



FACULTY OF LAW
Lund University

Karl Ewald

Express Warranties in
Marine Insurance: A
Comparative Study of
English and Norwegian Law

Master's thesis
30 credits

Supervisor: Abhinayan Basu Bal

Master's Programme in Maritime Law

10th Semester

Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	4
INTRODUCTION	5
1.1. Background	5
1.2. Purpose of the Thesis	6
1.3. Delimitations	8
1.4. Method and Materials	9
1.5. Disposition	10
2. THE ENGLISH LEGAL SYSTEM	11
2.2. The Law of Contract	11
2.2.1. <i>Conditions and Warranties</i>	12
2.2.2. <i>Intermediate Terms</i>	12
2.2.3. <i>Construction and Interpretation</i>	13
2.3. Marine Insurance Law	16
2.3.1. <i>Classification of Terms and Repudiatory Breach</i>	16
2.3.2. <i>Interpretation and Construction of Marine Insurance Contracts</i>	20
2.4. Promissory Warranties	21
2.4.1 <i>Historical Development of Warranties</i>	22
2.4.2. <i>The Definition of Warranties</i>	24
2.4.3. <i>Formal and Contractual Requirements of Warranties</i>	25
2.4.4. <i>Materiality</i>	27
2.4.5. <i>Exact Compliance</i>	28
2.4.6. <i>Breach</i>	31
2.4.7. <i>Causation</i>	33
2.4.8. <i>Waiver</i>	34
2.5. Types of Express Warranties	36
2.5.1. <i>Nationality</i>	36
2.5.2. <i>Navigation Restrictions</i>	36
2.5.3. <i>Survey Warranties</i>	37
2.6. Clauses Similar to Warranties	38
2.7. Construction and Interpretation of Warranties	40

3. COMPARATIVE STUDY: NORWEGIAN LAW	44
3.1. The Norwegian Legal System in General	44
3.2. The Norwegian Law of Contract	44
3.3. The Norwegian Law of Marine Insurance	45
3.3.1. <i>Alteration of Risk</i>	48
3.4. Comparative Analysis Between Norwegian and English Law	55
4. ANALYSIS OF WARRANTIES AND A SUGGESTION FOR REFORM	61
4.1. Grounds For Reform	62
4.2. Possible Approaches to Reform	66
4.3. Suggestions for Reform	67
5. CONCLUSION	70
BIBLIOGRAPHY	73
Books	73
Articles	74
Documents and Official Publications	74
Electronic Resources	75
TABLE OF STATUTES	76
Australia	76
England	76
Norway	76
TABLE OF CASES	77
Australia	77
Canada	77
Norway	77
United Kingdom of Great Britain and Northern Ireland	78
United States of America	83

Summary

In the context of English marine insurance law, a warranty is a contractual obligation of the assured to perform a certain duty or to ascertain or to negate a certain state of facts. The Marine Insurance Act of 1906 (MIA) further establishes that a warranty must be exactly complied with and does not need to be material to the risk. Where the assured fails to fulfil the warranty, the insurer will be discharged from any liability under the contract from the date of the breach. The implications of this system can be described as draconian to the assured, as he has no available defences and cannot have the claim for breach dismissed on the grounds that he has subsequently complied with the warranty. Two types of warranties can be said to exist: Express and implied. The second type is part of every contract of marine insurance as per MIA sect. 39-41, obligating, among other things, the assured to provide a seaworthy vessel. Express warranties, by contrast, are subject to the freedom of contract and can hence lay any obligation upon the assured, regardless of how remote to the risk it may be. The second type is therefore of particular interest. The main purpose of this thesis is to investigate the law relating to express warranties and to determine the reasons for why it was created and why it has been retained.

In order to achieve this purpose the author will use legal dogmatic method to analyse statutes and case law in order to determine; 1) the historical reasons behind the regime of warranties, 2) how the courts apply it in the modern day, 3) discuss and conclude whether it achieves whatever purpose it is determined to have.

To further deepen the understanding of the express warranty a comparative study will be performed. The Norwegian system has a very different and remarkable approach compared to the regime of warranties and is therefore chosen as the object of this study. The system, with particular focus on the

Norwegian Marine Insurance Plans, will be described and its relevant parts will be compared to the English.

In the final chapter the author will use the findings of the research of the English system of warranties and of the comparative study to determine whether the system of warranties is effective in respect to its purpose and whether it contributes to the upholding of a good balance between assured and underwriter.

Preface

It was during a class on marine insurance held by a guest lecturer from the University of Swansea, the honoured Professor Rhidian Thomas, that I first stumbled upon the topic of express warranties. While the idea intrigued me from the very start, it was only later when I decided to start researching the topic I started realizing its potential for a master's thesis.

During the work on this thesis I have received invaluable support and advice from my supervisor, Abhinayan Basu Bal, Lecturer at the Lund University. My deepest gratitude to him.

My mentor, Jonas Sandberg, who has supported me from the very beginning of my master's programme in maritime law, has provided massive amounts of encouragement in moments of doubt and has never failed to change my perspective for the better. Many thanks to him.

Further I would like to thank my girlfriend, family and my friends for never letting me down and being there for me when I needed you the most.

Karl Ewald

Lund, May 2012

Abbreviations

CMI	Comité Maritime International
ICA	Insurance Contracts Act, 1989, of Norway
ITCH	Institute Time Clauses (Hulls), 1995
MIA	Marine Insurance Act of 1906 of the UK
NCA	Norwegian Act Relating to Conclusion of Agreements (NCA), 1918
ND	Nordiske Domme I Sjøfartsanliggender (i.e. Norwegian law reports on Scandinavian Maritime Law Decisions)
NMIP	Norwegian Marine Insurance Plans
UNCTAD	United Nations Conference on Trade and Development

Introduction

1.1. Background

In marine insurance, a promissory warranty¹ is a fundamental duty of the assured, which he must perform to be able to enjoy the protection of the insurance contract. One purpose of such warranties is to ensure that the risk insured is not increased during the insurance period. This might explain the fact that the insurer will be discharged from liability under the insurance contract in case of even minor breach. Warranties can both be implied, an example being the ever-present warranty of seaworthiness, and expressly stated in the insurance contract. Express warranties may be considered to be unfair to the assured, since the policy is subject to the freedom of contract and such warranties may in theory concern any obligation of the assured. In fact, a warranty does not even need to be material to the risk, which is expressly provided in the Marine Insurance Act, 1906. This is especially controversial considering the fact that the assured must exactly comply with the warranty, and breach results in the loss of insurance cover, regardless of fault on part of the assured. It has even been held that the assured must comply with any obligation imposed by a warranty, even if it seems to give absurd effects.²

Further, the rule of warranties does not require for a causal link to be shown between the breach and the loss for the insurer to be discharged from

¹ In English contract law, the term “warranty” signifies a contractual stipulation, which when breached gives rise only to a claim for damages, but not for termination of contract, whereas “condition” signifies a stipulation which can give rise to the right of discharge from liability imposed by the contract (Sale of Goods Act 1979). Confusingly, in English Insurance Law the terminology is the opposite; a “warranty”, if breached, gives the insurer the right to be discharged from his liability under the contract, whereas “condition” can only give rise to a claim for damages (Marine Insurance Act 1906). To avoid confusion the former is sometimes referred to as “promissory warranty”. In this thesis the term “warranty” and “promissory warranty” will be used interchangeably to refer to the same type of term unless expressly stated otherwise. For further reading on general contract law warranties, the author would like to refer to Beatson, J., *Anson’s Law of Contract*, 28th ed. 2002, pp. 134-136.

² As per Lord Justice Bankes in *Farr v Motor Traders Mutual Insurance Society* [1920] 3 KB 669, para. 673, CA.

liability. Where a warranty is breached, it is irremediably breached and where the assured claims for a loss, which was not even remotely caused by the breach, the insurer will still not be liable to indemnify him. The regime of warranties therefore often comes across as surprisingly stringent in comparison to similar rules in other jurisdictions. It is important to notice, however, that warranties are only part of the whole machinery of marine insurance law. They are meant to create a transparent, solid basis, which the parties to the contract can use to negotiate their own terms. Unfair practice between insurer and assured cannot be said to be a consequence of the legal framework. In fact, parties will often agree to far less harsh contractual rules to mitigate the regime of warranties. To take an example, the insurer may often insert so-called held covered clauses, under which the effect of breach is continued coverage, but often under different conditions than before.

Despite the fact that warranties do not need to be material to the risk, warranties are very important to its definition, as the insurer will use warranties to establish and delimit what risk he has agreed to provide cover. The promissory warranty is therefore crucial to the delicate balance of interest between underwriter and assured. For this reason the law will place strong restrictions on its construction and interpretation.

1.2. Purpose of the Thesis

This thesis aims to examine the use of express warranties closer through legal analysis of relevant UK law and comparative analysis as well as exploration of business practice within marine insurance. The law of warranties is created by English courts and legislators and a large portion of the purpose is therefore to investigate and to evaluate and discuss the English legal system. For the purpose of perspective and for providing an additional basis for understanding and discussing promissory warranties, the thesis will then investigate the Norwegian system, which the author has chosen based on the growing importance of the Norwegian insurance market

globally as well as the prominence of its approach, which is quite different from the English one. It may initially be stated that the English legislation is largely based on old legal tradition established by the courts in the 18th century, while the Norwegian one is based on a special cooperation between the interested parties in marine insurance, such as insurers, assureds and brokers. Two such fundamentally different approaches will of course result in very different systems, but it can also be said that even the considerations regarding the underlying principles, such as the strength balance between insurer and assured, enacted through statute and litigation, have been very different and remains so today. The differences and similarities found between the UK and Norwegian systems will then be analysed and be subject to an attempt to explain the results of the comparison. This comparative analysis will provide additional basis for the analysis of the system of warranties in ch. 5 of this thesis.

The main questions may be summarized as:

- What is a promissory warranty in the context of the English law on marine insurance?
- Can the system of promissory warranties be said to effectively achieve its purpose and goal?
- Does the promissory warranty contribute to a fair balancing of interest between the parties of a contract of marine insurance?

To answer these questions the thesis will examine and discuss:

- The English law of contract as well as of marine insurance;
- The English law of marine insurance especially as it pertains to promissory warranties;
- The doctrine of promissory warranties with its various implications and potential problems;
- The corresponding aspects of the Norwegian legal system;
- The differences between these two distinct systems.

The hypothesis comes from the author's initial understanding of warranties, which is that it is a harsh term, primarily inserted into the contract by insurers who will take any chance to escape liability. This understanding will likely be changed during the research of this thesis, as the situation is likely much more nuanced. In other words the author hypothesises that he will come to the conclusion that the doctrine of warranties should be changed, for example through legislative measures.

In the analysis of this thesis the findings of chapter 2 and 3 will be analysed and used to determine the answers to the questions stated in this introduction. The author will also make suggestions for solutions for perceived problems.

1.3. Delimitations

This thesis will focus on express warranties and only briefly consider implied warranties. The reason is none other than the author's personal interest in the subject and the special problematic connected to express warranties.

With respect to comparative studies, they run the potential risk of becoming too shallow and fragmented, since a national legal system may only be properly understood in its full context, taking into account its every statute and principle. For this reason the author has made the decision to only compare two distinct jurisdictions; Norway and the UK. Still, it may be asked how the exclusion of the American system from the study can be justified, considering its importance on the global insurance market. Ever since the classic *Wilburn Boat*³ decision, there exist no single legal position on marine insurance warranties in the USA, since that case made clear that the question is to be resolved through State law. This gives rise to a very

³ *Wilburn Boat Co v Fireman's Fund Insurance Co* [1953] AMC 284, reversed [1955] AMC 467.

high level of inconsistency, potentially creating 50 different regimes on warranties. For this reason a comparative study becomes both very difficult to perform, and would also not produce satisfactory results. To generalise the whole American system and compare it to the English one would probably only result in confusion and not achieve the purpose of this thesis.

1.4. Method and Materials

This thesis uses legal dogmatic method to describe and evaluate the questions at hand. The descriptive parts uses case law, mainly of the UK, together with the opinions of distinguished legal authors as found in the books and journals stated in the bibliography, in order to describe the different aspects of the legal systems. The author has also frequently used established electronic legal databases, such as Westlaw, to find articles and case law synopsis.

When it comes to comparisons between the two national legal systems a comparative legal method will be used.⁴ It is arguable whether a single methodology for such comparisons does in fact exist, but in this thesis the following three steps are used:

- 1. Description of the legal systems, both from written law sources as well as case law and possible “soft law” sources;
- 2. Evaluation of the legal systems, especially considering their backgrounds and political considerations;
- 3. Comparison of the legal systems with the purpose of deepening the understanding and evaluation of the English legal system.

⁴ Bogdan, Michael, *Komparativ Rättskunskap*, 1993.

The author wishes to emphasize that the purpose of the comparison is to provide perspective on the English law on warranties in marine insurance. The comparison will therefore be a micro-comparison, of limited areas of the law of the two countries. Despite this, even limited areas of law must be analysed from its background and legal context. Therefore the contract law of both countries will be briefly described, but not materially compared.⁵ A discussion on conflict of law will not be pursued in this thesis.

1.5. Disposition

Following this introduction, Chapter two will describe the English legal system. The author will first briefly investigate the historical background of promissory warranties in contract of marine insurance. After this, the English law of contract will be described, first by explaining some basic contractual concepts and principles of contract interpretation and construction. Then, the English law on marine insurance will be described, particularly when it comes to insurance contracts. The last sub-chapter will then describe various considerations that are relevant to promissory warranties.

Chapter three is foremost a comparative study. The first part describes the Norwegian system seen through the lens of a study of the English legal system, meaning, for example, that some English legal terms may be used to draw parallels between the two systems, as well as describing aspects of Norwegian marine insurance law as it differs from English. A brief analysis of the differences and potential similarities between the two systems will then take place.

Chapter four and five, respectively, are the analytical and conclusive parts of this thesis, both based on the descriptive parts of chapter two and three.

⁵ While Norway does not have a law especially for written contracts, the UK Law of Contract is equivalent to what in Norway and other Scandinavian countries is referred to as the Law of Agreements.

2. The English Legal System

In this descriptive chapter we will lay the foundation for a discussion on express warranties by describing how the English legal system regulates the use of warranties. We will consider its historical background, as this is necessary to understand how and why warranties came to be such an important feature in contracts of marine insurance. A contract of marine insurance is subject to general rules and principles of law of contract as well as the law of insurance, and in more detail the law of marine insurance.⁶ This means that legislation, case law and principles relating to general contract law, general insurance law and to marine insurance law are relevant to the issue at hand and will all be addressed.

Thus, the English law of contract will be explained, especially focusing on the construction and interpretation of contractual terms. While general insurance law will not be separately dealt with, it will be referred to where it is relevant. Relevant legal rules of marine insurance will then be addressed. After these important foundations have been established we will examine the express warranty in the English law of marine insurance.

2.2. The Law of Contract

The Law of Contract is the creation of the UK courts. Even where statutes exist, those are practically codified case law. It is therefore crucial to analyse and to understand the reasoning of the courts. This is true in particular when it comes to contract construction and interpretation, as no statute provides guidance in that area.

⁶ Rose, F.D., *Marine Insurance: Law and Practice*, 2004, p. 161.

