which was introduced in 1912, then revised in 1963, 1982 and 2009 that presents its latest version.⁴⁰⁰ The SG form was replaced with the Institute Time Clauses, Hull in 1982 and 1983 after a joint work between the Lloyd’s underwriters’ Association and Institute of London Underwriters. In 1991 the MAR 91 standard policy was produced by the London market. Now the brokers use the so-called “Market Reform Contract” slip (MRC) that is a document providing a standard form of submissions.⁴⁰¹ There are now a number of clauses used in the marine insurance namely the Cargo Clauses, Institute Hull Clauses (Voyage and Time), and International Hull Clauses.

³⁹⁵ An independent intermediary between the assured and the insurer for facilitating the placement of assurance and the settlement of claims.

³⁹⁶ Özlem Gürses, Johanna Hjalmarsson and Richard Pillay, ‘Marine Insurance’ in Yvonne Baatz (ed) *Maritime law* (3rd ed., Informa Law from Routledge, Oxon: 2014) [429-430]; *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] 2 Lloyd’s Rep. 287.

³⁹⁷ Özlem Gürses, Johanna Hjalmarsson and Richard Pillay, ‘Marine Insurance’ in Yvonne Baatz (ed) *Maritime law* (3rd ed., Informa Law from Routledge, Oxon: 2014) [430].

³⁹⁸ United Nations Conference on Trade and Development, Legal and documentary aspects of marine insurance contract, TD/B/C.4/ISL/27/Rev.1 [15].

³⁹⁹ First Schedule of Act, s. 30(1).

⁴⁰⁰ Yvonne Baatz, *Maritime Insurance*, (3rd ed, Informa Law from Routledge, Oxon: 2014) [454]

⁴⁰¹ Yvonne Baatz, *Maritime Insurance*, (3rd ed, Informa Law from Routledge, Oxon: 2014)

Identifying Insurance Contracts

Marine Insurance has been and still is a contract.⁴⁰² When referring to the law of marine insurance one is talking about the principles that govern the rules of a contract of insurance that includes the agreement of the property insured between the two parties. Marine Insurance is an important component of maritime law as it enables shipping companies and individual ship-owners to reduce the financial losses likely to occur as a result of an unforeseen event. The rules governing insurance contracts play a key role in interpreting policy terms and the intentions of the parties. The focus of this study is to examine the rules on warranties and the duty of disclosure and presentation that form those terms of the contract that are essential for the insurer when agreeing to undertake a risk.

General Rules on Insurance Contracts

A consumer insurance contract, as defined under chapter 6 of the Consumer Insurance Act 2012 (CIDRA), is any contract of insurance between an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession, and a person who carries on the business of insurance and who becomes a party to the contract by way of that business (whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000).⁴⁰³ For insurance purposes a non-consumer insurance contract would be any contract that does not fall within the

⁴⁰² John Hare, 'The Omnipotent Warranty: England v. The World' in Marc Huybrechts and others (eds) *Marine Insurance at the Turn of the Millennium Volume 2* (Intersentia, 2000) [40-41].

⁴⁰³ Consumer Insurance (Disclosure and Representations) (CIDRA) Act 2012, chapter 6(a) and (b)

CIDRA definition, leaving the definition to be construed under common law⁴⁰⁴.

For the formation of an insurance contract that is legally binding there needs to be an application of general contract requirements⁴⁰⁵ that is: the offer and the acceptance. Another requirement for the successful formation of a contract is the consideration by both parties to enforce a contractual promise. For insurance purposes this consideration may be taken by means of the premium payment in exchange of the coverage of the policy.⁴⁰⁶ It is also common that the assured appoints a broker who will act on his behalf to find the syndicates that can cover the specific risk and in what terms. The broker and the assured share a contractual relation under which the broker owes the assured a duty of reasonable skills and care in the performance of actions which he has undertaken.⁴⁰⁷

In a contract of insurance, the two parties to the agreement are the insurer and the assured. The assured seeks to transfer the risk of the economic loss that may arise due to an unforeseen event causing the loss or damage of the ship or cargo. When entering into a contract the assured will be legally bound to pay an amount of payment or the equivalent to the insurer that is normally the premium in exchange of a sum of money or corresponding benefit⁴⁰⁸ so that the insurer undertakes the risk of an unforeseen event happening that would affect the assured's interest in the subject matter of insurance. In some instances,

⁴⁰⁴ Insurance Act 2015, s.1.

⁴⁰⁵ *Thomson v Weems* (1884) 9 App Cas 671, 683-684 (Lord Blackburn)

⁴⁰⁶ Özlem Gürses, Johanna Hjalmarsson and Richard Pillay, 'Marine Insurance' in Yvonne Baatz (ed) *Maritime law* (3rd ed., Informa Law from Routledge, Oxon: 2014), [429].

⁴⁰⁷ *Youell v Bland Welch (No2)* [1990] Lloyd's Rep 431; *Dunlop Haywards (DHL) Ltd v Barbon Insurance Group Ltd* [2010] Lloyd's Rep IR 149 [168-170]

⁴⁰⁸ *Channell J in Prudential v Commissioners of Inland Revenue* [1904] 2 KB 658

the insurer seeks to redistribute the risk through reinsurance arrangements. The law governing marine insurance contracts forms part of the general contract law but carries some unique features such as the nature of the marine insurance contract itself. A contract of marine insurance is a contract of indemnity under which the assured is to be indemnified in a manner and to the extent thereby agreed.⁴⁰⁹

In order to understand how an insurance contract works in practice and be able to construe principles that would address the current issues of the law, one should create a rigorous understanding of the peculiarities of an insurance contract. An important differentiation between a contract of insurance and a general one is the existence of a requirement for an insurable interest. For a valid insurance contract an assured must have an insurable interest in the subject matter of the insured object in order for him to claim under the policy⁴¹⁰. Every person that stands in a legal or equitable relation to the adventure of any insurable property at risk in the extent that he will be benefit from the safety or due arrival of the insurable property or be prejudiced by its loss, damage, or its detention or he might suffer liability in respect of that⁴¹¹. Any ship goods or movables exposed to maritime perils, are referred to as “insurable property.”⁴¹² Chalmers explains that what you insure is the pecuniary interest in the property or in respect to that property that is exposed to peril that is the risk of adventure.⁴¹³ Maritime perils are defined as the perils, consequent on or incidental to the navigation of the sea. Examples of maritime perils include perils of the

⁴⁰⁹ Marine Insurance Act, section 1.

⁴¹⁰ Marine Insurance Act 1906, s. 5.

⁴¹¹ Marine Insurance Act 1906, s. 5(2).

⁴¹² Marine Insurance Act 1906, s. 3(2) a.

⁴¹³ Sir Mackenzie Dalzell Chalmers and J. G. Archibald, *The Marine Insurance Act 1906* (3rd ed., Butterworth, 1922), [5]

sea, fire, pirates, war perils.

Another distinctive characteristic of an insurance contract is that it involves a risk that forms the subject of the contract. Risk can be identified as equal to a peril or a danger, an unfortunate event that might occur to anyone and designates an objective threat.⁴¹⁴ As described by François Ewald, nothing is a risk, but anything is a risk.⁴¹⁵ This is because a risk is something not predictable, a random event that might result in a loss or damages. When the insurer undertakes a risk, in reality he takes nothing but a probability of loss that would be a result of an unpredictable event that in effect could be anything. Since the assured buys nothing but a probability, he buys a protection against something that might or might not happen. The insurer's assessment of risk is reflected either in a numerical assessment that determines the financial ceiling of the policy cover and the premium to be charged in return or based on conditions under which he is prepared to accept the risk⁴¹⁶.

Warranties in Insurance Contract

Addressing the law on marine insurance would become incoherent without referring to the function of warranties in an insurance contract. The status of warranties is another aspect of an insurance contract that distinguishes it to that of a general contract. Generally, in non-insurance cases warranties are treated as those terms of the contract, which if breached will

⁴¹⁴ François Robert Ewald, 'Insurance and Risk', in Graham Burchell and others (eds) *The Foucault Effect: Studies in Governmentality* (Wheatsheaf, London: 1991), [199].

⁴¹⁵ François Robert Ewald, 'Insurance and Risk', in Graham Burchell and others (eds) *The Foucault Effect: Studies in Governmentality* (Wheatsheaf, London: 1991), [199].

⁴¹⁶ Özlem Gürses, 'Risk Definition in Insurance Law: Significance and Challenges' (2018) Nus Centre for Maritime Law Working Paper 18/08 [2]

merely entitle the injured party to claim damages.⁴¹⁷ Contract law warranties, unlike conditions or innominate terms, are not heavy or restrictive enough as to result in the termination of the contract. They are only seen as minor terms of the contract with no significant effect on the breach.⁴¹⁸ In contract law a termination of the agreement will only be possible where there is a breach of a condition being the core term of the contract or where there is a breach of an innominate term as long as the failure is substantial.⁴¹⁹ In an insurance contract, warranties escape the traditional legal effect given to them in contract law because of its use as a device to “define or circumscribe risk”⁴²⁰.

For marine insurance purposes, warranties have a more significant and restrictive role to play. Warranties in an insurance contract are core for the formation of an agreement between the two parties. This is because they form those terms of a contract under which the assured describes certain things or undertakes that certain things should be done and had they not existed the insurer might not have entered into the agreement in the first place.⁴²¹ They indicate the obligations of the assured at a specific date or time, non-compliance of which can result in the termination of the risk covered.⁴²² They are given the same weight that conditions are given for the purposes of contract law as they form

⁴¹⁷ Sale of Goods Act (SOGA) 1979, s 11(4).

⁴¹⁸ *Bettini v Gye* (1876) QBD 183.

⁴¹⁹ *Hong Kong Fir Shipping Ltd v Kawasaki Kisen Kaisha Ltd* (The “Hongkong Fir”) [1962] 2 QB 26 (CA) [70] per Lord Diplock.

⁴²⁰ The Law Commission Consultation paper No182 and The Scottish Law Commission Discussion Paper No 134, Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (2007) [2.1, 2.2]

⁴²¹ Marine Insurance Act, section 33(1); Law Commission and Scottish Law Commission, Insurance Contract Law Issues Paper 2 Warranties, November 2006.

⁴²² Marine Insurance Act; *Kler Knitwear v Lombard General Insurance Co* [2000] Lloyd’s Rep IR 47; *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (The “Good Luck”)* [1992] 1 AC 233, [1991] 2 Lloyd’s Rep 191.

terms delimiting risk that would be otherwise taken by the assured on the condition that the assured will keep their promises as agreed in the contract.⁴²³ As Boris Soyer stated, “warranties exist to make sure that the assured keeps up with the promises made by ensuring that he realises his commitments”⁴²⁴ while promoting transparency⁴²⁵ so that both parties’ interests are equally protected. Warranties set an essential mechanism for identifying the extent of the risk⁴²⁶ and their fulfilment is imperative, as a failure to comply will result in grave consequences such as the termination of the contract as a whole. The importance of compliance lies in the fact that warranties not only define the assured’s obligations for sustaining the insurance cover but also, the insurer’s liability depends on the successful fulfilment of the agreed terms. The importance of warranties in an insurance contract is also, emphasised by Lord Mansfield’s judgment which made a distinction between warranties that are part of a written policy⁴²⁷ and a mere representation. In his judgment in *De Hahn v Hartley*, he holds that a representation may be equitably⁴²⁸ and substantially answered but a warranty must be strictly and literally complied with.⁴²⁹ The definition of warranties implies the existence of two different types of warranties; being the promissory⁴³⁰ and affirmative⁴³¹ warranty. Warranties in the UK are distinguished by means of their nature or their construction.

⁴²³ Peter MacDonald Eggers QC, ‘The past and future of English Insurance law: Good faith and Warranties’, UCL Journal of Law and Jurisprudence [213]

⁴²⁴ Baris Soyer, Legislative Comment ‘Risk control clauses in insurance law: law reform and the future’ (2016) C.L.J. 109-127

⁴²⁵ Baris Soyer, Legislative Comment ‘Risk control clauses in insurance law: law reform and the future’ (2016) C.L.J. 109-127

⁴²⁶ Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001) [5]

⁴²⁷ *Pawson v Watson* (1778) 2 Cowp 785, [787-788]

⁴²⁸ Representation will be identified in Chapter 4 of this study.

⁴²⁹ *De Hahn v Hartley* (1786) 1 Term Rep 343, [345]

⁴³⁰ MIA 1906, section 33.

⁴³¹ MIA 1906, section 33.

Duty to Disclose and not Misrepresent

Another distinctive feature of marine insurance law is the nature of the contract being one of utmost good faith⁴³², which imposes on the assured a twofold duty; the duty to disclose any information that is material to the insurance and the duty not to misrepresent. The two duties were often seen as one and have now been replaced by the duty of fair presentation. The issue of disclosure was dealt with in the cases of *Fitzkerbert v Mather*,⁴³³ *Gladstone v King*⁴³⁴ and *Proufoot v Olontefiore*⁴³⁵ and elaborated on in the case of *Blackburn v Vigors*,⁴³⁶ where the judges held that it is only by a concealment on the part of the assured or the agent who effects the insurance that the policy is vitiated.⁴³⁷ The later Judgment of House of Lords in *Blackburn v Vigors*⁴³⁸ diverted from the judgment and held that in certain cases the insurer will be discharged from liability for non-disclosure of material circumstances, even if that information was unknown both to the assured and to the agent through whom the insurance was effected, promoting a strict interpretation of the doctrine.

Sections 18 and 20 encompass both a negative duty (to not misrepresent) and a positive duty (to disclose any material circumstances). Material for the purpose of marine insurance is defined as something that influences the judgment of a prudent insurer. The test of

⁴³² MIA 1906, s.17.

⁴³³ *Fitzherbert v Mather* (1785) 1 TR 12.

⁴³⁴ *Gladstone v King*, (1813) 1 M & S 35.

⁴³⁵ *Proufoot v Montefiore* (1867) LR 2 QB 511

⁴³⁶ *Blackburn Low and Co v Vigors*, (1886) 17 QBD 553 per Lord Esher

⁴³⁷ *Blackburn Low and Co v Vigors*, (1886) 17 QBD 553 per Lord Esher

⁴³⁸ *Blackburn Low and Co v Vigors*, (1887) 12 App Cas. 531.

materiality is a broad one encompassing whether the information would be generally of interest for the insurer.⁴³⁹ A second requirement to satisfy the test of materiality is that of ‘inducement’ introduced by the court in *Pan Atlantic* under which the insurer needs to show that he was induced to enter into the contract.⁴⁴⁰ In the case Lord Mustill held that there was a “presumption of inducement”, so that proof of objective materiality raises a presumption that the actual underwriter was induced⁴⁴¹ that was later proved to be the exception rather than the rule.⁴⁴²

Good Faith

The duty of utmost good faith was introduced in *Carter v Boehm*⁴⁴³ and was accepted and recognised as an established rule governing marine insurance.⁴⁴⁴ This duty of utmost good faith sets a high standard in that the assured is not only expected not to act fraudulently and not misrepresent but they are also, expected to voluntarily disclose every material circumstance known to him.⁴⁴⁵ The assured is under a duty to provide full and true disclosure of the risk in order for the insurer to consider whether to take the risk and against what premium. The assured is also, under duty not to misrepresent; that means that every material circumstance⁴⁴⁶ must be accurately presented. Since the insurer, who knows

⁴³⁹ *Pan Atlantic Insurance v Pine Top Insurance* [1994] 3 All ER 581

⁴⁴⁰ *Pan Atlantic Insurance v Pine Top Insurance* [1994] 3 All ER 581

⁴⁴¹ *Pan Atlantic Insurance v Pine Top Insurance* [1994] 3 All ER 581

⁴⁴² Rob Merkin, ‘Current Issues in Marine Insurance and Reinsurance Law’ (2005) https://nanopdf.com/download/current-issues-in-marine-insurance_pdf accessed at 5/1/2019

⁴⁴³ *Carter v Boehm* (1766) 3 Burr. 1905.

⁴⁴⁴ *Lloyd’s v San Juan Towing and Marine Serv. Inc* 778 F. 3d 69 (1st Circ. 2015).

⁴⁴⁵ Thomas J. Schoenbaum, ‘The duty of Utmost good faith in Marine Insurance: A comparative Analysis of American and English law’, (1998) 29 J. Mar. L. Com. 1, 1

⁴⁴⁶ Defined in chapter 5.

nothing, agrees to undertake the insurance risk it is only fair that the assured who knows everything owes in good faith, a duty to fully and accurately disclosure all material facts.⁴⁴⁷ Nonetheless, the application and the extent of the good faith obligation is uncertain as it is not clear whether the duty applies mutually to the insurer and the assured.

Even though there is no direct reference in the Act to whether the duty applies to insurers the Court has allowed the assured to terminate the contract when there was misrepresentation on the part of the insurer.⁴⁴⁸ In *Kettlewell v Refuge Assurance*, the court has ruled against an insurance company on the ground of misrepresentation regarding free premium payments. The court held that the assured had the right to terminate the contract due to the fact that the assured based his decision to enter into the contract on the information given regarding the free premiums.⁴⁴⁹

The Reform

In the 1980 Report the Law Commission expressed that there is a formidable case for reform on the law of duty of disclosure⁴⁵⁰ and examined a number of legal issues such as the lack of connection between the disclosure and the loss⁴⁵¹, the merits and demerits of

⁴⁴⁷ *Rozanes v Bowen* (1928) 32 LI. I. Rep. 98

⁴⁴⁸ *Kettlewell v Refuge Assurance* (1908) 1KB 545; *Brit UW Ltd v F&B Trenchless Solutions Ltd* (2015) EWHC 2237.

⁴⁴⁹ *Kettlewell v Refuge Assurance* (1908) 1KB 545.

⁴⁵⁰ The Law Commission, Insurance Contract Law: Non-Disclosure and Breach of Warranty (1980) Law Com. No 104 [27]

⁴⁵¹ The Law Commission, Insurance Contract Law: Non-Disclosure and Breach of Warranty (1980) Law Com. No 104 [67-70]

the principle of proportionality⁴⁵² and the consequences of a breach of the duty⁴⁵³. The Law Commission also identified and exposed a number of issues in regard to the law on warranties. Among other issues, the Law Commission discussed the law relating to the basis of contract clause, the lack of causation and the automatic discharge consequence.⁴⁵⁴ In 2002 the British Insurance Law Association issued a proposal for the examination of the law on warranties and duty of disclosure and the possibility of reform. In 2006 the English Law Commission jointly with the Scottish Law Commission started a review of the current law and after eight years of consultations provided a series of Reports⁴⁵⁵ based on their findings. The final report was published in 2014,⁴⁵⁶ which provides the source of the now reformed law under the Insurance Act 2015. The former 1906 Act has not been abolished but the 2015 Act reformed a number of its provisions. The two work in conjunction to regulate and govern the insurance contracts. The 1906 Act will still be used for defining key concepts while the definition for insurance contract contained in chapter 6 of Consumer Insurance Act 2012 is retained.

The reform brings six changes in the law of duty of disclosure and introduces three changes in the law of warranties that are introduced in the 2015 Act. The assured's pre-contractual duty of disclosure and non-misrepresentation is now replaced by the new obligation to

⁴⁵² The Law Commission, Insurance Contract Law: Non-Disclosure and Breach of Warranty (1980) Law Com. No 104 [30-35]

⁴⁵³ The Law Commission, Insurance Contract Law: Non-Disclosure and Breach of Warranty (1980) Law Com. No 104 [39-41]

⁴⁵⁴ The Law Commission, Insurance Contract Law: Non-Disclosure and Breach of Warranty (1980) Law Com. No 104 [90-94]

⁴⁵⁵ 2007, 2011, 2012

⁴⁵⁶ The Law Commission and the Scottish Law Commission, Law Com. No. 353 and Scot Law Com. No. 238, Insurance Contract Law: Business Disclosure; Warranties; Insurers' remedies for fraudulent claims; and late payment (2014)

make a fair presentation of the risk.⁴⁵⁷ Under the new duty of fair presentation the assured will be under duty to disclose information in a reasonably clear and accessible manner and ensure that every material presentation as to the matter of fact is correct and as to the matter of belief is made in good faith.⁴⁵⁸ The reform has abolished the provision, which provided that all the rules that provided that a contract is to be avoided on the basis that good faith was not observed.⁴⁵⁹ Under the 2015 Law a direct connection is only shown between good faith and presentation. The reform raises questions as to the applicability and the power of the duty of good faith in an insurance contract. This decision appears to minimize the gravity given to considering good faith when it comes to insurance contracts or perhaps the mere intention was to let the courts further develop the element of good faith and relation with the new duty of fair presentation on the basis of individual cases. The Act also, introduces provisions that define key concepts of the new duty of fair presentation. For a breach that is neither deliberate nor reckless the Act introduces three new proportionate remedies other than the avoidance of cover for a breach of the duty of fair presentation. The Act also, introduced the transparency requirements under section 17 that sets out the conditions under which the parties can contract out of the provisions of the 2015 Act with the exemption of the basis of contract clause.

When it comes to the law of warranties, the reform leaves the definition of warranties entirely intact requiring lawyers, insurance agents and brokers to look back to the former 1906 Act in order to define warranties.⁴⁶⁰ The definition for warranties is still provided

⁴⁵⁷ Insurance Act 2015, s. 3.

⁴⁵⁸ Insurance Act 2015, s. 3(3) c.

⁴⁵⁹ Insurance Act 2015, s. 14(1).

⁴⁶⁰ To be dealt with in chapter four.

under the Marine Insurance Act 1906, which states that a warranty refers to a promissory warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negates the existence of a particular state of facts.⁴⁶¹ The reform changes the law of warranties in three main ways: the abolition of basis of contract clause, the transformation of warranties into suspensive conditions and the introduction of an element of causation.

Section 9 of the IA 2015 abolishes the basis of contract clause that converts a statement made by the assured at a pre-contractual stage into warranties. Section 10 of the Insurance Act 2015 transforms warranties into suspensive conditions abolishing the automatic termination for a breach of warranty. As a result, the contract will merely be suspended which allows for the warranties to be remedied where possible. The automatic discharge of the insurer's liability and termination of cover for a breach of warranty can be avoided if the assured remedies the breach before the loss occurs. This means that warranties will be treated as suspensive conditions, suspending the cover until the breach is remedied. When dealing with those promissory warranties that require something to be done within an ascertainable time, the breach will be considered as remedied once the risk becomes essentially the same as that originally contemplated. For other warranties the breach will be considered as remedied, once the insurer ceases to be in breach. There are also warranties that if broken cannot be remedied. Further reference to the different types of warranties will be discussed in chapter four. Another important change was brought by section 11 of the IA 2015 that introduced a new element of causation between loss and

⁴⁶¹ MIA 1906, sections 33-41.

breach. A new element of causation is introduced requiring a connection between the breach and the actual loss, thus rendering materiality as a relevant factor.⁴⁶²

The English MIA 1906 was indeed one of the most influential Acts but, it now contains outdated provisions unfit for the current commercial and technological realities that may in many instances lead to unfair consequences. The IA 2015 modernises the provisions governing the rules on warranties and fair presentation to be up to date with the commercial realities but, seems to be at a first glance less insurer friendly. In order to be able to suggest the development of a CMIA it is important to examine former and current English law focusing on warranties and the duty of fair presentation, to find areas of weakness and improvement, and based on that, suggest proposals that will provide a basis for a CMIA. The essay first looks at identifying warranties, and the development of the rules governing warranties by analysing the relevant case law and legislation.

⁴⁶² Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001), [310] ('If there is no material effect then the breach cannot be causative of the loss').

CHAPTER 4

WARRANTIES: A DRAMATIC CHANGE IN LEGAL STATUS

Introduction

It is impossible for a constructive reform of insurance law to be achieved without an extensive discussion on warranties. This chapter thoroughly examines the law on warranties in the UK as historically followed by the Cypriot Courts. The absence of an Act specific to insurance contracts in Cyprus renders it impossible to fully capture the current state of insurance warranties. This is because there are no clear provisions guiding the law other than the case-by-case establishment of existing English law and a few judicial precedents from Cypriot Courts. Examining warranties will be key for this study not only because of their incredible power in insurance contracts but also, because of the controversial nature of warranties that had on many occasions brought unfair consequences for the assureds. This is more evident when considering the recent reform of the English MIA 1906 since reforming the rules governing warranties has been at the core of this reform.⁴⁶³ The problematic nature of the old rules governing warranties as incorporated under the MIA is manifested when looking at the rules setting the strict compliance of

⁴⁶³ See Law Commission's proposals in Law Commission, Part 3, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims and Late Payment Executive Summary Report, July 2014; Law Commission and Scottish Law Commission, Insurance Contract Law Issues Paper 2 Warranties, November 2006; The Law Commission and the Scottish Law Commission, 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 Disclosure 2012

warranties, which can result to harsh consequences for the assured that would extend when the breach was made right before any loss occurred or even when it was not causative of the loss.

The purpose of this thesis is to propose legislation for Cyprus, but since Cyprus has been following English laws it is necessary to assess the English MIA to see if it is a good fit for Cyprus. If marine insurance is an international business Cyprus' marine insurance needs to be consistent with overseas countries, therefore Cyprus should consider the reform brought by the UK. The aim of this chapter is to assess the English insurance warranties in order to provide a complete understanding of the law that developed around warranties and to suggest that Cyprus should follow the English example to reform its law with a few variations. The old law governing warranties still applies in Cyprus and it is uncertain whether Cyprus will continue to apply the rules as introduced under the former MIA 1906 or if judges will automatically apply the new rules in the IA 2015. This chapter considers the current commercial uncertainty for Cypriot marine insurance law and assesses both the MIA 1906 and IA 2015 to suggest that Cyprus should draft its own law taking inspiration from the English reform but also, considering the Australian steps. This chapter specifically examines the rules governing the English law on warranties and the shift towards an up-to-date application for marine insurance contracts.

This chapter begins by introducing the concept of warranties to then examine their legal status as incorporated under the 1906 Act and interpreted by the common law courts and then compare it to the 2015 Act. Comparing the 1906 law to the IA provisions will

allow for the examination of the suitability of the new rules for the Cypriot law. The chapter examines the old provisions on warranties that still apply in Cyprus to demonstrate the legal issues that they carry. Upon a thorough examination of the rules and after exposing the legal issues that entail, the study analyses the rules under the 2015 Act to show whether the new law achieves a solution to the problems brought to innocent assureds as a result of the rigid and unbalanced provisions governing warranties. It then assesses whether the reformed rules achieve the desirable elusive balance of parties' interests and if they are clear and coherent enough rendering them suitable for Cyprus to follow. The supporting evidence allows for the conclusion that following the reform, the legal status of warranties has considerably changed bringing the English insurance law a step closer to the desired balanced of party interests, but the implications of such changes need to be examined. By examining the reformed rules, it is possible to learn from the strengths of the law as well as consider any flaws to determine whether the reformed law is in its entirety: exemplary for Cyprus to follow or whether Cyprus should adopt its own Act. The study finally provides recommendations regarding the implementation of a clear legislation to regulate matters of insurance contracts for Cyprus that would be inspired by the 2015 Act but would not be a copy of it.

Background to the Law on Warranties

An essential part of this chapter is to provide a background on the law that Cyprus' law is based on and identify key concepts. Understanding the survival and development of warranties in marine insurance, facilitates the development of rules governing warranties

for Cyprus' law that are both fit and effective. To do so it is important that the development of English marine insurance warranties is briefly described and the law on warranties identified. Warranties were not always the absolute and detrimental principle that we know today. Warranties for English marine insurance originated in the seventeenth century, and were seen as nothing more than terms of the insurance contract, which formed the assureds' promise that certain facts were true.⁴⁶⁴ This is evident when looking at common law cases indicating that warranties were merely seen as contractual terms descriptive of the risk,⁴⁶⁵ a means for defining and delimiting the proposed risk undertaken by the assured.⁴⁶⁶ Warranties were still acknowledged as conditions precedent to the liability of the insurer but, the effect of a breach of warranty was not as harsh due to the much more lenient approach taken by the Courts.⁴⁶⁷ With the inspiration of Lord Mansfield, described as the establisher of a great part of this law, warranties have developed in the common law until their codification into an Act in the 19th century by Sir Mackenzie Chalmers.⁴⁶⁸ During that time warranties have become either something simple such as a means for defining the insurance risk or something so complicated and grave that could provide the means for the insurer to refuse any liability.

The case of *De Hahn v Hartley*⁴⁶⁹ established from a very early stage an element of strict compliance for warranties but it was not until the case of *Good Luck*⁴⁷⁰ and the introduction

⁴⁶⁴ William R. Vance, 'The history of the development of the warranty in insurance law' (1910), 20 Yale L.J. 523.

⁴⁶⁵ *Jefferies v Legandra* (1692) 4 Mod. 58; *Gordon v Morley* 93 Eng Rep 1171.

⁴⁶⁶ William R. Vance, 'The history of the development of the warranty in insurance law' (1910), 20 Yale L.J. 523.

⁴⁶⁷ *Jefferies v Legandra* (1692) 4 Mod. 58; *Gordon v Morley* 93 Eng Rep 1171.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ (1786) 1 TR 343; *Bond v Nutt* (1777) 2 Cowp 601

⁴⁷⁰ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1

of the automatic discharge principle that the harshness of the rule was exacerbated. The automatic discharge principle enabled the automatic termination of cover after a breach of warranty.⁴⁷¹ The nature of warranties was soon to become too restrictive. By the mid 20th century insurers could demand warranties for all types of things⁴⁷² no matter how trivial or irrelevant⁴⁷³, and a breach of warranty would discharge the insurer's liability leaving no space for the defence that the breach has been remedied⁴⁷⁴. It even became possible for the insurer to introduce into the contract, clauses that rendered terms agreed at the pre-contractual stage as warranties. The basis of contract clause allowed insurers to avoid the cover of the risk by converting statements into warranties using obscure and technical language that few could understand.

Consequently, the 1906 Act has attracted a great deal of criticisms as to the harsh nature of its provisions that often resulted to unfair consequences while many have described it as an archaic tool.⁴⁷⁵ This strict compliance rule and its application may be rationalised when considering that at the time the insurers based their decision to enter into contract with full trust on what the assured declared to be the truth without having access to relevant information through data collection or the Internet. Nowadays, the growth of information technology and data communication allows for access to information that in the past was impossible, making the rule on strict compliance and automatic discharge seem way too

A.C 233

⁴⁷¹ MIA, section 34.

⁴⁷² Merkin, Robert 'Reforming insurance law: is there a case for reverse transportation? Report for the English and Scottish Law Commissions on the Australian experience of insurance law reform'. Accessed at <http://www.lawcom.gov.uk/wp-content/uploads/2015/03/ICL_Merkin_report.pdf > (1/5/2017) [59]

⁴⁷³ *Woolmer v Muilman* (1763) 1 Wm Bl 427 ('technical reasons immaterial to the risk').

⁴⁷⁴ MIA, Section 34(2).

⁴⁷⁵ Baris Soyer, 'Legislative Comment, Risk control clauses in insurance law: law reform and the future' (2016) C.L.J. 109-127, [109].

harsh for innocent parties.

This restrictive nature of warranties has sparked a long debate among academics and lawyers. The English Law Commission expressed that “it seemed quite wrong that an insurer should be entitled to demand strict compliance with a warranty which was immaterial to the risk”⁴⁷⁶ and unjust that an insurer should be entitled to reject a claim for any breach, “no matter how irrelevant that breach to the loss.”⁴⁷⁷ Warranties were transformed from a tool for protecting the insurers to a means for avoiding liability for minor mistakes and relying on ‘technical grounds’⁴⁷⁸ imposing the need to question the morality of such a rule. Warranties in marine insurance came to have such an important role to play, being the core elements upon the making of the agreement and describing the limits of the risk covered by the insurer. The law of insurance is one that should not remain static or stuck to the past but should adapt to the changing trends of the commercial world. In an era of information and technology where the circumstances around the creation of an insurance contract have changed, it is fundamental that the law governing marine insurance is developed in a way that allows it to keep pace with ever-changing realities. The rules governing warranties in insurance contracts should be construed in such a way as to ensure that both parties are fairly treated and protected; the creation of a balance for party interests. Instead, they result to unfair consequences that may lead to the assured’s loss of confidence.

⁴⁷⁶ Insurance Law: Non-Disclosure and Breach of Warranty (1980) Law Com No 104, [6.9(a)].

⁴⁷⁷ English Law Commission, Insurance Law: Non-Disclosure and Breach of Warranty (1980) Law Com No 104, [6.9(b)].

⁴⁷⁸ *Glicksman v Lancashire and General Assurance Co* [1927] AC 139 [144-5] per Lord Wrenbury

The provisions governing warranties are now reformed in the UK under the Insurance Act 2015. After decades of implementing the provisions as embodied in the MIA 1906, the marine insurance industry will now need to adjust to the recent changes made and it will not be easy as legal uncertainty, confusion, complexity and inefficiency could be the new obstacles. Prior to examining the new provisions on the law of warranties to assess whether the ‘new warranties’ have escaped the draconian⁴⁷⁹ and unfair treatment, it is important to form an understanding of what constitute warranties and identifying the nature attributed to warranties as developed under the English marine insurance law. Understanding the different types of warranties and looking at their application will aid the development of efficient rules for Cyprus’ law.

The Nature of Warranties

As previously mentioned, in insurance law warranties are promises that create a condition of the insurer’s promise,⁴⁸⁰ and have characteristic legal consequences of a condition⁴⁸¹ rather than a promise. Warranties may also, be defined as those terms that qualify the subject matter of the insurance⁴⁸² and were developed to be used as a shield against liability and not a sword to impose liability.⁴⁸³ There is a general recognition that the nature of warranties in English insurance law has been largely formed by Lord Mansfield⁴⁸⁴ who

⁴⁷⁹ Baris Soyer, ‘Legislative Comment, Risk control clauses in insurance law: law reform and the future’ (2016) C.L.J. 109-127, [109].

⁴⁸⁰ Edwin W. Patterson, ‘Warranties in Insurance Law’, (1934) Columbia Law Review No 4 Vol. 34 [596]

⁴⁸¹ *Yorkshire Insurance Company v Campbell* [1917] A.C. 218

⁴⁸² *Yorkshire Insurance Company v Campbell* [1917] A.C. 218

⁴⁸³ Thomas J. Schoenbaum, ‘Warranties in the Law of Marine Insurance: Some Suggestions for Reform of English and American Law’ (1998) Tul. Mar. L.J. 23, 269, [279]/

⁴⁸⁴ Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001),

laid down the importance of strictly complying with a warranty.⁴⁸⁵

Complying with the warranty is a condition precedent to the attaching of the risk.⁴⁸⁶ In the case of *Good Luck*, the insurer was discharged from liability due to the fact that fulfilling the promissory warranty became a condition precedent of the insurer's liability.⁴⁸⁷ The case further held that there is no distinction between the operation of an insurance warranty as a condition precedent to initial attachment of the risk and to its continuation.⁴⁸⁸ The word "condition" as incorporated within MIA 1906⁴⁸⁹ is used in its contingent sense and it has nothing to do with the 'conditions' within contract law⁴⁹⁰. It merely means the coming into existence of an obligation, or duty or further duty to perform an obligation is dependent upon the fulfilment of the special condition⁴⁹¹; the definition provides a distinction between the two types of warranties affirmative/present and future/promissory.

The strict compliance rule is reflected in common law but also under the MIA itself. Section 33(3) of the MIA 1909 provides that a warranty is a condition that must be exactly complied with, whether it be material to the risk or not.⁴⁹² Not necessarily substantially but literally.⁴⁹³ This means that warranties can include terms that have nothing to do with the

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⁴⁸⁵ *Pawson v Watson* (1778) 2 Cowp 785, [787-788]

⁴⁸⁶ *Thomson v Weems* (1884) 9 App.Cas. 671, 684 per Lord Blackburn

⁴⁸⁷ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C 233 [262-3]

⁴⁸⁸ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C 233 [262-3]

⁴⁸⁹ MIA 1906, section 33(3)

⁴⁹⁰ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C 233 [262-3]

⁴⁹¹ [1991] 2 Lloyd's Rep 191, [202] per Lord Goff

⁴⁹² MIA 1906, section 33(3)

⁴⁹³ *De Hahn v Hartley* (1786) 1 TR 384 Ashhurst, J

risk insured.⁴⁹⁴ Lord Mansfield held that ‘it is perfectly immaterial for what purpose a warranty is introduced’.⁴⁹⁵ Nonetheless, warranties can serve different purposes and it is essential that those warranties that describe the risk and are material to the risk insured for, should be distinguished from those that have no effect on the breach in question. Warranties that might overall be considered material by the insurer do not necessarily have a material effect on the breach in question. Treating all warranties the same may cause a degree of unfairness, as those warranties having nothing to do with the bearing of the risk should result in minor consequences such as: entitle the insurer to damages. As a result, irrelevant or trivial mistakes will be given analogous punishment and the assured will still be reminded of their commitment and the fact that the contract agreed is based upon good faith. Reference will now be made to the different types of warranties.