The terms to a contract are divided into conditions, warranties⁷ and intermediate terms, of which only the first can give rise to the right for the injured party to avoid the contract. Even though a contract of marine insurance has its own definitions, some of these are fundamental to the understanding of the use of promissory warranties and will therefore now be explained.⁸

2.2.1. Conditions and Warranties

A condition is a term, which is fundamental to the contract to the level that the first party must fulfil it for other liabilities and duties under the contract arise.⁹ In other words the condition is precedent to the performance of the contract, therefore often called a condition precedent. If the condition is breached, the other party is no longer liable under the contract and may also sue the injuring party for potential damages. Therefore breach of a condition is often called a *repudiatory* breach and the condition may also be called a *promissory* condition. A warranty, on the other hand, can only give rise to a claim for damages.¹⁰ A term is therefore classified as a warranty where the parties have regarded it as subsidiary or collateral and not a precedent to the performance of the contract.

2.2.2. Intermediate Terms

An intermediate, or innominate, term may be defined as a special type of term, which is not a condition and not a warranty.¹¹ While this has been called a modern solution, intermediate terms in fact has very old roots and has been used in later cases where a term is not easily classified as a

⁷ In this and for the remainder of ch. 2.2., the word "warranty" signifies warranties in its general contract law definition.

⁸ Beatson, *op cit.*, p. 136.

⁹ *Ibid.*

¹⁰ *Ibid.*, p. 138.

¹¹ *Ibid.*, p. 135.

condition nor a warranty.¹² The effect of breach of an intermediate term is not clearly defined but will depend on the severity of the breach. Such a term may therefore be construed where the court cannot easily categorize a clause as neither a condition nor a warranty. It has been argued that to classify a term as either giving rise to a claim for damages or for the right of termination provides more clarity of application.¹³ However, the actual prejudice suffered by the innocent party is not always easily defined, and it would in some cases be fairer to give the disputed term more fluid effects of breach.

2.2.3. Construction and Interpretation

When a dispute of contract arises, the court will always look at the contract to determine exactly which obligations it imposes and what the consequences for potential breach should be. To determine this, the courts will use interpretation, which is the determination of the semantic content of a clause, and construction, i.e. the translation of this content into legal rules. In other words the construction is made to determine whether and in what way the clause is legally enforceable and the interpretation discerns exactly what the clause stipulates. The point of this process is to discern the mutual intention of the parties to the contract, by, so to speak, stand in the same shoes as the parties did at the contractual discussion, drafting and subsequent entering.¹⁴ The courts have no statutes to heed when performing this task, but rather principles enacted through case law. These are not rules in the formal sense, but rather a structured thought process aimed at helping the court to divine the intention of the parties.

¹² *Freeman v Taylor* (1831) 8 Bing. 124; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26, [1961] EWCA Civ 7, [1962] 1 All ER 474.

¹³ *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 Q.B. 164.

¹⁴ Beatson, *op. cit.*, p. 160.

The first rule is that words are to be understood in their “strict, plain and normal meaning”, being the way the word is usually understood.¹⁵ This first step is not always possible to perform, either because the parties have failed to make clear stipulations, or because of inherent equivocality of the language in itself. In such cases the court will use additional available information to discern the meaning of individual words, terms or the whole contract. Such *extrinsic* evidence could be other terms within the same contract, preliminaries to the contract or evidence of special understanding of a word in the industry or context within which the contract was concluded.¹⁶ First and foremost, however, the intention will be ascertained from the contract document. Behaviour of the parties subsequent to the concluding of the contract may not be used as support for a particular interpretation.¹⁷ The courts will favour a commercially sensible solution, rather than bringing a poorly worded contract to absurd results for the parties.¹⁸

The courts will pay close attention to the wording of a clause as well as of the rest of the contract to discern its intended meaning. For example, if the clause contains the words “precedent to liability”, it is likely that the parties intended for the clause to have this effect. However, if the phrasing is used indiscriminately for various clauses of different meaning this could actually speak against the clause being a condition precedent. The opposite is also true.¹⁹

A court will always attempt to construct a commercial contract to have a meaning, rather than having none at all. If a literal construing of the contract means that the contract is void, it can be said that this cannot have been the

¹⁵ As per Sir George Jessel MR in *Shore v Wilson* (1842), 9 Cl. & F. 355 1842; *Robertson v French* (1803) 4 East 130.

¹⁶ *Ibid*, pp. 132-134.

¹⁷ *Schuler AG v Wickman Machine Tool Sales Ltd.* [1974] A.C. 235.

¹⁸ Beatson, *op. cit.*, p. 161.

¹⁹ *George Hunt Cranes Ltd v Scottish Boiler and General Insurance Co. Ltd* [2001] EWCA Civ 1964; [2002] Lloyd's Rep IR 178.

intention of the parties, because then they would not have entered into the contract.²⁰

There is a tendency to construe an ambiguous term to the disadvantage of the party who imposed its inclusion in the contract: The *Contra Proferentem* rule.²¹ To take an example from marine insurance, consider the hypothetical situation where an underwriter has inserted a warranty into the policy and then seeks to rely on it for being discharged from liability. In case that the clause has an unclear meaning and may be construed either narrowly or broadly, the construing will be narrow in favour of the assured.²² Such was the case in *Kirkaldy & Sons Ltd v Walker*²³ in which the insurer insisted on the inclusion of a warranty for a condition survey at the establishing of the contract. The court held that “condition survey” was not a term of art, meaning it had no defined, accepted meaning outside of the contract. It was therefore said that the fact that this ambiguous wording had still been used should be resolved against the insurer. It should be emphasized, however, that for this rule to apply true ambiguity must be at hand, not only difficulty of interpretation.²⁴

The *Contra Proferentem* rule can be described as an attempt to protect the weaker party, as the party who drafts the contract is often the stronger, but is also to create an incentive to draft clearer contracts. Where a term is crucial to the contract, the insurer has all reason to insist that the term is included as a condition, for example by inserting the very words “condition”, and if he does not do so, this may in itself indicate that the term should not be understood as such.²⁵ However, the wording is not final and the matter is

²⁰ *WN Hillas & Co Ltd v Arcon Ltd* (1932) 43 Ll. L. Rep. 359 (1932) 147 L.T. 503 1932.

²¹ Short for *verba chartarum fortius accipiuntur contra proferentem*: “The words of deeds are to be interpreted most strongly against him who uses them”. This rule was used in, for example, *Dawsons v Bonnin* [1922] 2 AC 413. For further on this rule reading the author would like to refer to Beatson, *op. cit.*, p. 170.

²² Bennett, Howard, *The Law of Marine Insurance*, 2nd ed., 2006, p. 285; *Lawrence v Aberdeen* (1821) 5 B & Ald 107.

²³ [1999] C.L.C. 722. See also *Provincial Insurance v Morgan* [1933] AC 240.

²⁴ *Higgins v Dawson* [1902] AC 1.

²⁵ *Toomey v Banco Vitalicio de Espana sa de Seguros y Reaseguros* [2003] EWHC 1102 (Comm); [2004] Lloyd's Rep IR 354; [2004] EWCA Civ 622; [2005] Lloyd's Rep IR 423

ultimately one of construction in order to determine the mutual intention, not blindly following the text of the contract.

2.3. Marine Insurance Law

The most important statutory instrument for the regulation of marine insurance contracts is the Marine Insurance Act, 1906 (MIA).²⁶ It may be said, however, that in general the Act will give way to the agreement of the parties.²⁷ The insurance contract is not bound to a particular form, but may be decided between the parties. In order to achieve the force of law, however, the contract must be embodied in a policy, which complies with the rules stated in MIA.²⁸

2.3.1. Classification of Terms and Repudiatory Breach

In a contract of marine insurance the usual rules of classification of terms do not apply. Instead the terms used are traditionally terms defining the risk, exclusions from risk, warranties, conditions precedent and normal conditions.²⁹

Conditions that are fundamental to the contract may be divided into three main categories: 1) Conditions precedent to liability, 2) conditions precedent to the attachment of risk and 3) conditions subsequent. Common for all three is that the result of breach is always a *repudiatory* breach, meaning that the insurer loses the whole benefit of the contract and is therefore entitled to avoid his liability towards the assured. Where the

²⁶ All reference to this Act is made directly from the electronic legal database www.legislation.gov.uk, managed by The National Archives on behalf of Her Majesty's Government.

²⁷ MIA Sect. 87.

²⁸ MIA Sect. 22.

²⁹ Thomas, Rhidian, *The Modern Law of Marine Insurance*, 1996, p. 22.

insurer is blatantly prejudiced by the breach, it is possible to sue for damages as well.³⁰

A condition precedent to liability (1) refers to matters arising after an incident and defines the circumstances under which liability can come into question. Where the condition precedent is breached, the liability will never arise in case of breach. It is not likely, however, that a court will allow breach of a condition precedent to discharge the insurer from liabilities established *before* the breach.³¹ This follows the logic that where a condition has been complied with up until the date of the breach, it would be unfair for the assured to completely lose his cover. An example of a condition precedent to liability could be the duty of the assured to, without undue delay, give notice of an incident.³² If he fails to do so, the liability of the insurer will not be established. Because of such harsh effects, the courts have generally been reluctant to construe a clause as a condition precedent to liability.³³ The test will be whether the insurer loses the whole benefit of the contract through the breach.³⁴

The second type, conditions precedent to the attachment of risk, (2) is fundamental to the level that breach will result in termination of the contract. A typical example is the payment of the premium, which, if not fulfilled at all, will result in the insurer being completely relieved of liability both before and after the breach, as if the risk never attached. Even here the courts will be reluctant to construe the clause as such. This is not always true, however; in *Zeus Tradition Marine Ltd v Bell (The Zeus V)*³⁵ a clause reading: “Subject to survey including valuation by independent qualified surveyor prior to commencement of in commission period” was inserted

³⁰ Beatson, *op cit.*, p. 136.

³¹ *Kazakstan Wool Processors (Europe) Ltd v Nederlandsche Credietverzekering Maatschappij NV* [2000] Lloyd's Rep IR 371. In this case the court interpreted the “termination of all liabilities” not as discharge of all *existing*, or established, liabilities, but not of liabilities arising subsequent to the breach.

³² ITCH 1995, Clause 13.1.

³³ *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] Lloyd's Rep 437 (CA).

³⁴ *Svenska Handelsbanken v Sun Alliance and London Insurance plc* [1996] 1 Lloyd's Rep 519.

³⁵ [2000] 2 Lloyd's Rep 587.

into the contract under the heading “conditions”. The court considered the literal meaning of the words to find the intended effect of the clause, which must have been to ascertain through a survey that the risk described in the contract was the actual risk. Since the risk is a fundament of the contract, a clause whose performance is crucial to its definition should be a condition precedent to the attachment of risk. Another interpretation would have rendered the clause meaningless. It was also held that witnesses indicated that the “market understanding” of the clause would be that it should have this effect. This case shows that despite being generally reluctant to do so, courts may construe a clause as a condition precedent even where this does not follow from the literal reading of the contract.³⁶

Third we have conditions, which refer to behaviour of the assured subsequent to the concluding of the contract. Such terms, here referred to as conditions subsequent (3), could relate to circumstances that increases the risk, or for the assured to give notice of an incident.³⁷ An example would be the change of class of an insured vessel.³⁸ It is common that the exact consequences of breach are expressed within the clause itself, but in the absence of such express provisions the court will need to establish whether the condition is fundamental or minor. The test is, once again, whether the injured party has been deprived of the whole benefit of the contract through the breach. If this question is answered in the positive, the result is that the insurer may avoid the contract, as the breach is repudiatory.

In *The Hong Kong Fir*,³⁹ the court returned to the older classification of intermediate, or innominate terms, as it was established that the disputed clause, which stipulated a duty for the assured to notify the insurer of an incident, could not be said to be of fundamental *or* minor importance to the contract. The term had no clearly established consequences for breach, but it

³⁶ See also *George Hunt Cranes Ltd v Scottish Boiler and General Insurance Co. Ltd* [2001] EWCA Civ 1964; [2002] Lloyd's Rep IR 178.

³⁷ Soyer, Bariş, *Warranties in Marine Insurance*, 2001, pp. 44-46.

³⁸ See for example ITCH 1995, Clause 5.1.

³⁹ *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26, [1961] EWCA Civ 7, [1962] 1 All ER 474.

was held that if the breach seriously prejudices the insurer, he may be entitled to avoid liability. This may be described as a last resort in a situation where the insurer is evidently prejudiced, but the clause cannot give rise to neither discharge of liability nor a claim for damages by using the normal classification of terms for its construction. In *The Mercandian Continent*⁴⁰ a notification clause to keep the insurance company “fully advised” in the event of an occurrence, which might result in a claim was discussed. It was held that the clause could not be said to be a condition precedent, nor was it a warranty, but rather an innominate term. The court held that the consequences for the insurer who was not notified in due time was not severe enough to say that he had been seriously prejudiced. From these cases it can be deduced that notification clauses are often construed as innominate terms.

Sometimes courts find innovative use of old law. In *Alfred McAlpine plc v BAI (Run-Off) Ltd*⁴¹ the court held that a clause, regarding immediate notification of an incident, was not a condition precedent, as the wording of the clause did not expressly state so and it was not shown that the insurer lost the whole benefit of the contract through the breach, and it was thus not repudiatory. The mere fact that the late notification brought him troubles with the investigation of the incident was not enough. Further, another clause of the contract was expressly marked “condition precedent”, implying that the disputed clause was not. Instead, the court held that the insurer might have received the right to reject a claim arising from the incident that should have been notified of. This right must have stemmed from serious prejudice on part of the insurer. This solution of the court may be termed *severable* innominate terms, as it severs the contract into smaller parts, making the condition only apply to the claims arising from the incident for which the assured has not notified.⁴² However, in *Friends*

⁴⁰ *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep 563.

⁴¹ [2000] 1 Lloyd's Rep 437.

⁴² Bennett, *op. cit.*, p. 690.

*Provident Life & Pensions Ltd v Sirius International Insurance*⁴³ the court rejected that such severable innominate terms existed in law. The reasons for this were first of all that, in principle, the main business transaction is indivisible and may not be severed unless very special reasons can be said to exist. In the *McAlpine* case there was no express wording, which stated that the condition was severable, revealing that it was probably not the intent of the parties that it should have been. It was also held that a more proper solution would be for the insurer to claim for damages awarded for breach, which could in most cases be set off against the indemnification. It was held that those few cases where this was not a possibility, were not reason enough to introduce a new legal concept to the law of marine insurance contracts. It is therefore doubtful whether severable innominate terms can be said to exist today. This only applies to the construction made by court however, and it is still possible for the parties to conclude a contract on such terms.

2.3.2. Interpretation and Construction of Marine Insurance Contracts

When it comes to interpretation and construction, it can be said that despite the fact that a contract of insurance is quite different in nature from other business contracts, there are no statutory rules especially regulating the interpretation and construction of insurance contracts.

It is a general rule of interpretation that words are to be understood in their plain, normal meaning. This does not mean, however, that the courts will use a dictionary to ascertain the meaning of particular words. Words can have a special meaning within its context, in our case marine insurance. Further words can have a special meaning in a certain insurance market, for example the market of London. As far as the contextual interpretation of the word provides foreseeable and reasonable results, the courts will therefore

⁴³ [2005] EWCA Civ 601, [2005] 2 All ER (Comm) 145.

in most cases interpret certain words as practitioners within the same market understand them.⁴⁴

2.4. Promissory Warranties

The promissory warranty is a special concept of English marine insurance law that lacks equivalent in most other jurisdictions. To define it we must both look at statutes as well as historical and modern case law. If we identify the salient features of warranties, they are as follows:

- A warranty can cover any circumstance and does not need to be material to the risk,⁴⁵
- A warranty must be exactly complied with,⁴⁶
- The effect of breach is discharge of liability for the insurer,
- Breach can not be subsequently cured and the assured has no defence to the effects of a breach of warranty,⁴⁷
- A causal link between the breach and the loss claimed for needs not be shown and,
- The insurer can waive the breach.⁴⁸

Each of these will be dealt with separately. A few standard types of warranties will also be examined, as well as other types of terms, which are often confused with warranties. The construction of warranties is a very important matter, which will also be dealt with. We begin, however, with the historical development of warranties.

⁴⁴ Bennett, *op. cit.*, p. 268. It may be added, however, that some practice which is exclusive to Lloyd's market (and not to the London market as a whole) has been declared not to be binding by the court, as the assured cannot always be expected to fully understand every custom of the Lloyd's market before he enters into a contract. See *Gabay v Lloyd* (1825) 3 B & C 793.

⁴⁵ MIA sect. 33(3).

⁴⁶ *Ibid.*

⁴⁷ MIA sect. 34(2).

⁴⁸ MIA sect. 34(3).

2.4.1 Historical Development of Warranties

A contract of marine insurance may serve different purposes, but one of the most important is to define the risk and bind the assured to maintain it. More crucial circumstances, such as the physical nature of the thing insured and the risk that comes with it, will therefore be protected by a contractual term. Without a definition of risk, there can be no insurance, and therefore it may be said that such terms have been in use for as long as contracts of marine insurance has existed and it may be impossible to trace their exact origins.

Nevertheless, *express promissory warranties* is a special type of contractual term used for marine insurance contracts in common law countries, which can be traced back to old English case law. A promissory warranty stipulates a duty for assured which is so crucial to the performance of the contract, that without its fulfilment, the insurer is no longer liable. Such warranties have concerned matters such as the manning of the vessel,⁴⁹ the time of the vessel leaving port,⁵⁰ the course of the voyage⁵¹ or a requirement to sail in convoy⁵².

The principles of promissory warranties have since long been established by the English courts. For example, the doctrine of strict compliance may be traced back to the 18th century, in cases such as *Bond v Nutt*⁵³ in which it was held that even minor breach is sufficient to discharge the insurer from liability, and also that no causal link is required between the breach and the loss claimed for.⁵⁴ The principle that the warranty needs not be material to the risk was also early established.⁵⁵ Such case law is now incorporated into the MIA, making the principles part of every insurance contract under the jurisdiction of English courts.

⁴⁹ *Bean v Stupart* (1778) 1 Doug 11; *De Hahn v Hartley* (1786) 1 TR 343.

⁵⁰ *Sea Insurance v Blogg* [1898] 2 QB 398.

⁵¹ *Colledge v Harty* (1851) 6 Exch 205.

⁵² *Hibbert v Pigou* (1783) 3 Doug KB 224.

⁵³ (1777) 2 Cowp 601.

⁵⁴ See further *Hore v Whitmore* (1778) 2 Cowp 784; *Earle v Harris* (1780) 1 Doug KB 357.

⁵⁵ *Woolmer v Muilman* (1763) 1 Wm Bl 427; *Rich v Parker* (1798) 7 TR 705.

The doctrine has, while not always directly criticised, at least been perceived as having particularly harsh effects to the assured. The courts have therefore traditionally often interpreted and construed the obligations imposed by warranties narrowly in favour of the assured.⁵⁶ This will be further discussed below.

In contrast to the 18th- century court rulings which established the English regime, in other parts of Europe during the same time it was since long established that a causal link to the loss claimed for was required, otherwise the insurer could not be discharged by the breach. This can be seen in practice from the 12th and 13th century of hanseatic merchants in Italy.⁵⁷ The UK developed a distinct approach to the matter, however, and has upheld it to the present day.

A description of the historical background of warranties cannot be complete without the mention of Lord Mansfield, who became Chief Justice of the King's Bench in 1756. He established, to take an example, the duty of utmost good faith in *Carter v Boehm*⁵⁸ and held that materiality of breach to the loss was irrelevant when deciding on warranties in *Kenyon v Berthon*.⁵⁹ He also ruled the important *De Hahn v Hartley*⁶⁰ case, establishing and clarifying the doctrine of strict compliance mentioned above. Almost all the legal rules established by Lord Mansfield has found their way into the MIA 1906. The regime of promissory warranties is therefore heavily indebted to him.

⁵⁶ *Muller v Thompson* (1811) 2 Camp 610. A warranty that the vessel carried a specified type of cargo did not preclude the vessel from carrying other types of cargo.

⁵⁷ Soyer, *op. cit.*, p. 9.

⁵⁸ (1766) 3 Burr 1905, (1766) 97 ER 1162.

⁵⁹ (1779) 1 Dougl 12(n).

⁶⁰ (1786) 1 TR 343.

2.4.2. The Definition of Warranties

We begin by looking in the MIA, Sect. 33:

- (1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
- (2) A warranty may be express or implied.
- (3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

Several important points are found here. It can be deduced that the performance of the warranty in simple terms may be described as a *quid pro quo* duty that the assured must fulfil in exchange for the liability of indemnification on behalf of the insurer. This duty of the assured can be described as a duty to protect the risk insured against alteration.⁶¹ If the risk is increased, the factual situation do not correspond to the contract and the insurer should not be bound to indemnify another risk than the one he agreed to cover. It has even been said that the risk is the fundament of the contract, and where it is changed, there is no contract.⁶² The effect of breach is therefore *automatic* discharge from liability for the underwriter from the date of the breach, which was ascertained through *The Good Luck*.⁶³ Thus it

⁶¹ Hodges, Susan, *Law of Marine Insurance*, 1996, pp. 95-96; Rose, *op cit.*, p. 165.

⁶² As per Lord Mansfield in *De Hahn v Hartley* (1786) 1 TR 343.

⁶³ MIA Sect. 33(3). *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good luck)* [1992] 1 AC 233.

has been said that promissory warranties are conditions precedent to the liability of the insurer.⁶⁴

In the second part of Sect. 33 we find that a warranty may be express or implied. The express warranty is quite simply found on the face of the policy, but may also be incorporated by reference⁶⁵ or written in the margin of the policy.⁶⁶ Implied warranties are beyond the scope of this thesis, but a brief explanation is justified. Implied warranties are part of every contract of insurance, regardless of whether they are mentioned in the policy and regardless of whether the parties have otherwise agreed on its inclusion. The MIA mentions four types of implied warranties: 1) Warranty of seaworthiness, 2) warranty of portworthiness, 3) warranty of cargoworthiness and 4) warranty of legality.⁶⁷ These warranties aims to ensure that the vessel insured always is prepared for the perils of the sea in all aspects and that the operations performed are allowed under the law of the flag state and of other potentially applicable jurisdictions.⁶⁸

2.4.3. Formal and Contractual Requirements of Warranties

The MIA, Sect. 35, provides:

- (1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

⁶⁴ This use of terminology is somewhat confusing, as warranties do not entitle the insurer to avoid the policy completely. See Aikens, Sir Richard, *The Law Commissions' Proposed Reforms of the Law of "Warranties in Marine And Commercial Insurance: Will the Cure Be Better Than the Disease?"*, as found in ch. 6 of Soyer, Barış, *Marine Insurance Legislation*, 4th ed., 2010, p. 116.

⁶⁵ *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161.

⁶⁶ *Blackhurst v Cockell* (1789) 3 TR 360.

⁶⁷ MIA sect. 39(1-2), 40(2) and 41.

⁶⁸ P&I Insurance, which could indemnify a shipowner for claims arising from lack of seaworthiness, can of course not always have seaworthiness as an implied warranty to the contract. Please refer to Soyer, *op. cit.*, for further information and discussion.

- (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.

Here we find the formal requirements of the warranty, and we find that they are quite scarce. It is sufficient that the warranty is part of the contract in its true construction for the law to be satisfied. There is no particular wording required and hence a term can be classified as a warranty without containing the word “warranty” or “warranted”.⁶⁹ In *Sea Insurance Co v Blogg*⁷⁰ a clause, which required the assured to sail on a specific date, was construed as a warranty, despite the fact that the clause did not contain the word “warranted”. Thus it can be said that the term “express” warranty is somewhat misleading, as it seems to imply that the warranty must have a certain express wording, which is not the case. The term rather refers to its inclusion in the policy, to distinguish express warranties from implied.

The express requirement of inclusion into the policy for warranties in sect. 35(2) is unique to marine insurance. Answers to questions on slips or proposal forms can thus only become warranties if they are made part of the policy, by incorporation or insertion. The matter of inclusion of the slip into the policy is, however, a complex matter and will not be discussed here. It is sufficient to say that in practice the underwriters of Lloyd’s will in most cases make the slip part of the policy.⁷¹ Further, the warranty can be written on any part of the policy, including in the margin or on the back.⁷² Thus we can conclude that there exist very few limitations on warranties when it comes to formal requirements of the contract.

⁶⁹ *Kirkaldy & Sons Ltd v Walker* [1999] Lloyd's Rep IR 410.

⁷⁰ [1898] 2 Q.B. 398.

⁷¹ Soyer, *op. cit.*, p. 17. See also *Bensuade v Thames & Mersey Marine Insurance Co* [1897] AC 609.

⁷² *Bean v Stupart* (1788) 1 Dougl 11; *Kenyon v Berthon* (1788) 1 Dougl 12(n).

2.4.4. Materiality

In contrast to implied warranties, the express warranty is subject to the freedom of contract and a warranty can thus in practice include any obligation, provided it can be interpreted as a warranty in the legal sense.⁷³ It has long been established that the principle of materiality, which is used to define the duty of utmost good faith, has no impact on promissory warranties.⁷⁴ Therefore a warranty may even relate to a circumstance, which apparently does not impact the risk insured. While this may be surprising to the casual observer, it again reflects the objective and purpose of the promissory warranty. The obligation undertaken through the contract must be the same throughout the insurance period, unless the insurer agrees to undertake further commitments.

Notwithstanding the fact that warranties do not have to be material to risk, the warranty is crucial to the definition of the risk insured. Where a state of facts is warranted, the insurer has the right to fully rely on its fulfilment, to the point that the duty of disclosure of the assured is superfluous where the circumstance is covered by a warranty.⁷⁵ On the market the warranty acts as a tool for the parties to the contract to ensure that the risk insured is indeed the actual risk at any given moment of the insurance period. While this at first glance may seem beneficial only to the insurer, the assured benefits, for example in the sense that he does not need to pay a higher premium for circumstances he will cover under all circumstances. By warranting, for example, an undertaking to perform a survey of a vessel insured under the policy, the property will be insured at a lower risk and the premium will, hopefully, correspond to this.

⁷³ Bennett, *op. cit.*, p. 550.

⁷⁴ MIA Sect. 33(3). *Woolmer v Muilman* (1763) 1 Wm Bl 427.

⁷⁵ MIA 18(3d). See also *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd* [1967] 2 Lloyd's Rep 550.

2.4.5. Exact Compliance

The doctrine of exact, or strict, compliance has very old roots, as evident by the over two-hundred years old *De Hahn v Hartley*⁷⁶ case, in which a vessel had departed with 46 crew members when the insurance contract warranted at least 50. Despite the fact that 6 more was taken aboard after the first part of the voyage, the court held that the warranty was broken. Clearly, there existed no causality between the incident that took place in the latter part of the voyage and the insufficient number of crewmembers during its first part. Nevertheless, the court established strict literal compliance as a requirement. Therefore the assured cannot avail himself to the defence that he was not at fault or that the breach occurred through circumstances he could not control.⁷⁷

It is not easy to determine exactly what satisfies the requirement for exact compliance. The interpretation of the warranty becomes crucial to the determination of what obligation the warranty may infer.

In *Overseas Commodities Ltd v Style*,⁷⁸ the contract established that the cargo of tinned pork butts was to be marked for the purpose of verification. Some of the cargo, however, was incorrectly marked. The court held that even though the warranty was only partly breached, the insurer was to be discharged from liability. A different solution, argued for by the assured, might have been to only discharge the insurer from liability for the incorrectly marked goods, but the court did not use that option. Thus the application of a warranty is not severable.

The strict compliance requirement does not always serve the insurer. In the general insurance case *Svenska Handelsbanken v Sun Alliance and London Insurance plc*,⁷⁹ a condition that obligated the assured to conduct certain investigations of relevant business relationships was held to be a warranty.

⁷⁶ (1786) 1 TR 343. See also *Blackhurst v Cockell* (1789) 3 TR 360.

⁷⁷ *Hore v Whitmore* (1778) 2 Cowp 784.

⁷⁸ [1958] 1 Lloyd's Rep 546.

⁷⁹ [1996] 1 Lloyd's Rep 519.

The reasoning was that the stipulation went to the heart of the risk insured against. If the assured had not conducted such investigations, the risk would have been much harder to define and could increase during the insurance period without the consent of the insurer. Judge Rix J held, however, that while the clause was indeed a warranty, it only covered what the assured was aware of, not what he ought to have been aware of, and the warranty was thus not breached. In other words it was sufficient that the assured had in fact taken due care to conduct such investigations and he did not need to actually be aware of every circumstance that could have been investigated. The interpretation did in other words not impose further obligations than what the text expressly provided.

Similarly, in *Blackhurst v Cockell*,⁸⁰ a case that subsequently became written law through MIA Sect. 38, it was held that when a vessel was warranted “well” or “safe” on a particular day, it is sufficient that the vessel was safe sometime during that day. Consequently, where a vessel is safe in port at 6 o’ clock in the morning but is lost at 12 o’ clock at midday, the warranty has been complied with. The case shows that the English courts are reluctant to construct a warranty as a continuing obligation where this is not expressly provided.⁸¹

Where a warranty establishes the duty to sail on a certain date, this has been held to mean that the vessel must depart from the port with the intention of initiating the voyage. Movement within or close to the port or the mere weighing of the anchor is not enough.⁸² This can be said to come from a strict interpretation of the word “sail”, as it must be understood in the way the parties understood it at the establishing of the contract, being movement with the intention of initiating the period during which the vessel is subject

⁸⁰ (1789) 3 TR 360.

⁸¹ See also *Eden v Parkison* (1781) 2 Dougl 732 or the more recent *Hussain v Brown* [1996] 1 Lloyd’s Rep 627. However, where the clause was expressly drafted to provide a continuing obligation, the courts will construe it that way, *Eagle Star Insurance Co Ltd v. Games Video Co (The Game Boy)* [2004] Lloyd’s Rep IR 867.

⁸² *Nelson v Salvador* (1829) M & M 309.

to the most amount of risk. However, in *Sea Insurance Co v Blogg*⁸³ the insurance covered steamers sailing “on or after March 1”.⁸⁴ The insured vessel left port on 28th of February, sailing some 500 m outside port and anchored until morning, when it departed. The evidence showed, however, that the purpose of the first movement was to prevent the crew from leaving the ship and get drunk in the port. The warranty was thus not breached, as no attempt to initiate the voyage had been made.