Distinguishing Warranties

Warranties vary depending on the type of the risk attached to them and the nature attributed to them. Warranties in the UK are only distinguished by means of their nature or their construction. It is suggested that the definition of warranties makes reference to two types of warranties equating them with a promise; being the present and continuing as to the future events.⁴⁹⁶ Nonetheless, it appears that in practice only one of them is a promise per se as the one looks more like a representation and the other as a condition.⁴⁹⁷ An

⁴⁹⁴ Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001) [310].

⁴⁹⁵ *De Hahn v Hartley* (1786) 1 TR 384

⁴⁹⁶ Thomas J. Schoenbaum, ‘Warranties in the Law of Marine Insurance: Some Suggestions for Reform of English and American Law’ (1998-1999), 23 Tul. Mar. L.J. 267 [291].

⁴⁹⁷ Thomas J. Schoenbaum, ‘Warranties in the Law of Marine Insurance: Some Suggestions for Reform of

introduction of a causation test for marine insurance warranties would mean that developing an understanding for the different classification of warranties is crucial. The test concerning the effectiveness of the rules would be whether the warranty in question designed for the particular purpose gives an outcome, which achieves the purpose it was originally designated to serve. In order to do so, the most common types of warranties will be identified, and their distinction will be explained. Warranties are mainly divided into express, which are subject to the rules of contractual construction⁴⁹⁸ or implied by a policy⁴⁹⁹, and present/affirmative or future/promissory.

Express or Implied

Under English laws warranties are distinguished according to their structure into express or implied.⁵⁰⁰ Express warranties are those terms of the contract that are created with express wording. Under section 35(1), ‘express warranties may be in any form of words from which the intention to warrant is to be inferred’.⁵⁰¹ The express warranty must be stated in the policy or incorporated into it by words of reference appearing in the policy itself.⁵⁰² This has been interpreted as: any term can be classified as a warranty as long as it is part of the contract in its true construction. An instance of an express warranty is where a term states ‘warranted that a watchman is on watch for 24 hours’⁵⁰³. The English courts

English and American Law’ (1998-1999), 23 Tul. Mar. L.J. 267 [291]

⁴⁹⁸ Özlem Gürses, *Marine Insurance Law* (1st edn, Routledge, London: 2015), [102]; *Investors Compensation Scheme Ltd v West Bromwich Building Society* (No.1) [1998] 1 All ER 98.

⁴⁹⁹ MIA 1906, section 33(2).

⁵⁰⁰ Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001) [14]

⁵⁰¹ Marine Insurance Act, section 33(1).

⁵⁰² Marine Insurance Act, section 35(2).

⁵⁰³ *Forsikringsaktieselskapet Vesta v Butcher* [1989] 1 Lloyd’s Rep 331, [335].

have taken a very broad definition of what constitutes an express warranty. It was in the case of *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* it was shown that as long as the proper language is used it is not necessary that the word “warranty” or “warranted” be stated.⁵⁰⁴ Nonetheless, it can be argued that the term warranted may be used with “extremely ambiguity”,⁵⁰⁵ and in deciding cases one should look at whether on a proper construction of a clause, the intention of the parties was that the clause should be a warranty.⁵⁰⁶ In the post-reform case of *Bluebon Ltd v Ageas (UK) Ltd (formerly Fortis Insurance Ltd)* it was stated that construction was the only possible businesslike interpretation of the warranty and one should look at the purpose of that warranty.⁵⁰⁷

This total freedom to make almost anything into a warranty could indeed expose the assured to an unfavourable position. This is because a breach of warranty could leave the assured without cover even for a breach that has no bearing to the loss. In *HIH Casualty & General Insurance Ltd* the court held that the term stipulating the number of films to be made constituted a warranty.⁵⁰⁸ The court based its finding on the fact that the term was descriptive of the subject matter and material to the insurance risk.⁵⁰⁹ This is also, evident when considering the development of the so-called basis of contract clause, which could

⁵⁰⁴ *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] C.L.C. 1480; In *Kirkaldy & Sons Ltd v Walker* [1999] Lloyd's Rep IR 410 the court held that the failure to comply with the condition survey requirement was a breach of warranty which discharged the contract.

⁵⁰⁵ *Century Insurance Company of Canada v Case Existological Laboratories Ltd. (The "BAMCELL II")* (1984) 1 WWR 97.

⁵⁰⁶ *Kler Knitwear Limited v Lombard General Insurance Company Limited* [1999] 9 WLUK 269

⁵⁰⁷ *Bluebon Ltd v Ageas (UK) Ltd (formerly Fortis Insurance Ltd)* [2017] 2 C.L.C. 890

⁵⁰⁸ *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] C.L.C. 1480

⁵⁰⁹ *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] C.L.C. 1480

transform any term into express warranty no matter how trivial it was sometimes without the knowledge of the assured.

To the contrary, Australian courts seemed reluctant to interpret a term as a warranty in a number of cases⁵¹⁰ taking a more restrictive approach, thus departing from the English interpretation of the rules on warranties. The courts in Canada followed a similar approach and were unwilling to accept a term as a true warranty even if such term contained the word “warranted”⁵¹¹. The courts based their reasoning on the fact that the loss occurred at midnight and the breach of warranty had no bearing to the loss, and held that the condition contained in the clause constituted a limitation of the risk insured against but it was not a warranty.⁵¹² The case provides a clear distinction between a “true warranty”⁵¹³ and a merely suspensive condition that limits the risk.⁵¹⁴ The term true warranty refers to warranties that are material to the risk a breach of which has a bearing to the loss.⁵¹⁵ An English case that considered the Bamcell judgment was that of *Kler Knitwear Limited*, which held that the warranty was a suspensive condition and not a true contractual warranty.⁵¹⁶

The position of the law is much clearer when it comes to implied warranties.

⁵¹⁰ *Shearwater Marine Ltd. v. Guardian Insurance Co. et.al.*, [1998] CanLII 5882.

⁵¹¹ Warranted that a watchman was stationed on board the *BAMCELL II* each night from 2200 hours to 0600 hours with instructions for shutting down all equipment in an emergency. *Century Insurance Company of Canada v Case Existological Laboratories Ltd. (The "BAMCELL II")* (1984) 1 WWR 97.

⁵¹² *Century Insurance Company of Canada v Case Existological Laboratories Ltd. (The "BAMCELL II")* (1984) 1 WWR 97.

⁵¹³ *McIntosh v. Royal & Sun Alliance* (2007) FC 23

⁵¹⁴ *Century Insurance Company of Canada v Case Existological Laboratories Ltd. (The "BAMCELL II")* (1984) 1 WWR 97; [1986] 2 *Lloyd's Rep* 528 [533]

⁵¹⁵ *Shearwater Marine Ltd. v. Guardian Insurance Co. et.al.*, [1998] CanLII 5882.

⁵¹⁶ *Kler Knitwear Limited v Lombard General Insurance Company Limited* [1999] 9 WLUK 269

Implied warranties were developed during the nineteenth century and are implied into the policy as a matter of law by reason of the Marine Insurance Act 1906. They will normally apply unless they are inconsistent with the terms of the contract⁵¹⁷ or with an express warranty⁵¹⁸. Implied warranties are those warranties whose existence is assumed (implied) at law and will form part of any contract, regardless of whether they are mentioned in the policy and regardless of whether the parties have otherwise agreed on its inclusion. It is argued that the warranty of neutrality is not an implied warranty per se due to the fact that its application is subject to the existence of an express warranty of neutrality with respect to an insurable property.⁵¹⁹ The most common types of implied warranties in English marine insurance are the warranty of legality and the warranty of seaworthiness.

Warranty of seaworthiness is implied in marine policies by virtue of sections 39(1), 40 and the warranty of legality by virtue of section 41⁵²⁰. The implied warranty of legality only exists in marine insurance law⁵²¹ and can be both expressly incorporated in the contract or implied. As Lord Mansfield states: no court will lend its hand to the illegal party and no one can benefit from his own illegality.⁵²² This statement seems to be in conformity with the 1906 Act that emphasises the importance of complying with legality by referring to the concept of legality more than once. By means of section 41 under which the scope of the warranty of legality is described in ensuring that the adventure itself is lawful one

⁵¹⁷ Section 87

⁵¹⁸ MIA 1906, section 35(3)

⁵¹⁹ Christopher J. Giaschi Warranties in Marine Insurance, (Association of Marine Underwriters of British Columbia at Vancouver, April 10, 1997) <<http://www.admiraltylaw.com/papers/warranties.pdf> > accessed 10/04/2018

⁵²⁰ MIA 1906.

⁵²¹ *Euro-Diam Ltd v Bathurst* [1988] 2 All ER 23

⁵²² *Holman v Johnson* (1775) 1 Cowp 341

and that so far as it is in the assured's control, the adventure is carried out in a lawful manner. Whereas section 3(1) states that: "every lawful marine adventure may be the subject of a contract of marine insurance". In recent times the most common example of a warranty of legality is compliance with sanction regimes.⁵²³ Sanction clauses are being deployed in policy wordings across Lloyd's market⁵²⁴ in order to mitigate the risk of insurer's being exposed to international sanctions regimes. Unlike the warranty of legality, the warranty of seaworthiness will vary according to the type of the policy.

The implied warranty of seaworthiness will apply in full effect only to voyage policies. When considering a marine insurance case, the element of marine adventure must be taken into consideration. The warranty holds that the ship will be seaworthy 'at the commencement of the voyage' for the particular adventure insured. Seaworthiness of the vessel means that the vessel shall be fit as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage.⁵²⁵ The importance of such warranties lies on the fact that insuring a ship or a cargo, which can be exposed to the so-called perils of the sea will potentially increase the risk insured.⁵²⁶

The concept of seaworthiness is itself far-reaching⁵²⁷. Baris Soyer in *Warranties in Marine Insurance* citing *Burges v Wickman*⁵²⁸ suggested that the standard of seaworthiness is not absolute as one could unfold many aspects that would change the extent of the duty to

⁵²³ Breaching sanctions is illegal and create civil and criminal liability for the insurers.

⁵²⁴ Most common sanction clause used in Lloyd's LMA 3100.

⁵²⁵ *Dixon v. Sadler*, 5 M. & W. 405, 414

⁵²⁶ Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001), [6].

⁵²⁷ Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001)

⁵²⁸ *Burges v Wickman* (1863) 3 B & S 669,

provide a seaworthy ship⁵²⁹. This is because the standard of seaworthiness will change as there is an implied question of fact based on the specific circumstances such as the season or the specific voyage and the class of the ship insured meaning the purpose of the vessel.⁵³⁰ It also, depends on the scientific developments of a country and the standard practice or statutory provision. Soyer argues that implementation of such rule would be contrary to section 39(4) MIA 1906 and gives an example of two ships on the same voyage one under the flag of Cyprus and the other: England, both of which were not provided with the navigational equipment as required by the International Convention England was part of.⁵³¹ If Cyprus was not part of the same convention then that ship would be seaworthy as opposed to the English one.

Under English law in a time policy the insurer only needs to show that the ship was unseaworthy at the commencement of the voyage. But, for a voyage policy, the ship needs to be seaworthy for the duration of the trip and the burden of proof is threefold. The insurer will need to demonstrate that the ship was unseaworthy; that the unseaworthiness caused the loss, and that the assured was privy to the unseaworthy state of the ship⁵³². Nowadays, there is an implied warranty of seaworthiness for every voyage marine insurance contract⁵³³ and if the parties intend to exclude the implied warranty of seaworthiness, it must be expressed in plain language.⁵³⁴ For instance, express clauses incorporated into the

⁵²⁹ Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001)

⁵³⁰ Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001)

⁵³¹ Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001)

⁵³² Federal Act, section 37; B.C. Act, section 40.

⁵³³ *Woolf v Claggett* (1800) 3 Esp 257; *Douglas v Scougall* (1816) 4 Dow 276 Lord Eldon: 'there is nothing in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage assured ... both a view to the benefit of commerce and the preservation of human life ...'

⁵³⁴ *Quebec Marine Insurance Co. v Commercial Bank of Canada* (1870), L.R.3 P.C per Lord Penzance.

ICC can waive breach of warranty of seaworthiness.

Present or Continuing

Warranties may also be distinguished into present and continuing. Distinguishing between present and continuing warranties is core for the understanding of the suspensive condition principle due to the fact that under the reformed law the result of a breach might vary depending on whether the warranty is present/past or continuing. This is because the provisions on warranties under the 2015 Act allow the insurers to rectify their mistakes as long as they are done before any loss occurs, a thing that wouldn't be possible for present fact warranties. When considering the construction of warranties, English law distinguishes them into present/affirmative and continuing/promissory. Present fact warranties refer to those warranties under which the assured affirms or negates the existence of particular state of facts.⁵³⁵ They describe the scope of the insured risk⁵³⁶ and are stipulations that certain facts exist⁵³⁷ or will occur at the inception of the risk. A present or past warranty is a condition precedent to the 'attachment of risk' and, in cases where it is breached, the assured will not always be able to remedy his breach. This is because a promise designating the existence of certain facts during or before the commencement of the insurance contract was breached.

An instance of a case where a present fact warranty was breached can be found in the case

⁵³⁵ Baris Soyer, 'Beginning of a new era for insurance warranties?' (2013), L.M.C.Q Issue 3, 384-400

⁵³⁶ Baris Soyer, 'Beginning of a new era for insurance warranties?' (2013), L.M.C.Q Issue 3, 384-400, [388].

⁵³⁷ William R. Vance, 'The History of the Development of the Warranty in Insurance Law', (1911) 20 Yale L.J. 523; Edwin W. Patterson, 'Warranties in Insurance Law', (1934) 34 Colum. L. Rev. 595, [532].

of *De Hahn v Hartley*⁵³⁸ where the assured had undertaken that the vessel sailed from Liverpool with 50 hands on board while it actually sailed with less. Also, in *Hide v Bruce*⁵³⁹ it was warranted that the vessel commenced the adventure with 20 guns on board but the assured failed to fulfil his 'promise'. Consequently, based on the former English law the insurer would be discharged from liability, ab initio, as from the date of the breach (but the policy would be valid up until that date). In *Woolmer v Muilman* the assured warranted that the vessel was neutral by incorporating the term 'warranted neutral ship and property'⁵⁴⁰ and was in breach of an affirmative warranty as to the condition of the ship at the commencement of the trip. It is easier for the assured to check and ensure that an affirmative warranty is true and accurate as it concerns facts that already exist and are under his control. Therefore, the assured has no excuse in breaching warranties on the existence of facts that are known to him. Such warranties define the scope of the insured risk and are of particular importance for the formation of the contract.

Continuing⁵⁴¹ or promissory warranties tend to define the extent of the risk insured, thing that renders them particularly important and usually very material to the risk. They are promises by the insured that facts will or will not exist in the future or will or will not continue to exist for the future. They are merely recognised terms of the contract agreed to be material.⁵⁴² Such warranties relate to the future conduct of the assured and protect

⁵³⁸ (1786) 1 T.R. 343.

⁵³⁹ (1783) 3 Doug KB 213.

⁵⁴⁰ *Woolmer v Muilman* (1763) 3 Burrow 1419 97 E.R. 905

⁵⁴¹ Baris Soyer, *Warranties in Marine Insurance*, (1st edn, Cavendish Publishing Limited, London: 2001) [13] 'appropriate to refer to warranties of this type as 'continuing warranties'.

⁵⁴² William R. Vance, 'The History of the Development of the Warranty in Insurance Law', (1911) 20 YALE L.J. 523; Edwin W. Patterson, 'Warranties in Insurance Law', (1934) 34 Colum. L. REV. 595, [532].

insurer against alteration of the insured risk⁵⁴³. It therefore describes the occurrence of certain things after the commencement of the risk and during the continuation of the risk. Unlike present warranties the insurers will not be discharged from liability at the start of the policy (from the date of the breach) but only when the specific facts cease to exist at one point during the continuation of the contract. Breach of such warranties will not prevent the risk from running and any right vested in the assured will remain untouched at the time of the breach.⁵⁴⁴ This means that the assured could be able to claim for a partial loss that has occurred before the breach as any prior contractual rights or obligations will continue to be effective.⁵⁴⁵ Whether the assured could recover part of the premium paid depends on the divisibility of the risk insured against. An instance of a continuing warranty is where the assured undertakes that the owner or experienced skipper will be on board and in charge at all times.⁵⁴⁶ Also, where the warranty provides that the vessel will not sail in a specific area or at a specific time (navigation warranty).

Present or continuing, express or implied, warranties play a crucial role for the creation of contracts as they form the promises based on which the parties agree to undertake a contract. The rules governing warranties and upon which the successful execution of contracts rest must be carefully drafted in a clear manner to best serve the interest of the contracting parties. The chapter will now analyse English pre-reform case law governing insurance warranties to set out defects with the rules that form part of Cyprus' current law. It will do so by looking at the problem from three different perspectives: the basis of

⁵⁴³ Baris Soyer, 'Beginning of a new era for insurance warranties?' (2013), L.M.C.Q Issue 3, 384-400

⁵⁴⁴ MIA 1906, section 33.

⁵⁴⁵ MIA 1906, section 33(3).

⁵⁴⁶ *Pratt v Aigaion Insurance Co SA (The Resolute)* [2008] EWCA Civ 1314

contract clause, the automatic discharge element and the lack of causation.

Warranties Under the 1906 Act –Pre-reform

Basis of contract clause

After the abolition of the basis of contract law under s 9 of the Insurance Act 2015 (and s 6 CIDRA) there is a desirability to introduce s9 in the context of the Cypriot law reform. Since Cyprus implements the English basis of contract clause principle and due to the limited availability of Cypriot case law to test the doctrine, it is important to look at the application of the rule in different UK cases. Reference will be made to important case law (both marine and non-marine) underpinning the basis of contract clause and its application. When applying for insurance, it was necessary for the assured to fill in a proposal form that seeks answers to some basic pre-contractual information about him and the risk insured against. The common law provided that where a policy of insurance contains a provision stated that this proposal form should be the basis of the contract then, an implied warranty of the truth of the statements contained in the proposal form is imported.⁵⁴⁷ By means of that declaration, the so-called basis of contract clause expressly allowed any statement made by the parties at pre-contractual stage⁵⁴⁸ to be converted into warranties a breach of which would result in the automatic discharge of the insurer's liability leaving the assured without cover. Subject to those specific clauses incorporated into contracts it was possible

⁵⁴⁷ *Dawsons, Limited v Bonnin and Others* [1922] 2 A.C. 413.

⁵⁴⁸ Either orally or in writing.

for the insurers to convert any statements made by the assured during the presentation of risks into contractual warranties whether the statement was inducing, material or otherwise.⁵⁴⁹ This strict interpretation is shown in the case of *Dawsons Ltd v Bonnin* where the court held that even if the result was technical or harsh, since it is what the parties had agreed the court had to give effect to it.⁵⁵⁰ Lord Haldale explained his decision stating that hard cases should not be allowed to make bad law.⁵⁵¹ It is evident from case law that where the assured incorrectly answered questions made in the proposal form there was a tendency from the courts to take a literal approach of the “strict compliance rule” and decide in favour of the insurer; thus, accepting such terms as warranties and treating the cover as terminated.

Under the former law, the insurer could convert terms agreed at a pre-contractual stage as warranties by incorporating the following words “I/We agree that this proposal and declaration and any particulars given separately shall be the basis of the contract between the Insurer and myself/ourselves”⁵⁵² in the proposal form. By means of this sentence, the insurer could simply walk away where the description provided by the insured did not meet the actual facts or where one question was answered incorrectly no matter how immaterial or trivial. The discharge will have full effect even if the inaccuracy of the statement was without the knowledge of the assured for an immaterial⁵⁵³ or trivial⁵⁵⁴ statement. The

⁵⁴⁹ R. A. Hasson, ‘The “Basis of the Contract Clause” in Insurance Law’ (1971) *The Modern Law Review*, Vol. 34, No. 1 [29]; Willis Technical Insight, ‘The Insurance Bill’ (Willis Technical Insight, 2016) <http://www.willis.co.uk/documents/Services/Willis_Technical_Insight__Law_Commissions_Insurance_Bill_-_Corporate.pdf> accessed at 19/8/2016

⁵⁵⁰ *Dawsons Ltd v Bonnin* [1922] 2 AC 413 per Lord Haldane [424-425].

⁵⁵¹ *Dawsons Ltd v Bonnin* [1922] 2 AC 413 per Lord Haldane [424-425].

⁵⁵² *Zurich General Accident & Liability Ins Co. Ltd. v Morrison* [1942] 2 K.B. 53, 58, per Lord Greene, MR.

⁵⁵³ *Dawsons Ltd v Bonnin* [1922] 2 AC 413.

⁵⁵⁴ *Zurich General Accident & Liability Insurance Co v Morrison* [1942] 2 KB 53 by Lord Greene MR [58].

assured would have no defence even if he provided the statements in good faith. Unsurprisingly, such clauses were recognised as being “mere traps⁵⁵⁵” and “particularly vicious” as they enabled insurers to find loopholes and avoid liability for an inaccurate statement of no importance. Minor and immaterial misstatements made by the assureds could lead to such detrimental consequences.

Basis of contract clause was core for the construction of marine insurance contracts since such clauses facilitated the assessing of risk and ensured accountability by rendering all agreed at a pre-contractual stage to become essentially important and harsh as warranties. That seemed to not be an issue at the end of 17th start of the 18th century since there appeared to be no cases where the contract was avoided due to a breach of a pre-contractual term while the disputes arising were never related to a clearly immaterial issue⁵⁵⁶. This is shown in *De Hahn v Hartley*⁵⁵⁷ that involved a dispute regarding to the number of men on board a ship being incorrectly stated at a pre-contractual stage. The ship should have sailed from Liverpool with 50 hands or more, but the ship sailed with 46 men. In the case the number of men on board was relevant to the possibility of capture, which was one of the risks that the ship was insured against.⁵⁵⁸ Nonetheless, before the capture of the ship, it took in six more hands. The court held that the insurer should be discharged from liability. The reasoning behind the decision is that if an assured affirms a state of facts that should exist at a particular time and such facts do not exist then the assured is in breach

⁵⁵⁵ *Zurich General Accident & Liability Ins Co. Ltd. v Morrison* [1942] 2 K.B. 53, 58, per Lord Greene, MR.

⁵⁵⁶ A. Hasson, ‘The “Basis of the Contract Clause” in Insurance Law’ (1971) *The Modern Law Review*, Vol. 34, No. 1, [30]

⁵⁵⁷ *De Hahn v Hartley* (1786) 1 TR 343.

⁵⁵⁸ A. Hasson, ‘The “Basis of the Contract Clause” in Insurance Law’ (1971) *The Modern Law Review*, Vol. 34, No. 1, [30]

of a warranty that should lead to the repudiation of the contract. Remedying that breach at a later stage would not have excused the assured from his breach and would have automatically discharged the insurer's liability.⁵⁵⁹

In many occasions the court decided in favour of the insurer leaving the assured without cover for a breach of warranty that had not relevance to risk of loss. This can be seen in two cases where the assured was left without cover for inaccurately stating the date of sailing⁵⁶⁰ and the nationality of the ship insured⁵⁶¹ respectively. The judgments might seem more rational when considering the war risks and seasonal storm hazards at the time but, looking at them from today's perspective renders them harsh. By the 19th century and onwards the application of the basis of contract clause came to be too harsh on the assured.⁵⁶² Such application enabled the insurers to use the clause as a loophole for avoiding responsibility even for issues that had no relevance to the risk insured against.⁵⁶³

This is evident when looking at the case of *Genesis Housing Association*.⁵⁶⁴ In the case the proposal incorporated a clause, which provided that it would form the basis of the contract. In the proposal form the assured communicated the builders' names but it later turned out that the names were wrongly stated. The court held that the assured was in

⁵⁵⁹ *De Hahn v Hartley* (1786) 1 Term Reports 343; 99 E.R. 1130 [346]

⁵⁶⁰ *Kenyon & Another v Berthon* (1778), 1 Doug K.B. 12

⁵⁶¹ *Woolmer v Muilman* (1761) 1 Wm.BL. 427.

⁵⁶² *Dawsons Ltd v Bonnin* [1922] 2 AC 413.

⁵⁶³ *Dawsons Ltd v Bonnin* [1922] 2 AC 413.

⁵⁶⁴ *Genesis Housing Association Limited v Liberty Syndicate Management Limited and others* [2013] EWCA Civ 1173.

breach of a warranty, which led to the automatic discharge of the insurer's liability⁵⁶⁵ since the name of the builder given in the proposal form was not true to the claimant's knowledge and the claimant had given a warranty naming the wrong builder. The assured appealed on the basis that the proposal form was not placed in the list of contractual documents. It was then held that the basis of contract clause has a contractual effect and binds the parties even if there is no reference to it in the policy as the identity of the builder was a contractual term.⁵⁶⁶ Leaving the assured without cover due to an immaterial and trivial breach is a decision that may be characterised as both harsh and technical.

In the case of *Dawsons v Bonnin*⁵⁶⁷ the assured had inadvertently and inaccurately stated where the insured lorry was 'usually' garaged. The garage where the lorry was in reality parked was a shed in the assured's farm that was made out of wood. A petrol motor lorry parked in the same garage took fire and led to the assured's lorry burning up. The insurers refused to pay the claim on the basis that the statement was expressly incorporated in the policy. The policy included the condition⁵⁶⁸ that: "material misstatement or concealment of any circumstances by the insured material to assessing the premium herein, or in connection with any claim, shall render the policy void..."⁵⁶⁹ Looking at the condition incorporated into the policy it can be argued that the clause seems both reasonable and clear as it mentions a material misstatement or concealment that impacts

⁵⁶⁵ *Genesis Housing Association Limited v Liberty Syndicate Management Limited and others* [2013] EWCA Civ 1173.

⁵⁶⁶ *Genesis Housing Association Limited v Liberty Syndicate Management Limited and others* [2013] EWCA Civ 1173.

⁵⁶⁷ *Dawsons Ltd v Bonnin* [1922] 2 AC 413 per Lord Haldane.

⁵⁶⁸ 4th condition of the policy.

⁵⁶⁹ *Dawsons Ltd v Bonnin* [1922] 2 AC 413.

on the assessment of the premium. To determine this one should look at whether parking the lorry at the farm's garage increased the risk of the loss, on the basis of which a reasonable insurer would have asked for a higher premium.

The case was subject to considerable deliberation between five Lords (3:2). Lord Dunedin held that the basis of the contract clause “should not be seen as something pleonastic but rather as something that will make it possible for parties to understand that the statements are fundamental”⁵⁷⁰, but still conceding that the result would be technical and harsh. In his view the statement is contractually material from the moment they were made basis of contract.⁵⁷¹ The court should, therefore, give effect to the words agreed on by the parties. Lord Viscount Finlay disagreed, arguing the declaration that the proposal was to be “the basis” of the policy did not make every inaccuracy fatal to the policy, and that the inaccuracy in reference to the situation concerning the garage was not in fact a material one in the sense of the condition.⁵⁷² The Court with a majority of 3 to 2 recognising the harshness of the rule vested the importance of the basis of contract clause being what the parties have agreed and decided for the avoidance of the policy. The Court ruled that when the answers are declared to be the basis of the contract, ‘their truth is made a condition, exact fulfilment of which is rendered by stipulation as essential to its enforceability’ and ruled that the cover should be avoided.⁵⁷³ The reasoning given by the court was that there was a material misstatement as to the garage that was found material

⁵⁷⁰ *Dawsons Ltd v Bonnin* [1922] 2 AC 413 [435].

⁵⁷¹ *Dawsons Ltd v Bonnin* [1922] 2 AC 413 [435].

⁵⁷² *Dawsons Ltd v Bonnin* [1922] 2 AC 413 [430].

⁵⁷³ *Dawsons Ltd v Bonnin* [1922] 2 AC 413; Requirement of exact compliance underlined.

at assessing the premium. Even though the basis of contract clause had in many cases resulted to harsh consequences for the assured that were often based on technicalities in the present case the result was neither harsh nor technical. Having the lorry parked at the farm's wooden shed next to other petrol motor lorries was material to the risk of fire. The insurer did not agree to cover the risk for parking the lorry at that specific garage, under the present conditions and had the insurer known that the premium could have been higher, or the policy been refused.

The former law also allowed for the assured to lose cover because of a failure to understand the technical and ambiguous language incorporated in a policy. Big insurance companies were able to manipulate the wordings within the contracts, using technical language, which was more difficult for non-legal readers to understand, in order to avoid any obligation for a minor mistake from the part of the assured.⁵⁷⁴ As a result, assureds could be misled and answer inaccurately or incorrectly the questions asked at the pre-contractual stage. An instance could be using wordings such as “as in this deed provided”, “therein referenced”, or “shall not now, or in the future”. The Law Commission has characterised such conduct as a ‘major mischief’.⁵⁷⁵ In the context of marine insurance this would not be of much concern for cases involving large corporations as they have professional legal teams working for them; rendering it less likely that such clauses will be left unnoticed and reducing the possibility that the corporations would be disadvantaged by such clauses. It

⁵⁷⁴ Law Commission (1980); Richard Stead, Insurance Act 2015 Consumer Insurance (Disclosure and Representations) Act 2012 StJohn's Chambers, [2016] <http://www.stjohnschambers.co.uk/dashboard/wp-content/uploads/Insurance-Act-2015.pdf> accessed at 19/8/2016 ‘resulting to draconian consequences’

⁵⁷⁵ Law Commission (1980)

was immaterial whether or not the information was essential and effective in the decision of a prudent insurer to accept the risk.⁵⁷⁶ With this in mind, basis of contract clause was often seen as an unfair and insurer-friendly mechanism that should at the least be subject to major reforms. The English courts tend to take a restrictive and harsh approach when deciding cases involving basis of contract clauses. It seems that the rule has escaped its original purpose that is to ensure accountability and is instead used many times as a vehicle to punish or trap the assured.

Automatic Discharge and Suspensive Conditions

A consequence of warranties under the 1906 Act was the automatic termination of the insurer's liability upon breach of an insurance warranty. The automatic discharge principle gave rise to a number of issues rendering it essential that the effectiveness of the rule is assessed by looking at it through two perspectives; whether it serves the purpose of warranties and if it provides a fair balance of party interests. The Marine Insurance Act 1906 provides for automatic termination into its provisions in s 33(3), stating that 'if it be not so complied...the insurer is discharged from liability as from the date of the breach'⁵⁷⁷. This means that once the assured was in breach of an insurance warranty, the insurer would be automatically and entirely discharged from his obligation which means that he would be entitled to refuse paying any insurance claim made in regard to the specific contract. When contracting an insurance contract, the insurer agrees to undertake the risk relying on

⁵⁷⁶ Baris Soyer, *Warranties in Marine Insurance*, (1st ed, Cavendish Publishing, London: 2001) [160].

⁵⁷⁷ MIA 1906, section 33(3).

the contractual undertaking that forms the basis of such a warranty. When in breach it is assumed that the insurer is misled as to the extent of the risk and it would be to a certain degree understandable why he would not come on the risk at all.⁵⁷⁸

Under the MIA 1906 a breach of warranty would automatically free the insurer from all liability not just liability for the type of loss connected to the breach. In some cases, breach of warranty could also grant the underwriters the right to claim damages.⁵⁷⁹ This is shown in the case of *Kumar*⁵⁸⁰ and also the *Good Luck*⁵⁸¹ case. Another disproportionate consequence stems from the definite nature of the automatic discharge rule that did not allow for the breach to be remedied. This would be true even when the breach was remedied before any loss occurred. The assured would be unable to reinstate the risk by complying with the warranty following its breach⁵⁸² and before any loss occurred. Even if the assured did rectify his mistake following the breach, he could not use that as a defence⁵⁸³. A case that clearly demonstrates this is that of *Kler Knitwear Ltd v Lombard General Insurance Co Ltd*.⁵⁸⁴ In the case a clause provided that the sprinkler was to be inspected within thirty days of renewal of the contract. The assured failed to carry out the inspection as required but a late inspection was carried out (60 days after). Shortly after the inspection took place a storm started, which left the assured with a substantial loss. The insurer refused to pay the claim on the basis that the assured had breached the warranty.

⁵⁷⁸ Baris Soyer, 'Beginning of a new era for insurance warranties?' (2013), L.M.C.Q Issue 3, 384-400 [388]

⁵⁷⁹ *Kumar v AGF Insurance Ltd* [1999] Lloyd's Rep IR 147.

⁵⁸⁰ *Kumar v AGF Insurance Ltd* [1999] Lloyd's Rep IR 147.

⁵⁸¹ *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C. 233

⁵⁸² *De Hahn v. Hartley* (1786) 1 TR 343.

⁵⁸³ *JA Chapman & Co Ltd v. Kadirga Denizcilik Ve Ticaret* [1998] Lloyd's Rep IR 377

⁵⁸⁴ [2000] Lloyd's Rep. I.R 47

Although, the inspection was carried out prior to any loss and therefore ‘remedying’ the breach the assured was found in breach of a suspensive condition and the contract was repudiated as he had failed to do so within the agreed ascertainable time. The effect would be the same in the case of delaying a premium payment warranty. As a defence one could say that premium payment warranties were originally created to ensure that the insurers would be paid on time. Their strict and draconian⁵⁸⁵ nature created a high level of accountability due to the detrimental consequences such a breach would have. By means of this provision the assured could not use the defence that the breach has been remedied, and the warranty complied with, before loss occurred.

The automatic discharge element may in some instances create issues for the insurers in the sense that the cover may be terminated even if they would have continued with the contract had they become aware of the breach. This would be the case even if the insurer would have accepted the breach and the warranty was fulfilled before any loss occurred.⁵⁸⁶ The waiver by election as a matter of course becomes unavailable⁵⁸⁷ and any waiver by insurers would have been in the form of estoppel rather than election.⁵⁸⁸ The insurer will not have the right of election to waive⁵⁸⁹ the breach due to the cover being automatically terminated and the only escaping route would be through waiver by estoppel.⁵⁹⁰ In the

⁵⁸⁵ Reference to the term draconian when it comes to continuing warranties was made in *Hussain v Brown* [1996] 1 Lloyd's Rep 627 [630] per Saville L.J.

⁵⁸⁶ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd. (The Good Luck)* [1992] 1 A.C. 233, [262–63] per Lord Goff

⁵⁸⁷ *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147; [2008] Lloyd's Rep IR 489, [38].

⁵⁸⁸ Baris Soyer, ‘Beginning of a new era for insurance warranties?’ (2013), L.M.C.Q Issue 3, 384-400

⁵⁸⁹ *Kirkaldy & Sons Ltd. v. Walker*, [1999] Lloyd's Rep. IR 410 [422] per Mr. Justice Longmore.

⁵⁹⁰ *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions* [2002] Lloyd's Rep I.R. 325. For definition of waiver by estoppel look par 24 of the judgment.

*Milasan*⁵⁹¹ case the insured failed to keep a suitably qualified skipper on board of the yacht and was in breach of his duty to do so at all times. The claimants relied on waiver by estoppel, arguing that the insurers had waived compliance by accepting the second instalment of the premium even though they knew that a professional skipper was not on board at that time. The court reasoned that the witness statement did not suggest that he relied on the insurers' request for the second instalment of premium to consider it as being a representation, by means of which they were waiving compliance⁵⁹². Nothing in his words suggested that the assured considered or relied upon the insurers' failure to take steps for the breach as waiving compliance. The court held that from the point of breach the insurers were discharged from their liability by virtue of section 33(3) of the MIA 1906 and the waiver argument should fail since acceptance of premium was not a clear and unequivocal representation and there was no reliance therein. Even if a degree of reliance could be proved to exist, it is difficult to assess reliance by taking the 'reasonable person' test.