Where the assured must exactly comply with a warranty, the required time of compliance becomes an important factor. In *Forshaw v Chabert*⁸⁵ it was held that the implied warranty of seaworthiness obligated the vessel on a voyage from Cuba to Liverpool to sail with a crew of 10 and that this was a continuing obligation. Two of the crewmembers had not signed for the whole voyage and departed the vessel at a Jamaican port. Despite the fact that two replacements were taken aboard, the fact that the whole crew had not signed on for the whole voyage was enough to breach the warranty, discharging the liability of the insurer.

Where the assured agrees to a statement of facts contained in the policy, which are to be the “basis of the contract” according to the policy, this will in most cases be construed as a warranty.⁸⁶ This means that any statement of facts agreed to by the assured under such a label, will be a warranty, which, if breached, results in discharge of liability for the insurer. Even where the assured makes an innocent mistake without fraudulent intent, strict compliance will be required. Thus, the insurer can use such “basis” clauses to exclude himself from liability by claiming breach of statements made by the assured, which are non-material to the risk.⁸⁷ The Britannia P&I Rules,

⁸³ [1898] 2 Q.B. 398.

⁸⁴ See ch. 2.6. of thesis for a discussion regarding warranties which describe the insured property.

⁸⁵ (1821) 3 Brod & B 158.

⁸⁶ *Thomson v Weems* (1884) 9 App Cas 671, 684; *Yorkshire Insurance Company Limited v Campbell* [1917] AC 218; *International Management Group (UK) Ltd v Simmonds* [2003] EWHC 177 (Comm), [2004] Lloyd’s Rep IR 247, para. 154.

⁸⁷ The UK Law Commission has called this “a major mischief”, but no according change has taken place. See Law Commission Report, 1980, pt. VII.

rule 6(2) provides that “all particulars and information given in the course of applying for insurance shall ... be deemed to form part of the contract of insurance”. Such clauses can be said to be a way for the insurer to broaden the duty of disclosure by making the truth of the statements a condition precedent to the contract.⁸⁸

On that notion, it can be remarked that the duty of disclosure of the assured covers all circumstances that may be material to the risk. As warranties are used to delimit the risk, it is imaginable that a breach against a warranty could also be considered to be a breach against the duty of disclosure. However, as strict compliance is required, the insurer has the right to rely on the fulfilment of the warranty. Disclosure may therefore in some cases be superfluous because of a promissory warranty.⁸⁹

2.4.6. Breach

The result of breach of a warranty is *automatic* discharge of the liability of the insurer, from the date of the breach. This was established through the English case *The Good Luck*⁹⁰ in which the defendant argued that the discharge of liability was not automatic, but rather a right for the offended party to accept the breach, thereby discharging him from liability. This was rejected by the House of Lords, which declined to depart from “the plain meaning” of MIA Sect. 33(3), holding that a promissory warranty can be described as a “condition precedent” to the liability of the insurer. This would mean that where a promissory warranty is breached, this is always a repudiatory breach, leading to the automatic discharge of liability for the offended party.⁹¹ The insurer does not need to perform any action to be discharged, as he is off risk from the date of the breach and his liability never attaches.

⁸⁸ Bennett, *op. cit.*, p. 181.

⁸⁹ MIA 18(3d). See also *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd* [1967] 2 Lloyd's Rep 550.

⁹⁰ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233.

⁹¹ As per Lord Goff in *The Good Luck* case.

The MIA contains a few exceptions, however: In Sect. 34(1) we find that the breach of warranty may be excused on two occasions; where the warranty is rendered unlawful by subsequent circumstances or when the warranty ceases to be applicable to the circumstances of the contract. It is implied that these are the only defences the assured has available.⁹² Additionally, the assured cannot defend himself by claiming that the breach was only temporary and was subsequently remedied.⁹³

Where breach of warranty is declared there is no cure. Even where the circumstances that lead to the breach are subsequently remedied, there has still been a breach. This can be said to be a consequence of the fact that the principles of causation and of materiality are not applicable to promissory warranties. The question is rather whether the insured risk at some point has been altered.⁹⁴

In the case *Laing v Glover*⁹⁵ the insured vessel was warranted to “sail in convoy”. The vessel satisfied this initially, but completed the journey without being part of a convoy. The court held that the initial compliance was sufficient and the warranty was thus not broken. The anomaly that initial compliance satisfies a warranty, but subsequent will not, may be criticised, especially as the considerations of the court does not consider that the risk may be subsequently increased.

It is not sufficient that the assured was on course to breach a warranty or could be shown to have intended to do so. Thus, in *Simpson Steamship Co v Premier Underwriting Association Ltd*,⁹⁶ a vessel, which was warranted not to navigate any area east of Singapore, was lost on course to a place east of Singapore before having actually broken the warranty. Similarly, in *Baines*

⁹² Hodges, Susan, *Cases and Materials on Marine Insurance Law*, 1999, p. 275.

⁹³ Sect. 34(2).

⁹⁴ Bennett, *op. cit.*, p. 551.

⁹⁵ (1813) 5 Taunt 49.

⁹⁶ (1905) Com Cas 198; (1905) 10 Asp MLC 127.

v Holland,⁹⁷ a vessel was warranted to depart Quebec at a certain date to initiate its second part of its voyage. Having departed upon the first part of the voyage it was lost to an insured peril. It was held by the insurer that the first departure had taken place too late for the vessel to be able to comply with the warranted date for departure from Quebec, thus having broken the warranty. The court rejected this argument and declared that the warranty was not breached.

2.4.7. Causation

Causation between the loss claimed for and the breach of warranty needs not be proven for the insurer to be discharged from liability. This was established relatively early through case law, and remains the ruling principle.⁹⁸ To illustrate, consider the fictive situation where a warranty is issued stipulating that the whole crew of the insured vessel must be of Belgian nationality. The vessel is then declared a constructive total loss because of a risk insured against. It is grounded in hard weather with four Australian crewmembers aboard and the rest of Belgian nationality. In this case the warranty is breached and the insurer is discharged from liability, notwithstanding the fact that the nationality of the crew almost certainly had no causal link to the incident. While the principle of non-causation has been criticized, particularly in later years,⁹⁹ it once again reflects the nature of insurance contracts in the sense that for the underwriter to be liable the risk must be the same as the one he originally agreed to cover. This, it can be remarked, was particularly important in the 18th century, when the doctrine was established, as the insurer had no control over the assured vessel once it had departed on its voyage and had much slimmer opportunity than today to

⁹⁷ *Baines and Others v Holland* 156 E.R. 665 (1855) 10 Ex. 802 1855.

⁹⁸ See for example *Christin v Ditchell* (1797) Peake Add Cas 141. For a more recent ruling see *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852.

⁹⁹ *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 893, as per Lord Griffiths, who held it to be “one of the less attractive features of English insurance law”. See also the comments made by the House of Lords in *Wasa International Insurance Co Ltd v Lexington Insurance Co* [2009] UKHL 40.

investigate the location of incident.¹⁰⁰ The marine insurer of that time simply did not have access to anywhere near the same amount of information a modern insurer does. With that in mind, it is easier to understand that Lord Mansfield would establish such strict principles.¹⁰¹

2.4.8. Waiver

The insurer has the right to *waiver* the breach. The fact that this is a possibility can be said to be an argument against the discharge of liability being automatic, because if the discharge was automatic, there would be nothing to waive.¹⁰² The courts have instead held that the right to waiver is a voluntary equitable estoppel preventing the insurer from using the breach of warranty against the assured.¹⁰³ In order for this equitable estoppel to be effective, the insurer must give an unequivocal representation that he will not invoke the breach against the assured. There is also the possibility that the insurer can unequivocally represent that he will not rely on breach of the warranty in any case whatsoever.¹⁰⁴ Regarding this topic it has been argued that the underwriter does not need to be actually aware of the legal nature of the right he is surrendering, but that he in the assured's eyes must appear to be so.¹⁰⁵ In other words the assured has the right to rely on a waiver, unless he is in bad faith regarding the knowledge of the underwriter. This right of the assured has apparently been taken to precede the right of the underwriter to not have to give up his right to be discharged from liability because he was not aware of the legal implications of his waiver. It has been stated that the scenario appears unlikely in practice, as it is difficult to imagine a situation where the underwriter gives an apparently unequivocal

¹⁰⁰ Soyer, *op. cit.*, pp. 291-293.

¹⁰¹ *De Hahn v Hartley* (1786) 1 TR 343.

¹⁰² *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1990] 1 QB 818.

¹⁰³ *Ibid.* For a further discussion regarding estoppel in general the author would like to refer to Beatson, *op. cit.*, pp. 112-124.

¹⁰⁴ *Agapitos Laiki Bank (Hellas) SA v Agnew (The Aegeon) (No 2)* [2002] EWHC 1556 (Comm), [2003] Lloyd's Rep IR 54.

¹⁰⁵ *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391.

representation without being aware of its legal consequences.¹⁰⁶ On the other hand it is unlikely that the assured can be said to be in good faith unless the representation carries with it “some apparent awareness of rights”.¹⁰⁷

Even though the discussion may seem theoretical to a large extent, there have been court rulings where the matter has been crucial to the outcome. In *Kirkadly & Sons v Walker*¹⁰⁸ the policy included a warranty to conduct both a condition survey and a special towage survey. In fact only a towage survey was conducted, and the survey protocol was sent to the insurer. As the insurer was away on a holiday, the deputy underwriter acknowledged the survey and signed it “Noted and Agreed”. In court, the question arose whether this latter behaviour of the deputy underwriter amounted to waiver of the right to rely on the breach. The court answered the question in the negative. It was held that the facts of the case did not amount to an unequivocal representation to withdraw the legal rights of the insurer. In the words of Longmore J the underwriter or his deputy must have “actually addressed his mind to the question of the absence of a coalition survey”¹⁰⁹. Further, the learned judge held, as the insurer had only received the survey protocol and could not be expected to remember the exact policy for the client in question, they could not be said to have realized that the protocol signified a breach of warranty. Another important issue was that insurer waited for a very long time before the breach was invoked before the court. Even this behaviour could not be said to amount to an unequivocal representation.

¹⁰⁶ As per Tuckey LJ in *HIH Casualty & General Insurance Ltd v AXA Corporate Solutions* [2002] EWCA Civ 1253, [2003] Lloyd’s Rep IR 1, pt. 21-22.

¹⁰⁷ *Ibid.*

¹⁰⁸ [1999] Lloyd’s Rep IR 410.

¹⁰⁹ *Ibid* at p. 423.

2.5. Types of Express Warranties

A warranty can, once again, cover any circumstance and does not need to be material to the risk. Nevertheless, warranties are often used to cover certain common events, which impacts the risk. While it is beyond the scope of this thesis to describe every type, here follows a few examples of warranties often used in contracts of marine insurance.

2.5.1. Nationality

A warranty of nationality stipulates that part of the crew, the whole crew, the master, a certain officer, the vessel itself, etc. shall be of a particular nationality. The reason is usually to ensure that the person or vessel covered by the warranty complies with the laws of a certain jurisdiction. The MIA provides that there shall be no implied warranty of nationality of a ship.¹¹⁰ Thus a warranty of nationality of the vessel must be an express one. A description of the vessel can here be construed as a warranty of nationality, such as “a British ship” or similar. It is not granted, however, that other signs of nationality, such as the language of the name of the vessel, can be constructed to be a warranty of nationality.¹¹¹ Furthermore it has been determined that the nationality of a vessel shall be determined by reference to the nationality of its owners, not the state of registry.¹¹²

2.5.2. Navigation Restrictions

A navigation restriction can both concern a restriction for special operations undertaken by the insured vessel, for example towage,¹¹³ and for geographical limitations, being areas the vessel may not enter or enter under special conditions. The Institute Warranties,¹¹⁴ which are standard

¹¹⁰ MIA sect. 37.

¹¹¹ *Clapham v Cologan* (1813) 3 Camp 382.

¹¹² *Seavision Investments SA v Evenett (The Tiburon)* [1990] 2 Lloyd's Rep 418.

¹¹³ ITCH 1995 cl. 1.1.

¹¹⁴ Institute Warranties (01/07/76).

provisions that the parties may incorporate into their contract, exclude a number of areas and localities from cover.¹¹⁵ Often this exclusion is accompanied by a specific time frame or similar conditions, for example the Northern hemisphere during winter, when there is risk for ice.

It has been questioned whether a restriction on navigation is actually a warranty or merely descriptive of the risk.¹¹⁶ In *Colledge v Hardy*,¹¹⁷ it was determined that a clause restricting the geographical navigation of a vessel is a warranty. The rationale is that the assured undertakes not to perform a certain action, which would significantly alter the risk. It has been discussed whether it is too harsh for the assured to be without cover even after he has left the excluded area, and indeed clauses are often drafted to ensure that the assured will only be off risk until the vessel leaves the area. However, based on the *Colledge v Hardy* ruling, where nothing in the clause signifies that it should be a suspensory condition,¹¹⁸ the court will assume that it is a warranty.¹¹⁹

2.5.3. Survey Warranties

While the insurer is protected by the implied warranty of seaworthiness from the start of the insurance period, this is only a minimum requirement, and the insurer may need further reassurance as to the physical state of the vessel. Therefore it is common to require surveys, either as a condition precedent to the attachment of risk, or subsequent surveys for continued cover.¹²⁰ Such warranties are quite often used today, as it is said that it will provide mutual benefit to both the assured and the insured, as both will be ascertained of the safety of the vessel.¹²¹ However, the survey is made on

¹¹⁵ See also ITCH 1995 cl. 1.1.

¹¹⁶ Soyer, *op. cit.*, p. 29.

¹¹⁷ (1851) 6 Exch 205.

¹¹⁸ Suspensory conditions are discussed in the following ch. 2.6 of this thesis.

¹¹⁹ *Birrell v Dryer* (1884) 9 App Cas 345.

¹²⁰ *Kirkaldy & Sons Ltd v Walker* [1999] Lloyd's Rep IR 410.

¹²¹ Soyer, *op. cit.*, p. 35.

the expense of the assured. In the already discussed *Zeus V*¹²² case a survey clause was held to be a condition precedent to the attachment of risk, which was likely a consequence of the fact that the vessel in question was old and its safety could be questioned.

2.6. Clauses Similar to Warranties

Some types of contractual terms are similar to promissory warranties and may be labelled as “warranties” on the policy but have quite different implications. One such type is *exclusion clauses*, which uses similar wording to express warranties, such as: “Warranted free from...” followed by the circumstance during which the insurer will not be liable, for example capture and seizure of vessel.¹²³ The main difference here is that where such a circumstance does occur, the insurer will not be completely discharged from liability, rather the circumstance will not trigger his liability. The insurer will never be completely off risk and the assured may still claim for losses, which are not covered by the exclusion clause.

In cases where a contractual term describes the insured property, this will in many cases be taken to be a warranty, as this description will often define the risk insured.¹²⁴ For example, in *Baring v Claggett*,¹²⁵ a warranty on cargo was said in the policy to be carried by “The Mount Vernon, an American vessel”. This was held to be a warranty of nationality and not merely descriptive of the risk. By agreeing to include a description of the subject insured the assured substantially agreed to maintain the state of the property as it is defined in the policy. The question becomes one of construction, as the court must decide whether the description has been inserted with the purpose of only describing features of the property to

¹²² [1999] 2 Lloyd’s Rep 587.

¹²³ Bennett, *op. cit.* p. 554.

¹²⁴ *Yorkshire Insurance Co Ltd v Campbell*, [1917] AC 218.