Lack of Causation

Another characteristic of English warranties that was particularly controversial and has attracted much criticism was the fact that there was no need for any correlation between the loss and the warranty being breached⁵⁹³. The law on warranties under the 1906 Act

⁵⁹¹ *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd (The Milasan)* 2 Lloyd's Rep 458.

⁵⁹² *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd (The Milasan)* 2 Lloyd's Rep 458 [459] per Mr. Justice Aikens.

⁵⁹³ *Forsikringsaktielselskapet Vesta v Butcher* [1989] A.C. 852, [893–94] per Lord Griffiths.

was characterised by a lack of causation between the breach of warranty and the actual loss. Prior to the 2015 reform the case law provided for no latitude of excuse for the breach of marine insurance warranties and it did not matter whether the loss caused was due to the insured's fault or whether the assured was privy to the breach.⁵⁹⁴ The 1906 Act would leave the assured without cover even if complying with the warranty was outside his control and the breach was so immaterial or trivial to the loss occurred.⁵⁹⁵

*In Pawson v Watson*⁵⁹⁶ it was warranted that the insured ship would have 20 men and 12 guns on board, but it transpired that there were 16 men 11 boys, six swivels and 9 carriage guns. When the ship was captured, the insurer refused to pay the claim. It was held that “a term of the contract of insurance which must be strictly complied with and upon any breach of which, however trivial, the insurer is entitled to repudiate the policy”⁵⁹⁷. In the case the court found that the term in the policy amounted to a representation and not a warranty and therefore, the insurers had to pay the claim. But, had the term amounted to a warranty the assureds would be in breach and the insurers would be able to avoid liability even if the breach was unrelated to the loss occurred.⁵⁹⁸

De Hahn v Hartley was another case that involved a ship not having the same number of crew on board as warranted by the assured.⁵⁹⁹ The assured remedied his mistake before the loss occurred by recruiting the right number of crew but the court held that the insurer

⁵⁹⁴ *Bond v Nutt* (1777) 2 Cowp 601.

⁵⁹⁵ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C 233.

⁵⁹⁶ (1778) Cowper 785.

⁵⁹⁷ *Pawson v Watson* (1778) Cowper 785.

⁵⁹⁸ *Pawson v Watson* (1778) Cowper 785.

⁵⁹⁹ *De Hahn v Hartley* (1786) 1 TR 384

would still be able to avoid his responsibility leaving the assured without cover. In this case the decision is based on technicalities due to the fact that the assured rectified his mistake before the loss occurred, therefore his breach could not have increased the risk of the loss occurring. Another case that highlights the strictness of the rule is that of *Woolmer v Muilman* where the assured was in breach of warranty because the vessel was warranted to be neutral property, but it emerged that it was not⁶⁰⁰. The ship was to voyage from North Bergen to London but before it arrived at its destination it sank, and all goods were lost due to natural events.⁶⁰¹ The breach had nothing to do with the loss, but the contract was unenforceable. Consequently, the assureds found themselves in breach of a term that was irrelevant and immaterial to the loss. For many years the case law seemed to allow for no flexibility for the assured,⁶⁰² resulting to disproportionate consequences, as the assured would be left without cover for a breach of a warranty that had nothing to do with the actual loss or a breach that was remedied before any loss occurred.

In a more recent case *Overseas Commodities Ltd. v Style*⁶⁰³ a warranty provided that all the tins of pork being transported should be marked with their date of manufacture. Nonetheless, many tins were not marked as agreed and upon the day of delivery many tins were found damaged (rusty or broken). This amounted to a breach of warranty and the insurer was discharged of liability as from the date of the breach⁶⁰⁴. Even if the breach was not of considerable importance or immaterial to the loss the assured would still be unable

⁶⁰⁰ *Woolmer v Muilman* (1746) 3 Burrows' King's Bench Reports (1757-71) [1419] (Burr).

⁶⁰¹ Force of the winds and the stormy weather; Francis Hildyard, 'A Treatise on the Principles of the Law of Marine Insurance' (1845) Rayner and Hodges.

⁶⁰² *Woolmer v Muilman* (1763) 1 Wm B1 427.

⁶⁰³ [1958] 1 Lloyd's Rep. 546

⁶⁰⁴ MIA 1906, section 33(3).

to claim any insurance payment. Another significantly important case was that of *Yorkshire Insurance Company v Campbell*⁶⁰⁵. In this case, a horse insured for transit by sea was mistakenly stated to be a certain pedigree and because of this the assured was in breach of warranty. The assured was left without any cover for breaching a term that is entirely unrelated to the loss. Under the old law, any breach of warranty would result in the termination of insurer liability from the date of that breach, even if the risk was not substantial to it⁶⁰⁶ thus, illustrating the harsh effect the lack of a causation element could have on the outcome of a case.

In *Forsikringsaktieselskapet Vesta v Butcher*⁶⁰⁷ a warranty provided that someone should be watching over the assured's fish farm at all times. During a storm all the fish were swept away while no one was watching at that specific moment. The insured was found in breach even though he was incapable of doing anything (within his powers) to prevent the loss. In this case Lord Griffiths held that '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 exists.'⁶⁰⁸ It is therefore, possible to suggest that a causal link between a breach of warranty and the loss that actually occurs should be established for the insurer to be able to deny liability as a whole. This is also, evident from the case of *Genesis*⁶⁰⁹, which demonstrates an extreme instance where the assured (though innocent) was left without a cover for an

⁶⁰⁵ [1917] A C 218

⁶⁰⁶ *Yorkshire Insurance Company v Campbell* [1917] A C 218

⁶⁰⁷ *Forsikringsaktieselskapet Vesta v Butcher* [1989] 1 Lloyd's Rep 331

⁶⁰⁸ *Forsikringsaktieselskapet Vesta v Butcher* [1989] A.C. 852, 893-94, per Lord Griffiths.

⁶⁰⁹ *Genesis Housing Association Ltd -v- Liberty Syndicate Management Ltd* TCC Bailii, [2012] EWHC 3105 (TCC), [2013] BLR 28, [2012] 2 CLC 837.

unrelated to the loss breach. In the case the insurer had refused to pay the claim on the grounds that the proposal form included a basis of insurance declaration warranted by the proposer, because the assured had named a main contractor inaccurately.⁶¹⁰ Such a minor breach unrelated to the loss was sufficient to discharge completely and automatically the insurer's liability.

It is evident from the case law that a breach of warranty could not be excused even if it was not the assured's fault or he had no knowledge of the situation (good faith was not an excuse). Even though section 34(1)⁶¹¹ provides that the breach can be excused where a change of circumstance makes a warranty inapplicable to the circumstances of the contract or when compliance becomes unlawful, it seems that this provision has hardly been applied. In the recent case of *Agapitos and Laiki Bank Hellas v Agnew and Others (No 2) (the Aegeon)*⁶¹² a vessel was moored at Drapetsona to undergo conversion from a roll-on roll-off car ferry to a passenger cruise ship. A fire broke out on the seating placed in the garage deck due to hot work that was carried out nearby. The vessel had to move out of the port area as ordered by the Port Authority. After, the vessel collided and sank; eventually it was rendered to be a total loss. Although, it was apparent that the vessel was lost to an insured peril the insurers refused to pay the insurance claim because the owners were in breach of policy warranties in obtaining an updated LSA certificate and in obtaining approval by the LSA of the vessel's arrangements before beginning hot work and other similar warranties. The later breach of warranty mentioned was a continuing warranty,

⁶¹⁰ *Genesis Housing Association Ltd -v- Liberty Syndicate Management Ltd* TCC Bailii, [2012] EWHC 3105 (TCC), [2013] BLR 28, [2012] 2 CLC 837.

⁶¹¹ MIA 1906

⁶¹² [2003] Lloyd's Rep IR 54

which expired after the inception of risk. The assured argued that by moving the vessel the circumstances changed and therefore the warranty was inapplicable. However, the court did not agree with that. It argued that the circumstances would not merely change because the location of the vessel changed.⁶¹³ After explaining how the rules governing warranties applied on insurance contracts pre-reform it is important that the reformed rules on warranties are examined to assess whether Cyprus should follow the reformed law.

Warranties Under the New Insurance Act 2015

On the whole, the reform of the law on warranties does not imply the abolition of the rule. It merely concerns the mitigation of the effect that a breach will have on the assured.⁶¹⁴ This is justified by the fact that the element of strict compliance has an essential place⁶¹⁵ in ensuring that the assureds keep up with their commitments. Therefore, the strict nature of the rule is not the one that should be reformed but the draconian harsh consequences had the warranty been breached in a way that is fair and proportionate for both parties. It is imperative that the same sense of accountability is maintained but at the same time alleviating the harsh consequences resulting from a breach that may be immaterial to the loss or out of the assured's knowledge or control.

⁶¹³*Ibid* per Moore-Bick J [59]

⁶¹⁴Clarke Malcolm A., 'Insurance Warranties: The Absolute End?' (2007) *Lloyds Maritime and Commercial Law Quarterly*, Issue 4, 474-493

⁶¹⁵ Insurers and brokers Consultation Sydney 27 March 2000; Insurers, brokers and legal practitioners Consultation Perth 29 March 2000; J Hare 'The Omnipotent Warranty: England v The World' Paper International Marine Insurance Conference Antwerp November 1999 <http://www.uct.ac.za/depts/shiplaw/imic99.htm> accessed 24 February 2000.

This recent change brings a change for the English marine insurance market that may disturb the certainty of the existing law while radically changing the way fairness is distributed between the assureds and the insurers. Commercial law is indeed about balancing fairness and justice on the one hand and certainty on the other.⁶¹⁶ It is true that an efficient and coherent legal system should be based on principles of fairness and justice. A legal system should promote justice and fairness especially when the two parties agree to be bound legally by a contract in the eyes of the law. Legal certainty ensures that courts resolve disputes according to established legal norms and in doing so act in a legitimate manner⁶¹⁷. This implies that the law should be predictable and should treat similar cases consistently. Under Cypriot law there exists an inconsistent application of legal principles due to the legal uncertainty, which can be dealt with the development of an Act.

The UK law of warranties as introduced by the former MIA 1906 had established a degree of legal certainty, but the law was on many occasions criticised as lacking fairness as well as being behind the current commercial realities. The aim of this chapter is to assess the reformed law on warranties and consider whether it is fit for Cyprus to follow by looking at whether the changes brought resolve the legal issues previously discussed. It is vital to make sure that the reformed law both promotes justice and fairness balancing the interest of both parties and advances legal certainty⁶¹⁸ ensuring a fair treatment of the new cases. The new law makes changes in three main areas of warranties: the abolition of

⁶¹⁶ Peter MacDonald Eggers QC, 'The past and future of English Insurance law: Good faith and Warranties', *Journal of Law and Jurisprudence* [215]

⁶¹⁷ MacNeil, I., 'Uncertainty in commercial law' (2009) *EdinLR* Vol 13, 68-99 [71]

⁶¹⁸ *Wardle v Bethune* (1871) LR 4 PC 33 [59] per Lord Mansfield 'At first the rule appears to be hard, but it is settled on principles of policy, and, when once established, every man contracts with reference to it, and there is no hardship at all.'

contract clause, the transformation of warranties into suspensive conditions and the introduction of an element of causation, thereby addressing the harsh consequences.

Section 9: Warranties and Representations

The abolition of the basis of contract clause was one of the main changes adopted with the introduction of the 2015 Act.⁶¹⁹ Representations made by the assured at pre-contractual stage in regard to a proposed non-consumer insurance contract or a proposed variation to a non-insurance contract⁶²⁰ will no longer be converted into warranties by virtue of any arrangement⁶²¹ contained on a proposal form⁶²². As argued, ‘an anachronistic and unjustified rule was removed from English jurisprudence’⁶²³. It is suggested that the removal of such clauses will promote transparency as the assured will be in a better position to understand his commitment and will not be misled by means of lack of knowledge of the use of obscure language⁶²⁴. Despite the impact to fairness and the well-received nature of the reform, it is important to understand that section 9 removes a widely used risk prevention clause that was enforced for years.

At first glance, the Act seems to deprive insurers of remedies they would otherwise be

⁶¹⁹ Richard Stead, ‘Insurance Act 2015 Consumer Insurance (Disclosure and Representations) Act 2012’, (St John’s Chambers, Bristol, 7 April 2016) <<https://www.stjohnschambers.co.uk/wp-content/uploads/2018/07/Insurance-Act-2015.pdf>> accessed at 19/8/2016. ‘The reform will only be compulsory to consumer contracts and it will only provide a default regime to non-consumer contracts enabling them to contract out from it (subject to transparency safeguards as set out in s. 17)’.

⁶²⁰ Insurance Act 2015, section 9(1).

⁶²¹ General declaration

⁶²² Insurance Act 2015, section 9(2).

⁶²³ Rob Merkin† and Özlem Gürses, ‘The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured’ (2015) M.L.R. Volume 78, Issue 6, 1004–1027

⁶²⁴ Baris Soyer, ‘Beginning of a new era for insurance warranties?’ (2013), L.M.C.Q Issue 3, 384–400

entitled to by restricting their ability to convert statements of importance into warranties. Nonetheless, insurers will still be able to incorporate within the policy terms, which they consider essential by incorporating into the main body of the insurance policy terms of particular significance agreed in a pre-contractual stage.⁶²⁵ Insurers will be able to do so by introducing specific terms or representation as specific express warranties⁶²⁶ as long as it is through a policy term that is subject to remedial provisions under section 10 and 11 of the New Act⁶²⁷. To introduce terms or representations as express warranties the insurers will need to take clear and sufficient steps to bring them to the assured's attention before they are agreed upon.⁶²⁸ It is therefore possible to argue, that the Act does not seem to create a big effect on the freedom of contract.⁶²⁹ This is also, shown from the fact that the parties will be able to decide to contract out as long as they specify the consequence of the breach in a clear and unambiguous way.

In order to assess the effectiveness of the reform it is important to determine whether the abolition of the basis of contract clause was a needed change and whether it would bring the English insurance law a step closer to achieving the elusive balance of party interests. The law governing insurance contracts shall be based on principles that ensure and balance the parties' freedom of contract and the need for fairness while achieving a legal certainty.

⁶²⁵ Baris Soyer, 'Legislative Comment, Risk control clauses in insurance law: law reform and the future', (2016) C.L.J. 109- 127.

⁶²⁶ Ray Hodgins, *Insurance Law: Text and Materials*, (2nd edn, Cavendish Publishing Limited, Great Britain: 2002) [239].

⁶²⁷ Rob Merkin† and Özlem Gürses‡, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) MLR 78(6) 1004–10027, [1020].

⁶²⁸ The Insurance Act 2015 - Important changes for policyholders, Addleshaw Goddard LLP 8/2016 <<http://www.lexology.com/library/detail.aspx?g=bdb1560b-06e9-4b34-a543-19fc9a9d46ec>> accessed at 19/8/2016

⁶²⁹ Baris Soyer, 'Beginning of a new era for insurance warranties?' (2013), L.M.C.Q Issue 3, 384-400

The chapter will examine whether the abolition of the doctrine achieves all three elements. Since a contract is based on the decision of the parties to enter into a binding agreement and the policy reflects their intentions it raises the questions as to why parties should not be free to incorporate into their contract any terms, they think essential. The importance of basis of contract is shown in a number of cases. In *Genesis Housing Association v Liberty Syndicate Management*⁶³⁰ the Court held that where a proposal form contains a ‘basis of contract’ clause, then the proposal form has contractual effect even if the policy contains no reference to the proposal form and all statements in the proposal form constitute warranties on which the insurance contract is based. They cannot therefore be treated as immaterial. The court should treat the warranty as the basis of contract as both parties had agreed that it would⁶³¹ and that was their intention⁶³². This is because, sophisticated parties, receiving advice from professionals, are expected to be aware of the consequences associated with agreeing to a warranty while it is presumed that both parties intended that the clause is strictly complied with⁶³³.

Even though complying with the promises made is vital and strict compliance should be enforced, warranties should not be created by stealth. It is suggested that the court should seek to look at the real intentions of the parties rather than merely relying on technicalities that arise from the policy. It is not in the interest of any of the parties for the assured to have doubt as to what he is expected to do. On the contrary it is in the interest of assured

⁶³⁰ [57] per Jackson LJ.

⁶³¹ *Genesis Housing Association v Liberty Syndicate Management* [2013] EWCA Civ 1173; [2014] Lloyd’s Rep IR 318, [51].

⁶³² Clarke Malcolm A., ‘Insurance Warranties: The Absolute End?’ (2007) *Lloyds Maritime and Commercial Law Quarterly*, Issue 4, 474-493.

⁶³³ *AGF M.A.T (Allianz AGF MAT Ltd.) v Ocean Masters Inc.*, (2007) NLCA 35 [25].

to know what he is expected to do and of the insurer to know what he can expect as had those circumstances not existed the insurer would not undertake to be bound.⁶³⁴In *Wheelton* it was held that clear indication of their intention should be demonstrated so the term is construed as a warranty.⁶³⁵ For a warranty to be construed as a warranty there must be a clear intention and brought to both attention⁶³⁶ If there is any ambiguity in the language in the policy, then the warranty must be construed most strongly against them.⁶³⁷ Likewise, there must be a clear intention that the parties would want the contract to cease had the promise not been complied with. The contract is about what the parties intended. It may be suggested that they cannot have intended to cease cover have this term not been complied with. Looking at the parties' intentions will avoid the use of basis of contract clauses as a means to deceive the assureds. The abolition of the rule removes the possibility that big insurance industries can incorporate into the contract as warranties facts that the assured was not even aware of. It eliminates the possibility that the assureds are deceived through the means of an obscure language and prevents insurers putting assureds in a worse position that they would be had they not included those terms.

The reform promised not only to abolish the contract clause rule but, to harmonise the existence of a mechanism under which insurers can incorporate into the contract terms essential to the formation of it and ensuring that the assureds are well informed of the existence of all the terms introduced. It aimed to preserve the ability of insurers to introduce

⁶³⁴ Francis D Rose, *Marine Insurance Law and Practice* (London, 2004), [9.20].

⁶³⁵ *Wheelton v Hardisty* (1857) 8 El & Bl 232, 300, per Bramwell B.

⁶³⁶ *British Columbia* (1986) 2 Lloyd's Rep 524, 533 per Lambert J.; *Thomson v Weems* (1884) 9 App Cas 671, 682, per Lord Blackburn.

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the important terms as expressed warranties. In theory this shows a more proportionate and fair treatment for the assured while the insurer would not be deprived of his freedom to incorporate terms essential to him. This will ensure that none of them would be put in untenable position. The abolition of the rule will put an end to the misuse of the rule as a tool to avoid liability but at the same time important terms for prevention of risk will still be able to be incorporated. As a result, the insurers will be still protected against risks as they would have been had the basis of clause existed. The only problem would be how this would work in practice with minimal disturbance of the legal certainty. Especially when considering big insurance companies dealing with a number of clients or non-professional insurers that would not always be able to assess all the terms that they would consider essential.

The application of the basis of contract clause may have resulted in unfair treatment towards the assureds but it has achieved a certain level of legal certainty. Removing what was considered a protection mechanism for the insurer might lead to a fear and censure among the insurers but also, the legal certainty that has been achieved after decades of applying the same rules will be disturbed. The essence of basis of contract clause would not be eliminated but replaced due to the fact that insurers will still be able to introduce terms of importance to them. All that are agreed at a pre-contractual stage should be written down and those essential for the formation of the contract should be further discussed and expressly incorporated into the contract. Before the signing of the agreement both parties should be advised and guided as to the importance of their commitment and that all included should be accurate, bona fide, and understood. When the parties want to make a

term a core part of the contract they should clearly show their intention that the cover is to be ceased should term not been complied. Then it would be up to the discretion of the court whether to accept it or not on a case-by-case basis by interpreting the parties' intentions.

Abolishing the basis of contract clauses eliminates any possibility for the assureds to be misled and their confidence in insuring will be increased. At the same time, the insurers will not be harmed by this change, as they will be free to incorporate important terms in the contract provided, they take the necessary steps to bring them to the assured's attention. Also, abolishing the contract clause brings the UK in line with other countries that have abolished or are thinking to abolish such an "unnecessary" clause from their law. Already Australia⁶³⁸ and New Zealand⁶³⁹ have eliminated the use of basis of contract clause while the UK passed legislation in 2012⁶⁴⁰ abolishing the clause in consumer insurance contracts.

Section 10: Warranties as Suspensive Conditions

Section 10 of the Insurance Act 2015 transforms warranties into suspensive conditions radically changing the legal effect after a breach of a warranty. Specifically, section 10(1) removes the corresponding statutory provision by deleting the second sentence of section 33(3) of the 1906 Act. The section abolishes any rule that results in the termination of the

⁶³⁸ Section 24 of the Act provides that all statements of existing fact are to be treated as representations, and not as warranties rendering the clause ineffective.

⁶³⁹ The Insurance Law Reform Act 1977 prevents insurers from relying on statements made in proposal forms or other documents "on the faith of which the contract was entered into" to avoid liability unless the statement is both 'substantially incorrect' and material.

⁶⁴⁰ Consumer Insurance (Disclosure and Representations) Act 2012 /CIDRA.

insurer's liability under the policy⁶⁴¹ and instead renders any warranty a suspensive condition⁶⁴². This means that the cover will be suspended for the duration of the breach and once the breach is compensated then the insurer can no longer evade his legal obligation, as it will be fully restored⁶⁴³. The insurer will be free of any liability during the time of suspension in respect of any loss occurring, or attributable to something happening⁶⁴⁴. He will not be free from any liability for any loss that occurs before the breach of the warranty or after the warranties have been remedied. The rule obligates the insurer to pay a claim that arose after the breach has been successfully remedied while, it mandates that he shall still be liable to pay for a type of loss different from the one primarily designed to prevent⁶⁴⁵. If the breach has already been remedied prior to the loss, then the insurer will have to pay the insurance claim. The risk will only reattach if the insurer is satisfied that the risk was decreased at the level he agreed primarily to undertake. The reform attempts to be more 'magnanimous' when it comes to innocent breaches since, the assured is given the opportunity to remedy the breach, fix it and go back on cover but only in very limited situations. The insurance cover will therefore be suspended until the assured remedies his breach. The assured's ability to come back on cover will be down to three conditions; whether the warranty itself is a remediable one, whether the warranty was remedied before any loss occurred and whether the risk was reduced to a level that would satisfy the insurer.

⁶⁴¹ IA 2015, section 10(1).

⁶⁴² IA 2015, section 10(2).

⁶⁴³ Baris Soyer, 'Legislative Comment Risk control clauses in insurance law: law reform and the future' (2016) C.L.J 109-127, [113].

⁶⁴⁴ IA 2015, section 10(4).

⁶⁴⁵ Insurance Act 2015 Consumer Insurance (Disclosure and Representations) Act 2012 Richard Stead, St John's Chambers, (Bristol, 7 April 2016).

Section 10(5) of the IA 2015 states that “it is only possible to remedy the breach if the particular risk becomes essentially the same as that originally contemplated by the parties or if the insured ceases to be in breach”.⁶⁴⁶ For that reason the warranties can be separated to remediable and irremediable. Irremediable warranties may be those warranties that should be performed within an ascertained period of time or a present warranty such as a breach that has caused a loss that is incapable of being remedied. Let's take for example a present warranty that provides that bottle of wines should be stored on their sides and instead the assured stored them with the bottles upright, which meant consequently the bottles were ruined⁶⁴⁷. In that scenario the breach will be incapable of being remedied by putting the bottles as originally promised⁶⁴⁸ and the contract will be terminated. This would make sense, since an already ruined property would be impossible to be restored. The chapter will refer to remediable and irremediable breaches by looking at the different types of warranties as distinguished under English law-making reference to existing cases. It will be shown that even if the law appears to be much more lenient towards the assureds, the situations where the assured may come back on cover are limited to remediable only breaches and even when the warranty in place is one capable of being remedied the insurer needs to be satisfied that the risk is essentially the same as the one originally contemplated.

As aforementioned, present fact or past warranties may not always be

⁶⁴⁶ Insurance Act 2015, section 10(5).

⁶⁴⁷ Kees van der Klugt, ‘Insurance Act 2015 – What it Means for Lloyd’s’, (2015) Issue Number 2 ALM News [19-21].

⁶⁴⁸ Kees van der Klugt, ‘Insurance Act 2015 – What it Means for Lloyd’s’, (2015) Issue Number 2 ALM News [19-21].

remediable.⁶⁴⁹ For marine insurance, when an affirmative⁶⁵⁰ warranty is in place then it would be impossible for the breach to be remedied⁶⁵¹ as those types of warranties need to be complied before the attachment of the risk. This is because under those types of warranties the assured affirms that the insured property is of the stated quality, thing that would render the contract void at inception. This includes warranties that affirm that something shall or shall not be done. When there is a breach of an affirmative warranty and contract is rendered void, the insurer would be required to return the premium for total failure of consideration, exempt where illegality or fraud is present. In the case of *Yorkshire Insurance Company v Campbell*⁶⁵² the assured wrongly warranted the insured horse as “Bay gelding by Soult out of St. Paul (mare)”. The underlying breach clearly cannot be remedied. This is because it would be impossible for the assured to fix a promise that should be complied with before the attachment of the risk. When the warranty refers to the existence of a fact at an ascertained time that is the time the contract was made, and that ascertained time passed, then the assured cannot fix it. Consequently, he would be left without cover. Nonetheless, it would be unreasonable for assured to be left without cover for a breach of a warranty that has no bearing on the risk since such a term could not have been a condition precedent to the attachment of the risk.

In the case of *Staples*⁶⁵³ a term in the policy stated, ‘warranted by the insured that the

⁶⁴⁹The liability will be suspended only in regard to present fact or past warranties not aimed at a specific type of loss. Baris Soyer, ‘Beginning of a new era for insurance warranties?’ (2013), L.M.C.Q Issue 3, 384-400 [391]

⁶⁵⁰ eg where the assured had undertaken that the ship was neutral at the commencement of the trip where it was not. The vessel was clearly not neutral and could not have been and nothing would have changed that.

⁶⁵¹ Baris Soyer, ‘Legislative Comment Risk control clauses in insurance law: law reform and the future’ (2016) C.L.J 109-127, [113].

⁶⁵² (1917) A.C. 218

⁶⁵³ *Staples v Great American Insurance Company, New York* (SCC), [1941] S.C.R. 213; CanLII 3

within named yacht shall be used solely for private pleasure purposes and not to be hired or chartered unless approved and permission endorsed hereon'. There was evidence that the boat had been used to ferry an employee across the lake for work purposes by an individual other than the owner, with the owner's permission, on two occasions about a month before the loss. The boat was lost as a result of fire. The Canadian Court concluded that, at the time of the loss, the boat was being used solely for private pleasure purposes hence no breach of warranty was present⁶⁵⁴. When considering section 10 of the IA 2015 there is an assumption that had the same case occurred in an English court the result would be the same. As the breach would be taken as remedied due to the fact that the yacht was used for the right purpose before the loss. But if the loss occurred while the yacht was used for another purpose at the time of the loss then the cover would not be capable of being recovered.

Generally speaking, premium payment warranties and any present or past fact warranties that are not aimed at a specific type of loss form examples of remediable breaches. These terms are used for the purposes of describing the risk generally at the outset. However, it will be hard to distinguish between whether a warranty serves the purpose of describing the limits of the cover in general terms or whether it is a term aiming to reduce a particular risk-increasing circumstance.⁶⁵⁵ The abolition of the automatic termination rule seems to be clearer and more straightforward when it comes to premium payment warranties. Since premium payment warranties⁶⁵⁶ have no bearing on the risk the insurer will still be

⁶⁵⁴ *Staples v Great American Insurance Company, New York* (SCC), [1941] S.C.R. 213; CanLII 3 [222].

⁶⁵⁵ Baris Soyer, 'Beginning of a new era for insurance warranties?' (2013), L.M.C.Q Issue 3, 384-400 [392]

⁶⁵⁶ Premium payment warranties were known for their harsh nature in promoting accountability and ensuring that the assureds were to pay the premium money by the time agreed.

responsible to pay the claim as long as the payment is made before any loss occurs⁶⁵⁷. Premium payment warranties were originally created to ensure that the insurers would be paid on time and the strictness of the rule created a high level of accountability. The 2015 Act inadvertently removes entirely or decreases in a great degree the power that the Premium Payment Warranties otherwise had⁶⁵⁸. This is because the assured will be able to pay its premium after the date that is required under the Premium Payment. The assured will be able to pay the premium after the date provided in the premium payment warranty but before any loss occurred and can use that as his defence. Therefore, the assured can recover the policy by remedying his breach, decreasing the insurer's benefit of avoiding payment of a claim for a trivial mistake. The risk will be just suspended until further investigations regarding the actual circumstances of the case.

Future or continuing warranties on the other hand are highly remediable as the breach may be remedied once the assured ceases to be in breach⁶⁵⁹. Where a contract provides that a vessel shall not engage towage or salvage services, once the vessel does so the cover will be suspended and come back on risk when the services are completed⁶⁶⁰. However, if afterwards it develops another defect and sinks, if this can be attributed to the previous breach then it is obvious that even if the breach was remedied it was not reduced to a level

⁶⁵⁷ Andrew Stevenson, 'The Insurance Act-The Death Knell for Premium Payment Warranties?' (2016) Elborne Mitchell LLP
<http://www.elbornes.com/downloads/pdfarticles/insurance/The_Insurance_Act_2015_-_Andrew_Stevenson_12.05.16-rvsd.pdf> accessed at 19/8/2016

⁶⁵⁸ Andrew Stevenson, 'The Insurance Act-The Death Knell for Premium Payment Warranties?' (2016) Elborne Mitchell LLP
<http://www.elbornes.com/downloads/pdfarticles/insurance/The_Insurance_Act_2015_-_Andrew_Stevenson_12.05.16-rvsd.pdf> accessed at 19/8/2016

⁶⁵⁹ IA 2015, section 10(5) b.

⁶⁶⁰ Baris Soyer, 'Legislative Comment Risk control clauses in insurance law: law reform and the future' (2016) C.L.J 109-127, [113].

the insurer would be satisfied with⁶⁶¹. For instance, in a navigation warranty if the insurer is on risk, then premium is usually not returnable if paid in advance or will still remain payable if part of it is not paid in advance. For instance, a warranty provides that a burglar alarm should remain installed and maintained. If the alarm is not triggered because of lack of maintenance or because he failed to install it then the insurer will be able to avoid liability to pay the claim. Alternatively, if the assured has repaired the alarm prior to that then the insurer will be unable to avoid paying the claim. The insurer will be able to be discharged from the liability to indemnify the assured for the loss caused by the breach but the policy as a whole will be still available. As a result the insurer will not benefit from his breach but at the same time the policy will not be terminated as a whole.

In *Kler Knitwear Ltd v Lombard General Insurance Co Ltd*,⁶⁶² the assured warranted to inspect the sprinkler within 30 days of renewal of the policy but only inspected it 60 days later. A loss occurred after the delayed inspection was carried out, due to a storm. Under section 10 of the IA 2015 the cover would be suspended from the date that the sprinkler should have been inspected until the date it was actually inspected assuming no loss occurred during that time. Had the loss occurred before the breach was remedied (the sprinkler being inspected) then the assured would not be able to remedy his breach and go back on cover. Since the assured had successfully remedied the breach before any loss has occurred, then the cover would be suspended the breach is remedied. As aforementioned, promissory warranties that need to be complied with at an ascertained time can only be

⁶⁶¹ Baris Soyer, 'Legislative Comment Risk control clauses in insurance law: law reform and the future' (2016) C.L.J 109-127, [113].

⁶⁶² [2000] Lloyd's Rep. I.R 47

cured if the insurer is satisfied that the risk became essentially the same as that originally contemplated by the parties.

A different case example would be where the assured undertakes to do something by an ascertainable/ specific time. A vessel is warranted to arrive at port by July 5th but fails to do so and arrives some days later then the breach will be suspended until the successful arrival of the vessel at the port. If meanwhile the vessel develops a defect and sinks before it arrives then the cover will cease to exist. If it arrives at the port even late and then sinks the breach will be considered as remedied and the insurer will no longer be able to cease cover. But, what if the failure to arrive on time caused another defect that resulted in a loss. A breach can be remedied only where the warranty is ultimately complied even if late⁶⁶³ and as long as the risk becomes essentially the same with that which was originally agreed. An issue could be how will the degree of risk be calculated and when will the risk become essentially the same. If for the same ship there is another warranty, warranting that a professional should inspect the ship once a month but then fails to do a check. If the professional inspects the ship some days after the breach will be suspended. But, if the ship sinks some days after the inspection then it would impossible to be certain whether the risk was substantially the same after the inspection. If the ship have developed a defect as a result to the inspection not being made a month ago and consequently caused the ship to sink then why should the breach be remedied? In this case even if the inspection was made the risk could not have been substantially the same but should be possible to remedy it only if it can be proved that it has nothing to do with the loss.

⁶⁶³ Insurance Act 2015, sections 10(5), 10(6).

It is true that the suspension of the cover gives a more “holistic approach”⁶⁶⁴ but much uncertainty is created in the area. One obvious indication is when considering the requirement to decrease the risk to a level that the insurer would accept especially where the breach still has adverse consequences on the risk after it has been compensated. It is not clear what would satisfy the insurer as sufficiently decreased risk and on who the burden is to prove that. Also, there is no clear distinction between remediable and irreparable warranties. It is not fair that a term designed to prevent a specific type of loss, removes the insurer’s obligation to pay for a different type of loss. Where a term is designed to reduce the risk of a particular type of loss, a breach of that term should suspend liability only in respect of that type of loss.⁶⁶⁵ It is essential that insurers are advised not to use language that would create potential uncertainty in a case of a breach. It would be up to the English courts to develop judgments that would fill in the gap and provide interpretation of the rules incorporated into the Act based on good faith principles and the commercial realities. The UK was not the first country to implement the doctrine of suspension of the cover from the date of the breach since the majority of the American courts already implement it⁶⁶⁶. They hold that when breaches of warranties in marine policies concerning private use⁶⁶⁷ and watchmen⁶⁶⁸ were remedied, coverage was restored while a breach of a promissory warranty will not terminate the coverage unless this is stated convincingly in

⁶⁶⁴ Baris Soyer, ‘Beginning of a new era for insurance warranties?’ (2013) L.M.C.Q Issue 3, 384-400 [391].

⁶⁶⁵ Law Commission, Insurance Law—Non-Disclosure and Breach of Warranty (Law Com No 104: Cmnd 8064, 1980); Baris Soyer, ‘Beginning of a new era for insurance warranties?’ (2013), L.M.C.Q Issue 3, 384-400 [390]

⁶⁶⁶ *Cotton Blossom Corp. v Lexington Ins. Co.* (1985) 615 F. Supp. 87 (E.D. Mo. 1985) (applying federal and state law)

⁶⁶⁷ *Reliance Ins. Co. v Yacht Escapade*, (1960) 280 F.2d 482, 487, 1961 AMC 2410, 2416 (5th Cir. 1960).

⁶⁶⁸ *Henjes v Aetna Ins. Co.* (1943) 132 F.2d 715,719, 1943 AMC 27,31-32 (2d Cir. 1943); *Aguirre v Citizens Cas. Co. of N.Y.* (1971) 441 F.2d 141,145, 1971 AMC 1134, 1139 (5th Cir. 1971).

the policy⁶⁶⁹.

Another question raised is whether the suspension of the warranty is giving an adequate protection for insurers.⁶⁷⁰ Especially in cases where there is an adverse impact from the breach after it has been remedied which resulted to an increase of the risk. Situations can exist where both parties are benefited from the contract not being terminated. With the reform waiver by election will be available as the contract won't be automatically terminated and the insurer will be able to decide whether to accept the breach and wants to continue with the cover or not. The reform gives the right to the insurer to choose between two alternative and inconsistent causes of action open to him (waiver by election or waiver by estoppel). This can be further supported by reference to section 10(2)⁶⁷¹ under which the insurer will no longer have obligation in regard to any loss that has occurred or has been attributed to something happening after the breach of a warranty in the contract and before that breach has been remedied. The incorporation of the words 'something happening' within the provisions allows for a wider interpretation of the action made and therefore, a level of scrutiny.⁶⁷² By incorporating the words 'attributable to something happening'⁶⁷³ the Act tries to capture situations where the loss occurred as a consequence of an event, which happened during the period of suspension but is actually suffered after the breach has been remedied.