¹²⁵ (1802) 3 Bos & Pul 201.

discern it from others, or if it has been inserted to provide the exact nature of the property, which the insurer has agreed to cover.¹²⁶

Another type is *suspensive conditions*, breach of which will not lead to a discharge of the liability of the underwriter, but instead lead to a temporary suspension of liability.¹²⁷ An example of such a provision might be a geographical one: “No cover in the Mediterranean Sea”, meaning that an incident which takes place in that area will not be covered by the insurance. As soon as the property leaves the area, however, it will once again be within the liability of the insurer.¹²⁸ Such conditions may be intentionally inserted into the insurance contract by the parties and will often be unproblematic.

However, suspensive conditions can also be the result of construction by a court, which holds that it would be exceedingly harsh to construe the condition as continuing obligation. This was an important factor of the judgment of the Australian 1932 case *Dawson v Mercantile Mutual Insurance Co Ltd*,¹²⁹ in which it was held that the assured should not lose his insurance cover because of an act, which had no impact on the risk and had nothing to do with the loss claimed for.¹³⁰

Similarly, in Canadian case *The Bamcell II*,¹³¹ a warranty that a vessel had a night watchman at certain hours was construed as a suspensive condition by the court. It was held “significant” that the breach of this condition was not the proximate cause of the loss claimed for. It is doubtful whether UK courts would adopt such practice. However, in non-marine insurance, the UK courts have been observed to use similar trails of thought. In *De*

¹²⁶ Soyer, *op cit.*, pp. 52-53.

¹²⁷ *Ibid.*, p. 555.

¹²⁸ Such clauses may be found in The International Hull Clauses (01/11/03, for example clause 10.1 and 11) or ITCH 1995 (for example clause 1.1.).

¹²⁹ [1932] VLR 380.

¹³⁰ *Ibid.*, 388.

¹³¹ *Century Insurance Co of Canada v Case Existological Laboratories Ltd (The Bamcell II)* [1986] 2 Lloyd's Rep. 524.

*Maurier (Jewels) Ltd v Bastion Insurance Co. Ltd*¹³² it was held that a term, expressly said to be a warranty in the contract text, which stipulated that the insured property carry a certain security system, was a suspensory condition. In another general insurance case, *CTN Cash and Carry Ltd v General Accident Fire and Life Assurance Corp plc*,¹³³ which expressly warranted the assured to ensure that the insured property, a kiosk, was to be attended and locked during business hours, the court held that the term was a suspensive condition. The courts have not used this option of construction in marine insurance cases, however.

2.7. Construction and Interpretation of Warranties

To determine whether a contractual term constitutes a promissory warranty the intention of the parties must be discerned through methods of interpretation and construction of the contract as a whole.¹³⁴ Here may be relevant the full contract text, the circumstances at its inception, relevant business practice and in some cases the subsequent behaviour of the parties, in other words basic concepts of contract construction.¹³⁵ The first matter is construction, or in other words to decide whether the clause in question actually is a warranty in the legal meaning.

The containment of the word “warranty” is not conclusive,¹³⁶ though the use of the word “warranty” may indicate that the term should be constructed as such.¹³⁷ Without an appropriate wording, however, the courts will likely not construct a term as a warranty unless it relates to the risk. For example, the

¹³² [1967] 2 Lloyd's Rep 550.

¹³³ [1989] 1 Lloyd's Rep 299.

¹³⁴ *Thomson v Weems* (1984) 9 App Cas 671, 683.

¹³⁵ See ch. 2.2.3 of this thesis.

¹³⁶ *Union Insurance Society of Canton v George Wills & Co* [1916] AC 281; *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161.

¹³⁷ *Kirkaldy & Sons Ltd v Walker* [1999] Lloyd's Rep IR 410.

payment of the premium at a specified date will not be construed as a warranty unless it is expressly labelled as such, since such an obligation does not alter the risk insured.¹³⁸ It has been held that “One test is whether it is a term which goes to the root of the transaction; a second, whether it is descriptive of or bears materially on the risk of loss; a third, whether damages would be an unsatisfactory or inadequate remedy”.¹³⁹ This statement summarized the construction of a warranty as three different tests, all of which separately could lead to the clause being held to be a warranty. It is notable that materiality may be indicative in the construction, considering that it is not relevant to the question of compliance.

The second task for the court is to decide the exact content of obligation stipulated by the warranty; this is usually called interpretation. Where the wording of a warranty is clear in itself, it is to be interpreted literally, according to its “strict, plain, normal meaning”.¹⁴⁰ Further, the courts will construe the meaning in accordance with its context, being the contract itself and the factual circumstances on the whole.¹⁴¹ The court will especially consider the consequences for the parties in relation to their mutual intention.¹⁴²

A warranty will be given a reasonable construction in relation to its intended purpose. In *The Newfoundland Explorer*¹⁴³ a warranty stipulated that the insured vessel be “fully crewed”. This was held to constitute an obligation to always have at least one crewmember aboard at all times, except in cases of emergency. Similarly, in *Pratt v Aigaion Insurance Co SA*¹⁴⁴ the assured warranted that the at least the owner or an experienced skipper was to be

¹³⁸ Bennett, *op. cit.*, p. 539.

¹³⁹ As per LJ Rix in *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735; [2001] CLC 1480 at paragraph 101.

¹⁴⁰ Sir George Jessel MR in *Shore v Wilson* (1842), 9 Cl. & F. 355; *Robertson v French* 102 E.R. 779 (1803) 4 East 130 1803.

¹⁴¹ *Arbuthnott v Fagan* [1995] CLC 1396.

¹⁴² *Kazakhstan Wool Processors (Europe) Ltd v Nederlandsche Credietverzekering Maatschappij NV* [2000] Lloyd's Rep IR 371.

¹⁴³ *GE Frankona Reinsurance Ltd v CMM Trust No 1400 (The Newfoundland Explorer)* [2006] Lloyd's Rep IR 704.

¹⁴⁴ [2009] Lloyd's Rep IR 149.

aboard “at all times”. This was held to only apply to times when the vessel was at sea, despite the “at all times” requirement.

For the purpose of ensuring due care of the assured with respect to insured property, insurers sometimes insert a “warranted uninsured” clause into the policy.¹⁴⁵ This clause means that the assured may not take insurance upon a specified part of the vessel, such as one-fifth or one-eighth. To assess whether such a warranty has been breached the court will use the agreed value of the property, rather than the actual value.¹⁴⁶

The question of literal interpretation in “warranted uninsured” cases was brought up in *General Insurance Co of Trieste Ltd V Cory*.¹⁴⁷ In this case a vessel valued at £12,000 was insured for £9,600, with £2,400 being warranted uninsured under the policy. A syndicate that subscribed to £5,000 of the whole policy subsequently became or was in the danger of becoming insolvent and advised assureds to take out insurance elsewhere. This led the assured to take out additional policy to a value of £3000 to cover for the loss. This meant that while the contract of insurance still stipulated that the vessel was insured for £9,600, the effective insurance cover was only for £7,600. Despite this, the insurer argued that the warranty in accordance with established principles was to be interpreted literally, meaning that the assured had broken the warranty by taking out insurance, effective or not, which exceeded the agreed amount uninsured. The court instead held that the meaning of the clause was nothing more than that £2,400 was to be borne by the assured himself. The assured had in this case acted in the interest of the safety of the vessel, being of interest to the underwriter as well as himself. Judge Mathew J held that such a strictly literal interpretation as suggested by the underwriter could in fact reach absurd results, in fact leading the assured to undertake greater liability than the warranty obligated.¹⁴⁸ This illustrates the situation where the courts do not

¹⁴⁵ Dover, Victor and Brown, RH, *Handbook to Marine Insurance*, 1975, p. 371.

¹⁴⁶ *Muirhead v Forth & North Sea Steamboat Mutual Insurance Association* [1894] AC 72.

¹⁴⁷ [1897] 1 QB 335.

¹⁴⁸ *General Insurance Co of Trieste Ltd V Cory* [1897] 1 QB 342.

go by the strict interpretation of the warranty, searching more to discern the intended purpose of the warranty in question. It should be noted, however, that the matter is one of interpretation. The warranty must still be strictly complied with.

The question of whether such a warranty could be breached by the obtaining of an honour policy was addressed in *Roddick v Indemnity Mutual Insurance Co Ltd*,¹⁴⁹ but not decisively answered. It was held in the first instance that an honour policy in fact did breach the warranty, as it infringed its purpose: To ensure that the assured was “his own insurer” for the specified portion of the value. In the second instance, however, it was argued that while an honour policy was regularly recognized and enacted by underwriters, it was not a legally recognized security and thus could not breach the warranty. The issue has not yet been authoritatively solved.¹⁵⁰

¹⁴⁹ [1895] 1 QB 836, [1895] 2 QB 380.

¹⁵⁰ Bennett, *op. cit.*, pp. 546-547.

3. Comparative Study:

Norwegian Law

In this chapter we will first describe the Norwegian legal system, starting with general rules on insurance and contract, proceeding with the rules of marine insurance, and then describing the rules regarding alteration of risk. In the following sub-chapter we will compare the findings of Chapter 3 of this thesis, the English law with respect to warranties, to the Norwegian system.

3.1. The Norwegian Legal System in General

The Norwegian system can be classified as part of what is usually called the Scandinavian system, which is a type of civil law jurisdiction with strong emphasis on *travaux préparatoires*. In fact, it is not possible to fully understand the Norwegian system without reading the legal commentaries of the draft makers. Case law may be relevant in certain aspects, but even courts are bound by the preparatory works, as they are considered to be functional parts of the legislation.

3.2. The Norwegian Law of Contract

While it is beyond the scope of this thesis to compare the whole English law of contract to the Norwegian law regulating the same area, to provide basis for the comparison in ch. 4.2 of this thesis a few facts will be stated. The Norwegian Act Relating to Conclusion of Agreements (NCA) of 1918¹⁵¹ is

¹⁵¹ Unless expressly stated otherwise, all reference to Norwegian written sources of law in this thesis are made through the electronic legal database www.lovdato.no, which supplies

applicable to all agreements, which are to be governed by Norwegian law.¹⁵² A contract regulated under Norwegian law is generally subject to full freedom of contract. Though the NCA is fundamental and may be used in cases of, for example, fraudulent acts, the rules of contract interpretation are enacted through the courts.

Also, there exist no express classification of contract terms in Norwegian law; hence there are no conditions precedent, innominate terms, or warranties. Rather the classification is made on types of contract breach. Where a breach is material, it will in most cases give rise to the right of termination of contract. Where breach is not material, the remedy is less strict, giving rise to a claim for damages.¹⁵³

3.3. The Norwegian Law of Marine Insurance

There are two major sources of legislation that are relevant to marine insurance in the Norwegian system. The first is the Insurance Contracts Act of 1930 (ICA), which, though fundamental, has limited influence on the question at hand. The second, more relevant one, is the Norwegian Marine Insurance Plans (NMIP), the use of which can be traced to 1871. It has been revised on a regular basis with 10-30 year intervals and is in its 1996

both translated and original language material. It is supplied and maintained by the Norwegian Department of Justice as well as the University of Oslo.

¹⁵² It is noteworthy that Norwegian Contract law is not one of contracts per se, but rather of *agreements*, which may be evidenced through contract. It will not influence the issues at hand, as it is likely unimaginable to show that an agreement of marine insurance exists without a written contract.

¹⁵³ Boye, Knut and Musæus, Lars, *Norway*, article found in ch. 20 of *The International Comparative Legal Guide to: Commodities and Trade Law 2006*, Global Legal Group, 2006.

edition, which came into force in 1997.¹⁵⁴ The NMIP is normally updated annually and is currently in its 2010 version.¹⁵⁵

If we begin by looking into the ICA we find that its part A regulates basic matters of damage insurance, beginning with definitions (§ 1-2), insurance period (§ 3-1), the duty of disclosure (§ 4-1) and the premium (§ 5-1). The only paragraph directly relevant to marine insurance is § 1-3, which states that it is possible for ships which are to be registered in the Norwegian ship registry in accordance with the Norwegian Maritime Code of 1994, to contract on other conditions than the rules in the ICA, with the exception of § 7-8, which is always mandatory.¹⁵⁶ Hence the parties to an insurance contract retain full contractual freedom, subject only to the Norwegian law of contract and the mandatory provisions of ICA.

The NMIP is the main instrument for the regulation of marine insurance in Norway, with the exception of P&I insurance. They are the result of joint efforts from the main interested parties to the market of marine insurance, i.e. insurers, assureds and others.¹⁵⁷ These can technically be classified as a private law or even agreed standardized conditions and are made applicable by direct reference in the insurance contract.¹⁵⁸ The NMIP is accompanied by extensive *Commentaries*, which are considered functional parts of the actual text and will be used by the courts in disputes regarding the true interpretation of the NMIP.¹⁵⁹ Because the Commentary is updated together with the actual text of the NMIP, new case law will influence both the clauses and their interpretation in the Commentary. Therefore case law finds

¹⁵⁴ Falkanger, Thor, et al., *Scandinavian Maritime Law: The Scandinavian Perspective*, pp. 478-479.

¹⁵⁵ Many of the provisions remain unchanged when a new revision is made. See for example the 1964 version, of which many provisions were retained in the latter versions of the NMIP.

¹⁵⁶ § 7-8 stipulates that an injured subscriber to liability insurance may take direct court action against an insurer of a larger commercial operation to receive remuneration for a claim. This is applicable to ships that are subject to the Norwegian Maritime Code of 1994.

¹⁵⁷ This approach is not unique; for example Germany relies on similar semi-private regulation: The General Marine Insurance Terms of 1919.

¹⁵⁸ Falkanger, *op. cit.*, pp. 476-478.

¹⁵⁹ This may be illustrated by the Norwegian cases ND 1998 s. 216 NSC OCEAN BLESSING; ND 2000 s. 442 NA SITAKATHRINE.

its way into the actual rules through incorporation rather than indirect influence. That does not mean that case law may not be relevant, but for this reason the case law is not as crucial to the Norwegian system as it is to warranties.

One can ask what law will apply to a contract, which is to be decided under Norwegian law, but does not contain a reference to the NMIP. The only plausible answer is that the case will be solved under the ICA, and it is likely that the NMIP will still at least partly be applicable through analogy. The question is of less practical importance, however, as the major insurers and ship owners have developed and recognized it as the agreed standard conditions.

P&I insurance, which was regulated by the NMIP until its 1996 revision, is now regulated by standard contracts developed and maintained by the Norwegian P&I Clubs Skuld and Gard for Norway and Swedish Club for Sweden. The NMIP nevertheless contains rules that may be applied to P&I insurance of fishing vessels and smaller cargo ships.¹⁶⁰ However, if we look at the Gard Rules of 2012, the general rules regarding alteration of risk are almost identical materially to the ones found in the NMIP.¹⁶¹ This thesis will therefore focus on the NMIP, as it is sufficient for a satisfactory comparison.¹⁶²

The Norwegian system is widely recognized as a very modern and sophisticated one. The 1982 UNCTAD Report expressly recommended the Norwegian form when suggesting reforms in international marine insurance.¹⁶³

¹⁶⁰ NMIP ch. 17 sect. 6-7.

¹⁶¹ Gard Rules 2012, ch. 3, rule 7. The Gard Rules may be read in their entirety at www.gard.no.