⁶⁶⁹ *Henjes v Aetna Ins. Co.*, (1943) 132 F.2d [719], 1943 AMC at 32; *Ennia Schadeverzekering*, 457 So. 2d [1100].

⁶⁷⁰ Baris Soyer, 'Beginning of a new era for insurance warranties?' (2013), L.M.C.Q Issue 3, 384-400 [389]

⁶⁷¹ Insurance Act 2015, section 10(2).

⁶⁷² Baris Soyer, 'Legislative Comment: Risk control clauses in insurance law: law reform and the future' (2016) C.L.J. 109- 127 [114].

⁶⁷³ Insurance Act 2015, section 10(4).

Section 11: Causation between loss and breach

The third big change in the law on warranties is the introduction under section 11⁶⁷⁴ of an element of causation. The section applies to all terms that seek to exclude or limit an insurer's liability but does not apply to those terms that define the risk as a whole.⁶⁷⁵ It provides that breaching a warranty, which would reduce the risk of losing a particular kind, at a particular location, and time would not discharge the insurer's liability if the non-compliance with that risk did not increase the loss that occurred; the burden will be on the assured to prove.⁶⁷⁶ This means that the breaching of a warranty alone will not be enough to establish a discharge of liability. If the non-compliance with the warranty does not increase the risk then the insurer will not be automatically discharged and therefore, won't be able to deny liability for paying a claim. By virtue of this section insurers need to prove that there was a connection between the breach of warranty and the loss suffered. The relevant test of causation requires a breach by the assured that "increased" the risk that the loss occurred in the circumstances that occurred.⁶⁷⁷ The section does not require an actual contribution or causation of the breach to the loss but a mere connection; the test takes a more flexible approach, which will promote deeper factual analysis. This is because it will capture not only those breaches that directly caused or contributed to the loss but also, those that have increased the risk of causing that loss.

⁶⁷⁴ Insurance Act 2015, section 11.

⁶⁷⁵ Law Commission and Scottish Law Commission, Insurance Contract Law, Business Disclosure, Warranties, Insurer's remedies, Fraudulent Claims and late payment, Law Com No 353, Scot Law No 238 July 17, 2014.

⁶⁷⁶ Insurance Act 2015, section 11.

⁶⁷⁷ Insurance Act 2015, section 11.

Causation provides the means of connecting a conduct with the relevant effect that such conduct had⁶⁷⁸. It is an element of responsibility as under that principle the party will suffer the harsh consequences for something, he was responsible for and not an irrelevant minor mistake. Many causes may contribute to factors that will eventually result in a particular loss. By means of causation one is able to distinguish between the numbers of causes that trigger the respective loss.⁶⁷⁹ This requirement for causation argues for a more just decision-making process as it provides a means to connect the breach made with the resulting loss. It is fairer for the assured to suffer the harsh consequences that a breach of warranty had for a loss caused by his misconduct. The causal link as introduced by the UK does not refer to an actual cause or contribution to the loss. The UK's test does not refer to a proximate cause test but rather any conduct that might increase the risk of the loss occurring.⁶⁸⁰ Consequently, the insurer will only need to prove that the breach of warranty increased the risk. This means that it will be sufficient if he is able to prove that the breach was somehow related to the loss.

By virtue of the section the insurer will no longer be able to rely on non-compliance with a warranty or a term related to loss of a particular kind time or location, if the non-compliance could not have increased the risk of loss that occurred. For example, if the warranty holds that the assured must make sure that the packages of sugar are stored in a specific manner, but he fails to do so, if then the vessel sinks due to a problem in the

⁶⁷⁸ Francis Rose, *Marine Insurance: Law and Practice*, (2nd edn, Informa Law from Routledge, 2013) [401].

⁶⁷⁹ Francis Rose, *Marine Insurance: Law and Practice*, (2nd edn, Informa Law from Routledge, 2013) [401].

⁶⁸⁰ Insurance Act, section 11.

machinery of the vessel or due to natural events, the insurer will no longer be able to rely on the argument of non-compliance with that requirement to terminate his liability, because even if he had done so correctly it could not reduce the risk of the vessel sinking. In the case that the assured's conduct obviously caused the loss, he will not be able to rely on section 11. For instance, if the warranty provided that the goods should be packed in a certain safe packaging but the assured failed to do so and because of that they got damaged, then the insured cannot claim that the breach could not have increased the risk. The causation test gives a better protection for the assureds since the assureds will not be deprived from their cover in cases that causation is not present. For instance, terms that have no bearing on the risk such as premium payment warranties and any present or past fact warranties that are not aimed at a specific type of loss will not result to the assureds' termination of cover.

The introduction of the causation test also, seems to generate a better balance between the interest of the insurer and the assured, bringing an end to the unfair and harsh consequences of the previous law. But, even with the introduction of the causation test and the much more lenient approach taken after a breach of warranty, warranties form an important part of the contract and maintaining their strict compliance needs to be at the core of insurance law. Assureds need to be informed of the importance of their promises even those that are immaterial to the risk. The reform was aimed at reducing the heavy consequences of a breach of warranty, stopping the potential unfairness created, but not to eliminate the strictness of complying with a warranty. Introducing a new test for causation would lift the heavy and sometimes-unnecessary burden put on the assureds but may create legal

uncertainty. Thus, examining the application of the test to see what would satisfy an increase of the risk would be necessary.

In assessing the new element of causation, it is important to examine the test of causation and the burden of proof in a number of cases. In *Forsikringsaktieselskapet Vesta v Butcher*⁶⁸¹ the policy contained a warranty that there will be a 24-hour watch over the insured fish farm. One night all the fish were swept out of the farm by a heavy storm, and there was no watchman on duty as warranted. Although it was acknowledged that no watchman could prevent the loss in any event, the House of Lords held that under English law the insured's failure to maintain such a watch discharged the underwriters from their liability. Lord Griffiths regretted to comment in his judgement that 'it is one of the less attractive practices of English law that breach of warranty in an insurance policy can be relied on to defeat a claim under the policy even if there is no causal connection between the breach and the loss.' Even if the watchman was there, there was nothing in his power that he could do to avoid the loss. Under the new rules of causation, the insurer would not be discharged due to the fact that his absence could not have increased the risk. However, there will be cases that will be difficult to determine whether the risk was increased by that breach or not. There is a great difficulty in assessing the causation test where the breach has a continued impact on the loss. For instance, a vessel warranted the water boiler to be maintained at all times has a defect that was repaired. After a storm the ship catches fire. In practice the same defect that was repaired could have increased the risk that the vessel caught fire. Consequently, the test would promote a detailed factual analysis in order to

⁶⁸¹ *Forsikringsaktieselskapet Vesta v Butcher* [1989] 1 Lloyd's Rep 331 [335].

assess whether the breach of such term could have increased the risk of loss.

Comparing Warranties in MIA 1906 and IA 2015

The 2015 Act radically changes the conventional way warranties were treated but retains the doctrine as part of the law. In order to assess the efficiency of warranties under the 2015 law it is necessary to look at the new rules as incorporated under the IA 2015 and any likely consequences, to compare them with the former rules. Following this comparison, the chapter will be able to suggest that the new law will bring a change to centuries of following the same rules and in drafting its own Act Cyprus should learn from their example. After looking at the new rules and the change they bring the study will expose the problems that could be created with Cyprus' decision to incorporate the new rules.

Basis of Contract Clause

It is an essential component of law that parties entering into an agreement are free to choose the law by which their contract is to be governed. Similarly, parties should be free to incorporate into the contract every term that they think crucial to the formation a binding agreement especially when agreeing to undertake a particular risk. Abolishing the basis of contract clause would eliminate any mischief of the former law but could result to giving too much power to the assureds and a limitation to the freedom of contract. That is why the reform allows for the insurer to be able to incorporate statements that they consider

fundamental to the formation of the contract provided that some procedures are fulfilled.⁶⁸² This means that the insurers will be able to introduce specific terms of particular significance to the main body of the insurance policy⁶⁸³ as long as they have taken clear and sufficient steps to bring those terms to the assured's attention before they are agreed upon⁶⁸⁴. In theory, this appears to be a more proportionate and fairer legal regime but a deeper analysis of the practicality of this change is essential in order to show whether it is indeed efficient.

A recent case of general insurance will be considered to look at the treatment of cases after the reform. In *Mohammed Ashfaq v International Insurance Company of Hannover Plc*⁶⁸⁵ the assured failed to convince the Court that he was a consumer for the purpose of the Consumer Insurance Act 2012⁶⁸⁶ meaning that the MIA would apply. The case involved an appeal brought by the claimant on the basis that whatever the position at common law, that position had now been changed because of the enactment of the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015. The original claim involved an insurance claim after a fire damaged a rented property. The claim was rejected on the grounds that the claimant was in breach of the statements that form a basis of contract clause: 'You or any joint or co-insured have never... been convicted, or have any

⁶⁸² Ray Hodgkin, *Insurance Law: Text and Materials*, (2nd edn, Cavendish Publishing Limited, Great Britain: 2002), [239].

⁶⁸³ Baris Soyer, 'Legislative Comment, Risk control clauses in insurance law: law reform and the future', (2016) C.L.J. 109-127.

⁶⁸⁴ The Insurance Act 2015 - Important changes for policyholders, (Addleshaw Goddard LLP 8/2016) <<http://www.lexology.com/library/detail.aspx?g=bdb1560b-06e9-4b34-a543-19fc9a9d46ec>> accessed at 19/8/2016.

⁶⁸⁵ *Mohammed Ashfaq v International Insurance Company of Hannover Plc* [2017] C.L.Y 1340.

⁶⁸⁶ *Overy v Paypal (Europe) Ltd* [2012] EWHC 2659 (QB); *Mohammed Ashfaq v International Insurance Company of Hannover Plc* [2017] C.L.Y 1340 [58-60].

prosecutions pending, in respect of any offence other than motoring offences.’ Despite the outcome of the case, the court had recognised that “it is true that both Acts had changed the law in relation to breach of warranty, non-disclosure and misrepresentation”⁶⁸⁷ and there was no doubt about that. However, the claimant could not rely on the Insurance Act due to the fact that it was not in force at the date of the inception of this Policy. The ICA will only apply to consumer insurance contracts enforced after the 6th of April 2013 and only if the claimant can establish that he is a consumer. Due to the policy being issued before the Insurance Act came to effect it was held that the position at common law in regard to basis of contract clause would be followed under the recent case of⁶⁸⁸ *Genesis Housing Association v Liberty Syndicate Management*.⁶⁸⁹ But, had the policy been issued after that date the insurer could not have relied on the basis of contract clause to avoid liability.

Abolishing the basis of contract clauses would mean that if there is something the insurer would deem essential, he should include it in the form of an express warranty and bring it to the assured’s attention. Thus, if a term is essential for the formation of the contract and relevant to the risk attached it should be made clear from the very beginning. Failure to disclose material to the risk terms may give rise under the duty to make a fair presentation of the risk. Abolishing such clauses would push both parties to “lay all their cards on the table” and the court to look behind at factual analysis and the real intentions of the parties.

⁶⁸⁷ *Mohammed Ashfaq v International Insurance Company of Hannover Plc* [2017] EWCA Civ 357 (CA) [23].

⁶⁸⁸ *Mohammed Ashfaq v International Insurance Company of Hannover Plc* [2017] EWCA Civ 357 (CA) [25].

⁶⁸⁹ *Genesis Housing Association v Liberty Syndicate Management* [2013] EWCA Civ 1173; [2014] Lloyd’s Rep IR 318 (per Lord Dyson MR, Jackson and Gloster LJ).

The abolition of the basis of contract clause alone might not be enough to achieve the fair dissolution of the contract and a fair balance for both parties. Such a big change may indeed bring the insurer to a disadvantage in the absence of a good organised and well-informed system. This is because the requirement to incorporate terms of importance as express warranties and communicate them to the assureds may give rise to them losing the case based on technical issues. Having this in mind, it is the assured that best knows what it is essential information for the insured property in question. The law should be equipped to deal with cases based on standards of fairness allowing the availability of proportionate remedies. When resolving cases, the court should not just look at the policy itself but also at the real facts of the case and specifically at the parties' intentions. To avoid unnecessary disputes the insurers or insurance companies shall list all those promises made at a pre-contractual stage sending them back to the assured to receive a written confirmation by means of signature. They could also prepare a list of different terms of importance to different types of insurance to have in mind. Another way is mandatory online training available to all employees or individual insurers and assureds informing them of the changes of the new law and the importance of having a clear understanding of the importance of warranties and their role in a policy. The assured will be advised to bring everything he fails to understand to the insurer's attention and the insurer will be required to explain everything that is not written in a clear and understandable way to the assured. The court would then be able to decide on a case-by-case basis considering the element of good faith. The decision should be based on whether the information provided was one that played a role for the decision of a prudent insurer to accept the risk.

Warranties as Suspensive Conditions

The reform seems to tackle the issues arising from the harsh provisions of the automatic discharge principle, but some complications and uncertainties might arise in regard to remedying specific types of warranties. The first and most obvious category of warranties that might result in mistrust and loss of accountability is the premium payment warranties, due to the fact that the reform takes their power away or decreases it in a great degree⁶⁹⁰ by rendering them less effective; allowing the assured to pay them after the date agreed as long as they are paid before any loss occurred.⁶⁹¹ The 2015 Act renders warranties as suspensive conditions thus, taking away the non-remediable nature of the old warranties. For instance, in *Kler Knitwear Ltd v Lombard General Insurance Co Ltd*,⁶⁹² the breach of warranty would be considered as remedied under the new law provided that the risk became essentially the same. It is evident that the cause of the loss was the storm but, the question would be whether the delayed inspection of sprinkler substantially increased the loss.

The Act removes the harsh consequences that arise from a breach of a premium payment warranty, but it creates questions in regard to warranties that cannot easily be remedied such as time-specific (affirmative) warranties while it is unclear when will the risk become essentially the same. Even when the breach is remedied it will be difficult to go back on cover as the insurer should be first satisfied that the risk has become essentially the same

⁶⁹⁰ Andrew Stevenson, 'The Insurance Act-The Death Knell for Premium Payment Warranties?' (2016) Elborne Mitchell LLP

http://www.elbornes.com/downloads/pdfarticles/insurance/The_Insurance_Act_2015_-_Andrew_Stevenson_12.05.16-rvvd.pdf accessed at 19/8/2016

⁶⁹¹ Ibid.

⁶⁹² [2000] Lloyd's Rep. I.R 47

as originally intended by the parties. This is because the breach would still have adverse consequences on the risk after it has been compensated.⁶⁹³ The lack of materiality was the main element that made the unfair consequences even more disproportionate and unfair. This is because the liability of the insurer would be discharged, and any importance or materiality would be of no importance. The study will now refer to the old law, baring no rule on materiality or causation and the effect of the new causation test.

Causation

The rationale behind the strictness of warranties and the automatic termination principle was to promote transparency and push the assureds to realise the importance of their commitment.⁶⁹⁴ Thereby, insurers would ensure that they had control of the risk and would solely be liable if the assureds kept up with their promises. The strict interpretation of the rule was in some instances unjustifiable leaving the assured without cover for immaterial breaches of warranties and allowing the insurer to be discharged of his entire contractual obligation for a breach that was unrelated to the actual loss suffered. After observing the unfair consequences of the old law, it is possible to suggest that in order for the law to be considered as ‘morally correct’⁶⁹⁵ there should be a causal link between the breach in question and the loss that occurred. The Law Commissions have expressed their reluctance to comprehend why the insurer should be able to refuse paying a claim, for a

⁶⁹³ The most common type of warranty would be a navigation warranty.

⁶⁹⁴ Baris Soyer, Legislative Comment ‘Risk control clauses in insurance law: law reform and the future’ (2016) C.L.J. 109-127.

⁶⁹⁵ Ray Hodgkin, *Insurance Law: Text and Materials*, (Cavendish Publishing Limited, 2nd edn, Great Britain: 2002). [287].

building that was ruined by a fire when the contract was about a working burglar alarm.⁶⁹⁶

It is proclaimed that since the purpose of warranty of fact is identifying the risk, it is then conceptually appropriate to have a causal link between the breach and the risk when assessing a breach of warranty.⁶⁹⁷ The new provisions as encompassed in section 11, addresses the issues that previously arose due to the unjustified rules of the Marine Insurance Act 1906. Consequently, it will not be possible to capture warranties and terms designed to define the risk as a whole since breaching such terms would not have changed the level of risk attached. The new rules are something completely new to English insurance law and could potentially create great uncertainty on the application of warranties.⁶⁹⁸ Section 11(1) further clarifies that the section will only apply to terms and warranties if complying with them would reduce the risk of loss of a particular kind, loss at a particular location or loss at a particular time. Thus, the insurer will not be able to rely on non-compliance to discharge its liability if the breach could not have increased the risk of the loss, which actually occurred in the circumstances that occur. As a result, the insurer's ability to rely on a breach of warranty in order to discharge his liability will be decreased⁶⁹⁹. Generally, the new provisions are fairer and more proportionate, and the element of causation strikes a better balance between the party interests due to the fact that the court needs to look at the actual facts of the case to assess whether the breach was somehow material to the loss.

⁶⁹⁶ Law Com No 353 / Scot Law Com No 238, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment July 2014.

⁶⁹⁷ Soyer, B. (2008). "Reforming Insurance Warranties - Are we finally Moving Forward" in Baris Soyer, (Ed.) *Reforming Marine and Commercial Insurance Law* (Informa, 2008) pp. 127-154. ch 7[149].

⁶⁹⁸ Health and Safety at Work, Insurance Act (2015) H.S. W. 2015, 21(2), 1-3.

⁶⁹⁹ The UK Insurance Act 2015, Holman Fenwick Willan, (June 2015) <<http://www.hfw.com/downloads/HFW-UK-Insurance-Act-2015-June-2015.pdf>> accessed in 24/6/2016

As previously mentioned, after the introduction of the Insurance Act 2015 the rule will be that the insurer will be unable to rely on non-compliance with a warranty or a term related to loss of a particular kind time or location, if the non-compliance could not have increased the risk of loss that occurred. For example, if the warranty holds that the assured must make sure that the packages of sugar are put in a specific manner, but he fails to do so, if then the vessel sinks due to a problem in the machinery of the vessel or due to natural events, the insurer will no longer be able to rely on the argument of non-compliance with that requirement to terminate his liability, because even if he had done so correctly it could not reduce the risk of the vessel sinking. The English test of causation does not refer to an actual causation or contribution to the loss but rather to the question of whether the breach increased the risk of the loss. This gives a more flexible approach, as it will be able to capture not only those breaches that directly caused or contributed to the loss but also, those that have increased the risk of causing that loss. In the case that the assured's conduct obviously caused the loss, he will not be able to rely on section 11. For instance, if the warranty provided that the goods should be packed in a certain safe packaging but the assured fails to do so and because of that they got damaged, then the insured cannot claim that the breach could not have increased the risk.

Reference will be made to instances that illustrate the potential treatment of the English test of causation. An obvious example to understand this would be a warranty, which provides that the assured should ensure that all flammable liquids should be packed in certain safe packaging, but the assured, uses a cheaper material breaching the promise

made. Later a fire starts on the ship that results in substantial losses. Even if the weather conditions caused the fire, it could be argued that the failure to package the goods appropriately increased the risk that the fire would have started. Under the old law the insurer could refuse the claim even if the breach had no conceivable connection to a loss caused by a storm.

In some instances, it will be more difficult to prove whether a failure to act could have increased the risk or not. For example, where the assured is in breach of the warranty that required him to have a fire expert on board when the ship was carrying flammable liquids. However, other crew-members well-trained in any kind of emergency situation were on board. The liquids caught fire due to the weather conditions. The crew did everything in their power, but the fire expanded, and the vessel became a total loss. In such cases, it is unclear whether the risk would have been reduced had the expert been on board and deeper factual analysis would be required. Due to the recent nature of the reform, there exist only few claims dealing with warranties most of which are claims or appeals of policies that pre-date the 2015 reform⁷⁰⁰. In the recent case of *Aspen Insurance*⁷⁰¹ the Court referred to clause 10 of the policy, which did not require a causal link between the breach and the circumstances of the loss. Having this in mind and the fact that the case arose before the implementation of the Insurance Act 2015, it was held that there was nothing in the causation point.⁷⁰²

⁷⁰⁰ *UK Acorn Finance Limited v Markel (UK) Limited* [2020] EWHC 922 (Comm), 2020 WL 01930308; *Aspen Insurance and Another v Sangster & Annand Ltd* [2019] Lloyd's Rep. IR 218.

⁷⁰¹ *Aspen Insurance and Another v Sangster & Annand Ltd* [2019] Lloyd's Rep. IR 218.

⁷⁰² *Aspen Insurance and Another v Sangster & Annand Ltd* [2019] Lloyd's Rep. IR 218.

Causation is not a new concept in English insurance law and the judges have been concerned with issues of causation, and specifically a “proximate causation”,⁷⁰³ many years back.⁷⁰⁴ A problem with establishing causation can be found in situations where there are more than one perils causing the losses of the ship. Such an instance was present in the case of *Leyland*.⁷⁰⁵ In the case the ship was torpedoed by an enemy submarine and was towed to a quay in the outer harbour. Due to the weather conditions the ship bump the quay and due to fears of it sinking, it was moved to a breakwater, but it soon sank due to heavy seas.⁷⁰⁶ The house of Lords was concerned with whether the loss was caused from the perils of the sea which was covered by the policy or from hostilities (exemption not covered by the policy). In the judgment it was held that:

“Where various factors or causes are concurrent and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may variously be ascribed the qualities of reality, predominance, efficiency”⁷⁰⁷

Consequently, the Court referring to the “causa proxima” doctrine, held that where there are more than one causes or factors causing the loss, the entire loss will be attributed to the peril that proximately caused the loss on the grounds of efficiency, predominance and qualities of reality. It then established that causation is not to be determined by the last cause in point of time but referred to a cause proximate to efficiency instead.⁷⁰⁸ This means

⁷⁰³ Bennet, Howard, *The law of marine insurance* (2d ed, Oxford university press, 2006) [302]; H. L. A. Hart and Tony Honoré, *Causation in the law* (2nd ed, Clarendon Press, Oxford: 1985).

⁷⁰⁴ *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350; *Reischer v Borwick* [1894] 2 Q.B. 548.

⁷⁰⁵ *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.

⁷⁰⁶ *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.

⁷⁰⁷ *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 per Lord Shaw

⁷⁰⁸ *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 per Lord Shaw [367]

that the relevant proximate cause was the effective cause and not necessarily the last cause.⁷⁰⁹

Causation for the purpose of the English Insurance Act may be described as a test identifying the extent of increasing the risk and limiting the instances where that will be caught as having caused it. A test of causation will indeed offer a more just outcome due to the fact that assureds will not be left without cover altogether for totally immaterial and unrelated to the risk terms. The increase of risk test would call for a deeper factual analysis that would require a detailed case-by-case examination of all relevant information and factors. It may be suggested that the test introduced by the UK can be too broad and controversial, as anything could have increased the risk. This is due to the nature of the test that captures more than a direct causation of loss, resulting to a myriad of possibilities that would satisfy the increase of risk test. This would mean that each case will be different, and the results will vary, especially where there are other proximate causes involved that were or not the only reasons. A failure to look at the parties' intentions along to a limited factual analysis may lead to adopting a restrictive approach that would be too harsh on the assured. Also, the rule being broad and uncertain will make it more difficult to litigate as it will be more time consuming (resulting to longer trials) and might be more costly (detailed factual enquiry will be necessary) as it will be concerned with finding fault or privity on the part of the insured.⁷¹⁰ There is not much clarity as to who will carry the burden of proof in proving whether there was or there wasn't a causal link. As a standard

⁷⁰⁹ *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.

⁷¹⁰ R Cooper, 'Australian Perspectives in Marine Insurance' Paper Shipping in the New Millennium Conference MLAANZ Brisbane 19 March (1999).

principle of law, the person making the allegation must prove it. But it would be fairer if both parties bring evidence to advance their contention. There is also, no clarity or any list indicating at what risk the warranty aims at; fact that will create long disputes. Also, there is no yet detailed guideline as to how the different cases will treat administrative expenses (being the costs to maintain the ship in good condition, the salary of the crew and other general necessary expenses). A suggestion to address the vagueness and ambiguity of the law would be adopting a test limiting the circumstances that would satisfy the increase of risk test and clarifying the uncertainty around the new causal link requirement. But since the UK is a common law jurisdiction it is very likely that the legislators could have intended for the gradual development of the law through common law and judicial interpretation.

There are indeed many promising changes made to the law on warranties. Generally, the new provisions will have a positive impact on the marine insurance industry, as they strike a balance to the parties' interests. An important factor of the reform is that the new provisions balance the protection of the party autonomy while promoting confidence in the insurance market. In the UK the party autonomy principle is a generally accepted and respected concept that plays a key role for the formation of contracts. It is essential that the law is formed in such a way that the party autonomy is protected but limit the possibility of abusing that party autonomy for deception purposes. This will only be successful if the law is designed in such a way that the insurers are not deprived of their freedom to contract and incorporate any term that were agreed to be undertaken by the assured. At the same time the assured should feel confident insuring their property and provide for no loopholes or technicalities that would result in unjustified consequences. The abolition of basis of

contract clause makes sure that any warranty should be set out in writing and consequently improves confidence by removing a mechanism that was seen as a trap for the assured. Rendering warranties as suspensive conditions allowing for the assureds to be able to remedy certain types of warranties and the introduction of causation test also, provide a stepping-stone towards the elusive balance of party interest.

The English marine insurance law was one of the least assured friendly and the warranties were seen as a “prodigal aberration”⁷¹¹. The reform tries to change that by balancing the need for protection of the insurer undertaking the risk against any inaccuracy of terms and the need to protect the assured from the harsh and sometimes disproportionate consequences. It is the underlying suggestion that Cyprus should reform the law on warranties and introduce rules of fairness and proportionality that strike the balance of party interests. The chapter will now assess how the three main changes brought on the law of warranties would apply on Cypriot law by looking at the effect of the law on pre-existing Cypriot cases where possible.

IA 2015 for Cypriot law

The English Insurance Act improves the marine insurance law in many ways, but the principles have yet to be tested in practice. In the light of the recent reform and the likely impacts on the Cypriot law this study reaches the general conclusion that the reform

⁷¹¹ Clarke Malcolm A., ‘Insurance Warranties: The Absolute End?’ (2007) *Lloyds Maritime and Commercial Law Quarterly*, Issue 4, 474-493.

in the area of warranties was a step towards achieving the elusive balance of party interests. It is this chapter's underlying aim to assess what adopting the rules on duty of fair presentation as introduced under the English Insurance Act means for Cyprus. After extensively examining the 2015 Act and analysing the subsequent case law, this chapter examines the changes brought to the law in relation to Cyprus. By considering all the benefits but also the flaws of the Act the chapter assesses the likely impact of the reformed law on pre-existing Cypriot cases that will aid the development of the Cypriot Act. However, the provisions lack guidance as to the definition of the terms. The definition of what constitutes a non-consumer insurance contract is very broadly identified as a contract that is not a consumer insurance contract the definition of which is linked with the Consumer Insurance (Disclosure and Representations) Act 2012.⁷¹² The law might also, create confusion⁷¹³ as both marine and non-marine insurance cases will be treated under the same Act.

Basis of Contract Clause to be Abolished

Following the UK's decision to abolish all basis of contract clauses, it is important to consider whether Cyprus should abolish the basis of contract clause from its law. In order to answer this question, it is essential to assess whether abolishing the basis of contract clause better balances the need for the insurer's reasonable expectation and the

⁷¹² Section 1 defines a consumer insurance contract as a contract between an insurer and "an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession". The insured must be "an individual" – a natural person and not a company.

⁷¹³ *Ashfaq v International Insurance Co of Hannover Plc* Court of Appeal (Civil Division) [2017] EWCA Civ 357

assured's need for protection. Abolishing the contract clause will help Cyprus keep in line with international standards. Even though, such a change may initially create confusion and uncertainty it may bring many benefits for the assureds and if applied with care can bring the right balance for party interests. Not desiring to deprive them of their freedom to contract the Act allows insurers to incorporate any term agreed at a pre-contractual stage that they regard as important as long as they take the necessary steps to communicate it to the assured. Consequently, the new rules ensure the assured's protection and at the same time retain the freedom of contract to not become too restrictive to the insurers. The abolition of basis of contract clauses gives an extra protection to the assureds, as only statements that are important and communicated to them will be incorporated into the contracts, which means that statements at a pre-contractual stage of little importance will not be converted into warranties that if broken would otherwise result in the termination of the cover.

An obvious argument, contrary to the belief that abolishing such clause is the best way forward, is that it is difficult to be certain that the insurer will be able to distinguish all the terms that are material to the risk and essential to the formation of the contract. This may be further supported by the idea that the law governing insurance contracts should not impose restrictions on individuals that take away their freedom to contract. Also, a decision not to abolish the basis of contract clause for Cypriot law would require the adoption of further rules that would obligate the insurers to communicate all the terms rendered into warranties to the assureds.

When looking at the limited cases resolved under Cypriot law, it is hard to notice any issue with the current law of basis of contract clause. This is because in the few cases of insurance where the assured appears to be in breach of terms that are rendered as warranties by virtue of the basis of contract clause, the courts seem to favour the assureds by supporting the argument of waiver of breach by the insurer where that information could be easily made available to them.⁷¹⁴ Even though the strict compliance element for basis of contract clause is adopted and the courts uphold that breach of such warranties entitles the insurer to terminate his responsibilities no matter how immaterial, it seems that the courts, where possible, favoured the assured based on the argument that the insurer had waived his right to do it. This is seen in cases such as *Proodeftiki Insurance Company*.⁷¹⁵ This could lead to the false assumption that abolishing the basis of contract clause is an unnecessary change. Basis of contract clause can be tricky and can allow room to be used against the assureds. The Courts indirectly avoiding applying in depth the basis of contract clause further supports the point that basis of contract clause is indeed an archaic and unnecessary rule.

Warranties to Become Suspensive Conditions

Another change in the area of warranties is the removal of the grave consequence of the doctrine. The IA retains the nature of warranties and the importance of relying on promises made and only mitigates the consequences of a breach of warranty. The warranties become

⁷¹⁴ See chapter 2. Eg *Proodeftiki Insurance Company Ltd v Andreas Prodromou* (2003) 1(A) CLR 600.

⁷¹⁵ *Proodeftiki Insurance Company Ltd v Andreas Prodromou* (2003) 1(A) CLR 600.

suspensive conditions and are remediable as long as the breach is remedied before any loss occurred. It is therefore essential to assess whether Cyprus should follow the UK and transform its warranties into suspensive conditions allowing for the possibility to remedy an innocent breach. After understanding the different types of warranties that exist, it is now obvious that not all warranties can be remedied. Even if they are remedied it is not certain which is the desired level that the insurer would be satisfied for the risk to become essentially the same as the one contemplated. This development entails some practical consequences. It will be difficult for the interested parties to be able to understand which instances the section captures, due to the fact that the Act does not include who is to prove whether or not the risk has become essentially the same. It is also, stated that it will be hard to prove the time that the breach occurred and the specific time it was remedied.⁷¹⁶

The decision to implement the much more lenient approach taken by the UK might disincentivize the assureds from fulfilling their promises in a timely manner especially when it comes to premium payment warranties. The rules eliminate the non-remediable nature of the English warranties that insurers have no liability for a breach of a premium payment warranty that has no bearing on the risk. After examining the new rules, it is possible to conclude that the remediable effect of warranties might create some uncertainty especially when distinguishing between the different types of warranties but, Cyprus should transform warranties into suspensive conditions. It is important to maintain the strictness of the warranty itself to promote accountability of the parties. They are still an essential part of the contract and all warranties must be respected no matter how trivial or

⁷¹⁶ Özlem Gürses, 'Reform of construction of insurance contract terms' (2013) 1 JBL 39.

immaterial they are. Consequently, it is essential to keep the provision that a warranty should be strictly complied with whether material to the risk or not. At the same time the consequences of warranties should be less strict and should be proportionate to the specific type of warranty breached. Thus, a test or classification that determines which are the remediable warranties and what happens to the warranties that are not remediable should be developed.

In each case one should ask what the scope of the specific warranty breached is, as the objectives of the warranties are not always easily identified. The law of warranties is designed to guard against a second danger associated with insurance: a form of “moral hazard”. This is when a policyholder insuring a risk may fail to take proper precautions. It is important to distinguish whether a warranty is a condition precedent to the attachment of the risk (which discharges the liability from the date of the breach the risk is not attached from the time onward) or a ‘condition precedent to the contract’ (the breach avoids the whole contract, because the foundation of the contract collapsed due to the breach and there was no contract from the outset) A term designed to prevent a specific type of loss, should not remove the insurer’s obligation to pay for a different type of loss. Where a term is designed to reduce the risk of a particular type of loss, a breach of that term should suspend liability only in respect of that type of loss. It is essential that insurers are advised not to use language that would create potential uncertainty in a case of a breach. Guidance should be given in regard to entering into contracts under the 2015 law and to explain how the new law works.

Introduction of Causation

Another long-needed change in the law on warranties is the introduction of causation test. Cyprus law on warranties relies on the former English law where no causation test exists. The identification of a causal link is not necessary as a breach of warranty will automatically leave the assured without cover and no questions of causation need to be examined by the courts. Many jurisdictions including Canada and Australia have made attempts to introduce a causation test in common law even before the development of the IA.⁷¹⁷ This study will thoroughly examine how well the Cypriot law adjust to the potential created by the introduction of causation.

Looking at different cases it is evident that, there is an implied need for a causation test in marine insurance. The insurer enters into the contract with the understanding that he would pay an insurance claim resulting from unpredicted risks. It is therefore right to assume that the insurer should not be able to refuse paying claims exempt where a breach from the assured resulted in an unpredicted danger that increased the risk or where he has acted fraudulently. Incorporating a requirement for causation would mean that the assured will not lose cover for innocent and unrelated to the loss breaches.

The new test of causation as introduced in English marine insurance law for the first time will create some confusion and potential uncertainty since Cyprus has been following the English rules on warranties and the respective automatic termination principle. The

⁷¹⁷ This is seen from common law cases such as *Allison Pty Ltd v Lumley General Insurance Ltd* (2006) 200 FLR 394, 14 ANZ Insurance Cases 61-708, [2006] WASC 104.

vagueness of the “increase of risk” test may seem positive for the insurers, as it will capture anything that could have increased the risk and for the assureds as the cover will not be terminated for something completely immaterial. But in some instances, it might be difficult to prove whether non-compliance could have increased the risk of loss. Especially in cases where the breach made did not cause or contribute to the loss but could have potentially increased the risk of such a loss occurring. Even if the loss was not caused by the breach it could be relevant to it, rendering hard to prove whether the breach increases the risk in question or not.

It is suggested that establishing a causal connection between the increase of the risk and loss is difficult in some instances.⁷¹⁸ For instance, the test will be unable to capture instances where the risk has been materially increased by the breach, but the loss has nothing to do with the increase of the risk.⁷¹⁹ This argument was based on the hypothesis that if a car being insured for private use was in reality used for commercial gain. If the damage occurred while transferring passengers for commercial gain then the causal link is obvious but if the car was stolen at night while the car was parked then no causal link can be established between the increase of risk and the loss.⁷²⁰ Conversely, section 11 does not apply to those terms that define the risk as a whole and the requirements that the car was

⁷¹⁸ Zhen Jing, Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions’ proposals for reform of the law of warranties, (2014) 25 Insurance Law Journal [203].

⁷¹⁹ Zhen Jing, Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions’ proposals for reform of the law of warranties, (2014) 25 Insurance Law Journal [203].

⁷²⁰ Zhen Jing, Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions’ proposals for reform of the law of warranties, (2014) 25 Insurance Law Journal [203].

not used for commercial gain would be one that defines a risk as a whole.⁷²¹ The warranty in question is a condition precedent to the attachment of the risk and the insurer should be able to avoid the cover whether it has increased the risk or not. The test of causation will require deeper factual analysis of the facts pertaining to the particular case. Also, it will be difficult to identify the precise objective of the warranty. The need for deeper factual analysis along with the uncertainty and complication that might be generated may result to increased litigation and therefore higher industry costs and time-consuming procedures.