¹⁶² Furthermore, cargo insurance is regulated by the Conditions relating to Insurance for the Carriage of Goods, 1995. These Conditions do not contain particular rules regarding alteration of risk, but the relevant rules of the ICA may be applied. Cargo insurance will not be subject to discussion in this chapter, as we will focus on the NMIP.

¹⁶³ United Nations, 1982, Rev 4, para 226.

3.3.1. Alteration of Risk

As has been stated above, the legal institution and contractual term “promissory warranty” has no direct equivalent in Norwegian law. Indeed, the institution is almost uniquely English and such terms are not used in non common law systems.¹⁶⁴ Under Norwegian law we will rather find clauses relating to the alteration of risk, which will not be expressly labelled as “warranties” or “condition precedent”. It will instead be the role of the courts to decide whether the true interpretation of the clause fulfils the requirements for being a risk alteration clause.¹⁶⁵ It should be noted, however, that it is incorrect to speak of promissory warranties as the equivalent of clauses relating to alteration of risk in the NMIP, as warranties do not have to be material to the risk at all.¹⁶⁶ Still, it must be said that the main purpose of warranties is indeed to define and therefore to preserve the risk and to protect against alteration.¹⁶⁷ With respect to these nearly identical purposes, it is possible to make a comparison.

With the aim of comparing the English and Norwegian legal solutions to the same problem, this thesis will now describe the Norwegian rules relating to the alteration of risk and discuss its advantages and drawbacks compared to the English rules. It should be emphasized that the goal is not to compare the NMIP to the MIA, as one contains standardized terms and the other is fundamental legislation, but to compare the two systems as a whole. In the comparison reference will therefore be made to, for example, the ITCH 1995 as well as English legislation.

The ICA has rules relating to the alteration of risk (which may be found in sect. 4-6 and 4-7), but as stated above, unless the parties agree to do so, they

¹⁶⁴ Soyer, *op. cit.*, p. 272.

¹⁶⁵ It is noteworthy that the NMIP does not mention “increase” in risk but rather “alteration”. The reason is that in some situations it may be easy to show that the risk has changed, but it may be more difficult to prove that an actual increase has occurred. See NMIP Commentary Part 1, p. 78.

¹⁶⁶ MIA Sect. 33(3).

¹⁶⁷ Bennett, *op. cit.*, p. 538.

will in most cases be superseded by the NMIP or any other clauses that the parties agree to.

In ch. 3 of the NMIP¹⁶⁸ we find the duties of the insurer and of the assured. According to § 3-8 an alteration of risk is “a change in the circumstances which, according to the contract, are to form the basis of the insurance, and the risk is thereby altered contrary to the implied conditions of the contract.” The assured must notify the insurer of any alteration (§ 3-11). In the Commentary it is stated that such change in circumstances does not mean an increase in intensity of an insured peril.¹⁶⁹ Therefore the assured is not under the obligation to give notice if the ship is under extremely heavy weather or similar. The question is then what circumstances could be said to alter the risk “contrary to the implied conditions of the contract”. The decisive factor here will be the construction of the contract and thus to basic principles of insurance and contract law. The Commentary provides that the issue is whether the insurer should accept the new risk with an increased premium or whether the alteration gives such severe consequences that it amounts to “frustration of the fundamental expectations upon which the contract was based”.¹⁷⁰ Nothing in the text or the Commentary provides that the wording used in § 3-8, “implied conditions of the contract”, should be taken to mean implied conditions in the sense of implied warranties in the English system, such as seaworthiness. It rather means the true purpose and goal that the parties intended as revealed through the true interpretation of the contract.¹⁷¹

If the assured intentionally or agrees to such an alteration of risk, the result is the option for the insurer to cancel the contract after 14 days notice (§ 3-10). There is no automatic cancellation, which is in fact regarded in the

¹⁶⁸ All reference to the contents of the NMIP 2010 in this thesis are made through the electronic legal database www.norwegianplan.no, which is supplied in both English and Norwegian by The Nordic Association of Marine Insurers (Cefor) and operated by Det Norske Veritas, which is an independent Norwegian foundation especially dedicated to advice on management of risk.

¹⁶⁹ NMIP Commentary Part 1, p. 77.

¹⁷⁰ NMIP Commentary part 1, pp. 77-78.

¹⁷¹ In further support of this notion it may be added that the Norwegian version, which is to have precedence in disputes concerning its interpretation, speaks of “avtalens forutsetninger” which could also be translated into “preconditions of the agreement”.

NMIP Commentary as an “unnecessarily severe sanction”.¹⁷² The fact that the text reads: “Intentionally caused or agree to” shows that the assured may defend himself by proving that the alteration took place without any intention or agreement on his part, through representation or tacit acceptance. In most cases, though, it will likely be difficult for the assured to prove that an alteration of risk took place without any fault on his part. It may be noted that the right to cancellation is not impacted by whether notice is given or not by the assured.

For the insurer to be able to invoke alteration of risk according to § 3-8, he must be able to show that he would not have enacted the insurance if he had been aware that the alteration of risk would occur (§ 3-9). If he, on the other hand, potentially would have granted the insurance cover despite the alteration of risk but on different terms¹⁷³, the insurer will only be liable to the extent that the assured can prove that the loss is not “attributable” to the alteration, (§ 3-9 2 para.). “Attributable” in this case is not clearly defined in the NMIP text or in the Commentary, though the latter speaks of loss “due” to alteration.¹⁷⁴ It will be up to the courts to determine when a loss is attributable to the alteration of risk, on the basis of principles of insurance and contract law. Further, in § 3-12, it is granted that the insurer may not invoke an alteration of risk where this has ceased to be material to him. In cases where the loss has several causes, not all of them attributable to the alteration of risk, the court may limit the insurance compensation in accordance with a general rule on apportionment (§ 3-9, para. 2; § 2-13).¹⁷⁵

Another important clause is § 3-36, in which we find that the insurer may not evoke against the assured fault or negligence on part of the master of the vessel or its crew in their operation of the vessel. In the English system such a clause would be irrelevant to the application of warranties, as any

¹⁷² NMIP Commentary part 1, p. 79.

¹⁷³ The word “terms” refers to both the terms of the insurance contract as well as other arrangements the insurer could make with the assured, such as taking out higher reinsurance, NMIP Commentary part 1, p. 73.

¹⁷⁴ NMIP Commentary part 1, p. 79.

¹⁷⁵ NMIP Commentary part 1, p. 73.

circumstance covered by a warranty must be strictly complied with, regardless of who committed the fault. The logic behind the § 3-36 is that negligence on part of his seamen is a circumstance that the assured should always be protected against.¹⁷⁶ It should be remarked that commercial decisions that the master makes on part of the assured do not fall under this clause, as it only applies to actions taken “in connection with their service as seamen” (§ 3-36 para. 1). Further, in para. 2 of the same clause we find that the insurer may invoke error on part of any organisation or individual to whom the assured has delegated decision-making authority concerning circumstances which are material to the insurance. The matter is extensively dealt with in the Commentary, and it is provided that, for example, a duty imposed upon the master to ensure compliance with applicable safety regulations falls under the first paragraph, meaning that fault committed during the performance of this duty is covered by the insurance.¹⁷⁷

This system stands in stark contrast to the system of promissory warranties, as it first of all does not grant automatic discharge of liability regardless of the practical effects of breach, and second because it gives regard to causation. Granted, it will be hard for the insurer to both show that a) the risk has been altered and b) that the alteration is such that he would not have enacted the insurance or at least not on the same conditions. In other words the reason that the insurer potentially would not have accepted the insurance must be shown to have some connection to the risk.¹⁷⁸

The crucial question is a hypothetical one: What would the insurer have done at the time he entered into the contract if had known that the risk would be altered? The circumstance, which is alleged to alter the risk, must

¹⁷⁶ NMIP Commentary part 1, p. 112.

¹⁷⁷ NMIP Commentary part 1, pp. 112-113.

¹⁷⁸ See for example ND 1978 s. 31, where undermanning of the vessel was held to be an alteration of risk. It was discussed that the manning of the vessel cannot in all cases be said to alter the risk, at least not where this does not breach any specific safety regulations. However, in this case the machine engineer officer lacked certification, both at the time of the contracting of the insurance and the time of the incident. Therefore the court held that it was shown that the insurer would not have accepted the insurance on such factual basis.

have been such that it cannot have been irrelevant to the insurer.¹⁷⁹ The Commentary provides that it is sufficient for the insurer to prove, on a balance of probabilities, that he would not have accepted the risk. Furthermore, it is “irrelevant” what another insurer in the same situation would have done.¹⁸⁰ The insurer can therefore not refer to practice in the same industry to prove that he would not have enacted the insurance. He may still refer to practice of his own and to practice, before and subsequent to the contract in question, between the assured and himself.¹⁸¹

As an example, towage undertaken by the vessel is unregulated in the NMIP, meaning that it could fall under the scope of § 3-8. If the towage is undertaken without consent from the insurer it could likely be declared to be an alteration of risk, although in this case perhaps it will be held that the insurer would have accepted the risk under different conditions, for example a higher premium. If the assured can prove that the incident was not caused by the towage, the insurer would therefore be liable, even though the risk in fact was altered while the towage was undertaken. Already it can be seen that Norwegian law puts the insurer in a remarkably weaker position than English law. On the other hand the insurer is always able to rely on that the assured follows the safety regulations and laws of the flag state, which we will see now.

Following this general definition clause we find special rules for situations that are expressly stated to alter the risk. The first one is found in the second paragraph of § 3-8, in which we find that a change of management of the vessel, either by change of the manager of the ship or through change of any other company responsible for the operation of the ship, made without the consent of the insurer, is an alteration of risk.¹⁸² The same applies to change of classification society. Further we find loss of class of the insured vessel (§ 3-14), trading limitations (§ 3-15) and illegal operations (§ 3-16). The

¹⁷⁹ Endresen, Clement, *Opplysningsplikt i sjøforsikring: Omfang, reaksjoner og forholdet til sikredes omsorgsplikter*, 1981, as printed in MarLus no. 65, Oslo.

¹⁸⁰ NMIP Commentary part 1, p. 72.

¹⁸¹ *Ibid.*

¹⁸² NMIP Commentary Part 1, p. 78.

general rule (§ 3-8) will in fact rarely be applied, as the special rules covers almost every situation that could alter the risk.¹⁸³

Every clause has separate scope and consequences of breach and we must therefore look at each of them separately. Loss of class according to § 3-14 refers to the situation where the assured requests that the class be cancelled, or where it is suspended by the society. The main rule is that at the commencement of the insurance period, the vessel shall be classed by a classification society and that with loss of class, the cover is terminated. The clause does not, however, cover loss of class because of a casualty. This is to protect against unintended consequences of classification societies who automatically suspend the class of the vessel when a casualty has occurred.¹⁸⁴ The result of loss of class is termination of the insurance contract, unless the insurer explicitly consents to a continuation of the contract. However, if the loss of class should occur as the vessel is embarked on a voyage out at sea, the cover shall not be suspended until it has reached a safe port, which the insurer may nominate. This could potentially mean that when a vessel underway loses its class, notifies the insurer within 14 days as per § 3-11 and receives instructions to sail for nearest safe port, it is still covered by the insurance and any loss, which occurs on the way to the port, will be within the liability of the insurer. The insurer may in such cases attempt to defend himself through another clause, for example § 3-22, if he can prove that the assured did not comply with applicable safety regulations. In some cases, though, he may be forced to compensate the assured despite the loss of class.

Ever since the 2007 revision there is no provision on seaworthiness in the NMIP; it has to an extent been replaced by clearer, though perhaps less established, provisions relating to safety regulations.¹⁸⁵ Breach of a safety regulation issued by public authorities, the insurer or the policy and by classification societies leads to the insurer being discharged from liability,

¹⁸³ NMIP Commentary Part 1, p. 77; Falkanger, *op. cit.*, p. 490.

¹⁸⁴ Soyer, *op. cit.*, p. 284.

¹⁸⁵ NMIP Commentary, Preface.

but only where the incident claimed for was a consequence of the breach. As this thesis does not analyse the implied warranty of seaworthiness and there is therefore no need to describe corresponding Norwegian rules, this will not be delved deeper into, though it may be remarked that the approach is quite unique and seems to be confined to Scandinavia.

The trading limitations in § 3-15 are geographically defined in the Appendix to the plan and are divided into conditional and excluded areas. In conditional areas navigation is allowed, but the insurer can require an additional premium and may stipulate other conditions for the navigation of such an area. If an incident should occur, the insurer is entitled to a deduction of the agreed indemnification settlement of one fourth, up to a maximum of 175,000 USD. In an excluded area, the insurance will temporarily be suspended and if the ship leaves the area before the insurance period expires, it comes into effect again. The insurer may consent to continued cover for navigation in suspended areas.¹⁸⁶

§ 3-16 grants that where the vessel is used for illegal purposes the insurer is not liable. If we look to the third paragraph we find that there is a distinction made between the vessel being used primarily for illegal purposes and the vessel occasionally being used for such purposes. In the former case the result is immediate termination of contract, regardless of whether the assured was or ought to have been aware of the use. If the vessel is only occasionally involved in such activities, the assured has the opportunity to show that he neither were aware nor ought to have been aware of the activities. To be successful, the assured must show that he attempted to intervene without undue delay after he received notice of the illegal activities. In the Commentary for § 3-16 we find that an illegal purpose can not only be claimed when the vessel is in breach of the flag state laws, but

¹⁸⁶ It may be noted that the English ITCH 1995 holds that breach of a trading warranty is held covered provided that the assured agrees to the increased premium and immediate notice is given (clause 3). This is similar to the provision in NMIP § 3-15, but likely more harsh to the assured, as there is no deduction limit.

also the laws of the state, which has authority over the ship at the present moment, for example the port state.¹⁸⁷

3.4. Comparative Analysis Between Norwegian and English Law

The most prominent feature of Norwegian marine insurance law compared to English is probably that it does not use a central legal source, further enacted through extensive case law. Instead the Norwegian system relies on a private law instrument created through cooperation between the interested parties to the insurance contract. Further, Norway is a civil law jurisdiction, which in itself creates very fundamental differences between the two systems, which must be addressed. First of all the Norwegian system for marine insurance does not rely as heavily on direct reference to case law, being more reliant on the preparatory works of the written law. As has been mentioned, this is not a feature only of Norwegian marine insurance law, but of Scandinavian legal systems on the whole.¹⁸⁸ Further, the central legal source of Norwegian marine insurance is updated almost annually by its practical users, and important legal decisions will find its way into its text or Commentary. While the Commentary is not *travaux préparatoires* in the usual meaning, as the NMIP is not a law enacted by the legislators of Norway, it will be used by courts dealing with application or interpretation of the NMIP.¹⁸⁹ However, it is not within the scope of the thesis to compare and discuss the two legal systems as a whole. Instead we will now focus on the implications of the legal structural differences. Norway has decided not to have a central source of legislation but has left it, more or less, in the hands of the practitioners of marine insurance to regulate itself.

¹⁸⁷ NMIP Commentary part 1, pp. 85-87.

¹⁸⁸ Bogdan, *op. cit.*, pp. 48-49.

¹⁸⁹ Falkanger, *op. cit.*, pp. 476-478. See also ch. 4.1. of this thesis.