When considering the Cypriot case of *Klitos Mavrides* where the insurer was able to refuse cover based on the argument that the assured was 100% working in the office when he was in the workshop doing labour work⁷²². The case involved a personal accident claim in which the assured was severely wounded by an iron band. In this case the court decided that the assured could not claim because there was a breach of warranty by virtue of the basis of contract clause. When considering the changes in law the insurer's argument would fail as all clauses rendering statements in the proposal form as warranties are eliminated. But had the insurer incorporated his occupation in the company as an essential term and communicate to the assured his intentions to incorporate it as warranty, then the court would be dealing with questions of causation. Working in a workshop is clearly more hazardous than working in an office and might have increased the risk of him being wounded. Nonetheless, this is a question for the Court to answer. Taking a different example of common cases in Cyprus is car accident claims. In such cases the claims involved statements (as part of the proposal form) as to the value of the car or the condition

⁷²¹ Insurance Act, section 11.

⁷²² *Klitos Mavrides v Cannon Insurance Ltd.* (1983) 1 J.S.C. 36.

of it when it was purchased as new or second hand⁷²³. Under the IA the insurer would still need to pay the claim and cannot terminate the contract on the basis of breach of warranty as such clause (basis of contract clause) cease to exist. The insurer could make a claim for a breach of duty of fair presentation that would be discussed in chapter 5. From there it would be down to the different cases and would need factual analysis, examination of the car and professional testimonies to determine if the car being second hand increased the risk of the car being involved in that accident. Obviously if there was nothing wrong with the car then it would be hard to prove that that breach contributed to the loss at all.

Overall, the Act appears to carry balanced provisions and is a step towards the elusive balance of parties' interests. The reform has indeed alleviated the draconian effects that the breach of a warranty would otherwise give, and the English marine insurance is certainly carrying better and more balanced mechanisms for resolving its cases. The right to terminate the contract when there are sufficiently serious consequences rather than automatically discharging the insurer from any liability is described as being vital for bringing the new warranty provisions in line with the general contract rules.⁷²⁴ The UK's test of causation as provided by IA is flexible and has a wide application since it catches any breach that would reasonably increase the risk; a mere connection will be enough to establish liability. Consequently, it could capture something that has a potential to increase the risk, even if that loss has really occurred due to another circumstance or where that loss would have occurred even if the breach was not made. If the breach made by the assured

⁷²³ *Proodeftiki Insurance Company Ltd. v Andrea Prodromou* (2003) 1(A) CLR 600.

⁷²⁴ Baris Soyer, 'Reforming Insurance Warranties - Are we finally Moving Forward' in Soyer, B. (Ed.) *Reforming Marine and Commercial Insurance Law* (Informa, 2008) ch 7 [132].

has an effect on the risk but it is actually irrelevant, as it did not directly cause it, the test could still capture it on the basis that it increased the risk that the loss would have happened. This study would suggest considering the structure of the “potential” causation test and limit it where the circumstances are such that the breach could have indirectly increased the risk of loss but was so small that the loss would still result had the warranty been complied with. Introducing a direct element of causation: That the omission or failure to fulfil a term “directly or substantially increased the risk of loss which actually occurred in the circumstances in which it occurred”.

CHAPTER 5

THE “ALL- INCLUSIVE” DUTY OF FAIR PRESENTATION

Introduction

The matrix of disclosure, misrepresentation and “good faith”⁷²⁵ was another major reform needed in marine insurance and this study would be incomplete if it failed to address the necessary changes made to the law pertaining to the duty of disclosure and misrepresentation; now referred to as duty of fair presentation. Referring to the duty of fair presentation will allow us to see the broader picture of the reform and determine whether the reformed law will better serve the two parties entering into the insurance agreement. By examining the rules reforming the law on duty of disclosure and misrepresentation the study will be looking at legal issues to assess if the rules introduced for the UK would best fit Cyprus’ legal system. One should find the real legal issues behind the reform and analyse them by reference to the law in need of reform to be able to suggest whether Cyprus should incorporate the new duty of fair presentation as part of its law.

The Law Commission has identified three main issues with the former law; the connection of the disclosure with the loss, the principle of proportionality and the grave consequences of a breach of disclosure.⁷²⁶ The English Insurance Act 2015 reforms the old duty of disclosure and misrepresentations and brings six main changes to the law that will come to

⁷²⁵ Francis D Rose, *Marine Insurance: Law and Practice* (2nd edition, 2012).

⁷²⁶ The Law Commission Insurance Law: Non-Disclosure and Breach of Warranty (1980) Law Com. No 104.

radically change what used to be the duty of disclosure and the duty not to misrepresent. This chapter seeks to contribute to the understanding of the new duty of fair presentation and the extent of the improvement that this brings to marine insurance law in an attempt to demonstrate that Cyprus should follow the steps of the English Insurance Act 2015 and reform its law on duty of disclosure and misrepresentation.

The chapter will first briefly outline the old law of duty of disclosure and development of the rules as set in the 1906 Act to provide a complete understanding of the law that Cyprus follows. It then moves on to demonstrate the complications and weaknesses of the legislation that Cyprus still follows in order to introduce the new duty of fair presentation as incorporated in the 2015 Act. Special emphasis will be given to the element of good faith and the position of the reformed law in regards to the connection of good faith to the new duty. After a comparison and exhaustive analysis of the rules the chapter will establish that the new law was a great improvement on the law of duty of fair presentation. The analytical and comparative approach taken throughout this study paves the way for the development of an Act for Cypriot marine insurance by determining whether the new provisions on fair presentation are fit for Cyprus to follow. A background of the rules of duty of disclosure will first be provided identifying the concepts of disclosure and representation and how they apply in practice to then provide the historical development of the duty of disclosure and misrepresentation.

The Pre-reform Matrix of Disclosure and Representation

At the outset one should identify the two main concepts of disclosure and representation in order to lay the foundation of this chapter. The 1906 Act imposes a twofold duty on the assured, which has been seen as one even though the terms refer to two distinct duties that the assured has to oblige to; the duty to fully disclose material information and the duty to accurately present the risk.⁷²⁷ The matrix of non-disclosure and misrepresentation has been seen as one due to the fact that the duty placed on the assured is one that captures two elements; him disclosing all information known to him and in doing so be certain and accurate as to the clarity and truthfulness of his statement.⁷²⁸ While disclosure played a key role, misrepresentation was not of particular importance since non-disclosure has been seen to hold subsumed questions of misrepresentation.⁷²⁹ Historically, the two duties have been seen as one, and were referred to as the matrix of disclosure and misrepresentation.⁷³⁰ Much debate arose regarding this notion that resulted in the idea that misrepresentation and non-disclosure are two entirely different principles and should be treated separately.⁷³¹ This was based on the fact that the rules of misrepresentation were developed by the Courts of Equity while rules of non-disclosure are a creature of common law.⁷³²

The general duty is outlined in section 18 of the MIA 1906 that states that the assured is under an obligation to disclose all material facts relating to the proposed insurance and not to make misrepresentations regarding those facts.⁷³³ These provisions are nonetheless

⁷²⁷ Marine Insurance Act 1906.

⁷²⁸ Francis D Rose, *Marine Insurance: Law and Practice* (2nd edition, 2012).

⁷²⁹ J Birds & N J Hird, *Birds' Modern Insurance Law* (6th ed 2004), [101].

⁷³⁰ Francis D Rose, *Marine Insurance: Law and Practice* (2nd edition, 2012).

⁷³¹ Francis D Rose, *Marine Insurance: Law and Practice* (2nd edition, 2012).

⁷³² John Bird and Norman J Hird, 'Misrepresentation and Non-Disclosure in Insurance Law - Identical Twins or Separate Issues?' (1996) 59 MLR 285.

⁷³³ Marine Insurance Act 1906

subject to further modifications by the terms of each individual contract. The burden for proving a non-disclosure and misrepresentation by the assured lies on the insurer. Generally, the rules governing misrepresentation and non-disclosure in regard to materiality and subsequently avoidance of contract are the same.⁷³⁴ Both provide a defence taken by the insurer and they are statements made or not made in the process of negotiating a contract that result to avoidance of contract when in breach. The main difference between the two is that non-disclosure has to do with a lack of good faith through inaction while misrepresentation while misrepresentation is about bad faith through action.⁷³⁵

Disclosure refers to the common law⁷³⁶ duty of the assured to disclose to the insurer all material facts to the risk in question.⁷³⁷ It involves a failure to act on the part of the assured to provide information to the assureds that are relevant to the risk and requires an actual knowledge established. Under the duty of disclosure, the assured is obliged to disclose all material facts, which would influence the judgment of a prudent underwriter (whether he is or he is not aware of them)⁷³⁸. Oral or written information should be provided before the conclusion of the contract.⁷³⁹ The need in an insurance transaction to include all the information known to him about any matter that the insurer should know in deciding whether to accept the cover of the risk and that are essential for a taking decision after the formation of contract. For instance, it is essential to inform the insurer about a defect. Non-disclosure involves situations where the assured fails to disclose something, which

⁷³⁴ *Pan Atlantic Insurance Co. Ltd. and another v Pine Top Insurance Co. Ltd.* [1994] 2 ALL E R 581 per Lord Mustill

⁷³⁵ Francis D Rose, *Marine Insurance: Law and Practice* (2nd edition, 2012) [5.1].

⁷³⁶ Derived from common law.

⁷³⁷ Marine Insurance Act, section 18.

⁷³⁸ Marine Insurance Act, section 18.

⁷³⁹ Mac Gillivray, *Insurance Law*, (9th ed., Sweet and Maxwell, London: 1997), [397]

was not the subject of a question but was known to him and ought to have considered it to be material. Even though there is no general obligation for insurers to ask any questions, the assureds are still expected to disclose information about the risk, which they have not been asked. Even when the assured completes the form with care, there could be something else that a prudent insurer would consider material which the particular insurer did not think to ask about but which nonetheless, the applicant was expected to think of and disclose.⁷⁴⁰ [L] [SEP] This is because it is the assured that knows the most about the insured property.

Under section 18 of the MIA 1906 “the assured is under the duty to disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him”.⁷⁴¹ Assureds need to disclose all material facts subject to four exemptions. They will be excused from duty of non-disclosure when the information involves facts, which reduce the risk or are common to knowledge, facts the insurer knows or is presumed to know or that the insurer has waived.⁷⁴² The remedy for a breach of the disclosure duty is that the insurer may avoid the contract.⁷⁴³

⁷⁴⁰ Malcolm A Clarke, *Policies and Perceptions of Insurance Law in the Twenty First Century* (OUP, New York: 2005) [103].

⁷⁴¹ Marine Insurance Act 1906, section 18(1).

⁷⁴² Marine Insurance Act 1906, section 18(3).

⁷⁴³ Marine Insurance Act 1906, section 18(1).

The assured is also under an obligation not to misrepresent any material facts.⁷⁴⁴ Representation involves an act that the assured made but was not correct or accurate.⁷⁴⁵ In an insurance transaction the assured needs to tell the truth and not misrepresent any information about any matter that the insurer should know in deciding whether to undertake the risk and that are essential for a taking decision after the formation of contract. A representation may be either a representation of fact, or of expectation or belief.⁷⁴⁶ Representations of expectation or belief will be regarded as true if it was made in good faith⁷⁴⁷, if the person that made the representation genuinely believed it to be true. If they express it dishonestly, they therefore made a fraudulent misrepresentation. Again, the remedy for misrepresentation is avoidance of the policy. Under the former legislation the insurer was able to avoid the contract even if the material misrepresentation was negligent or entirely innocent (in good faith) rendering the remedy for fraudulent, negligent and innocent misrepresentation the same.⁷⁴⁸

Avoidance normally requires restitution: the parties must be restored to the positions they were in prior to the contract being made.⁷⁴⁹ The insurer may reject any claim that has been made and recover any claims payments already made. In most cases the policyholder may demand the return of the premium paid (where no fraud or illegality is established).⁷⁵⁰ The only exemption provided under section 84(3)(a) of the MIA 1906 is that “where the policy

⁷⁴⁴ Marine Insurance Act 1906, section 18(1).

⁷⁴⁵ Marine Insurance Act 1906, section 20(4).

⁷⁴⁶ Marine Insurance Act 1906, section 20(3).

⁷⁴⁷ Marine Insurance Act 1906, section 20(5).

⁷⁴⁸ Marine Insurance Act 1906, section 18(1).

⁷⁴⁹ Law Commission and Scottish Law Commission, Insurance Contract Law, Business Disclosure, Warranties, Insurer’s remedies, Fraudulent Claims and late payment, Law Com No 353, Scot Law No 238 July 17, 2014, [4.47].

⁷⁵⁰ Marine Insurance Act 1906, section 84(3)(a).

is void or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured”.

As mentioned before, representations were seen as less important since the duty of disclosure was seen as subsuming issues of misrepresentation.⁷⁵¹ They involve something that was directly said that answers a specific question. A direct representation that is not true is a misrepresentation.⁷⁵² The distinction between disclosure and representation is demonstrated in *Zurich*⁷⁵³ case where it was held that:

“Misrepresentation of a material fact will afford grounds for avoidance of the policy whether or not the proposer was aware that it was incorrect, whereas avoidance for non-disclosure will be restricted to facts of which the proposer was aware and which they ought to have realised the insurer would regard as material”.⁷⁵⁴

A material misrepresentation is one that would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.⁷⁵⁵ The case of *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*⁷⁵⁶ describes a material circumstance to be one that would have an effect on the mind of the prudent insurer in assessing the risk and it is not necessary that it would have a decisive effect on the insurer’s acceptance of the risk or on the amount of premium charged. The case added a second

⁷⁵¹ J Birds & N J Hird, Birds, *Modern Insurance Law*, (6th edn, 2004) [101].

⁷⁵² Marine Insurance Act 1906, section 20(1).

⁷⁵³ *Zurich General Accident and Liability Insurance Co v Leven* [1940] SC 406,415 per Lord President Normand.

⁷⁵⁴ *Zurich General Accident and Liability Insurance Co v Leven* [1940] SC 406,415 per Lord President Normand.

⁷⁵⁵ Marine Insurance Act 1906, Section 20(2).

⁷⁵⁶ *Pan Atlantic Insurance Co. Ltd. and another v. Pine Top Insurance Co. Ltd.* [1994] 2 ALL E R 581.

requirement of inducement under which an insurer may avoid the contract if it is demonstrated that it was induced by the misrepresentation to enter into the policy on the relevant terms. The burden would be on the insurer to prove that a different outcome would actually have resulted had the true information been stated.

Materiality and Material Circumstances Defined

The duty of disclosure requires the assured to disclose every material fact known to him or that he should have known in the ordinary course of business. This means that the assured must disclose before the completion of the contract all material circumstances, which are within his actual or presumed knowledge. It is important to understand the meaning behind “material circumstance”. In general materiality refers to an element important to the issue or matter at hand as to influence one’s mind. Material can be defined, as being of such nature that knowledge of it would affect an individual’s decision-making process or something that is significant and important enough to merit attention⁷⁵⁷. The latter seems to give a broader meaning to the concept of materiality. In law where an element of materiality needs to be present the party has to prove that the matter was material to the issue in question; the subject matter of a statement that relates to a circumstance that is important for the decision-making. An instance could involve information, which is important for a party making a reasonable decision about whether to enter into an agreement. Information that would affect the decision to undertake an insurance risk, the liability of the insurer and the amount of coverage or premium.

⁷⁵⁷ The New Oxford American Dictionary 1335 (2001).

Specifically, under English marine insurance law, section 18(2) defines material circumstances to be every circumstance, which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. Every circumstance is material if it would influence the judgement of a prudent insurer in fixing the premium and the terms of the insurance and determining whether to accept the risk. A circumstance may be material even if disclosure would not necessarily lead to an increased premium or declinature of the risk. This is shown in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*⁷⁵⁸ where the court held that it suffices that expert evidence from an underwriter in the market at the time demonstrates that the fact would have been of interest to a prudent underwriter even if it would not have affected the final underwriting decision. This enhances the suggestion that the test is a generous one.⁷⁵⁹

The Duty of Disclosure and Misrepresentation

Reference will be made to the development of the rules as incorporated under the English 1906 Act to provide a complete understanding of the law that Cyprus follows. In the UK pre-contractual disclosure originated in the law of marine insurance in the 16th century as a result of the judgment in the case of *Carter v Boehm*⁷⁶⁰ where Lord Mansfield referred to the principle of good faith in commercial transactions. The contract of insurance was one

⁷⁵⁸ *Pan Atlantic Insurance Co. Ltd. and another v. Pine Top Insurance Co. Ltd.* [1994] 2 ALL E R 581.

⁷⁵⁹ Rob Merkin, 'Current Issues in Marine Insurance and Reinsurance Law' Barlow Lyde & Gilbert (Robert Merkin, 2005) <https://nanopdf.com/download/current-issues-in-marine-insurance_pdf> accessed at 5/1/2019.

⁷⁶⁰ *Carter v Boehm* (1766) 3 Burr [1905].

of speculation. The underwriter trusts the representation made by the assured is true and proceeds with confidence that no circumstance was kept for him. The special facts on which the contingent chance is to be computed, lies on the knowledge of the assured.⁷⁶¹ In the case it was held that “a contract of marine insurance is one of the utmost good faith and if good faith is not shown by either party then the policy may be avoided”. The insurance law then developed the so-called pre-contractual duty of disclosure. In the case it was held that keeping back any circumstance even by mistake the insurer would still be deceived and the policy would be void⁷⁶². In marine insurance it was the assured that was required to communicate the information to the insurer⁷⁶³ on the basis that the insured item was not available for inspection and the negotiations relied purely on descriptions offered by the assured⁷⁶⁴.

The duty of non-disclosure and misrepresentation was later codified in sections 17-20 of the Marine Insurance Act 1906, originally created for solely marine insurance issues⁷⁶⁵ but extended to all forms of insurance and reinsurance⁷⁶⁶. Referring to the duty of disclosure entails both a positive duty⁷⁶⁷ to disclose all material facts to the proposed insurance and an omission to do so that will result in avoidance of the cover. The duty both encompasses elements of concealment and omission⁷⁶⁸, which means that the assured must avoid material, false statements and disclose material facts⁷⁶⁹. In order for an insurer to avoid the

⁷⁶¹ *Carter v Boehm* (1766) 3Burr [1909].

⁷⁶² *Carter v Boehm* (1766) 3Burr [1909] per Chief Justice.

⁷⁶³ Gary I. Salzman, ‘Misrepresentation and Concealment in Insurance’, (1970-71) 8 Am. Bus. LJ. [119].

⁷⁶⁴ William Reynolds Vance, *Handbook on the Law of Insurance*, (3rd ed., 1951) [368].

⁷⁶⁵ The Explanatory Memorandum to the Insurance Laws Amendment Bill 1997 (Cth) [87]

⁷⁶⁶ *Pan Atlantic Co. Ltd. v Pine Top Insurance Co. Ltd.*, [1995] 1 A.C. 501, [1994] 2 Lloyd’s Rep. 427.

⁷⁶⁷ Sir Mackenzie D. Chalmers, *Chalmers’ Marine Insurance Act 1906*, (5th ed., 1956) [29, 30].

⁷⁶⁸ Insured’s duty of disclosure (1975) [243].

⁷⁶⁹ Marine Insurance Act 1906, sections 18 and 20.

contract he needs to prove that both an element of materiality and an inducement exists. Section 17 of the 1906 Act on the duty of disclosure codifies the common law and is applicable for post-contractual (after the conclusion of the contract) presentations as well as for pre-contractual (before the conclusion of the contract)⁷⁷⁰ whereas sections 18-20 are confined to pre-contractual representations. Section 18 deals with disclosure by the assured and refers to situations continuing after the contract is concluded limiting the circumstances it applies just to pre-contractual ones. This means that there was no obligation to disclose material facts that were known after the contract was made.⁷⁷¹ Section 19 deals with disclosure by the assured's agent to insure requiring him to disclose all material circumstances and section 20 deals with the assured's duty not to misrepresent material facts. An insurance agent must disclose material facts known to the agent whether or not the assured was aware of them.⁷⁷²

Sections 18 and 20 are effectively mirror-image provisions and require the assured to disclose, or not misrepresent any material facts⁷⁷³. In the case of *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*⁷⁷⁴, an additional subjective inducement test was suggested by the Court whereby the insurer needs to prove that had that fact made known to him; the outcome would have differed.⁷⁷⁵ Such as a different premium would have been

⁷⁷⁰ *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437; *K/S-Merc Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] 2 Lloyd's Rep 563; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] 1 Lloyd's Rep 389.

⁷⁷¹ *Cory v Patton* (1872) L.R. 7 Q.B. 304

⁷⁷² Marine Insurance Act 1906, section 19.

⁷⁷³ Rob Merkin† and Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) M.L.R. Volume 78, Issue 6, 1004–1027 [1009]

⁷⁷⁴ *Pan Atlantic Insurance Co. Ltd. and another v. Pine Top Insurance Co. Ltd.* [1994] 2 ALL E R 581 per Lord Mustill; Rob Merkin† and Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' (2015) M.L.R. Volume 78, Issue 6, 1004–1027 [1009].

⁷⁷⁵ Rob Merkin† and Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and

asked for or that the insurer would not have accepted the risk in its entirety.⁷⁷⁶ This means that the insurer will be able to avoid the contract if he demonstrates that it was induced by the misrepresentation to enter into the policy on the relevant terms. The inducement test became the dominant issue in the vast majority of cases.⁷⁷⁷ Inducement must be proved to show that a breach of the duty to disclose and not to make misrepresentation was present. But no evidence of the effect of the breach of that duty is necessary to show that his duty was breached.

According to Merkin one of the most significant developments in the law of marine insurance is the “rise of inducement”.⁷⁷⁸ The actual insurer is under the obligation to demonstrate that he was induced to enter into this policy by that non-disclosure or misrepresentation.⁷⁷⁹ Inducement involves looking at the impact of a material fact but also at the likely consequences of a failure to disclose.⁷⁸⁰ The question to ask is whether the insurer would underwrite the risk in question on the same terms had the assured made full and accurate disclosure of all material facts.

Assured’ (2015) M.L.R. Volume 78, Issue 6, 1004–1027 [1009].

⁷⁷⁶ *Pan Atlantic Insurance Co. Ltd. and another v. Pine Top Insurance Co. Ltd.* [1994] 2 ALL E R 581 per Lord Mustill; Rob Merkin† and Özlem Gürses, ‘The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured’ (2015) M.L.R. Volume 78, Issue 6, 1004–1027 [1009].

⁷⁷⁷ Rob Merkin, Rob Merkin and Ozlem Gurses, ‘The Insurance Act 2015: Rebalancing the interests of Insurer and Assured’ (2015) *Modern Law Review*, Vol. 78, No. 6.; *Sea Glory Maritime Co, Swedish Management Co SA v AL Sagr National Insurance Co* [2013] EWHC 2116 (Comm); *Lewis v Norwich Union Healthcare Ltd* [2010] Lloyd’s Rep IR 198; *Drake Insurance plc v Provident Insurance plc*

⁷⁷⁸ Rob Merkin, ‘Current Issues in Marine Insurance and Reinsurance Law’ Barlow Lyde & Gilbert (Robert Merkin, 2005) <https://nanopdf.com/download/current-issues-in-marine-insurance_pdf> accessed at 5/1/2019 [1].

⁷⁷⁹ *Pan Atlantic Insurance Co. Ltd. and another v. Pine Top Insurance Co. Ltd.* [1994] 2 ALL E R 581; *Assicurazioni Generali v Arab Insurance Group* [2003] Lloyd’s Rep IR 131.

⁷⁸⁰ Rob Merkin, ‘Current Issues in Marine Insurance and Reinsurance Law’ Barlow Lyde & Gilbert (Robert Merkin, 2005) <https://nanopdf.com/download/current-issues-in-marine-insurance_pdf> accessed at 5/1/2019 [2].

Utmost Good Faith Under the 1906 Act

A doctrine of utmost importance in insurance law is that of good faith. The provision is a reflection of the Latin phrase “uberrima fides” which basically means utmost good faith. Good faith is described as “a principle of fair dealing”.⁷⁸¹ The doctrine was created on the assumption that facts that are material to the particular insurance are exclusive to the assured but do not generally lie within the knowledge of the insurer⁷⁸². The insurer will trust in confidence that the assured in good faith discloses all the facts material to the insurance. Nowadays, this is not always true as there are many instances where insurers seem to know more about the subject matter of the insurance than the assured. Though the doctrine itself is comprehensive, the application of the doctrine remains unclear while the extending of the doctrine to post-contractual situations creates a questionable deterrence. The study questions the absence of the post-contractual duty of good faith under the 1906 Act and the lack of clarity when it comes to the application of the good faith principle that remains a problem even after the 2015 reform.

In the UK, academics make reference to the matrix of disclosure presentation and good faith as they are often used as one.⁷⁸³ Specifically, the law of marine insurance imposed a duty of utmost good faith or “uberrima fides” on all contracts of marine insurance.⁷⁸⁴

⁷⁸¹ *Manifest Shipping Co. Ltd. v Uni-Polaris Shipping Co. Ltd. and Others (The star Sea)* [2001] UKHL/1; [2001] 1 Lloyd’s Rep 389 [48].

⁷⁸² *London General Omnibus Co. v Holloway* [1912] 2 K.B. 72 [85] (C.A.).

⁷⁸³ FD Rose, *Marine Insurance Law and Practice* (London, 2004).

⁷⁸⁴ Marine Insurance Act, section 17.

Hence, good faith was directly related to disclosure and misrepresentation this being evident by both common law and the Act itself.⁷⁸⁵ Good faith originated in the case of *Carter v Boehm*⁷⁸⁶ where Lord Mansfield established the principle of good faith in commercial transactions. In the case it was held that “a contract of marine insurance is one of the utmost good faith and if good faith is not shown by either party then the policy may be avoided”. To understand the contract of good faith Lord Mansfield observed that:

“...Good faith forbids either party by concealing what the privately knows, to draw the others into a bargain from his ignorance of that fact and his believing the contrary.”⁷⁸⁷

These contracts rely entirely on good faith since the insurer enters into the contract with the belief that what was said was true in good faith. Later, Lord Justice Scrutton had observed that for centuries in English law “a man who knows everything comes to an underwriter who knows nothings asking him to insure, consequently it is the duty of that man who desires to make the policy to make a full disclosure to the underwriter without being asked of all the material circumstances because the assured knows everything and the underwriter knows nothing”⁷⁸⁸. Nowadays with the freedom of information and the data technology developments things have changed since the insurer has at his fingertips; information and details that the assured might even forgot about. Surely, this is not always the case.

⁷⁸⁵ Marine Insurance Act, section 17; *Carter v Boehm* (1766) 3Burr [1909].

⁷⁸⁶ *Carter v Boehm* (1766) 3Burr [1909].

⁷⁸⁷ *Carter v Boehm* (1766) 3Burr [1909].

⁷⁸⁸ *Rozanes v Bowen* [1928] 32 LIL Rep 98 [102].

The insurance law then developed the so-called non-disclosure principle. The term ‘utmost’⁷⁸⁹ was a refinement added by Buller J, in *Wolff v Horncastle*.⁷⁹⁰ There was a differentiation in terminology of the terms distinguishing between a mere good faith and an utmost good faith. This differentiation was more apparent after *Carter v Boehm* since even if the suppression of the facts is made mistakenly the policy will still be voided on the basis that the risk actually taken, and the risk intended or agreed on was different.⁷⁹¹ One could say the term utmost was an unnecessary addition since it does not change or increase the enforceability of the rule but is merely a vocabulary addition. The adjective utmost has been seen as a rhetorical flourish rather than a legal term⁷⁹². The duty of good faith when it comes to the pre-contractual duty is a mutual one. Originally, section 17 was treated as a preamble to sections 18-20. Section 17 of the Act states that: “A contract of marine insurance is a contract based upon the utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party”.

Good faith principle is accepted to apply for pre-contractual duties but there are many questions about whether it should continue to apply to post-contractual situations. The “*Star Sea*”⁷⁹³ and “*The Mercandian Continent*”⁷⁹⁴ were two of the cases that questioned whether the duty of good faith continues after the making of the contract of insurance and what would be the consequences had it been breached. But the courts seemed to reject extending the law on good faith to post-contractual situations⁷⁹⁵. Based on this pre-

⁷⁸⁹ Dictionary’s definition for the word utmost is extreme/great.

⁷⁹⁰ *Wolff v Horncastle* (1798) 1 B & P 316

⁷⁹¹ 3 Burrow 1905 [1909]; 97 ER 1162 [1165].

⁷⁹² F.D.Rose, *Marine Insurance: Law and Practice*, (2nd edition, 2012) [5.23].

⁷⁹³ [2001] 1 Lloyd’s Rep. 389, House of Lords.

⁷⁹⁴ [2001] EWCA CIV 1275, Court of Appeal (31 July 2001).

⁷⁹⁵ Francis D.Rose, *Marine Insurance: Law and Practice*, (2nd edition, 2012) [5.2].

contractual mutuality and the absence of reciprocal obligations between the assured and the insurer in post-contractual situations, there are questions created as to whether the duty of good faith should be mutual for post-contractual duties.⁷⁹⁶ Citing the case of *Pan Atlantic*⁷⁹⁷ in the case of *Star Sea*⁷⁹⁸ it was held that the courts tend to strongly disapprove the use of the assured's duty of good faith as an instrument from the insurer to act in bad faith. In some cases the insurer's right of avoidance could be restricted when applying the insurer's good faith principle.⁷⁹⁹ One case that this can be shown in is that of *Drake* where the court held that the principle of good faith should be able to restrict the application of the right to avoid the policy only when that remedy would operate unfairly.⁸⁰⁰ In order for the good faith principle to be fairly distributed one should balance its application by "measuring the rights and wrongs of the parties"⁸⁰¹ which would give rise to complexity and obscurity within the law. Lord Rix then suggested that this proportionality principle required would be inconsistent with the simplicity and certainty upon which English commercial law was founded.⁸⁰² Nonetheless, the law can be both certain and proportionate by implementing clear rules for the duty of good faith in its role, its application and effect. In determining issues of non-disclosure and misrepresentation, courts should look at the real intentions of the parties and the existence of good faith, since a contract of insurance

⁷⁹⁶ André Naidoo, 'Post-Contractual Good faith- A further Change in Judicial Attitude' (2005) 68(3) MLR 464-474.

⁷⁹⁷ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581, 623 per Lord Lloyd.

⁷⁹⁸ [2001] UKHL 1; [2001] 1 Lloyd's Rep 389 [57] per Lord Hobhouse.

⁷⁹⁹ *Manifest Shipping Co. Ltd. v. Uni-Polaris Shipping Co. Ltd. and Others* (The star Sea) [2001] UKHL 1; [2001] 1 Lloyd's Rep 389 [57] per Lord Hobhouse.

⁸⁰⁰ *Drake Insurance Plc v Provident Insurance plc* [2003] EWCA Civ 247; [2004] Lloyd's Rep 268 [87] per Rix LJ

⁸⁰¹ *Drake Insurance Plc v Provident Insurance plc* [2003] EWCA Civ 247; [2004] Lloyd's Rep 268 [88] per Rix LJ

⁸⁰² *Drake Insurance Plc v Provident Insurance plc* [2003] EWCA Civ 247; [2004] Lloyd's Rep 268 [88] per Rix LJ

is one based on the parties' intentions and both parties enter into the policy on the assumption that the other party is acting in good faith. Good faith as a matter of principle should be expected for the duration of the policy, until the moment a claim is taken to court.

The Issue Under the 1906 Act

The law of disclosure, misrepresentation and good faith though a great development for the law of marine insurance they came to be problematic and had attracted a great deal of criticism as to their harsh and unfair application. In theory, the doctrine of utmost good faith applies equally to the insurer and the insured, but in practice it has come to mean that the assured is under a heavy onus of disclosure when he applies for an insurance cover.⁸⁰³ Even though the concept of good faith was originally introduced on the basis that the assured was in a position to know more regarding the insured property than the insurer, in recent times it appears that insurers are more well-informed regarding the subject matter of insurance and the law governing insurance bringing the assured to a disadvantage. The law under the 1906 was not enforced to equally protect both parties considering the knowledge of the parties and the specific circumstances in question.

The test designed to address issues of non-disclosures and misrepresentations obliged the assured to disclose every material circumstance known to him before the contract was concluded and that he was deemed to know all the information that he ought to know in

⁸⁰³ Islam Ahmed Siddiqui, 'Insured's Duty of Disclosure in Canadian and English Law', (1975) 13 Alta. L. Rev. 242.

the ordinary course of business. This would mean that the assured had to predict what a prudent insurer might have found of interest.⁸⁰⁴ To predict everything that an insurer could find material could be an impossible task and it would be really easy for the assured to fail to include information that the insurer would claim to be of high importance for his decision to enter into contract.

The assured is under a duty to disclose what is known or ought to be known in the ordinary course of business to the insurer but there is no clear statement of exactly when either party possesses the requisite knowledge. Also, the prudent insurer test appears on its face to require the assured to predict what a prudent insurer might find of interest. It is often impossible to be able to know. The Consumer Insurance (Disclosure and Representations) Act 2012, which came in to force on 6 April 2013, has already changed that in terms of consumer insurance and those duties no longer apply to consumers. They were instead replaced by a single duty to take reasonable care to avoid misrepresentation, thereby abolishing any disclosure requirement and leaving the onus squarely on the insurers to ask questions. When the assured failed to include or mention information or misrepresented then the insurer could avoid the entire policy where materiality and inducement was proved. The consequence of such failure was frequently disproportionate to the degree to which the insurer has been misled.⁸⁰⁵ Lord Kennedy in one of his judgements has expressed that “No class of case occurs to my mind in which our law regards mere non-disclosure as

⁸⁰⁴ Rob Merkin and Ozlem Gurses, ‘The Insurance Act 2015: Rebalancing the interests of Insurer and Assured’ (2015) *Modern Law Review*, Vol. 78, No. 6.

⁸⁰⁵ Rob Merkin and Ozlem Gurses, *The Insurance Act 2015: Rebalancing the interests of Insurer and Assured* (2015) *Modern Law Review*, Vol. 78, No. 6.

invalidating the contract, except in the case of insurance.⁸⁰⁶

Failure to comply with the section would again result to avoidance of the policy. It is therefore not a surprise that the provisions of section 19 have been characterised as curious.⁸⁰⁷ The duty of disclosure and representation often operated as a trap for the assured that were unaware that the duty even existed. Hence, policyholders could be denied claims and render the entire contract as void even though they have acted honestly and reasonably. This could occur even for innocent or minor mistakes rendering the remedy overly severe. The Marine Insurance Act 1906 provides the parties with only one remedy no matter how grave or minor the breach was and that is of avoidance of the entire policy, *ab initio*, subject to repayment of the premium in the absence of fraud.

The implications regarding the law on disclosure and misrepresentation were numerous and needed to be dealt efficiently and promptly. The English and Scottish Law Commissions⁸⁰⁸ and National Consumer Council⁸⁰⁹ urged the need for “a long delayed” reform of the duty of non-disclosure. The Law Commissions have criticised that the Consumer Insurance law need to be updated to correspond to the realities of a mass consumer market⁸¹⁰. Such a reform was criticised as being “too long delayed”⁸¹¹ while the

⁸⁰⁶ *London General Omnibus Co. Ltd v. Holloway* [1917] 2 KB, CA [85] per Kennedy L J.

⁸⁰⁷ Rob Merkin and Ozlem Gurses, *The Insurance Act 2015: Rebalancing the interests of Insurer and Assured* (2015) *Modern Law Review*, Vol. 78, No. 6.

⁸⁰⁸ Law Commission, *Insurance Law, Non-Disclosure and Breach of Warranty* (1980) Law Com. No 104, [1.21].

⁸⁰⁹ *Insurance Law Reform: the Consumer case for review of insurance law* (May 1997).

⁸¹⁰ The Law Commission and the Scottish Law Commission, *Consumer Insurance Law: Pre-contract disclosure and misrepresentation* Law Com 319/Scot Law Com No 219 Dec. 2009 (Crown Copyright 2009)

⁸¹¹ *Insurance Law, Non-Disclosure and Breach of Warranty* (1980), Law Com No 104 [10, para 1.21(a)].

provisions have been characterised as unfair and disproportionate.⁸¹² Following a series of consultations and Issue Papers, the Consumer Insurance (Disclosure and Representations) Bill was introduced in the House of Lords on 16 May 2011. The Consumer Insurance (Disclosure and Representations) Act 2012 received Royal Assent on 8 March 2012 and came into force on 6 April 2013. The Act applies solely for consumer insurance issues and abolishes all the traditional rules of non-disclosure and misrepresentation in consumer contracts and introduced a duty of reasonable care not to make a misrepresentation. Similarly, the Law Commission for marine insurance has described the law under the Marine Insurance Act as being out-dated and out of step with the realities of the 21st century commercial practices, which resulted to a reform on the law.⁸¹³ Many proposals and recommendations were made for years until the passing of the Insurance Act 2015.