This raises the issue of transparency, being the possibility for anyone who may be subject to the rules of a legal system to predict or foresee the results of its application. It is without doubt easier for practitioners of marine insurance law to predict the results of a legal instrument they themselves have drafted and which they continually update to follow the current legal situation, both nationally and internationally.¹⁹⁰ On the other hand the English system has very old roots and rests on well-established principles of contract law, which, although they may be difficult to penetrate for a student of civil law, are typical of common law, especially with regard to the rules of contract. Further, the Institute Clauses used in the London market fulfils much the same purpose as the NMIP in providing a central set of clauses. It is therefore doubtful whether the English system can be criticised for lacking transparency, at least in the eyes of its own practitioners. Still, the Norwegian system has a highly systematic and structured body of rules, where the answer to most issues can be found in the text of the NMIP or its Commentary. This makes the system more accessible to foreign students and practitioners, arguably especially so for someone with a civil law background. In contrast the English system relies on case law and without a thorough knowledge of past and recent case law, the MIA does not in itself provide sufficient information for the parties to a marine insurance contract. However, the parties as well as the brokers of Lloyd's will be updated on every development concerning promissory warranties and the legislators continue to rely on their professionalism.¹⁹¹

On a detailed level, we can value and compare the system of promissory warranties in the light of its purpose. This purpose must be said to be to protect the fundamentals of the marine insurance contract, being the insured risk. Further, the balancing of strength between insurer and assured must be regulated to prevent either party from benefitting on the expense of the other and warranties have a role to play here as well. For the sake of evaluating

¹⁹⁰ It can be remarked that despite efforts from both the UNCTAD in 1989 and ongoing work in the CMI, no widely accepted international instrument for harmonization of marine insurance clauses exists today.

¹⁹¹ See, for example UK Law Commission 1980, para. 2.8 p. 14.

and discussing how the English system of promissory warranties achieves these two purposes, we will now compare it to the Norwegian system of alteration of risk.

The first rule that should be considered is the general rule on alteration of risk: NMIP § 3-8. In the English system the insurer protects himself from an unwanted increase of risk by inserting warranties into the insurance contract. These can cover any circumstance, must be strictly complied with and can only be avoided by the assured if he can show that the true construction of the contract grants that the clause is in fact not a warranty at all. In the Norwegian system the insurer seems to be in a comparatively more difficult position. The remedy for alteration of risk on part of the assured is never automatic discharge of liability, regardless of how severe the alteration might be. A causal link between the alteration and the loss is required, and even where such a link is shown to exist, the assured may still show that the alteration occurred for reasons outside of his control.

If we look at the special rules of the NMIP compared to the same circumstances covered by warranties under the English system, we arrive at similar conclusions. A warranty on geographical trading limits would in many cases be construed as a suspensive condition, where the cover is only temporarily be suspended for as long as the vessel navigates a restricted area. However, in a case where the wording clearly states that the effect of breach shall be discharge of liability, the court will likely decide to uphold it.¹⁹² The NMIP provides that if the vessel should navigate a so-called “conditional” area the primary remedy for breach of the trading limitations shall be continued cover, but under conditions the insurer may decide, for example a higher premium. If the vessel should navigate an “excluded” area, however, the only available remedy is temporary suspension. However, the effect can never be complete discharge of liability for the insurer.

¹⁹² It should be noticed that in the ITCH 1995 breach of a trading warranty is a held covered clause, see cl 3.

When it comes to loss of class, this is often covered by an express warranty in contracts under English law.¹⁹³ The corresponding clause in the NMIP is § 3-14. The result of loss of class is by necessity rather strict to the assured; the remedy is termination of the insurance. The termination is not, however, automatic and gives the assured the opportunity to make sure that the vessel is in a safe port before the insurance is terminated. It is pretty clear that the English system is more severe to the assured in this aspect, even though it can be said that both systems impose stringent requirements on the assured.

With respect to the purpose of protecting the insured risk and preventing an unwanted alteration, it is not easy to determine which system is the more successful. A system, which generally requires strict adherence to the contract, likely encourages carefully drafted contracts. On the other hand a less strict system, which allows for some alteration of risk, may benefit the assured in an unfair way, as he, after all, will be the one with the most control over the insured property and therefore any impact on the risk. The English system can be perceived as a strict one in this regard, as warranties impose strict adherence, regardless of causation. However, it must be recalled that warranties are only part of the foundation of a larger system, of which it is much harder to express a general opinion. For example, many times the assured will be protected by a *held covered clause* on occasions, which would traditionally be covered by a warranty.¹⁹⁴ Such clauses may be said to be an attempt to mitigate the harsh realities of warranties. Nevertheless, it must be said that on the paper none of the two systems exhibit any immediate defects when it comes to protection against risk alteration.

From another perspective, the balance between insurer and assured can be discussed. As has already been remarked, it seems that in most situations where an alteration of risk has occurred, English law is stricter against the

¹⁹³ See, for example, ITCH 1995, cl. 4.

¹⁹⁴ Bennett, *op. cit.*, pp. 556-588.

assured.¹⁹⁵ It may even be said that the English law primarily aims to protect the insurer. This may, once again, be motivated by the fact that the assured has the control over the insured property, which is reflected by provisions regarding, for example, duty of disclosure or the duty to provide a seaworthy ship. It is logical that the insurer should be put in the same position, as he would have been in if not for the alteration. It is highly debatable, however, whether the insurer does not achieve sufficient protection where a causal link between breach and loss is required. If the loss claimed for was caused by the breach, the insurer is not liable. In cases where the risk was increased, but this had no causal link to the loss, it is hard to defend why the insurer should be discharged from liability. Such a system seems to uphold an unfair balance between insurer and assured.

A second notion is that the Norwegian system provides for the assured the option to prove that the alteration was due to circumstances outside of his control and upon which he could not have intervened. The consequence of breach under English law is more severe in this regard, as the assured will lose his cover regardless of whether the assured could have prevented the situation or not. Thus, in a hypothetical situation where a vessel is in breach of a safety regulation because of negligence on part of the master, which the assured could not have foreseen or have prevented, the effect under Norwegian law would be that the insurer would still have to cover the loss (§ 3-36).¹⁹⁶ In contrast, if compliance to the safety regulation had been covered by a warranty under English jurisprudence, it must be strictly complied with, and the assured has no defences available to breach, save the possibilities stated in MIA Sect. 34(1).¹⁹⁷

On the whole, in comparison the system of warranties seems to quite one-sidedly protect the insurer against alteration of risk. In contrast the Norwegian system attempts to maintain balance between the parties without sacrificing the possibility for the insurer to protect himself against being

¹⁹⁵ Soyer, *op. cit.* pp. 286-287.

¹⁹⁶ See further NMIP Commentary part 1, p.

¹⁹⁷ *Hore v Whitmore* (1778) 2 Cowp 784.

prejudiced by an unfair alteration of risk. The fact that the insurers and assureds and other interested parties are allowed, to an extent, to themselves regulate their contractual relationship grants that both parties are represented, if not equally, then at least in a balanced way. While the Norwegian system does not have anywhere near the history and background the UK system has, it stands as an established system, which is still fluid and changing with the world of shipping and insurance. The system of alteration of risk further enables understanding of the rigidity of the system of warranties. While this thesis does not suggest that the Norwegian system should, or could, be adopted by the English insurance market, it might be of interest to English practitioners and legislators to study its implications and practical impact.

4. Analysis of Warranties and a Suggestion for Reform

Marine insurance is strongly distinguished from other types of insurance partly because of the major values attached to a single hull, and partly because of the unique risks a vessel on the sea is subject to. The world of shipping could likely not exist on the level it does today without insurance. If shippers were forced to cover every incident and loss themselves only a few shippers could persist, leading to a very cramped market of sea transportation. Further, a contract of insurance is a contract of utmost good faith.¹⁹⁸ When an insurer undertakes to cover the risks a vessel, or cargo, is subject to, it is for granted that he cannot do so without demanding a certain level of care from the assured and that he has the same information available to him as the assured. Thus we have terms, such as warranties, to ensure that circumstances that are relevant to the risk are not altered during the insurance period.

The doctrine of warranties stems from a period of time where insurers had very little insight and control over the state of the vessel even before it had left the port. Therefore exact compliance was required; otherwise the insurer faced no liability. This does not only reflect the world of marine insurance of that time, but business relationships on the whole. The parties simply did not have access, nor the possibility to harvest, the amount of information the parties to a contract have today. This, of course, motivated Lord Mansfield to establish exact compliance to the contract so as to protect the market of insurance from becoming a market of gambling and fraud. His judgment can hardly be criticised today.

In modern times this strictness of approach has been somewhat loosened, but still warranties are without question the most important type of term to a contract of marine insurance. Where a warranty exists on its true

¹⁹⁸ Thomas, *op cit.*, pp. 26-46.

construction, the courts will uphold it, regardless of fault on part of the assured and regardless of causality between loss and breach. It can be questioned whether such an approach is motivated today. The technology of the present day gives the insurer the means to communicate with the vessel and to be at the site of possible incidents very quickly, often within a few hours. Further, databases and inspection records provided even at foreign ports are now accessible to the insurer, providing an important advantage. It is therefore difficult to defend the position that an insurer should be able to free himself from liability because of a breach, which has no connection to the loss.

The Norwegian example, which was subject to discussion in ch. 3 of this thesis, provides that other ways of defending the position of the insurer are possible, and in some cases even more preferable. A legal order where the insurer and the assured are in more equitable positions, both in the perspective of business negotiations and a possible dispute, likely provides a more friendly insurance market. In order for the London market to continue to compete with other global markets, such as the Norwegian or the German, a more balanced system for regulation of alteration of risk needs to be developed.

4.1. Grounds For Reform

In simple terms, the proponents of the warranty system argue that:

- The system serves as a mere foundation upon which the parties can agree their own terms. It is not more draconian than the parties who use it to their advantage.
- It is logical that the insurer should not have to cover a risk, which he has not agreed to.

- Changing the rule would create considerable turmoil in the London market and remove the certain ground that has been there for hundreds of years.

These views may be said to mirror the positions of the courts in most of the cases described in ch. 2 of this thesis. Additionally, underwriters of London especially argue along lines of the third point; that changing the law on warranties now is not possible considering it has been used for a very long time and is established in the practice of every insurer since the 18th century. It can even be said that the assureds who are dealing with the London insurance market are likely to be well informed of the consequences of warranties, therefore paying close attention to the wordings of the contract and are not likely to be confused.¹⁹⁹ Similarly it has been proposed that the purpose of the MIA is to provide a clear basis, or minimum rules, from which the parties can establish their contract. So-called held covered clauses, where the insurer undertakes to cover a changed circumstance, but under different conditions, are often used to mitigate the consequences of warranties.²⁰⁰

In 2007, the UK Law Commission published a report, proposing reforms on the field of marine insurance.²⁰¹ While this paper does not reflect the fixed policy of either the UK Law Commission, it brought forth much criticism of the current system, concluding by calling it “unjust” to the assured.²⁰² One point, which was particularly emphasized, is that most assureds do not realize the exact implications of a warranty, perhaps assuming it will give rise to a raised premium but nothing more. On the other hand it can be argued that it is not a strong argument for a reform to hold that the assured will understand the law better only because it is changed. Additionally, the

¹⁹⁹ Aikens, *op cit.*, pp. 117-118.

²⁰⁰ Bennett, *op cit.*, 556.

²⁰¹ The Joint Consultation Paper of the Law Commission and the Scottish Law Commission on Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (LCCP 182/SLCDP 134), July, 2007, henceforth referred to as: Law Commission, 2007.

²⁰² Law Commission, 2007, para. 8.22.

Law Commission expressed that the freedom of contract should not be interfered with.²⁰³ It has been commented that this is a weak basis for reform, as it would be useless to make the enormous effort required to change the law, just to have the parties agree on their own terms anyway.²⁰⁴ The Law Commission proposed several suggestions for reform, which will not be described here. As of May 2012 no legislative measures have been taken.

The author would like to answer the argument, that the insurer needs to be able to use warranties to be protected from undue alterations of risk, by stating that the insurer will still be protected from having to cover a risk he has not agreed to, even if a requirement for causation is inserted. The fact that the risk for the whole venture has increased through breach of a warranty does not necessarily mean that the risk for a particular incident increases. If a loss does occur and it is not caused by a breach, the risk for the incident has not in fact increased. On the other hand, if causation can be shown, the insurer will be liable. In cases where a loss has not occurred, but the warranty has been breached, the position of the insurer will not be effected by matters of causality. The proponents of the retaining of the regime conversely state that the courts will possibly have trouble using the concept of “causation” and “connection” and it is uncertain whether this will lead to an improvement.²⁰⁵

Further, the author would suggest that just the fact that a legal framework is established, is not alone an argument for its retaining. The law must follow the requirements of the individuals who use it, both assureds and insurers. The London market will struggle to maintain its position on the global market without standardised terms, which respond to the needs of the modern day ship and cargo owner. However, it must be borne in mind that certainty of the legal rules is a crucial incentive for an assured to choose a certain legal market. A sudden change is therefore not preferable. The CMI

²⁰³ Law Commission, 2007, para. 5.128.

²⁰⁴ Aikens, *op cit.*, p. 119.

²⁰⁵ Aikens, *op cit.*, p. 121.

work group, which researches possible reforms in marine insurance stands behind this viewpoint, pointedly stating: “The legislator should ‘leave well alone’”.²⁰⁶ However, it is not necessary to, like the Law Commission has suggested, remove the law of warranties and refer to the general law of contract.²⁰⁷ Rather the MIA could be added to and gradually reformed at a pace, which the London market could catch up to. This option will be further discussed in sub-chapter 4.3. of this thesis.

The parts of the MIA, which relate to warranties, are also in principle applicable to non-marine insurance. Despite this, non-marine insurers have declined to apply the regime in cases where there is no causal link between the breach and the loss, through the Statement of General Insurance Practice.²⁰⁸ While this instrument is not legally binding, it is evidence of a view among non-marine insurers and assureds that the regime is too harsh to apply, at least outside of marine insurance.

Further, in Australia warranties in non-marine insurance are completely abolished through its Insurance Contracts Act 1954, sect. 54. Instead the insurer may defend against a claim only where the failure to comply with the contract has no bearing on the loss. It has also been proposed by the Australian Law Reform Commission that warranties are removed even from marine insurance.²⁰⁹

Canadian courts have been particularly hesitant to apply the regime of warranties. *The Bamcell II*²¹⁰ has already been discussed, but several other cases point towards a practice of focusing on giving causality between breach and loss weight when deciding whether to construct a clause as a

²⁰⁶ Clarke, Malcolm, *An Interim Discussion Paper on Alteration of Risk*. CMI Yearbook 2003, pp. 500-522.

²⁰⁷ Law Commission 2007, para. 8.89.

²⁰⁸ Statement of General Insurance Practice 1986, sect. 2(b)(iii), Association of British Insurers.

²⁰⁹ Review of the Marine Insurance Act 1909 (ALRC Report 91); Merkin, Robert, *Marine Insurance Legislation*, 4th ed., 2010.

²¹⁰ *Century Insurance Co of Canada v Case Existological Laboratories Ltd (The Bamcell II)* [1986] 2 Lloyd's Rep. 524.

warranty. This was also evident in *Federal Business Development Bank v Commonwealth Insurance*,²¹¹ in which a clause that expressly contained the words “Warranted that...” was held not be a warranty, which was motivated by the British Columbia Supreme Court with the reasoning that the parties could not have intended for the clause to be strictly complied with.²¹² Such reasoning would likely not be accepted in British courts, and indeed the rulings of Canadian courts are only of illustrative importance, but yet, these cases show reluctance outside of the UK to apply the regime of warranties.