The Duty of Fair Presentation-Post Reform

An essential part of this chapter is understanding the new duty of fair presentation as incorporated under the English Insurance Act in order to assess whether Cyprus should follow the UK's steps. Before referring to the rules governing the duty of fair presentation it is paramount to examine what issues are the law of non-disclosure and misrepresentation designed to address and why they play a key role for the protection of the insurers. The law

⁸¹² *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485.

⁸¹³ Law Commission's proposals in Law Commission, Part 3, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims and Late Payment Executive Summary Report, July 2014; Law Commission and Scottish Law Commission, Insurance Contract Law Issues Paper 2 Warranties, November 2006; The Law Commission and the Scottish Law Commission, 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 Disclosure 2012

of non-disclosure and misrepresentation protects the insurers against circumstances where the assureds may know more about the risk than them. Receiving all the information necessary would be essential as based on that information the insurer will decide whether to undertake the risk in question and in what price and terms. A problem that occurs with the lack of this information is the so-called “adverse selection”.⁸¹⁴ If the insurers are not able to understand whether the risk is higher or lower then they will be forced to put up premiums, which could ultimately lead to the market losing viability.⁸¹⁵ Hence, it is crucial that the assureds disclose all the information known to them and answer all the questions asked accurately with reasonable care. The rules on non-disclosure exist to protect the insurers and make sure that they know all the necessary information before they decide to accept a great risk. Similarly, the new rules on fair presentation are designed to protect the insurers against any disclosure or misrepresentation from the assured that could result to him entering into an insurance contract that entails higher risk of that undertaken or that he would not have entered into the same agreement had he known all the information. The new provisions seem to have an obvious content only in regard to the pre-contractual duty and make no reference in regard to the post-contractual duty. The new provisions as introduced under the Insurance Act 2015 will be underlined so that the basic understanding of the reformed law is drawn.

⁸¹⁴The Law Commission Consultation paper No182 and The Scottish Law Commission Discussion Paper No 134, Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (2007) [1.60]

⁸¹⁵ The Law Commission Consultation paper No182 and The Scottish Law Commission Discussion Paper No 134, Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (2007) [1.60]

The “New” Duty of Fair Presentation

The new law reforms the former legislation covering marine insurance in many ways. After warranties the second most needed change on the law of insurance was that of the pre-existing duty of disclosure and presentation. The Insurance Act 2015 reformed the law of non-disclosure and misrepresentation by removing the wording “duty of disclosure and misrepresentation” and replacing it with the wording “duty of fair presentation” which still captures both disclosure and misrepresentation by the assured. The term “fair presentation” has previously been used in that sense under common law.⁸¹⁶ This is seen in the case of *Carter v Boehm* where it was stated that the question must always be “whether there was under all the circumstances at the time the policy, a fair presentation”.⁸¹⁷ Based on this, the fair presentation of the risk was subsumed into the assured’s duty to disclose all-important information fairly and honestly. Other than a change in terminology, the term still incorporates the principles of disclosure and representation. Specifically, section 21(2)⁸¹⁸ of the Act repeals the former sections 18⁸¹⁹, 19⁸²⁰ and 20⁸²¹ and under section 3⁸²² introduces the new duty of fair presentation that illustrates in clear terms the requirements of the duty. The requirements entail both a disclosure and misrepresentation, thus requiring

⁸¹⁶ *WISE (Underwriting Agency) Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] 2 All ER (Comm) 613 [63].

⁸¹⁷ *Carter v Boehm* (1766) 3 Burrow 1905 [19011]; 97 ER 1162 [1166] per Lord Mansfield; See also: *WISE (Underwriting Agency) Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] 2 All ER (Comm) 613 [63].

⁸¹⁸ Insurance Act 2015, section 21(2).

⁸¹⁹ Marine Insurance Act 1906, section 18 (on disclosure by the assured)

⁸²⁰ Marine Insurance Act 1906, section 19 (on disclosure by agent effecting insurance)

⁸²¹ Marine Insurance Act 1906, section 20 (on representations pending negotiation of contract (pre-contractual representations))

⁸²² Insurance Act 2015, section 3.

the assured to make a fair presentation of the risk.⁸²³ Thereby, the first change on the old duty of non-disclosure and misrepresentation merely reflects a change in terminology.

The reform also, goes a step further in clarifying the law. The Act extends to better explaining the duty of fair presentation and the appropriateness of cover. Section 4,5,6 clarifies the law and provides much more explanatory provisions on what constitutes knowledge of material circumstances while section 3 goes on to explain the duty in a clearer way. The duty requires a disclosure in a manner that would be reasonably clear and accessible to a prudent insurer⁸²⁴. Specifically, under section 3 subsection 4 duty to disclose involves a disclosure of every material circumstance which the insured knows or ought to know or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances⁸²⁵. The Act also provides some exemptions where the assured will be under no requirement to disclose. The assured does not have to disclose a circumstance, which diminishes the risk that the insurer knows or ought to know or is presumed to know or if it is something as to which the insurer waives information⁸²⁶. Those exemptions will indeed render the application of the law less hard on the assured. Section 7 refers to material disclosure and material representation. The reform retains the old definition of materiality.

The reform also changes the consequences after a breach of the duty and introduces a

⁸²³ Insurance Act 2015, section 3(1).

⁸²⁴ Insurance Act 2015, section 3(3)(b).

⁸²⁵ Insurance Act 2015, section 3(4).

⁸²⁶ Insurance Act 2015, section 3(5).

number of proportionate remedies depending on whether the breach was deliberate, reckless or fraudulent and depending on the effect of the breach on the insurer. It also, shows the distinction between contracts that contain variations and those that do not. The insurer will only be able to avoid the policy entirely if the breach of duty of fair presentation is deliberate or reckless and insurer can prove that he would not have entered the contract had he known the information. The requirement of deliberate and reckless made it very difficult to prove as it is only the insured himself “knowing his state of mind”⁸²⁷. In determining the outcome, the court would need to analyse in detail the specific facts of the case such as witness and expert reports. Section 8 refers to the new less draconian (“softer”) remedies incorporated and the requirements for their fulfilment. The law provides the insurer with a more proportionate remedy when answering question carelessly. The Act replaces the duty to volunteer information with the duty to take reasonable care to answer the insurer’s questions fully and accurately and the consumers will be protected if they have acted honestly and carefully. The insurer is also, put under a duty to investigate or enquire information that he suspected to be wrong. The reform attempts to make the law clearer and simpler by placing both the insurer and the insured in a position to know their rights and obligations.⁸²⁸

Utmost Good Faith

The reform also advances changes in regard to the utmost good faith and the relation

⁸²⁷ Lord Mance, House of Lords Special Public Bill Committee in December 2014.

⁸²⁸ British Insurance Law Association, Insurance Contract Law Reform-Recommendations to the Law Commission (2002) [1.4].

between the new duty of fair presentation and utmost good faith. The new law refers to a duty to present the risk in a fair way, but it is not clear what the role of good faith is. Any rule of law that allows a party to a contract of insurance to avoid the contract based on the fact that the utmost good faith has not been observed by the other party is abolished.⁸²⁹ Section 14 of the Insurance Act 2015 repeals the concluding sentence of section 17 of the 1906 Act, along with any corresponding rule of the common law, to leave the bare statement that a contract of marine insurance is one of the utmost good faith. The reform appears to eradicate any effect the breach of the duty of fair presentation had and merely states that all contracts of insurance are of utmost good faith, thus creating uncertainties as to the effect of the good faith requirement. The Act makes reference to the good faith element once again in section 3(3) c. Section 3(3)c includes that every material representation as to a matter of fact is substantially correct and every material representation as to a matter of expectation of belief is made in good faith⁸³⁰ establishing a link between good faith and a material representation. But no sufficient clarification was made in regard to the role of good faith nor a direct link can be established between duty of disclosure and utmost good faith. In that sense the Act fails to clarify the law when it comes to the principle of good faith that is of utmost importance for any contract nor does it provide a definition of the term ‘utmost’.

⁸²⁹ Insurance Act 2015, section 14(1).

⁸³⁰ Insurance Act 2015, section 3(3)(c).

Analysis of the New Rules

Following a number of Issue and Consultation Papers the Insurance Act 2015 came into force on 12 of August 2016 and reformed the matrix of non-disclosure, misrepresentation and good faith. The Act attempted to make the law clearer and simpler so that both the insurers and the assureds are in position to know their rights and obligations. Due to the nature of the reform and after decades of imposing an out-dated law avoiding a degree of uncertainty and a few challenges would be impossible. Undoubtedly the reform brings advancement to the law pushing it closer to striking the desired balance of party interests, but the Act is far from perfect. After an analysis of the rules in question it will be shown that there is room for further improvement while the good faith element was not properly addressed. Reference will be made to the changes brought by the new duty of fair presentation and the potential implications to show whether Cyprus should implement the new duty altogether.

Disclosure Rules for Fair Presentation Explained

The duty of fair presentation requires the assured to make to the insurer a fair presentation of the risk by disclosing every material circumstance known or ought to be known in a fair manner. The assured now needs to disclose information that would influence the judgment of an insurer when deciding to underwrite a risk or provide sufficient information to put a prudent insurer on notice to enquire further. The duty is still a twofold duty while the nature of the duty remains the same. The first case to consider the duty of fair presentation under

section 3(1) of the new Insurance Act 2015 is the case of *Young v Royal and Sun Alliance plc*.⁸³¹ The case involved the principle of waiver, which has not changed under the IA 2015. In the case it was held that the question to ask was whether a reasonable person in the position of the assured would be justified in thinking that the insurer had restricted their right to receive all material information.⁸³² During the pre-contractual stage in the proposal form there was a question asking whether any of the parties either personally or in business capacity have been declared insolvent to which they answered no (even though one of the parties have been a director in other companies that had also been declared insolvent). It was held that this did not amount to a waiver by the insurer. The Scottish Court of Appeal⁸³³ upheld the decision but took the opportunity to provide further guidance. There was a slightly better ambition to identify the date of the contract and the timing of the (non)waiver. The 2015 Act shifted the burden of identifying what is material to the insured in the form of the duty to make a fair presentation of the risk. The assured is no longer under duty to disclose what the insurer would think material but a general duty to present the risk in a fair manner.

Materiality and Knowledge of the Assured

The English IA attempts to tackle the uncertainty that the new duty of fair presentation brings by providing exhaustive definitions on what constitutes materiality and knowledge of the assured. Section 7 retains the old definition of materiality, which holds that “a

⁸³¹ *Young v Royal and Sun Alliance plc* [2019] CSOH 32.

⁸³² *Young v Royal and Sun Alliance plc* [2019] CSOH 32.

⁸³³ *Young v Royal and Sun Alliance Insurance PLC* [2020] CSIH 25

circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.”⁸³⁴ The term “circumstance” is defined in the new legislation to include any communication made to, or information received by, the insured⁸³⁵. The Act also proceeds to elaborate on the identification of what will suffice, as material by giving examples of circumstances that would be considered material. Such circumstances include special or unusual facts relating to the risk, any particular concerns which led the insured to seek insurance cover for the risk or anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.⁸³⁶

When dealing with misrepresentations the law holds that every material representation as to a matter of fact must be substantially correct.⁸³⁷ The Act retains the former principle on material representation under section 7(5) IA 2015 that a material representation would be regarded to be substantially correct if a prudent insurer would not consider the difference between what is represented and what is actually correct to be material.⁸³⁸ Every material representation as to a matter of expectation or belief must be made in good faith. The Act seems to be more lenient towards the assureds by allowing a representation to be withdrawn or corrected before the contract of insurance is entered into⁸³⁹. Section 3(3)(b) clarifies the

⁸³⁴ Insurance Act 2015, section 7(3).

⁸³⁵ Insurance Act 2015, section 7(2).

⁸³⁶ Insurance Act 2015, section 7(4) (a), (b), (c).

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⁸³⁸ *Eagle Star Insurance Co Ltd v Games Video Co (GVC) SA, The Game Boy* [2004] 1 Lloyd’s Rep 238; Insurance Act 2015, section 7(5).

⁸³⁹ Insurance Act 2015, section 7(6).

law and clearly sets out the circumstances under which disclosure will be accepted. Disclosure must be made in a manner reasonably clear and accessible to a prudent insurer. Although the Act does not require a broker to perform the underwriting function for the insurer, at the very least the broker must not render disclosed material facts opaque or inaccessible⁸⁴⁰, meaning that the assureds or the agent of the assured need to present the information in a clear and structured way so that the insurers can efficiently assess the risk. The Act seeks to stop the assured providing information in a form of “data dumping” or by using complicated presentations during the proposal time by imposing provisions that require the assured to “signpost” all material information bringing them to the insurer’s attention.⁸⁴¹

The legislation retained the former objective materiality test under section 7(3) while section 8(1) codifies the subjective inducement test. Section 3(4)(a) preserves the rule that the assured must disclose every material circumstance, which the assured knows or ought to know. In addition to the former requirement the current legislation under section 3(4)(b) allows for a disclosure that “gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances”.⁸⁴² Both circumstances will suffice for fulfilling the requirement of what

⁸⁴⁰ Harry Wright, ‘The Insurance Act 2015’ (2015) International Underwriting Association 1-53

⁸⁴¹ Rob Merkin and Özlem Gürses, ‘The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured’ (2015) M.L.R. Volume 78, Issue 6, 1004–1027 [1011]; David Hertzell, ‘The Insurance Act 2015 Background and Philosophy’ in Malcolm Clarke, Baris Soyer, *The Insurance Act 2015: A new regime for commercial and marine insurance law* (1st edn, Routledge, 2016) [8]; Harry Wright, ‘The Insurance Act 2015’ (2015) International Underwriting Association 1-53 [9].

⁸⁴² There is no equivalent provision in the 1906 Act. Assureds have argued in a number of cases that the insurers should have played an active role in making further investigations, but the courts have emphasised that the duty of making a fair presentation was that of the assured. *Marc Rich and Co AG v Portman* [1996] 1 Lloyd’s Rep 430; [1997] 1 Lloyd’s Rep 225; *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] 2 Lloyd’s Rep 483.

the assured ought to know providing for a lesser form of disclosure. This means that even if the first requirement is not satisfied the assured will still be able to satisfy the duty if he gives a “prudent” insurer enough information to put him on notice that he needs to make further enquiries in order to reveal the material circumstances. This appears to allow for a less strict approach towards the assureds. Section 8(1) of the 2015 Act codifies the subjective inducement requirement which affords protection for the assured by removing the right of the insurer to any remedy for breach of duty unless the insurer can prove that, “but for the breach, the insurer either would not have entered into the contract of insurance at all or would have done so only on different terms”.⁸⁴³ This will be construed in the same way as the former law so that it is necessary for the insurers to show that had there been compliance with the duty of fair presentation there would have been a different underwriting outcome.⁸⁴⁴

Under section 4(6) of the IA the assured will be deemed to know what “should reasonably have been revealed by a reasonable search.”⁸⁴⁵ Putting the insurer into enquiry to reveal the material circumstances in question both provides a defence for the assured and helps the insurer make informed decision in deciding to take the risk and in what terms. The insurer is expected to take an active approach to assess the risk they undertake in order to take a well-informed decision for deciding whether to enter into the contract or the price of premium, verifying things that are easily available to him and making further enquiries

⁸⁴³ The notion of requiring proof of inducement as a prerequisite to a remedy, rather than as a part of the test of breach, is borrowed from s 29 of the Australian Insurance Contracts Act 1984.

⁸⁴⁴ *Drake Insurance plc v Provident Insurance plc* n 24 above; *Toomey v Banco Vitalicio de Espana SA de Seguros y Reaseguros* [2004] EWCA Civ 685.

⁸⁴⁵ Baris Soyer, ‘Insurance Act 2015 Coming into Force: Overhauling Commercial Insurance Law in the UK’, (2016) JIML 22, 4, 253–256 [254].

where necessary. However, a question that may arise here and can potentially create confusion and uncertainty, is what will suffice as a reasonable search? A reasonable search should mean the search of information that is either in the possession of the insurer or that it is easily accessible to the insurer. It is also only the insurer that knows his state of mind and how the facts would change his decision.⁸⁴⁶

New Remedies

The current IA 2015 removes the existing remedy of avoidance where fraud is not involved and incorporates new proportionate remedies. The Law Commissions have described that as the removal of the “all or nothing” approach to remedies for breach of the duty of fair presentation⁸⁴⁷. This has been described as the most significant step taken by the Insurance Act 2015 for mitigating the unfairness of the former legislation as set out in the 1906 Act⁸⁴⁸.

Under the Insurance Act 2015 the insurer can only avoid the policy entirely and keep the premium where the breach of duty of fair presentation is deliberate or reckless and the insurer proves that he would not have entered the contract had he known that information and would have done so only in different terms. Where the insurer would have entered into the contract but on different terms then he may treat the contract as having those terms while if he would entered into the contract with higher premium then he may reduce the

⁸⁴⁶ Lord Mance, House of Lords, Special Public Law Committee (Lord Mance, December 2014).

⁸⁴⁷ Law Commission and Scottish Law Commission, Insurance Contract Law, Business Disclosure, Warranties, Insurer’s remedies, Fraudulent Claims and late payment, Law Com No 353, Scot Law No 238 July 17, 2014. [11.19-11.21].

⁸⁴⁸ Rob Merkin and Özlem Gürses, ‘The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured’ (2015) M.L.R. Volume 78, Issue 6, 1004–1027.

amount to be paid in the claim proportionally. Specifically, under section 8 and schedule 1, if the breach is a “qualifying breach” and the inducement test is satisfied, then avoidance remains possible where the insurers can prove that the qualifying breach was deliberate or reckless or the qualifying breach was neither deliberate nor reckless and had the breach not existed the insurer would not have entered into the contract on any terms. Where the qualifying breach was neither deliberate nor reckless, then the premium must be returned. Therefore, for business insurance the insurer is entitled to a remedy for any breach, and potentially the remedy of avoidance even in the absence of fraud or recklessness. The reform was a much-needed step since the former MIA 1906 failed to distinguish between fraudulent innocent and negligent non-disclosure/misrepresentations as well as the degree of impact the breach had on the risk covered. Now the Act provides new remedies proportionate to the breach made that are included in Schedule 1 Insurer’s remedies for qualifying breaches.

Waiver

The law did not change in any way what constitutes a waiver for the purpose of insurance contracts⁸⁴⁹. Under the 2015 Act the insurer may not avoid the contract where it can be proven that he has waived the breach. For instance, if an insurer has discovered that the assured made a fraudulent claim he needs to be alerted to his right to terminate the policy by giving notice to the assured. When they know of the right to terminate (or reasonably ought to know about it) and instead decided not to do so they could be precluded from

⁸⁴⁹ Opinion of Lady Wolff in the cause *Wayne Stephen Gardner Young against Royal and Sun Alliance Plc* [2019] CSOH 32.

doing so by waiver.

The insurer may waive a breach through the traditional waiver by election, but it is also possible for the breach to be waived through a waiver by estoppel when the assured is convinced that the insurer had decided to waive his right.⁸⁵⁰ In the latter scenario no active approach is expected on the part of the insurer, as his failure to act is consequential to him waiving the breach and losing the right to refuse a claim. The assured may prove the existence of waiver of estoppel where the insurer fails to make further enquiries of information that would prompt a reasonably careful assured to do so. The Act makes direct reference to a second type of waiver by estoppel that results from the insurer asking a limiting question in such a way that a reasonable assured would assume that the insurer had no interest in knowing any further information around that question. The case of *Doheny* characterised questions of that nature as an inquiry⁸⁵¹. The test to be applied following *Doheny* case is whether “a reasonable person reading the proposal form would be justified in thinking that the insurer had restricted its right to receive all material information and consented to omission of the particular information not disclosed”⁸⁵². Since the Act does not refer to any changes to the actual law of waiver there is the assumption that the tests would remain the same⁸⁵³.

Specifically, the waiver principle was enshrined in the 1906 Act and re-enacted as section

⁸⁵⁰ *WISE (Underwriting Agency) Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962; [2004] 2 All ER 613 [63].

⁸⁵¹ *Doheny v New India Assurance Co Ltd* [2004] EWCA Civ 1705, [2005] 1 All E.R. (Comm) 382, [2004] 12 WLUK 425.

⁸⁵² *Doheny v New India Assurance Co Ltd* [2004] EWCA Civ 1705, [2005] 1 All E.R. (Comm) 382, [2004] 12 WLUK 425.

⁸⁵³ *Young against Royal and Sun Alliance Plc* [2019] CSOH 32.

4(6) of the 2015 Act, which holds that a failure by insurers to ask follow-up questions is a waiver of the additional information.⁸⁵⁴ This section is designed to promote the notion that insurers should not rely upon disclosure but should instead ask the right questions.⁸⁵⁵ This will prompt a reasonable and honest insurer to take a more active approach that may then result in fewer disputes. The principles on waiver have been applied in the recent case of *AWG Group*⁸⁵⁶ that re-established the old case of *Armia Ltd*. In the case Lord Doherty (following the approach taken by Lord Fraser in *Armia Ltd*⁸⁵⁷) confirmed that for a party to successfully rely on an argument on waiver he must be able to prove reliance.⁸⁵⁸ Another case involving waiver by the insurer based on the Insurance Act 2015 is that of *Young against Royal and Sun Alliance Plc*⁸⁵⁹. “One consequence of this development is the application of this second type of waiver, not least because there is no longer a proposal form that falls to be construed (and which is the context in which this form of waiver arises)”⁸⁶⁰. There is, therefore, “no in limine identification by the insurer of the scope of what it considers material, and which could form the basis of this form of waiver”.⁸⁶¹

Waiver has typically only been reported as relating to pre-contractual disclosure obligations where the category of information, which the insurers are said to have

⁸⁵⁴ *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA*.

⁸⁵⁵ See Insurance Bill Explanatory note, [14].

⁸⁵⁶ *AWG Group v HCP II Properties* 101 GP Ltd [2017] SCS 28 [14-18]; *Fieldoak Ltd v Citywide Glasgow Ltd* [2017] CSOH 138, [110].

⁸⁵⁷ *Armia Ltd v Daejan Developments Ltd* (1979) SC (HL) 56, [69].

⁸⁵⁸ *ibid.*

⁸⁵⁹ *Young against Royal and Sun Alliance Plc* [2019] CSOH 32.

⁸⁶⁰ Opinion of Lady Wolff in the cause *Wayne Stephen Gardner Young against Royal and Sun Alliance Plc* [2019] CSOH 32, [86].

⁸⁶¹ Opinion of Lady Wolff in the cause *Wayne Stephen Gardner Young against Royal and Sun Alliance Plc* [2019] CSOH 32, [86].

dispensed with can be “clearly and narrowly defined.”⁸⁶²The existing law on waiver remains the same even after the reform. The reform may result in a decrease of the number of disputes as it prompts both parties to take an active approach but where a dispute takes place the result would not be as straightforward when dealing with “limiting” questions. It is therefore suggested that the insurers avoid using vague language when posing questions in the proposal form so that no room for interpretation is left.

Contracting Out

When it comes to commercial insurance contracts the Insurance Act 2015 prohibits contracting out with respect to “basis of contract clauses⁸⁶³” but allows for an exemption in any other case. After the reform it will be possible to “contract out” of the new provisions subject to important transparency guidelines, when the insurer satisfies section 17 of the Act. The so-called “transparency requirements” mean that the insurer must take sufficient steps to bring the disadvantage of the contracting out term to the assured’s attention in a clear and unambiguous manner. The Act also explains that in determining whether the requirements are fulfilled for a successful application the following need to be considered, the characteristics of the assured, of the kind in question and the circumstances of the transaction. Even when the insurer fails to fulfil the transparency requirements, the assured may not rely on that failure and the term can still be enforced if he had actual knowledge of the disadvantageous term when the contract was made. The provisions on contracting out seems clear in theory but in practice there is a degree of uncertainty as to proving the

⁸⁶² *Noblebright Ltd v Sirius International Corporation* [2007] Lloyd’s Rep IR 584, [65].

⁸⁶³ Insurance Act 2015, section 16(1).

requirements were fulfilled and the extent and impact of limitation clauses.

IA for Cypriot Law

As a general principle, a law governing insurance contracts should encourage the full exchange of information between the insurer and the assured in a fair manner so that insurance is correctly priced for both parties. To reach this objective Cyprus legislators should create an Act that incorporates a test that introduces a fair balance for the exchange of information. Not developing an Act would mean that the Cypriot courts reliance on UK common rules might eventually lead to inconsistencies and confusion. The law should provide a fair balance by requiring the assured to disclose information regarding the insured property but also, to require the insurer to play an active role in asking the questions that he would like to know as he is the one knowing what is important and relevant to the risk undertaken. The current Cypriot law fails to provide the right balance of party interests while the law provides a general unpredictability. The English IA 2015 attempts to solve all these issues and brings a big change in the insurance law through the incorporation of the all-inclusive duty of fair presentation.

Fair Presentation of the Risk

Disclosing such information must be made in a manner that is reasonably clear and accessible to a prudent insurer⁸⁶⁴. The assured must disclose “every material circumstance”

⁸⁶⁴ Insurance Act 2015, section 3(3)(b).

which he “knows or ought to know”. It will suffice to show that he has disclosed enough information to put the insurer on notice that it needs to ask for further information from the insured before it makes the underwriting decision. This provides for a lesser form of disclosure⁸⁶⁵ and a more lenient interpretation.

In *Michalakakis Pavlou v Egis*⁸⁶⁶ (involving a motor insurance) the court held that it did not consider the assured’s speeding ticket as material. In the case the insurance company refused to pay the claim based on the argument that the assured failed to disclose a column of his previous convictions including a speeding ticket he was issued in the past. The proposal form included the question: ‘please state any material facts regarding the vehicle and driver’s to be insured.’ The Court held that there was no question of previous convictions and therefore he was not expected to do so⁸⁶⁷. Nonetheless, the assured’s speeding ticket is a fact that could influence the judgment of a prudent insurer in concluding the contract and in what terms while the speeding habits of an individual may be considered a material circumstance. Adopting the new duty of fair presentation would achieve a better balance of party interests and a more consistent decision-making based on a clear legal framework.

The duty of fair presentations applies specifically to a pre-contractual stage as the assured is under the duty to make a fair presentation of the risk before the contract is entered into.

⁸⁶⁵ Rob Merkin and Özlem Gürses, ‘The Insurance Act 2015: Rebalancing The Interests of Insurer and Assured (2015)’ *The Modern Law Review*, Vol. 78, Issue 6.

⁸⁶⁶ *Michalakakis Pavlou v Egis Insurance Co. Ltd* (2004) 1B CLR 1124.

⁸⁶⁷ *Michalakakis Pavlou v Egis Insurance Co. Ltd* (2004) 1B CLR 1124.

This could mean that if the assured becomes aware that he has given incorrect or incomplete information regarding the risk upon completion of the contracts, then he will not be required by the law to communicate this information to the insurer. For instance, if something in the circumstances change that would require a higher premium but the insurer was not notified the insurer would have been paid lower premium for higher risk. The Cypriot case of *Elissar International Trading*⁸⁶⁸ shows the importance of the requirement for the duty of disclosure to apply for post-contractual situations. In the case the assured was unable to claim the amount that reflected his product's loss because he did not produce any evidence of the sale of products, which should have been a testimony for the purpose of calculating the actual loss. The judge held that the amount stated on the policy was merely an indication of the amount, which the appellants could recover.

Knowledge of the Insurer and Waiver of the Breach

Under the new duty of fair presentation of the risk, the assured needs only to volunteer essential information, so as to make a fair presentation of the risk but if there is any problem with the presentation of the risk then it is for the insurer to enquire further. Failure of the insurer to ask follow-up questions would be a waiver of the additional information. Adopting the provision regarding the insurer's responsibility to make further enquiries should there be a problem with the presentation of the risk, would be in line with the current rules adopted by the Cypriot courts. When looking back at the Cypriot cases

⁸⁶⁸ *Elissar International Trading v PanEuropean Insurance Company Ltd* (2006) 1 CLR 682.

*Proodeftiki Insurance Company*⁸⁶⁹ and *American Life Insurance*⁸⁷⁰ citing the textbook “General Principles of Insurance law” the Court held that “When the answers which the proposer gives are inconsistent or unsatisfactory, and no further inquiries are made by the insurance company and a policy is issued, the company cannot repudiate liability on the ground that there has not been a full disclosure, for it will be held to have waived its rights”⁸⁷¹. The Court continued with upholding that if after the insurer seeks to ask for clarification and the answer of the assured is hesitating or unsatisfactory, the insurers may have the option of declining the assurance or seeking information from other sources or of charging a higher premium⁸⁷² rendering the contract voidable.

The case of *American Life Insurance* deals with the issue of waiver by estoppel⁸⁷³. In the case the assured replied negatively to the question of whether he had undergone any check-up exam regarding his health. The insurance company had contradicting evidence regarding the assured’s health but failed to investigate the issue or ask for further enquiries. The Court decided that the insurance company has waived its right to refuse the claim.⁸⁷⁴

Proportionate Remedies for Cyprus

Another important component of insurance law that has been rendered problematic under

⁸⁶⁹ *Proodeftiki Insurance Company Ltd. v. Andrea Prodromou* (2003) 1(A) C.L.R. 600.

⁸⁷⁰ *American Life Insurance Company Ltd v Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A C.L.R. 593 [606].

⁸⁷¹ E.R. Hardy Evamy, *General Principles of Insurance Law* (Butterworths Law, 6th ed, 1993) [191-192].

⁸⁷² E.R. Hardy Evamy, *General Principles of Insurance Law* (Butterworths Law, 6th ed, 1993) [191-192].

⁸⁷³ *American Life Insurance Company Ltd v Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A CLR 593.

⁸⁷⁴ *American Life Insurance Company Ltd v Tzbeta Michael Micheal and Andrea Kyriacou Matsagkou* (2007) 1A CLR 593.

the current law of Cyprus is the absence of proportionate remedies when it comes to the duty of non-disclosure. To solve this problem the English law has removed the “all-or nothing”⁸⁷⁵ principle. The Act introduces a new system of remedies other than avoidance to compensate the insurer for loss where the policyholder has acted honestly, but has nevertheless failed to provide full and accurate information.⁸⁷⁶ When there is a breach of the fair presentation duty the law should aim to put the insurer into the position it would have been in had full and accurate information been provided. The compensatory remedies introduced look at what the insurer would have done had it known the real facts. Where the insurer would have declined the risk altogether the policy should be avoided the claim refused and the premiums returned.⁸⁷⁷ Where the insurer would have accepted the risk but included another contract term, the contract should be treated as if it included that term.⁸⁷⁸ Where the insurer would have charged a greater premium the claim should be reduced proportionately.⁸⁷⁹ For example, if the insurer would have charged double the premium it need only pay half the claim.

Even before the enforcement of the IA cases had made reference to its provisions and in particular the proportionate remedies afforded by it. *Involnert Management Inc* was a case of disclosure in which the court held that the insurers were entitled to avoid a policy under section 18 MIA 1906 that covered a yacht for €13 million due to the owner’s non-disclosure of the fact that the yacht had been valued at €7 million and was on sale for €8 million at

⁸⁷⁵ Law Commission, Insurance Contract Law, Business Disclosure, Warranties, Insurer’s remedies, Fraudulent Claims and late payment, N° 353, Scot Law N° 238 (summary) July 17, 2014, [6.8 ref.LC 353], 17 July 2014, executive summary [3.11].

⁸⁷⁶ Insurance Act 2015, schedule 1 part 1.

⁸⁷⁷ Insurance Act 2015, schedule 1 part 1, 4

⁸⁷⁸ Insurance Act 2015, schedule 1 part 1, 5.

⁸⁷⁹ Insurance Act 2015, schedule 1 part 1. 6.

the time of inception of the policy.⁸⁸⁰ In the case it was made clear that the court acknowledged the outcome was unjust as an innocent failure to do full disclosure resulted in putting the insurer in a better position than it would have been in if full disclosure had been given.⁸⁸¹ The court opined that the right result would be a more proportionate remedy that would be achieved under the provisions of the new IA 2015 that is if the policy was treated as valid but the coverage was reduced to €8 million in line with the true market value of the yacht.⁸⁸²

The recent case of *Versloot* involve an appeal from a ship-owner (assured) against a Court of Appeal and High Court's decision that held that the insurers were entitled to avoid the insurance claim for his ship's engine damage due to the fact his statement amounted to a fraudulent device. The ship-owner had recklessly stated that the crew was unable to deal with the leak due to the heavy weather but in reality, the flooding was caused as a result of the crew's negligence.⁸⁸³ The appeal was allowed and held that the fraudulent claim rule, which applied to contracts of insurance and prevented an insured from recovering under the policy where his claim was fabricated or exaggerated, was of considerable importance. However, it did not extend to fraudulent devices or collateral lies where the claim was justified, and the lie had no relevance to the insurer's liability. Lord Mance argued that Insurance was about the assessment of risk and the settlement of claims. Both processes depended on good faith and fair information. To suggest that a lie, which the insured felt was necessary to promote settlement of a claim was immaterial or "collateral" if years later

⁸⁸⁰ *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2834.

⁸⁸¹ *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2834.

⁸⁸² *Involnert Management Inc v Aprilgrange Ltd* [2015] EWHC 2834.

⁸⁸³ *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG DC Merwestone* [2016] UKSC 45.

it could be shown that it was after all unnecessary mistook the nature of the business and the relationship. The threshold test for materiality should be whether the lie if believed, would significantly improve the insured's prospects at the time of the lie.⁸⁸⁴

The new proportionate remedies introduced under the 2015 IA seem to better strike the balance of party interests, introducing provisions that operate fairly for both parties. Cyprus should follow this example and incorporate the provisions that provide for proportionate remedies, which will achieve certainty and consistency in decision-making.

Utmost Good Faith

Another issue with the current Cypriot framework is the uncertainty regarding the duty of Utmost Good Faith. Cypriot Judges have expressed (citing English decisions) the fact that an insurance contract is one of utmost good faith, but no further development of the principle was possible as there was no opportunity for the judges to apply it in practice. Good faith on its own cannot give a cause of action for any insurer or policyholder but a failure to act in good faith when in breach of a contractual term or in fulfilling their duty of fair presentation of the risk could render the contract void.⁸⁸⁵ This is because lack of good faith entails bad faith, indicating that the party has acted fraudulently.

Section 14 of the 2015 Act removed the remedy of avoidance of the contract for breach of

⁸⁸⁴ *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG DC Merwestone* [2016] UKSC 45. [111-113, 130].

⁸⁸⁵ Insurance Act 2015, schedule 1 part 1.

the duty of good faith in section 17 of the 1906 Act. Previously academics referred to the matrix of disclosure misrepresentation and good faith⁸⁸⁶ but it is not clear that this is the case now as the new duty of fair presentation only refers to the duty to make a presentation of the risk in a fair way. No direct reference is made in regard to issues of disclosure and good faith creating some question marks regarding the extent and effect of the element of good faith. Good faith is still a general interpretive principle and all insurance contracts are contracts of good faith. Good faith will still exist, and the parties will still need to disclose information in good faith, but its application and effect will be restricted giving no direct remedy to the insurers.

Generally speaking, the new Act undeniably solves many problems of the former rules governing the duty of disclosure and misrepresentation but fails to sufficiently address the good faith principle. The duty of utmost good faith creates more uncertainty than before leaving the rest up to the contraction of the courts. Incorporating the new rules with some variations will be a good step for Cyprus. The IA 2015 has improved the law of warranties drawing the line for the creation of an efficient, fair and certain application of the law on warranties. It indeed brought a change that will benefit the assureds but there is more to be done in order to bring the elusive balance of party interests. To better assess whether Cyprus should follow the English Insurance Act this study will take a comparative approach with another jurisdiction that has attempted reform in the area.

Australia is another commonwealth jurisdiction that (as opposed to Cyprus) has

⁸⁸⁶ Francis D Rose, *Marine Insurance: Law and Practice* (2nd edition, 2012).

successfully copied the MIA 1906 that is currently being enacted despite the expressed intention to reform it. Australia was able to reform its Insurance Contracts Act 1984 and effectively departed from the English approach when it comes to general insurance contracts. By comparing England (the mother nation of marine insurance) and Australia it will be possible to make suggestions for developing a successful MICA for Cyprus. In that way one can learn from the mistakes as well as strengths of both jurisdictions. The Insurance Act 2015 applies to contracts of insurance governed by English law, which are new agreements concluded after 12 August 2016 and variations made after 12 August 2016 to existing contracts of insurance entered into at any time. This means that there are still cases to be solved based on the former legislation while it will take a while until new cases surface allowing the courts to construct the principles left to interpretation. On the other hand, the Australian ICA was codified based on pre-existing common law principles and has been in effect before the English reform.

CHAPTER 6

COMPARISON WITH AUSTRALIA

Introduction

Australia as well as Cyprus and a number of other Commonwealth jurisdictions share a “common legal heritage”⁸⁸⁷ that traces back to the English colonial era such as the adoption of the common law system and the rule of law. As another commonwealth jurisdiction, the source of Australia’s insurance law has been influenced by the English common law and in particular the Marine Insurance Act 1906. Both Cyprus and Australia have based their marine insurance law on English laws while being open to comparative law⁸⁸⁸ either by citing foreign decisions in order to reach an outcome for a case or adopting principles as enunciated by other jurisdictions.⁸⁸⁹ Similar to Cyprus and presumably for many other Commonwealth jurisdictions, the comparative approach for Australian law is seen as “instructive”⁸⁹⁰ and an important part for the country’s law development. To better address the issue of the status of warranties and fair presentation the chapter will consider attempts at reform made by another Commonwealth jurisdiction modelled on English laws. Looking at Australia’s steps in reforming the law will provide a good example for comparison in order to draft marine insurance legislation for Cyprus.

⁸⁸⁷ Nicholas Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26 U Queensland LJ 317, [323].

⁸⁸⁸ Nicholas Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26 U Queensland LJ 317.

⁸⁸⁹ Nicholas Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26 U Queensland LJ 317 [323].

⁸⁹⁰ Nicholas Aroney, 'Comparative Law in Australian Constitutional Jurisprudence' (2007) 26 U Queensland LJ 317, [318].

Australia was able to develop into a successful insurance industry and was one of the Commonwealth countries that questioned the applicability of the English principles of insurance such as the lack causation for warranties, producing an ALRC (2001) report followed by a draft Bill in an attempt to reform their Marine Insurance Act 1909. The proposal intended to introduce a regime that is consistent with international standards while separating matters of marine insurance from that of general insurance⁸⁹¹. Until today, Australia has not been able to reform its MIA 1909 despite their expressed efforts to do so but, has published a number of proposals for reforming the law. A reform of the Australian Insurance contracts Act that is specific to contracts of insurance other than marine was introduced even before the UK, which was further amended in 2013. This will allow us to examine how the changes to the law on warranties, disclosure and misrepresentation worked, as there was enough time for the cases to develop and the industry to adjust. All of these considerations make the Australian jurisdiction a good choice for comparison with the UK, and a test case for changes in Cyprus. Australia has retained the MIA 1909, which applies to contracts of marine insurance and the Australian ICA 1984 that was reformed in 2013 and applies to contracts of general insurance.

Australia is one of the Commonwealth countries to have attempted reforms to marine insurance after relying on English rules for decades while it had introduced legislation governing general insurance drawing a clear separation between matters of marine and general insurance. Since 1984 The country has introduced a federal Act (ICA) to deal with

⁸⁹¹ Davis Ian, 'Reforming the Mia ... Options & Constraints' (2000) ALRCRefJl 29; (2000) 77 Australian Law Reform Commission Reform Journal 41 [41-45].

issues of general insurance and is planning to reform its MIA that will be apply to issues of marine insurance only. This study will suggest that Cyprus should do the same. After examining the English rules in detail this chapter considers the situation in Australia in order to determine whether Cyprus should follow any of the variations introduced by the Australian Law Reform Commission (ALRC)⁸⁹² for reforming its MIA 1909. In doing so it will consider and examine both the principles of the ALRC specific to marine insurance and the Australian ICA for general insurance to learn from a country that drifted away from the English insurance law and that treats separately marine and non-marine insurance cases.

Australia's Insurance Law

Introduction of the Australian Insurance Contracts Act

Before the introduction of the Insurance Contract Bill 1984, to reform its insurance contract law, the Australian law was described as chaotic⁸⁹³ and uncertain.⁸⁹⁴ This could be a result of the problematic interaction of Australian federal and state legislation (often of limited application) with common law principles derived from England. When reviewing the decision to introduce the federal Act governing insurance contracts one can notice the benefits of such decision. Having a single Act governing insurance contracts not only brings the desired certainty in the commercial industry but also, “makes it easier to teach

⁸⁹² Review of the Marine Insurance Act 1909 (Cth) ALRC Report 91 (2001).

⁸⁹³ M.D. Kirby, ‘Australian Insurance Contract Law: Out of the Chaos – A Modern, Just and Proportionate Reforming Statute’ (2011) 22 Insurance Law Journal 1, [2].

⁸⁹⁴ The Hon. Michael Kirby AC CMG, ‘Insurance contract law reform- 30 years on’ (2014) Insurance Law Journal [3-4].

lawyers and claims managers the basic principles of insurance law”.⁸⁹⁵ This is itself a contribution to fairness and balance.⁸⁹⁶ It is also a contribution to “knowledge of rights and duties and to economic efficiency in the operation of a vital national industry”.⁸⁹⁷ The Act reformed and modernised the law in relation to contracts of general insurance, striking a better balance of party interests. However, the ICA specifically restricts its provisions from applying to contracts of marine insurance, which are covered under the MIA 1909⁸⁹⁸ and therefore, separates matters of marine insurance to those of general insurance. Consequently, there exist more specialised provisions for treating the different types of insurance contracts.

Having both the MIA and the ICA calls for a need to identify what really is a contract of marine insurance requiring a clear definition of what consists a marine insurance contract. Failure to do so will create confusion in regard to the contracts to be dealt under the 1984 Act. It is important to examine whether the Act clearly articulates the conditions by which a contract of insurance can be considered as one of marine insurance under the law. The 1909 Act identifies what includes a contract of marine insurance under sections 7,8 and 9 bringing clarity as to which contracts are covered under the MIA 1909 and leaving all the contracts that are not covered under the MIA 1909 to be automatically covered under the general ICA 1984. The ICA now further clarifies the law to state that the MIA 1909 does not apply to contracts regarding pleasure craft but applies to vessels used for rewards.

⁸⁹⁵ M.D. Kirby, ‘Annual Review of Insurance and Reinsurance Law: Launch of the 2004 Volume’, Sydney, 23 February 2005.

⁸⁹⁶ M.D. Kirby, ‘Annual Review of Insurance and Reinsurance Law: Launch of the 2004 Volume’, Sydney, 23 February 2005.

⁸⁹⁷ M.D. Kirby, ‘Annual Review of Insurance and Reinsurance Law: Launch of the 2004 Volume’, Sydney, 23 February 2005.

⁸⁹⁸ Insurance Contracts Act 1984, section 9(1)(d).

Therefore, the ICA now applies to insurance contracts insuring pleasure crafts⁸⁹⁹. This distinction can be found in the commercial and non-commercial nature of the activities⁹⁰⁰. The ICA governs those insurance contracts regarding non-commercial activities while non-disclosure of material matters may entitle the insurer to set aside the policy in circumstances that are not available⁹⁰¹.

The case of *Gibbs v Mercantile Mutual Insurance* was concerned with the question of whether the policy was one governed by the MIA 1909. Specifically, the Court was concerned with the question of whether the losses against which Mercantile agreed to indemnify Gibbs and Paraglide were losses arising from, or consequent on, or incidental to, a marine adventure. To assess this the Court had to go through the history of marine insurance and the original purpose of the MIA 1909. The Court then held that none of the two policies were intended to apply to MIA 1909. The provisions contained under the MIA 1909 that reflects the provision of the English MIA 1906 are more favourable to the insurers as opposed to the Australian ICA that affords more protection to the assureds. In the case of *Gibbs v Mercantile Mutual Insurance (Australia) Ltd*⁹⁰² the judge rejected the argument that the policy was a marine insurance policy covered by the MIA. The insurer would under the 1909 Act be able to deny liability due to the assured's failure to disclose material matters when renewing the policy. However, because the Insurance Contracts Act was applied and not the Marine Act, it was held that the insurer could not escape liability,

⁸⁹⁹ Insurance Contracts Act 1984, section 9A.

⁹⁰⁰ *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* [2003] HCA 39; 214 CLR 604; 199 ALR 497; 77 ALJR 1396 [40]

⁹⁰¹ *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* [2003] HCA 39; 214 CLR 604; 199 ALR 497; 77 ALJR 1396 [41].

⁹⁰² (2003) HCA 39; 214 CLR 604; 199 ALR 497; 77 ALJR 1396.

something that shows that the ICA provides more assured friendly provisions than the MIA 1909.

Warranties for General Insurance

Even though Australia has not reformed its MIA 1909 many attempts have been made to address the lack of causation through case law while the country has already reformed warranties in their Insurance Contracts Act 1984. The ICA abolishes basis of contract clauses that converted statements into warranties from its general insurance law.⁹⁰³ The biggest change that comes with the Australian ICA in the area of insurance is the abolition of the doctrine of warranty from general insurance contracts. The Act removes the use of the term “warranty” from all contracts and renders all such statements to be representations. The country has shifted from the English approach by removing all terms of warranties and condition precedent and rendering the basis of contract clause ineffective. The rationale of doing so was expressed in the Australian Law Reform Report where the Committee states that “the parties’ rights in the event of a breach of, or non-compliance with, a contractual term should depend on ‘matters of substance’, not on whether a term is characterised as warranty or a condition, or on the difference in effect between a breach of warranty and an occurrence caught by a temporal exclusion.”⁹⁰⁴ Specifically, section 24 of the reformed law renders all warranties of existing facts to be representations by stating that “a statement made in or in connection with a contract of insurance, being a statement made by or attributable to the insured, with respect to the existence of a state of affairs does not have

⁹⁰³ Insurance Contracts Act 1984, section 24 ICA.

⁹⁰⁴ ALRC Report No 20, <<http://www.alrc.gov.au/report-20>> accessed March 2018.

effect as a warranty but has effect as though it were a statement made to the insurer by the insured during the negotiations for the contract but before it was entered into". Thus, treating warranties as any other term of the contract, resulting to the neutralization of the effect of warranties.

Duty of Disclosure

Section 21(1) imposes and retains the duty on the assured to disclose matters that are in his knowledge and that are relevant to the insurer's decision in accepting the risk. The section extends the duty to situations where a reasonable person in the circumstances could be expected to know them. The Act takes away the "mythical"⁹⁰⁵ "prudent insurer" criterion and instead refers to a reasonable insurer requirement. The Act does not require the assured to disclose things that are of common knowledge or that diminish the risk. This will potentially reduce claims that are solely based on technicalities. In the Insurance Contract Amendment Act 2013 reform section 21 has been amended so that in determining what might be expected to be known by a reasonable person, the court must regard the nature and extent of the cover to be provided and the class of persons who would ordinarily take out such cover⁹⁰⁶. Section 21A has been amended to remove the possibility of an insurer asking, "catch all" or general questions. A new section 21B has set out equivalent provisions for renewals. The obligation of the insurer to inform the assured of the duty of disclosure by section 22 has been enhanced.

⁹⁰⁵ The Hon. Michael Kirby AC CMG, 'Insurance contract law reform- 30 years on' (2014) Insurance Law Journal.

⁹⁰⁶ The Hon. Michael Kirby AC CMG, 'Insurance contract law reform- 30 years on' (2014) Insurance Law Journal [16].

Under section 27 a mere failure to answer or providing an incomplete or irrelevant answer to a question included in a proposal form will not alone give basis to be considered as misrepresentations. Even when the statement made by the proposed assured was in fact untrue the statement will not be a misrepresentation if a reasonable person in those circumstances would have believed it to be truth.⁹⁰⁷ An untrue statement will be translated into a misrepresentation if the person who made the statement knew, or a reasonable person in the circumstances could be expected to have known, that the statement would have been relevant to the decision of the insurer whether to accept the risk, and if so, on what terms. The Act appears to conflate the classification of a statement as a misrepresentation with materiality. A misrepresentation for the purpose of the Australian ICA seems to stress the significance of the good faith between the two parties.⁹⁰⁸ The significance of the good faith for the Australian insurance contract law is also, evident when looking at the incorporation of the “utmost” good faith requirement.⁹⁰⁹

For a misrepresentation to be established the assured or any reasonable assured in the same circumstances would need have some kind of knowledge that the information would be important to the insurer, which indirectly refers to an absence of an element of good faith. The requirements include both a subjective and objective test since the former one would be extremely hard to prove as it refers to the state of mind of the specific individual. Section

⁹⁰⁷ Insurance Contracts Act 1984, section 26.

⁹⁰⁸ Insurance Contracts Act 1984, section 26.

⁹⁰⁹ Insurance Contracts Act 1984, section 13; The Law Commission and Scottish Law Commission, Insurance Contract Law: Summary of Responses to Third Consultation Paper: The Business Insured’s Duty of Disclosure and the Law of Warranties, Chapter 1: The Business Insured’s Duty of Disclosure (March 2013) [6.6].

28 of the ICA addresses the consequences of non-disclosure or misrepresentation and applies to situations where the assured failed to comply with the duty of disclosure or made a misrepresentation to the insurer before the contract was entered into. Under the ICA, and applying to any form of insurance other than marine, the insurer may avoid the contract only where the failure was fraudulent or the misrepresentation was made fraudulently⁹¹⁰ that is to say: acting in bad faith. The Act, by virtue of section 56, allows for the Court to use their discretion in deciding whether to disregard fraud but only where the fraud is insignificant or minimal. If this is not the case, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made.⁹¹¹ When it comes to life insurance the Court may, when it seems unfair or too harsh, disregard the avoidance as fraud⁹¹². The Act removed from the definition of misrepresentation statements made with reasonable belief⁹¹³ or statements which the insured, or reasonable person, could not be expected to know were relevant.⁹¹⁴

In the case Cypriot case of *Eretria v PanEuropean Insurance Company*, the Courts decided that the non-disclosure of the previous incident of fire to the ship and the misrepresentation of the real value of the ship were not material. The damages to the ship were caused by a fire incident. The court held that the previous fire incident would not have influenced the judgment of a prudent insurer in fixing the premium or considering whether to enter into

⁹¹⁰ Insurance Contracts Act 1984, section 28(2); Schedule 5 para 4.

⁹¹¹ Insurance Contracts Act 1984, section 28(3).

⁹¹² Insurance Contracts Act 1984, section 31.

⁹¹³ Insurance Contracts Act 1984, section 26(1).

⁹¹⁴ Insurance Contracts Act 1984, section 26(2).

the contract. The new law introduces an objective test of whether the non-disclosure would influence the judgment of a prudent insurer. The representation of the real value of the ship would influence the judgment of a prudent insurer since the assured could have entered into the insurance on different terms or not have entered at all. The rule will push courts to look behind at factual analysis and the real intentions of the parties. In determining whether a disclosure of the incident would influence the judgment of a prudent insurer, the court would look at things such as the time and reasons of the fire and whether the ship was restored to the state it was before the fire occurred. It follows that the Australian objective test allows judges to determine the outcome of the case in a more effective and proportionate manner by looking at the real facts of the case rather than technicalities.

Duty of Good Faith

When it comes to the duty of good faith, the Australian ICA 1984 introduced an implied term of utmost good faith on the part of the insurer⁹¹⁵. The new section 13(2) ICA as amended in 2013 treats a failure to act with the utmost good faith as a contravention of the requirements of the ICA. Section 14A of the ICA also, incorporates a specific remedy where the insurer's breach of utmost good faith when it comes to "the handling or settlement of a claim or potential claim under the contract"⁹¹⁶. This shows that the good faith principles exist to pre-contractual as well as post-contractual situations whereas direct reference is made to the duty and the obligation to being complied with by both the insurer and the assured. The wider and bilateral principle of utmost good faith adopted in

⁹¹⁵ Insurance Contracts Act 1984, section 13.

⁹¹⁶ Insurance Contracts Act 1984, section 14A.

Australian insurance law has proved all embracing.⁹¹⁷ It is beneficial in the regulation of the conduct of insurers throughout the currency of policies⁹¹⁸. The Australian ICA renders the duty of utmost good faith into a contractual obligation for both parties a breach of which can entitle the other party to damages. The case of *Matton Developments Pty Ltd v CGU Insurance Limited* [2015] QSC 72 provides an explanation of the extent of the duty as it applies for the insurers. The insurers are under duty to act in accordance with commercial standards of decency and fairness and with due regard to the insured's interests but are not required to put the interests of the assureds above theirs, thus separating the duty to that of fiduciary⁹¹⁹.

The Australian ICA v English IA

The English Consumer Insurance (Disclosure and Representations) Act 2012 (UK) has replaced the duty of disclosure with the duty on the insured to answer express questions honestly. The business IA 2015 on the other hand introduces the duty to make a fair presentation of risk that is one that is clear and accessible to a prudent insurer. A point to consider is the extensive and elaborated duty of disclosure and misrepresentation under the ICA as opposed to the new duty of fair presentation introduced under the English IA 2015. It is important to consider that the Australian ICA is a codification of existing tested principles. The Australian ICA eliminates the use of the term “prudent insurer” for general

⁹¹⁷ The Hon. Michael Kirby AC CMG, ‘Insurance contract law reform- 30 years on’ (2014) Insurance Law Journal [29].

⁹¹⁸ The Hon. Michael Kirby AC CMG, ‘Insurance contract law reform- 30 years on’ (2014) Insurance Law Journal [29].

⁹¹⁹ *Matton Developments Pty Ltd v CGU Insurance Limited* [2015] QSC 72.

insurance and instead makes reference to a duty to 'take reasonable care not to misrepresent' that includes answering express questions honestly. This was tested in practice in the Australian case of *Permanent Trustee Australia v FAI Insurance Company Ltd*⁹²⁰. In the case the majority held that an assured's disclosure obligations relate only to those matters which the insured knows or a reasonable person in the circumstance could be expected to know are relevant to the insurer's assessment of the risk and, if so, on what terms. The court decided the case based on the interpretation of sections 21 and 26 of the Act. The majority distinguished between: those matters that are relevant to an assessment of the insured risk (such as the nature of the assured's business); and those matters of a commercial nature which have no bearing on the risk but may influence the insurer's decision whether or not to enter into the contract of insurance.⁹²¹ It was held that the assured was under no obligation to disclose matters in relation to the latter. Hence, the assured was under no obligation to disclose whether he would, at a later date, renew the insurance contract with FAI. Also, an assured need not disclose a matter 'that diminishes the risk'. Section 21 requires a disclosure of every matter that is known to the assured, (actual or constructive knowledge).

To show how the statutory test of relevance works in practice one can look at the Australian case of *Commercial Union Assurance*. In the case the court held that it should be shown that:⁹²²(1) Mr Poole knew such matters to be relevant to Chubb's decision whether to accept the risk (and if so on what terms) (s 21(1)(a)); or (2) a reasonable person in Mr Poole's

⁹²⁰ [2003] 197 ALR 364.

⁹²¹ *Permanent Trustee Australia v FAI Insurance Company Ltd* [2003] 197 ALR 364.

⁹²² *Poole v Chubb Insurance Company of Australia Ltd* [2014] NSWSC 1832.

circumstances could be "expected to know" those matters to be so relevant (s 21(1)(b)). The insured is not under a duty to disclose matters, which the insurer "knows" (s 21(2)(c)). It was common ground that the word "knows" in this context also means actual knowledge held by the particular officer of the insurer handling the insurance⁹²³. Section 26(2) imports the same test of relevance in relation to misrepresentations by providing that a statement made by a person proposing for insurance will not be a misrepresentation "unless the person knew, or a reasonable person in the circumstances could be expected to have known, that the statement would have been relevant to the decision of the insurer whether to accept the risk and, if so, on what terms".⁹²⁴ A representation for consumer insurance in Australia is one that the assured knew or a reasonable assured in the same circumstances would be expected to know that the statement would be relevant to the decision of the insurer to enter into the contract. The test requires the misrepresentation to be relevant to the insurer's decision thus influence him to some degree to enter into the contract, and that the assured did not act in good faith.

The ICA removes the concept of warranties for general insurance while the IA retains warranties and merely removes the unfair consequences arising from a breach of warranty by removing the automatic discharge effect and replacing it with suspension of the cover until the breach is remedied. The Australian ICA removed entirely the use of the term "warranties" from general insurance and replaced them with "representations". Another difference between the English IA and the Australian ICA is that the English IA retains the

⁹²³ *Commercial Union Assurance Co of Australia Ltd v Beard* [1999] NSWCA 422; (1999) 47 NSWLR 735 [62-63] per Davies AJA.

⁹²⁴ Insurance Contracts Act 1984, section 26(2).

seaworthiness and legality warranties under sections 39 and 40 of the MIA 1906. This is because the warranties of seaworthiness and legality are implied warranties specific to contracts of marine insurance. When comparing the IA to the ICA it is good to consider things of special nature that would specifically apply to marine insurance contracts which reminds us why the marine insurance should be a separate act itself. The relevant test for causation as incorporated under ICA is that of causative or contributing to. Section 54(2)(5) provides that where an act or omission by the assured could reasonably be regarded as being capable of causing or contributing to a loss, the insurer may not refuse to pay the claim to the extent that the assured can prove that the relevant part of the loss for which recovery was sought was not caused by the act or omission. On the other hand, the English IA refers to the extensive increase of risk test.

Reforming the duty of good faith in English Insurance resulted in a certain degree of uncertainty while the Act undermines the sanctity of good faith. In the UK, the general IA 2015 merely repeals the statement contained in section 23 of the Marine Insurance Act 1906 that the remedy for breach of the duty of utmost good faith is avoidance leaving the statement that a contract of insurance is a contract of good faith. The Act has no clear position as to the real effect of the doctrine nor its connection to the duty to fairly present the risk. It may be suggested that the duty of fair presentation is a furthering of the idea that the contract of insurance is a contract of utmost good faith. But no such clarification was made in the Act. The Australian Act on the other hand incorporates a clear requirement for both parties to act with good faith for any matter relating to the contract while the parties are not able to rely on the provisions of the contract if doing so would mean not acting in

good faith⁹²⁵. One may argue that there is a wider reciprocal statutory duty applied under the ICA. Under both Acts the insurer will be able to avoid the policy when fraud is involved. The English IA for non-fraudulent breaches replaces the remedy of avoidance with proportional remedies but does not leave too much discretion to the judge for refusing avoidance in cases of minimal fraud.⁹²⁶

The ALRC Report on Reforming the MIA 1909

Despite not reforming its marine insurance law the Australian Law Reform Commission published a report proposing changes to the Marine Insurance Act 1909 that was then codified as a proposed Bill. The proposed title of the legislation was the Marine Insurance Amendment Act 2016 but currently it is not enacted. As opposed to the UK, Australia's Bill demonstrated the desire to retain its marine insurance law under a separate legislative instrument to that of general insurance that is governed under the ICA. Retaining the existing structure of the MIA would mean the reformed law would be more readily identifiable, understandable and accommodated by the practitioners⁹²⁷. Marine insurance law has certain distinctive characteristics such as the importance of warranties, the implied warranties specific to marine insurance such as seaworthiness and warranty of legality and the wording specific to marine insurance. This may be observed when looking at life

⁹²⁵ Insurance Contracts Act 1984, sections 13 and 14.

⁹²⁶ Permanent Trustee Australia Ltd v FAI Insurance Company Ltd [2003] DeakinLawRw 8; (2003) 8(1) Deakin Law Review 185.

⁹²⁷ Daryl Williams, Review of the Marine Insurance Act 1909 (Daryl Williams, January 2000) <http://www.fortunes-de-mer.com/mer/images/documents%20pdf/legislation/Etrangere/Australian_Marine_Insurance_Act_Revision.pdf > accessed at 12/06/2018 [12].

insurance as opposed to marine insurance. Marine insurance is a contract of indemnity under which the assured seeks to be indemnified for the possible losses occurred that could be total or partial, while life insurance is more like an investment where a specified amount would be paid upon the death of the assured. Additionally, marine insurance is different to every other form of insurance, as it requires flexibility in policy drafting. It is also, suggested that incorporating marine insurance in the general insurance law would mean that the ICA would need to be re-enacted.⁹²⁸ Not only would incorporating provisions for general insurance and marine insurance create confusion (through a generalised language applying to all forms of insurance) but also, it would mean that the legislators would need to change the existing layout of the law. It is also attested that the ICA and MI serve different functions and interests⁹²⁹. It would therefore be impractical to incorporate all types of insurance under one single Act.

The Commission proposed the abolition of a requirement of insurable interest and the basis of contract clauses. The Commission went a step further and suggested the abolition of warranties in its entirety and replaced by a number of structured warranties available for the insurer should the assured breach any of the express contract terms. This idea was then abandoned as the Bill retains the term “warranties” but, the nature of the duty was significantly changed. The Act abolishes any effect of the warranties that entitled the

⁹²⁸ Daryl Williams, Review of the Marine Insurance Act 1909 (Daryl Williams, January 2000) <http://www.fortunes-de-mer.com/mer/images/documents%20pdf/legislation/Etrangere/Australian_Marine_Insurance_Act_Revision.pdf > accessed at 12/06/2018 [12].

⁹²⁹ Daryl Williams, Review of the Marine Insurance Act 1909 (Daryl Williams, January 2000) <http://www.fortunes-de-mer.com/mer/images/documents%20pdf/legislation/Etrangere/Australian_Marine_Insurance_Act_Revision.pdf > accessed at 12/06/2018 [34].

insurer to avoid any liability and treats warranties the same as any term of a contract of marine insurance. The Australian Law Reform Commission (ALRC) suggested that section 54 of the ICA was unsuitable for marine insurance. Nonetheless, they agreed that a causal link in the form of *causa proxima* is an essential concept because ‘it is not equitable to allow an insurer the right to avoid liability for a minor or an immaterial breach⁹³⁰’. They described such a link as a ‘well understood insurance law concept⁹³¹’. This shows Australia’s willingness to incorporate a causal link. This is also shown in the case of *Allison Pty v Lumley*.⁹³² In this case the captain, on sound advice, moved the vessel to escape from a cyclone that was about to hit the vessel, but the vessel was caught in the cyclone and the assured claimed damages. The policy incorporated an express warranty not to move the vessel and therefore there was a direct breach. In this regard the insurer denied payment of the claim. The court held that the insurer should pay the claim because the plaintiff’s action was reasonable as he was acting to avoid damage, the loss was caused by the same cyclonic peril that was going to hit the vessel anyway and the loss was not caused by the breach but from a peril of the sea. The proximate cause was the cyclone and not the act of the captain to move the vessel and the court held that the assured was not in breach of the warranty because he moved it to protect it from the storm. The Western Australian Supreme Court took a more flexible approach than the UK courts, stating that the rule on exact compliance as expressed under section 39(3) MIA 1909 was not to be taken too literally.⁹³³ Looking at this, one can observe that there is a departure from the automatic termination rules.

⁹³⁰ “Review of the Marine Insurance Act 1909”, ALRC Report 91 (2001), ss 9.120-9.127.

⁹³¹ *ibid.*

⁹³² *Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General Insurance Ltd* (2006) 200 FLR 394, 14 ANZ Insurance Cases 61-708, [2006] WASC 104.

⁹³³ *Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General Insurance Ltd* (2006) 200 FLR 394, 14 ANZ Insurance Cases 61-708, [2006] WASC 104; Bill for an Act to amend the Marine Insurance Act 1909 and for related purposes [16].

The Bill provides that subject to a breach of warranty or any express insurance term of the contract by the assured, the insurer will be entitled to be discharged from all liability for any loss that was proximately caused by the breach.⁹³⁴ The assured need to prove that the loss to be indemnified was not proximately caused by or attributable to, as the case requires, the breach. The ALRC also argued that the English wording ‘increase the risk’ was too narrow. They went on to explain that if the breach did not cause or contribute to the risk that occurred it could increase the risk that the loss occurred. The English IA 2015 on the other hand required that the insurer proves that the breach merely increased the risk of the loss occurring. When applying the English causation test on the Australian case of *Pilbara Pilot*⁹³⁵ the test could have failed. Even though the captain was in breach of his warranty he did so to avoid what was going to happen anyway. Under English law the court would have asked whether the moving of the vessel from the port could have increased the risk of the vessel being caught in the storm; a thing that would not be straightforward and would allow the decision to fall to the discretion of the court. The flexible nature of the rule does not necessarily mean that it would put the assured at a disadvantage.

When it comes to the duty of disclosure the Australian Bill suggests retaining the old duty of disclosure with a few variations as opposed to the English IA 2015, which introduced the new duty of fair presentation. The duty is a pre-contractual one and requires the assured

⁹³⁴ Daryl Williams, Review of the Marine Insurance Act 1909 (Daryl Williams, January 2000) <http://www.fortunes-of-sea.com/mer/images/documents%20pdf/legislation/Etrangere/Australian_Marine_Insurance_Act_Revision.pdf> accessed at 12/06/2018 [23].

⁹³⁵ *Allison Pty Ltd t/as Pilbara Marine Port Services v Lumley General Insurance Ltd* (2006) 200 FLR 394, 14 ANZ Insurance Cases 61-708, [2006] WASC 104.

to disclose to the insurer every circumstance, which he knows to be material, or which a reasonable person in the circumstances could be expected to know to be material. Therefore, introducing an element of materiality that can be either subjective or objective.

Comparing the Australian ALRC Report to the English IA 2015

An Act governing insurance contracts should be one that contains balanced, proportionate and fair rules. As a result, a fair balance between the interests of insurers and policyholders would be achieved and confidence in the insurance industry will be established. This thesis examines whether the English IA 2015 provides a clear and fair framework governing marine insurance law in order to assess whether Cyprus should follow its footsteps. It is necessary to consider whether the provisions introduced under the IA 2015 will promote proportionate decision-making and fairness for both parties or whether the Australian Bill better balances the party interests. The comparative analysis will not only allow for a better understanding of how insurance principles are applied in an international level but also bring conceptual solutions and contribute to the development of an efficient legislation for Cyprus.

As opposed to the Australian ICA that entirely abolishes any concept of warranties, the proposed Bill for Australian MIA seems to aim at retaining warranties or at least the very notion of warranties. This is also, true under the English IA 2015 which only alters the harsh consequences of the doctrine but does not amend the concept of warranties. When it comes to causation for insurance warranties, the Australian Bill introduces the proximate

cause test as opposed to the more flexible increase of risk test adopted by the IA 2015. The English causation test might create some difficulties when determining if the breach increased the risk of loss while the provision rendering warranties as suspensive conditions is not absolutely clear as there are questions on how to resolve issues arising from different types of warranties. The Australian Bill appears to allow avoidance of liability by the insurer if the assured is in breach of a warranty or any other express term of the contract. The Bill incorporates the same good faith duty imposed under the ICA 1984, as opposed to the English IA 2015 which leaves the application of the utmost good faith unclear and possibly for the courts to develop. The Australian Bill suggests incorporating a duty that has been applied and tested by the courts for decades whereas the UK Act reforms its duty and eliminates any effect the duty had on the insurance contract. The Australian Bill is also clear to identify the extent of the duty of good faith that is for the duration set out in the contract. The Bill clarifies that the good faith element must be observed from both parties to the contract.

The 2015 Act provides more detailed and clear rules on the new duty of fair presentation, which will promote confidence. Marine insurance law not only needs to provide certainty for both parties but also transparency and proportionality so that the number of times that claims are rejected for unintended failures of information exchange is reduced. The English and Scottish Law Commissions have found it crucial for all the remedies to be specified directly in the legislation. The IA explains the law regarding what would satisfy a disclosure of material circumstances and the extent to which the insurer should play an active role in asking the questions that he would like to know. The Law Commissions have

provided definitions and examples to explain many areas of the law in order to achieve the desired clarity that the law needed. The new duty of fair presentation does not clarify whether misrepresentation and disclosure are two different things under the new duty of fair presentation, thus creating uncertainty as to the application of the rule. It is therefore suggested that a clear link should be established regarding the effect of good faith in situations involving misrepresentation and non-disclosure.

The chapter examined the rules on warranties, disclosure and misrepresentation as developed by the Australian courts and the attempts to reform their Australian MIA 1909 that is a copy of the English MIA 1906. This allowed for an effective comparison to address whether following or implementing a reform following the 2015 Act would be the right course of the action for Cyprus. The UK 2015 Act provides, in general, coherent and clear provisions for everyone to understand. It is suggested that the Act will offer clarity⁹³⁶ in the area of marine warranties as it provides clear and coherent rules⁹³⁷. However, the new provisions are theoretical suggestions based on vague standards for balancing interests and achieving fairness that were not examined in practice and the application of which will bring confusion. An example of this is the causation test that appears to be too broad and not having set practical examples will cause complexities. The Australian ICA on the other hand is based on rules developed by the Courts. The chapter concludes that the best course of action is the development of a single Act for marine insurance that incorporates provisions learning from both the English reform and the Australian Bill. The specifics for

⁹³⁶ Peter Morse, 'Getting to grips with the Insurance Act' (2015) E.G., 1544, 98.

⁹³⁷ Soyer, B. (2008) 'Reforming Insurance Warranties - Are we finally Moving Forward' in Soyer, B. (Ed.) *Reforming Marine and Commercial Insurance Law* (Informa, 2008) Ch 7 [132].

the formation of the Cypriot MICA will be discussed in chapter seven.

CHAPTER 7

FORMING THE MIA FOR CYPRUS

Introduction

The effect of implementing an Act for contracts of marine insurance could bring a huge change for the Cypriot insurance market. This will set the first stepping-stone for Cyprus' insurance industry growth that will boost the country's economy. The key to attaining this development is creating an Act that is in line with countries that not only sets the example for marine insurance but that also promotes confidence for both parties. Most importantly the law needs to contain provisions that will attract the insurers to insure ships and goods using the national law. For this reason, leaving behind the former MIA might create controversy since it was known as one of the most insurer-friendly legislations. Even though the MIA worked for the interest of the insurers, the "archaic" provisions were often creating time-consuming litigations and uncertain outcomes during Cypriot courts. Developing a legislation to govern insurance contracts for marine adventures will certainly bring legal and economic benefits for the country. The benefits of a nicely crafted and efficient legislation are well-accepted. The decision to develop an Act governing the parties' relations and protecting their interests based on principles of fairness will eventually achieve the needed certainty and clarity of the law that would lead to reducing costly and time-consuming litigations. This chapter suggests that Cyprus should develop its own Act for marine insurance contracts that should be modelled after the English IA with some variations from Australia.

To avoid generalizations and create further bafflement it is suggested that in this regard Cyprus should follow the Australian example thus separating marine to non-marine insurance. For the introduction of the Cypriot Marine Insurance Contracts Act (CMICA) there are key factors to be taken into account. First, the decision to implement one Act specific to marine insurance means that the Act needs to be more specific and comprehensive (this we learn from the Australian example) and second the fact that the Act relates to adventures of marine insurance means that the abolition of warranties is out of the picture. This is further supported by the decision of the ALRC to retain the doctrine of warranty after many considerations to the contrary.

The current status of Cypriot marine insurance is one of chaos and confusion. Currently the courts of Cyprus follow rules from English common law that are based on the former MIA 1906. The reform of the English MIA will leave the Cypriot Courts relying on principles that the mother legislation has discarded. The decision of Cyprus to continue following UK common law might eventually lead to inconsistencies. Cyprus should consider following the reform to be in line with overseas countries. Following the English reform other countries that have been relying on English principles will change their law in regards to marine insurance. Canada and Australia (that has already made attempts to reform its law) form a good example. Independent of the decisions to reform the law or not Cyprus needs to show the legal basis of such decision. This study suggests that Cyprus should reform its law and be in line with international standards and commercial realities following the example of a country that is considered as the expert in marine insurance.

This chapter will attempt to show the effect of Cyprus implementing provisions as introduced under the 2015 Act in the area of warranties and duty of fair presentation under the Cypriot Marine Insurance Contract Act.

The new Insurance Act 2015 addresses all types of insurance but may create chaos as well as longer and more expensive litigations. Copying both English Acts would be ineffective for Cyprus because of the complexity of having two Acts in place at the same time. The suggestion for Cyprus to draft its own law following the example of the UK, but also looking at Australia, will bring far-reaching consequences for the Cypriot marine insurance law. Due to the absence of any laws in the form of legislation in the area of insurance contracts, Cyprus can start by introducing the CMICA, which would encompass clear and detailed provisions to govern the contracts of marine insurance. The successful development of a clear Act that is insurer friendly but at the same time does not lead to grievous and unfair consequences, will promote both insurers and assureds to insure their ships locally. While the previous chapters have examined the changes to the law of warranties and disclosure and misrepresentation, this chapter will look at the development of an efficient Act for Cyprus. The focus of the chapter will be to make suggestion for the creation of a draft focusing on reforming the law of warranties and disclosure and misrepresentation that could set the basis for the development of the CMICA.

The introduction of the Act itself will be a big change for Cypriot marine insurance since no legislation is currently in place. The Act will bring much needed clarity. The biggest impact of the proposed legislation will be on how they contract out of risk. Prior to the

introduction of the IA, insurers could contract completely out of all risk, loss or damage to assureds' goods. The proposed changes to the MIA will mean that these providers will have to act with the utmost good faith and will no longer be able to contract outside of their terms and conditions. The new IA is slightly more restrictive than the former MIA. Taking into consideration both the Australian ICA and the English IA this chapter will suggest provisions for the development of an insurer friendly marine insurance that does not place the assured in an unfavourable position with harsh and unfair consequences.

Cyprus should have a law specifically governing marine or commercial insurance contract that is separated to life insurance. Cyprus marine insurance provides no separation between different types of insurance treating all the cases the same.⁹³⁸ For many reasons insuring a life differs to insuring your business or ship. As discussed, life insurance differs from marine insurance and other commercial insurances. Therefore, Cyprus should first develop one Act specifically and solely addressing marine insurance issues.

Development of a CMICA

Since Cyprus marine insurance purely consists of common law and relies on English rulings, then following judgments from new cases that are based on the new IA 2015, may create further inconsistencies in decision-making. Legal development based on common law is not a viable proposition (cause of the UK reform). The solution to this problem is for Cyprus to introduce legislation that is clear and coherent and balances the interests of

⁹³⁸ eg life insurance and marine insurance will be dealt in the same way

the parties. By bringing the comparison of Australia and examining the different approach taken to reforming English laws, it is possible to suggest the development of an Act specific to marine insurance namely the Cypriot Marine Insurance Contracts Act. The Act would only reform the law of marine insurance, but no restrictions will be imposed as to its application to other forms of commercial insurance. Nonetheless, it is suggested that a separate Act or at least specific provisions should be developed to deal with problems of general insurance including life insurance. This will be dealt with in future research.

The study suggests that the provisions incorporated under the IA 2015 create the right conditions to attain the desirable balance between the party interests. The legislation deals in a great extent with the problems of the previous law but, some areas need further clarification. Nonetheless, Cyprus should follow the Act in introducing a causation test and rendering warranties as suspensive conditions but should incorporate some variations that were influenced by Australia.

Suggestions for Warranties

The proposal for Cyprus' law development is the retention of warranties in the area of marine insurance contracts. Removing warranties might have worked for general insurance but it would be impossible to create such a radical change in marine insurance. This is because of the importance that warranties have played historically in the formation of marine insurance contract but also, because of the need to stay in line with international standards following the reform made by the UK. The importance of warranties in an

insurance contract can be based on the fact that warranties are those terms of the contract that form the promises made by the assured and that influence the decision of the insurer to enter into the contract. To understand the importance of retaining warranties in the context of marine insurance one can look at the history of marine insurance.

The abolition of the basis of contract clause would be a big step for Cypriot marine insurance. The English Act restricts the parties' freedom to contract by abolishing all clauses that would allow the statements said at a pre-contractual statement to be converted into the basis of the contract (warranties). The basis of contract clause seems to create no problems for Cypriot law other than the harsh consequences when in breach of a term contained therein. Thus, it is suggested that removing the automatic termination principle and adding a causation test might be enough. One aspect that needs to be considered is that there needs to be a provision spelling out the consequences of using unclear language.

The decision to remove the automatic termination principle for Cypriot law and convert warranties into suspensive conditions would eliminate the harsh effect a breach of warranty has for the assured. The remedies from a breach of warranty should be proportionate to the specific type of warranty. Warranties should be categorised according to the effect they have on the breach and the importance for the insurer in deciding to insure and not merely according to their description. It is important that the law is sufficiently clear so to distinguish between remediable and irreparable warranties. Cyprus should abolish the automatic termination principle, thus allowing for the assureds to remedy their breach provided they do before any loss occurs and the risk was restored to the one originally

agreed. In incorporating the “essentially the same” test for remedying warranties it is suggested that the test should be based on what a reasonable insurer in the same circumstances would consider essential and not what the insurer in question would.

Incorporating the English causation test for establishing a relation between the breach and a loss might create much flexibility and thus complexity when deciding whether the breach increased the risk of the loss occurring. This is because the insurer could argue that anything could have increased the risk. This would be more challenging in situations where the breach made did not directly cause or contribute to the loss but could have potentially increased the risk of such a loss occurring. Even if the loss was not caused by the breach it could be relevant to it, rendering it hard to prove whether the breach decreases the risk in question or not. The UK’s test of causation as provided by IA is more flexible and has wider application since it catches any breach that would reasonably increase the risk; a mere connection will be enough to establish liability. If the breach made by the assured has an effect on the risk but it is actually irrelevant, as it did not directly cause it, the UK’s causation test will still capture it on the basis that it increased the risk that the loss would have happened. This could be argued to give fairer results as the breach could be a severe factor connected to the loss even if it did not directly cause or contributed to it. This chapter suggests that the Cypriot MICA should incorporate the following test for establishing causation: The omission or failure to fulfil a term “directly or substantially increased the risk of loss which actually occurred in the circumstances in which it occurred.” This test would push the court to look at an effective cause, therefore limiting the test capturing anything. An example will be taken into account in order to consider how the suggested

test will apply in practice.

In the aforementioned case of *Dawsons v Bonnin*⁹³⁹ the assured had inadvertently and inaccurately stated where the insured lorry was ‘usually’ garaged. Based on the proposed test, of such a term is expressly made into a warranty and the assured is in breach of that term, then he would have to prove that parking his lorry in the farm’s garage did not directly or substantially increased the risk of loss. The test would push the courts to look behind at the real facts of the case to determine whether parking the lorry in the wooden shed next to the petrol lorry substantially increased the risk.

In the case of *General Insurance Cyprus Ltd v Pharmacies Aristos Vasiliou* the insurer refused to pay the claim because the insurance contract included the provisions that the contract of insurance would not cover damage occurred directly or indirectly from explosion.⁹⁴⁰ The court held that in the given case the use of LPG in *Mike's Kebab* was domestic in nature, namely cooking. It is irrelevant if the cooking is not done in a family home. It is the nature of the use of LPG that counts. So, if for example in a factory gas is used to prepare hot drinks or food for staff, the use of gas is domestic. Conversely, if gas in a home is used to drive the turbine to generate electricity, or the fire is caused by an explosion of gas used to drive a motor vehicle, then the use is not domestic.⁹⁴¹

⁹³⁹ *Dawsons Ltd v Bonnin* [1922] 2 AC 413 per Lord Haldane.

⁹⁴⁰ In deciding the case the court adopted the ruling in *Re an Arbitration between the Mayor, Aldermen and Burgesses of the Borough of Willesden and Municipal Mutual Insurance Ltd* [1944] 2 All E.R. [444], which held that “since the boiler was only used for heating water to heat the building, it was used for domestic purposes only. The fact that a business was carried on in the building was immaterial, the material consideration being what the boiler was used for and not what the premises were used for”.

⁹⁴¹ *General Insurance Cyprus Ltd v Pharmacies Aristos Vasiliou Ltd* (1998) 1 A.A.D 754.

Suggestions for the duty of fair presentation

When it comes to the duty of the assured to disclose all material facts and to not misrepresent, the English IA introduces a new duty of fair presentation that brings together both duties. The duty abolishes the termination of cover when such failure is not deliberate nor reckless and introduces a number of proportionate remedies. The question here is whether Cyprus should adopt the rules as introduced by the UK's IA. When it comes to disclosure and misrepresentation the Cyprus courts have already adopted rules under common law. In the case of *Kyriacos Iacovou* it was held that the insurer would be able to refuse cover if he could prove that (i) an alleged circumstance did exist at the time when the negotiations between the insured and the insurers had not been completed, (ii) that the insured knew or should have known of the existence of that circumstance, (iii) that the circumstance in question was material and (iv) that the circumstance was not disclosed to the insurers.⁹⁴² Also, fair presentation of the risk should include all the circumstances that would increase the risk or the premium. The new duty of fair presentation incorporates clear detailed rules defining the new concept and how it should apply. This will tackle potential confusion in the area. The abolition of the termination of cover and the introduction of proportionate remedies will result in a much fairer, consistent approach. The clear rules can also deal with the inconsistencies of the law.

As discussed, the principle of utmost good faith has not been dealt with in practice by the Cypriot courts. Therefore, the law in relation to the doctrine is characterised by uncertainty.

⁹⁴² *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides.

The Cypriot common law only provides the description that the contract of marine insurance is one of utmost good faith that is derived from English common law. The reform in the area of good faith by the English legislators does not address this issue. The new rules on utmost good faith create further uncertainty, as it is not clear what the effect of a breach of good faith is if any at all. The reform takes away the effect of a breach of good faith that entitled the insurer the termination of the cover and merely establishes a link between the duty not to misrepresent and good faith. The IA seems to restrict the effect of the duty of utmost good faith on contracts of insurance. However, a breach of the “tortious” duty of good faith under the Australian ICA entitles the insurer to damages where there is a logical connection between the breach of the duty and the consequent damage to the assured.⁹⁴³ The Australian duty of utmost good faith contains more elaborate rules and clarifies the extent of application of the duty of good faith. The case of *Matton Developments Pty Ltd v CGU Insurance Limited*⁹⁴⁴ further clarified this by stating that “...the duty of utmost good faith will require an insurer to act in accordance with commercial standards of decency and fairness, and with to the insured’s interests, but will not require the insurer to put the interests of the insured above its own”.⁹⁴⁵ The duty of utmost good faith does not equate to, nor is it synonymous or analogous to, a fiduciary duty.⁹⁴⁶ When it comes to the duty of good faith Cyprus should follow the example of the Australian Courts, which would clarify the law on good faith for Cyprus’ marine insurance contracts. At the same time the onus is not too harsh as failure to act in good faith on its

⁹⁴³ *CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1; 2007 High Court of Australia, 36.

⁹⁴⁴ *Matton Developments Pty Ltd v CGU Insurance Limited* [2015] QSC 72.

⁹⁴⁵ *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd* (2007) 209 FLR 247.

⁹⁴⁶ *CGU Workers Compensation (NSW) Ltd v Garcia* (2007) 69 NSWLR 680.

own will no longer allow the insurer to avoid liability. There needs to be some kind of connection between the breach and the damage.

After identifying the Cypriot common law and examining the law of warranties and fair presentation in both UK and Australia, it is attested that the Cypriot law governing marine insurance contracts is in need of reform and Cyprus should introduce a single Act specific to marine insurance namely the CMICA which will revise, update and provide improvements to the current law. Specifically, the thesis argues that the element of good faith and the extent of its application form aspects that need further clarification, as the Cypriot courts have not applied or considered them.⁹⁴⁷ When it comes to the duty of good faith Cyprus should learn from the Australian example that sets far clearer and more elaborate rules identifying the duty of good faith and its real effect. Even though basis of contract clauses do not seem to create problems or unfairness to Cypriot legislators, Cyprus should follow the UK and abolish the basis of contract clause. This study suggests that the basis of contract clause is not itself draconian but abolishing it brings Cyprus in line with overseas countries. Learning from the 2015 Act, it suggests the introduction of a causation test for warranties, the transforming of warranties into suspensive conditions and the introduction of a number of proportionate remedies when it comes to a breach of the duty of fair presentation. Nonetheless, the draft proposes that the causation test for the MICA is: That the omission or failure to fulfil a term “directly or substantially increased the risk of loss which actually occurred in the circumstances in which it occurred”.

⁹⁴⁷ It will be suggested that this can result in imbalance and unfairness as life and marine insurance (that is far from commercial) entail completely different types of risks and should be distinguished, thus specific rules should apply when dealing with cases of life insurance.

CHAPTER 8

CONCLUSION

Summary

This study has attempted to address the chaotic nature of Cyprus' marine insurance, due to the lack of a clear legal framework and the limited availability of cases that results in the country depending on English law that has not been tested. After an analysis and examination of available insurance cases the study suggests that Cyprus' common law system for governing marine insurance cannot be the solution to this problem. This becomes more evident when looking at the UK's decision to reform its marine insurance law, which will bring far-reaching consequences for not only the country's marine insurance but also for those countries that rely on the English law. The reason for suggesting an Act specific to Cyprus marine insurance is to promote commercial certainty and eliminate the gaps of the law that are shown in chapter two of the thesis. This is why a long overdue reform is needed. For the purpose of this thesis, suggestions are posited towards the development of a marine insurance act rather than a general act.

The purpose of this thesis is not to criticise the IA but, to develop a Marine Insurance legislation for Cyprus through the analysis of the English IA and MIA to find the most appropriate law. The decision to develop legislation will not only achieve certainty and consistency in court decisions but also result in a decrease of legal costs and create the right conditions for the country's insurance market to grow. Suggestions for reforming insurance

contracts could not be achieved without exploring in depth the rules on warranties and duty of disclosure and misrepresentation that are core for contracts of insurance. Therefore, the study's focus was in proposing clear and fair rules on warranties and fair presentation to promote consistency and proportionate decision-making. After examining the English Insurance Act this study suggests developing an Act that is based on English laws with some variations. The study has looked at the Australian example to form a comparison and enable the incorporation of rules that will put Cyprus in line with international commercial practices. After analysing the English rules and comparing them to that of Australia it is now possible to suggest an example of how a draft of CMIA could look.

The main conclusion is that the drafting of the CMIA is a necessary step for Cyprus' insurance industry. The study will provide a draft of the legislation that focuses on reforming the rules on warranties and fair presentation. Therefore, this chapter will consist of the drafting example of the CMIA and an explanation of the provisions. In general, the proposed construction of the CMIA will closely follow the structure and layout of the English Marine Insurance Act with the exception of a few new sections to provide further clarity. The legislation will incorporate the relevant reforms on warranties and duty of fair presentation made by the UK along with suggestions made in the Australian Bill for reforms to the Australian MIA 1909. The draft is not a direct copy of the existing UK law as it encompasses provisions from the Australian law and rules upheld in the Courts of Cyprus. The Act will be different to the English one in the sense that it will be construed to apply specifically to marine insurance. All rules will be contained in the same legislation, in an effort to introduce an Act that is both clear and comprehensive.

DRAFTING THE CMICA

The CMICA would be developed to deal with issues specific to marine insurance and will be a codification of principles originating from English rules, with some Australian variations, while maintaining those rules construed by Cypriot Courts that seem to create no legal problems. The suggested Act is intended to deal with the obscurity and inconsistencies of the current law. The suggestions for reform focus on issues that have been exposed as problematic by both the UK and Australia namely, disclosure and misrepresentation, warranties and remedies for non-fraudulent breaches, leaving questions of insurable interest to be dealt in another chapter. The suggestion focuses on separating Marine insurance from other general insurance following Australia's decision and develops an Act that applies specific to Marine Insurance policies.

INTERPRETATION AND APPLICATION

APPLICATION

Explanatory Notes: This Act would apply to contracts of Marine Insurance. A contract of marine insurance is defined in the chapter titled "Definitions". In determining contracts that are marine insurance contract the Act will borrow the definition provided by the Australian Marine Insurance Act. The Act would be introduced for marine specific insurance but nothing in its provisions would prevent its application to any other form of insurance. The draft Act only incorporates those provisions, which are in urgent need for

reform and clarification and would not be a copy of the English IA 2015 though many of its provisions will be borrowed from the reformed Act.

INTRODUCTORY PROVISIONS

Explanatory Notes: The first Clause contains definitions of insurance terms. Section 1.1a. Introduces a definition of ‘insurer’ for the purpose of the Act in simplistic language. Clause 1.1.b. provides a definition of “*assured*” for the purpose of this Act. The Act retains the definition under clause 1.1.c of a contract of marine insurance as provided in the English MIA 1906

2. GENERAL RULES RELATING TO MARINE INSURANCE

Section 2 of the Act would outline those rules that are distinctive and important for the formation of an insurance contract.

DUTY OF UTMOST GOOD FAITH

Explanatory Notes: The proposed Act retains the duty of Utmost Good faith that applies in general to all contracts of marine insurance. The duty will clearly apply to the pre-contractual and post-contractual stages until such time that there is a claim that results in litigation. The rules on good faith are borrowed from the Australian Insurance Contracts Act and the Australian Bill for an Act to amend the MIA 1909 incorporating detailed provisions for dealing with matters of good faith.

3. RULES AFFECTING THE INSURANCE CONTRACT

Section 4 of the suggested Act introduces those rules affecting an insurance contract

namely, the rules on warranties and the duty of fair presentation, providing clear provisions on how they will be governed under the Act. Most of this part will be based on the English IA 2015 with some variations and influences from Australian law.

3.1 WARRANTIES

Explanatory Notes: This section retains warranties as a part of the CMICA. It follows the English example due to the significance of warranties for the formation of a marine insurance contract. The Act will retain the definition of warranties as enunciated in the original MIA 1906 and will bring together provisions on the nature of warranties. In doing so it will clearly identify express warranties. The Act will change the effect of a breach of warranties to mitigate the harshness of the current rules. Consequently, all warranties will function as suspensive conditions. The proposed Act introduces a causation test based on which the decision of whether the insurer can be discharged from liability will be taken, thus limiting the circumstances that the assured will lose cover.

3.1.1 BASIS OF CONTRACT CLAUSE:

Explanatory Notes: The Act suggests the abolition of the rule in an attempt to be in line with international practices' approach. Subject to the proposed Act all representations made at a pre-contractual stage cannot be converted into warranties as a result of clauses incorporated into contracts stating that such representations are to be made the basis of the contract. This does not mean that the representations made at pre-contractual stage cannot be made into warranties but rather that they cannot be automatically converted into ones by incorporating the basis of contract clauses. If the insurer deems such statements to be

of essential importance, he may incorporate such statements as warranties by expressing it with clear and unequivocal language to the assured. This would enable the assured to correct possible mistakes or misunderstandings and consequently prevent the termination of contracts as a result of innocent breaches of warranties.

3.2 Nature of Warranties and 4.3 Express warranties: Explanatory Notes: The Act will retain the original definition of warranties as incorporated under the English MIA 1906 and followed by Cyprus since the development of Cypriot insurance law. This is aimed at the consistency of law and to avoid any unnecessary changes that may add confusion. The Act retains definitions that result in no unfairness for the parties and are clear and widely understood concepts.

3.4 Warranties rendered into suspensive conditions: Explanatory Notes: Similar to the English reforms under the IA 2015, the Act abolishes the automatic termination of cover. Where the breach is not fraudulent, the assured will have the opportunity to rectify his errors as long as this is done before any loss occurs.

3.5 Causal Link: Explanatory Notes: The Act like the English IA 2015 introduces a causation test between the breach and the loss. Subsection 3, which provides for a causation test, follows both the English IA 2015 and the Bill for reforming the Australian marine insurance law. The Act incorporates the more explicit test of “direct or substantial increase”. Therefore, the specific breach must directly or substantially increase the risk of the loss occurring. The insurer will bear the burden of proving that there was a breach of a

warranty or express term of the contract while the assured will bear the burden of proving that the loss for which it seeks to be indemnified had no substantial or direct connection to the breach. Thus, the assured would need to prove that his breach did not substantially increase the risk.

3.6 EFFECT OF BREACH OF WARRANTIES

Explanatory Notes: The Act would remove the strict effects resulting from a breach of warranty through the abolition of the automatic termination principle. The insurer will be able to refuse a claim in respect of any loss occurring, or attributable to something happening after a breach of warranty and before the breach is remedied.

4. DUTY OF FAIR PRESENTATION

4.1 Scope of the duty

Explanatory Notes: The Act introduces a subjective and objective requirement. The duty extends its application to post-contractual stage in the sense that if the assured becomes aware of material information upon completion of the contract he must fairly present this to the insurer. The reform merely changes the name of the duty as the duty of fair presentation incorporates both the duty of full and accurate disclosure and non-misrepresentations.

4.2 Failure to fulfil the duty

4.2.1 Fraudulent presentation

Where a breach is fraudulent, the insurer would be entitled to avoid the contract. The Act then identifies what qualify as a fraudulent breach under s4.2.2.

4.2.3 Non-Fraudulent presentation

Where the breach is non-fraudulent, the insurer needs to prove that the non-disclosure induced him to enter into that contract.

Explanatory Notes: s. 4.3 identifies the requirements for a breach of the duty of fair presentation. The Act will clearly incorporate the requirements for proving a breach of warranty as identified in the Cypriot case of *Kyriacos Iacovou* and inspired by the English MIA 1906 and relevant textbooks.⁹⁴⁸

4.4-4.5. Knowledge of the Assured:⁹⁴⁹

The Act provides a twofold test for what an assured knows, incorporating a subjective and an objective element to better capture the realities of business relation. Courts will have to determine what the assured actually knows and also what a reasonable assured should be expected to know. The section defines what the assured “knows” and “ought to know” for the purposes of the duty of disclosure. The Act distinguishes between two scenarios: the assured being an individual or not. An individual is presumed to know what he knows and anything, which is known by an individual who is “responsible for the insured’s insurance”. Where the assured is not an individual, the knowledge of such an assured’s senior

⁹⁴⁸ Quoting the case of *Kyriacos Iacovou v The United British Insurance Co. Ltd* (1958) (V23) 1 CLR 303 per Judge Josephides

⁹⁴⁹ *Condogiannis v Guardian Assurance Co.*, 90 L.J.P.C. 168

management and the person or people responsible for the insured's insurance will be attributed to the assured.

4.6 Knowledge of insurer

In determining what qualify as knowledge of an insurer the Court should look at what an insurer actually knows (or one or more of the individuals who participate on behalf of the insurer whether the individual does so as the insurer's employee or agent, as an employee of the insurer's agent or in any other capacity), what he ought to know or what he is presumed or expected to know. Subsection 4 requires the insurers to enquire about or confirm things, that the insurer suspects are wrong or incomplete. In such case the insurer is under duty to make a reasonable search, eg making enquiries. The reasonable search duty may extend to situations where such a search would be reasonable in the circumstances or where that information was available to the insurer. Subsection 2 extends the duty to situations where an employee or agent of the insurer knows it and ought reasonably to have passed on the relevant information. The duty of disclosure now includes not only information known by the employee placing the insurance but also any information received or held by the agent in the course of acting for the policyholder.

4.7. Materiality identified

Explanatory Notes: The Act incorporates the decisive influence test for dealing with questions of materiality.

5. REMEDIES FOR DUTY OF FAIR PRESENTATION

5.1 Explanatory Notes: The Act incorporates a number of proportionate remedies following the English IA 2015.

5.2 The Act would set the requirements to satisfy a breach of the duty of fair presentation. It will do so by distinguishing between deliberate or reckless breaches or non-deliberate or reckless breaches for both contract with variations and no variations respectively. It will include the proportionate reduction remedy as introduced under English law.

6. RULES RELATING TO THE LIABILITY OF THE INSURER

Waiver of Information

Explanatory Notes: The insurer is under the duty to seek for more information and failure to do so will amount to a waiver of its right to require more. This will apply where the insurer asks a limiting question.

PROPOSED CMICA DRAFT

SHORT TITLE

This Act may be cited as Marine Insurance Contracts Act.

INTERPRETATION AND APPLICATION

APPLICATION

(1) This Act shall apply to contracts of marine insurance.

(2) This Act does not apply to contracts of marine insurance made before the commencement of this Act.

(3) Where a ship in the course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act in so far as applicable shall apply thereto; nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

(4) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

INTRODUCTORY PROVISIONS

1.1 DEFINITIONS

- a. The insurer means a person or an insurance company or any other undertaking, which has as its objects the carrying out of insurance activities.
- b. The assured means a person or company who obtains the insurance cover in exchange for a premium.
- c. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in a manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to a marine adventure. (retained from the English MIA 1906)
- d. A broker is an individual or a company that works as an intermediary between the insurer and the assured.
- e. Insurance Risk is the risk of a financial loss that may arise as a result of an unforeseen event that causes damage to the ship or/and cargo and freight.

2. GENERAL RULES RELATING TO THE INSURANCE

Duty of Utmost Good Faith

2.1 A contract of insurance is a contract based on utmost good faith and there is an implied duty in such a contract requiring each party to it to act towards the other party, with the utmost good faith.

2.2 A failure by a party to a contract of insurance to comply with the implied duty of good

faith, is a breach of the requirements of this Act. (per Australian ICA)

2.3 In deciding whether reliance by an insurer on a provision of a contract of marine insurance would be to fail to act with the utmost good faith, the court shall regard any notification of the provision that was given to the assured, whether a notification of a kind mentioned in this Act or otherwise.

2.4 The requirement that each party act towards the other party with the utmost good faith extends for the duration of the relationship between the parties set out in the contract of marine insurance except in relation to any claim or other aspect of the relationship which becomes the subject of litigation between the parties, in which case the requirement ceases when the litigation is commenced but only in relation to the claim or other aspect that is the subject of that litigation. (per Australian Bill for an Act to amend the MIA 1909)

RULES AFFECTING THE INSURANCE CONTRACT

3 WARRANTIES

3.1 Basis of Contract Clause:

3.1.1. Representations made by the assured during the pre-contractual stage are not to be converted into warranties by means of any provision of the insurance contract.

3.1.2 Should the insurer wish for a pre-contractual representation to be a term of the contract between itself and the proposer, said insurer must communicate it to the assured

in clear and unequivocal language.

3.2 Nature of Warranties

(1) A warranty, under this section, means a promissory warranty, that is to say; a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

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

3.3 Express warranties.

(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

3.4 Warranties rendered into suspensive conditions.

(1) 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 and before the breach has been remedied.

(2) A case falls within this subsection if—

- (a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and
- (b) that requirement is not complied with.

Subsection (1) does not affect the liability of the insurer in respect of losses occurring, or attributable to something happening—

- (a) before the breach of warranty, or
- (b) if the breach can be remedied, before the loss occurred

For the purposes of this section, a breach of warranty is to be taken as remedied—

- (a) if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties,

3.5 Causal Link

(1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following—

- (a) loss of a particular kind,
- (b) loss at a particular location,
- (c) loss at a particular time.

(2) If a loss occurs, and the term has not been complied with, the insurer may not rely on

the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the assured satisfies subsection (3).

(3) The assured satisfies this subsection if he shows that the omission or failure to fulfil a term did not directly or substantially increase the risk of loss, which actually occurred in the circumstances in which it occurred.

3.6 EFFECT OF BREACH OF WARRANTY

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

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

1.3 The contract may be treated as valid after a breach of warranty if:

- (a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,
- (b) compliance with the warranty is rendered unlawful by any subsequent law, or
- (c) the insurer waives the breach of warranty.

1.4 The insurer may not avoid liability in respect of losses occurring, or attributable to something happening—

- (a) before the breach of warranty, or
- (b) if the breach of warranty is remedied before any loss occurs.

1.5 A breach of warranty is to be taken as remedied:

- (a) if the risk to which the warranty relates later becomes essentially the same as that originally contemplated by the parties,
- (b) in any other case, if the insured ceases to be in breach of the warranty.

1.6 Non-remediable warranty include where:

- (a) the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and
- (b) that requirement is not complied with.

4. DUTY OF FAIR PRESENTATION

4.1 Scope of the duty

- a. The assured shall before the contract is concluded, make an accurate and fair presentation of all material circumstances known to him or that a reasonable person in his place would consider as material.
- b. If the assured then becomes aware that he has given incorrect or incomplete information regarding the risk, he shall without undue delay notify the insurer, before any loss occurred.

4.2 EFFECT OF BREACH OF FAIR PRESENTATION

5.2.1 Fraudulent presentation

Where a breach is fraudulent, the insurer would be entitled to avoid the contract.

5.2.2 Fraudulent breach identified:

Where the assured gave incorrect or incomplete information knowing that it is a lie, or recklessly indifferent whether it is true or false, with the purpose that the recipient of the information acts on the basis of such statement.

4.2.3 Non-Fraudulent presentation

(a) Where the breach is non-fraudulent, the insurer needs to prove that the non-disclosure induced him to enter into that contract.

(b) When in breach of a non-fraudulent presentation, the assured may be entitled to one of the proportionate remedies contained in section six of the proposed Act.

4.3 ESTABLISHING THE BREACH

(1) (i) The onus for establishing a breach would be on the insurer.

(ii) there should be an alleged circumstance at the time when the negotiations between the assured and the insurers had not been completed,

(ii) the assured knew or should have known of the existence of that circumstance,

(iii) the circumstance was not disclosed to the insurers.

(iv) the circumstance in question needs to be material and

4.4. In determining what an assured need to disclose the Court should look at both a subjective and objective element.

4.5 SUBJECTIVE KNOWLEDGE OF THE ASSURED ⁹⁵⁰

The assured needs to disclose:

- (a) what he actually knows, and
- (b) what is known to one or more of the individuals who are responsible for the assured's insurance.

An assured who is not an individual knows only what is known to one or more of the individuals who are:

- (a) part of the assured's senior management, or
- (b) responsible for the assured's insurance. (eg broker)

4.6 OBJECTIVE KNOWLEDGE OF THE ASSURED

The assured needs to disclose:

- (a) any information that a reasonable man in his position would be expected to know.

4.7 KNOWLEDGE OF THE INSURER

In determining the knowledge of an insurer, the Court should look at what an insurer actually knows, what the insurer ought to know and what the insurer is presumed or expected to know.

⁹⁵⁰ *Condogiannis v Guardian Assurance Co.*, 90 L.J.P.C. 168

(1) An insurer knows something only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms.

(2) An insurer ought to know something only if (a) an employee or agent of the insurer knows it, and ought reasonably to have passed on the relevant information to an individual mentioned in subsection (1), or

(b) the relevant information is held by the insurer and is readily available to an individual mentioned in subsection (1).

(3) An insurer is presumed to know (a) things, which are common knowledge, and (b) things which an insurer offering insurance of the class in question to assureds in the field of activity in question would reasonably be expected to know in the ordinary course of business.

(4) The insurer should know things which the individual suspected, and of which the individual would have had knowledge but for deliberately refraining from confirming them or enquiring about them.

4.8. Materiality identified

(1) A circumstance or representation is material if it would influence the judgment of a prudent insurer in determining whether he will underwrite the policy at all and if so; on

what terms.⁹⁵¹

(2) The mere fact that the insurer states he would personally believe it to be material does not render it material.

(3) The assured needs to disclose any physical hazards material to the risk insured such as:

- (a) special or unusual facts relating to the risk,
- (b) any particular concerns which led the insured to seek insurance cover for the risk,
- (c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.

(1) A material representation is substantially correct if a prudent insurer would not consider the difference between what is represented and what is actually correct to be material.

(2) A representation may be withdrawn or corrected before the contract of insurance is concluded.

5. REMEDIES FOR A BREACH OF THE DUTY OF FAIR PRESENTATION

For a material breach that is neither deliberate nor reckless (non-fraudulent):

If, in the absence of the material breach, the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims but must in that event return the premiums paid.

⁹⁵¹ Marshall on Insurance (3rd ed, 1823) vol 1, [465]; Lord Mustill in *Pan Atlantic*; IA 2015

If the insurer would have entered into the contract but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.

(1) In addition; if the insurer would have entered into the contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim.

(2) In sub-paragraph (1), “reduce proportionately” means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract

Where variations to the contract existed:

Deliberate or reckless breaches

If a material breach was deliberate or reckless, the insurer—

- (a) may by notice to the insured treat the contract as having been terminated with effect from the time when the variation was made, and
- (b) need not return any of the premiums paid.

Non-deliberate or reckless breaches (1) This paragraph applies if—

- (a) a qualifying breach was neither deliberate nor reckless, and

(b) the total premium was reduced as a result of the variation.

(2) If, in the absence of the qualifying breach, the insurer would not have agreed to the variation on any terms, the insurer may treat the contract as if the variation was never made.

(3) If sub-paragraph (2) does not apply—

(a) if the insurer would have agreed to the variation on different terms (other than terms relating to the premium), the variation is to be treated as if it had been entered into on those different terms if the insurer so requires, and

(b) paragraph 11 also applies if the insurer would have increased the premium, would not have reduced the premium, or would have reduced it by less than it did.

Proportionate reduction

(1) If this paragraph applies, the insurer may reduce proportionately. the amount to be paid on a claim arising out of events after the variation.

(2) In sub-paragraph (1), “reduce proportionately” means that the insurer need pay on the claim only Y% of what it would otherwise have been under an obligation to pay under the terms of the contract (whether on the original terms, or as varied, or under the different terms provided for by virtue of paragraph 9(3)(a) or 10(3)(a)

6. RULES RELATING TO THE LIABILITY OF THE INSURER

(1) Waiver of Information

When the answers which the proposer gives are inconsistent or unsatisfactory, and no further inquiries are made by the insurer, the insurer cannot repudiate liability on the

ground that there has not been a fair presentation, for it will amount to a waiver by omission.

Conclusion

The UK common law was an essential component of the development of Cypriot insurance law that now forms the source of the law. The nature of Cypriot marine insurance law indicates that the English common law was set in stone for Cyprus' marine insurance and raises questions as to whether it is irreversible or not. In the Cypriot marine insurance law legal chaos prevailed. The thesis has looked at the Cypriot common law in insurance law and established the tendency of Cypriot Courts to follow English rules and textbooks in not only defining concepts but also in deciding cases. Even though the cases follow English common law it has been noticed that the Cypriot Judges might divert from English decisions and come to a totally different conclusion, creating instability and uncertainty of the law. This thesis has attempted to go a step beyond, to introduce a first draft to be potentially considered for reforming Cyprus' marine insurance in order to break the cycle of following English precedents that are too old and even left behind by English laws.

By looking at the few available insurance cases the study exposed the gap in marine insurance law that the courts have attempted to fill with the use of English rules and cases that have now become the source and basis of the Cypriot law. Decades after the development of the Cypriot marine insurance the law has stagnated, and the Cypriot Courts have been applying the same untested theories with insufficient discussions or criticisms of the topic.

In an attempt to address these issues this thesis has examined the English law under the

MIA 1906 that forms the foundation of the Cypriot common law. By doing so the thesis was able to demonstrate the issues with the rules governing warranties and duty of disclosure and misrepresentation that the Cypriot law is based on. Consequently, it was shown that Cypriot Courts are following rules that were described as problematic and particularly controversial by the English law. By looking at different English cases that tested and applied these rules, it was possible to show and conclude that the provisions were indeed problematic. This notion was supported by a number of academics, legislators and court judgments. The thesis then looked at the English response to this problem and therefore considered the reform undertaken by the UK under the IA 2015 in order to assess whether Cyprus should follow the English IA 2015 in reforming warranties and fair presentation for marine insurance. In answering this question, the thesis looked at the consequences of such reform for Cyprus' law by applying the new rules on different cases and determining whether they would bring the elusive and fair balance of party interests.

This thesis then examined the Australian example and its proposed Bill for reforming the MIA 1909, departing from the English laws as an alternative route to reform. Taking a comparative approach to Australia and looking at the different approach taken and the reasons behind it while examining how the rules suggested by the Australian Law Commission would apply on pre-existing Cypriot cases, it was possible to show whether or which of the provisions suggested by Australia are a better fit for Cyprus. The proposed draft for Cyprus consists of a combination of the English laws (both MIA 1906 and IA 2015) and the Australian laws (ALRC Report and ICA) with a few provisions taken from Cypriot common law. The suggested CMIA aims to deal with the inconsistencies that

emerge from the current application of the insurance rules in Cypriot law that can only be dealt with through a legal development based on legislation.

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