4.2. Possible Approaches to Reform

It is possible to imagine other ways of changing the regime of warranties than through legislation, or in other words, changing the MIA. The alternative to a legislative approach would be to require for the practitioners in the London market to issue binding statements of practice, or some other type of self-regulatory instrument. While this does not necessarily need to be a code, similar to the NMIP, it should be issued by both assureds and insurers, as to ensure both that the rules are fair to both parties, as well as its compliance. The merits of such an instrument have also been discussed in the comparative analysis performed in ch. 3.4 of this thesis. However, the solution is impractical for the London market, for two reasons: First, the insurers are not likely to agree to the creation of such an instrument. It must be said, that the system of warranties privileges the insurer in that he may insert clauses such as “basis of contract” and rely on its strict compliance, regardless of causation to losses claimed for. Therefore he is not likely to voluntarily agree to ratify an instrument that removes this privilege. Second, insurers are overrepresented on the London market, meaning that the instrument itself could in the end become even more beneficial to the insurers than the present regulations. Similarly it is not logical that a

²¹¹ (1983) 2 C.C.L.I. 200.

²¹² See also *Britsky Building Movers Limited v The Dominion Insurance Corporation* [1981] ILR 1-1420.

minority of assureds should decide the terms under which a majority of insurers should enter into contract.

It is the opinion of the author of this thesis that a legislative approach is to prefer. The standard Institute Clauses are in the hands of the insurers to amend, and as has been said it is not likely that the insurers themselves will agree to the removal of the warranty regime. Perhaps with political influence the London market could be convinced to, for the sake of competing with the global market, make adjustments. However, while the London market has lost ground to other markets in later years, its position still stands strong in the world of marine insurance.²¹³ It could be hard to argue in front of insurers that the better way to compete is to succumb to the pressure from assureds who choose a different market.

The legislative approach is not without its own issues, for example it may be said that the insurers may find other ways to be discharged from liability, for example by inserting clauses and hold that they are conditions precedent to the liability of the insurer. However, the author suggests not to remove warranties entirely from the MIA, instead a more moderate approach is preferable, which will now be described.

4.3. Suggestions for Reform

On the whole, the author of this thesis holds that the system of warranties, in particular with regard to the lack of a causality requirement, unjustly serves the insurer. Other disputed points, such as requirements for strict compliance and the fact that a warranty needs not be material to the risk, are possibly more justified. Strict compliance, as has been said, is a two-sided sword that does not only benefit the insurer.²¹⁴ It is common to require for terms of a contract to be strictly complied with, at least if they are clear and

²¹³ For statistics the author refers to Soyer, *op cit.*, pp. 295-301.

²¹⁴ *Hyde v Bruce* (1782) 3 Dougl 213. See also MIA sect. 38.

not ambiguous. It is not in itself an unfair feature of warranties. However, a warranty needs not be material to the risk. This means that the assured must strictly comply with a contractual provision, which has no bearing on the risk. On the other hand the freedom of contract should not unnecessarily be impeded, as the parties should be able to determine the content of the contract, even regarding clauses, which do not relate to the risk. For these reasons no changes are suggested as to these features of warranties.

It has accurately been said that causation in fact stems from the very nature of warranties; where it is breached, the insurer is no longer liable under the contract and thus no causality can be established.²¹⁵ However, it could be imagined that where the assured succeeds in establishing that no causality can be said to exist, the insurer is prevented from using the breach against the assured, similar in effect to the equitable estoppel applied when the insurer waives the breach.²¹⁶

The proposal here is to add a modifying stipulation, applying only to express warranties and setting the establishment of causation as a requirement where the breach is followed by a loss:

“In a situation where breach of an express warranty is followed by a loss, and the assured seeks indemnification for that loss, the insurer may not rely on that breach to be discharged from liability where the assured is able to prove that the breach did not cause or contribute to the loss”

Such a stipulation could be a section of its own, together with the other sections relating to warranties (33-41), or as an accompanying rule to sect. 33, 34 or 35. The author argues that changing or removing any sections is unnecessary to insert such a causation requirement. The burden of proof will be upon the assured to show that causation does not exist. To lay it upon the

²¹⁵ Benett, *op cit.*, p. 549.

²¹⁶ Ch. 2.4.8. of this thesis discusses the doctrine of waiver and equitable estoppel.

insurer to prove that causation exists to be able to be discharged for a breach would be unfair to the insurer, for obvious reasons. The wording “followed” by a loss should and will be strictly interpreted, as not meaning that the breach and the loss have a causal connection; it is rather to be understood in the chronological sense of the word.

With this, the arguably most unfair aspect of express warranties is removed, without altering or changing any existent rules. Most litigation practice could be retained, and it is the opinion of the author that the position of the insurer would in most cases remain unaltered. The solution also encourages due care on part of the assured, as he must ensure that any breach he commits does not cause an incident. Further, he must ensure that overreaching warranties, such as regarding safety requirements, are always complied with, as breach against such warranties are always likely to be held to be a proximate cause to a loss.

5. Conclusion

This thesis does not aim to propose that every insurer who inserts a warranty into a policy does so for malicious reasons. The contract of marine insurance is, it has often been said, a contract of utmost good faith, which sets it apart from other types of contract. The warranty, as well as many other implied and express obligations under a marine insurance contract stems from this principle. Without means to enforce the duty of utmost good faith in the court the insurer would not be able to protect himself against fraud and false information from the assured. However, it must be said that the insurer could potentially use the current regime as established by the English courts to escape liability in situations where he justly should have been made liable. Such practice is also evident in numerous contracts, in the standard Institute Clauses as well as other contracts; for example so-called basis clauses which enable any written statement on the proposal form to become basis of the contract, excluding the insurer from liability where breached.

The findings of this thesis suggest that it is a mistake to analyse the regime of warranties as an isolated rule of law. It is rather a fundamental part of a self-regulating system where the market can enact its own clauses and rules. Even with this in mind, some aspects of warranties can, in the opinion of the author, not satisfactorily be defended.

The Norwegian regulations, contained in the NMIP, for protection of alteration of risk is not based on exact compliance with certain contractual terms, but rather that an alteration of risk enables the insurer to cancel the contract with a 14 days' notice. Furthermore, special clauses regarding safety regulations, navigational limits, illegal activities, and other typical circumstances, which would alter the risk, are specially regulated and have their own requirements and consequences for breach. The system has been developed by insurers, assureds and other interested parties, and may

therefore be described as agreed standard conditions. The Norwegian system stands as a fine example of an alternative approach to the balancing of interest between assured and underwriter.

To summarize the view presented in the analysis of this thesis: The system of warranties unfairly benefits the insurer and should be amended. While it is likely impossible, and even unwanted, to remove warranties entirely from the MIA, a provision, which allows for the assured to show that no causation between breach and the loss claimed for exists, will go a long way to solve the problems. The requirement for exact compliance is so fundamental to the use of warranties that without it, we would no longer have a warranty. To suggest such a shift to the fundamentals of the law of marine insurance would not be realistic.

Additionally, the parties to a contract of a marine insurance will often establish less harsh rules. For example, navigational limits are often drafted as suspensory conditions, which only temporarily removes the insurance cover. In most cases a navigational limit would be constructed as a warranty by the court, but through careful drafting the parties can ensure that the clause clearly establishes it should not be understood that way. In other words the MIA regime on warranties is not a strict set of rules applicable to every contract of marine insurance, but rather a framework from which the parties can decide the content of the contract. The courts themselves sometimes also use alternative interpretations to establish more fair solutions than the ones imposed by the warranty regime. To take an example, in the Canadian case *The Bamcell II*²¹⁷ the court deduced that breach of a “warranted” clause had no bearing on the loss, therefore ruling that the clause was not a warranty, despite the fact that the MIA expressly stipulates that materiality to the risk is irrelevant to the compliance to a warranty. Such has often been the practice in Canadian and Australian cases, but not in UK cases on marine insurance.

²¹⁷ *Century Insurance Co of Canada v Case Existological Laboratories Ltd (The Bamcell II)* [1986] 2 Lloyd’s Rep. 524.

In the introduction of this thesis it was hypothesised that the research conducted would result in a more nuanced picture, but nevertheless coming to the conclusion that change must be made. This has turned out to be correct in almost every aspect. While the situation was revealed to contain even more niceties than the author would have imagined, it stands clear that certain aspects of the regime of warranties are due for a change. The reasons behind the creation of the promissory warranty, in particular the rulings of Lord Mansfield, show the reasons behind its creation and to some extent its retaining, but it does not justify why it should be applied in the same way in our times. There is good reasoning on both sides of the argument, but in the end the conclusion must be that the regime of express warranties is long due for a change.

Bibliography

Books

Beatson, J., *Anson's Law of Contract*, 28th ed., 2002, Oxford University Press, Oxford.

Bennett, Howard, *The Law of Marine Insurance*, 2nd ed., 2006, Oxford University Press, Oxford.

Bogdan, Michael, *Komparativ Rättskunskap*, 1993, Norstedts Juridik, Stockholm.

Dover, Victor and Brown, RH, *A Handbook to Marine Insurance*, 8th ed. 1975, Witherby & Co Ltd, London.

Falkanger, Thor, Bull, Hans Jacob and Brautaset, Lasse, *Scandinavian Maritime Law: The Norwegian Perspective*, 2nd ed., 2008, Universitetsforlaget AS, Oslo.

Hodges, Susan, *Cases and Materials on Marine Insurance Law*, 1999, Cavendish Publishing Limited, London.

Hodges, Susan, *Law of Marine Insurance*, 1996, Cavendish Publishing Limited, London.

Merkin, Robert, *Marine Insurance Legislation*, 4th ed., 2010, Lloyd's List Law, London.

Rose, F.D., *Marine Insurance: Law and Practice*, 2004, Informa Professional, London.

Soyer, Barış, *Reforming Marine and Commercial Insurance Law*, 2010, Informa Law, London.

Soyer, Bariş, *Warranties in Marine Insurance*, 2001, Cavendish Publishing Limited, London.

Thomas, D. Rhidian, *The Modern Law of Marine Insurance*, 1996, LLP Limited, London.

Articles

Aikens, Sir Richard, *The Law Commissions' Proposed Reforms of the Law of "Warranties in Marine And Commercial Insurance: Will the Cure Be Better Than the Disease?"*, as found in ch. 6 of Soyer, Bariş, *Marine Insurance Legislation*, 4th ed., 2010.

Boye, Knut and Musæus, Lars, *Norway*, article found in ch. 20 of *The International Comparative Legal Guide to: Commodities and Trade Law 2006*, Global Legal Group, 2006, accessed on <http://www.iclg.co.uk/khadmin/Publications/pdf/703.pdf> in May, 2012.

Endresen, Clement, *Opplysningsplikt i sjøforsikring: Omfang, reaksjoner og forholdet til sikredes omsorgsplikter*, 1981, as printed in *Marlus* no. 65, Oslo.

Documents and Official Publications

Clarke, Malcolm, *An Interim Discussion Paper on Alteration of Risk*. As found in the CMI Yearbook 2003, pp. 500-522.

The Joint Consultation Paper of the Law Commission and the Scottish Law Commission on Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (LCCP 182/SLCDP 134), July, 2007. As found on http://lawcommission.justice.gov.uk/docs/cp182_ICL_Misrep_Non-disclosure_Breach_of_Warranty.pdf in May, 2012.

UK Law Commission Report, 1980.

United Nations, UNCTAD Report, 1982.

Electronic Resources

The official website for access to UK legislation:
www.legislation.gov.uk

The official website for access to Norwegian legislation:
www.lovdata.no

The official website of the Comité Maritime International

The official website for access to the NMIP:
www.norwegianplan.no,

The website of Gard Norway:
www.gard.no

Westlaw, used for access to case law:
www.international.westlaw.com

Table of Statutes

Australia

Insurance Contracts Act, 1954

England

Marine Insurance Act, 1906

Sale of Goods Act, 1979

Norway

Act Relating to Conclusion of Agreements, 1918

Conditions relating to Insurance for the Carriage of Goods, 1995

Insurance Contracts Act, 1930

Norwegian Marine Insurance Plans 1996, version 2010.

Table of Cases

Australia

Dawson v Mercantile Mutual Insurance Co Ltd [1932] VLR 380.

Canada

Britsky Building Movers Limited v The Dominion Insurance Corporation
[1981] ILR 1-1420.

Century Insurance Co of Canada v Case Existological Laboratories Ltd
(*The Bamcell II*) [1986] 2 Lloyd's Rep. 524.

Federal Business Development Bank v Commonwealth Insurance (1983) 2
C.C.L.I. 200.

Norway

ND 1978 s. 31

ND 1998 s. 216 NSC OCEAN BLESSING;

ND 2000 s. 442 NA SITAKATHRINE

United Kingdom of Great Britain and Northern Ireland

Agapitos Laiki Bank (Hellas) SA v Agnew (The Aegeon) (No 2) [2002] EWHC 1556 (Comm), [2003] Lloyd's Rep IR 54.

Alfred McAlpine plc v BAI (Run-Off) Ltd [2000] Lloyd's Rep 437 (CA).

Arbuthnott v Fagan [1995] CLC 1396.

Baines and Others v Holland (1855) 10 Exchequer Reports (Welsby, Hurlstone and Gordon) 802, 156 E.R. 665.

Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good luck) [1992] 1 AC 233.

Baring v Claggett (1802) 3 Bos & Pul 201

Bean v Stupart (1778) 1 Doug 11.

Bensuade v Thames & Mersey Marine Insurance Co [1897] AC 609.

Birrell v Dryer (1884) 9 App Cas 345.

Blackhurst v Cockell (1789) 3 TR 360.

Bond v Nutt (1777) 2 Cowp 601.

Carter v Boehm (1766) 3 Burr 1905, (1766) 97 ER 1162.

Christin v Ditchell (1797) Peake Add Cas 141.

Clapham v Cologan (1813) 3 Camp 382.

Colledge v Harty (1851) 6 Exch 205.

CTN Cash and Carry Ltd v General Accident Fire and Life Assurance Corp plc [1989] 1 Lloyd's Rep 299.

Dawsons v Bonnin [1922] 2 AC 413.

De Hahn v Hartley (1786) 1 TR 343.

De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd [1967] 2 Lloyd's Rep 550.

Eagle Star Insurance Co Ltd v. Games Video Co (The Game Boy) [2004] Lloyd's Rep IR 867.

Earle v Harris (1780) 1 Doug KB 357.

Eden v Parkison (1781) 2 Dougl 732.

Farr v Motor Traders Mutual Insurance Society [1920] 3 KB 669.

Forshaw v Chabert (1821) 3 Brod & B 158.

Forsikringsaktieselskapet Vesta v Butcher [1989] AC 852.

Freeman v Taylor (1831) 8 Bing. 124 131 ER 348.

Friends Provident Life & Pensions Ltd v Sirius International Insurance [2005] EWCA Civ 601, [2005] 2 All ER (Comm) 145.

Gabay v Lloyd (1825) 3 B & C 793.

General Insurance Co of Trieste Ltd V Cory [1897] 1 QB 335.

George Hunt Cranes Ltd v Scottish Boiler and General Insurance Co. Ltd
[2001] EWCA Civ 1964; [2002] Lloyd's Rep IR 178.

Hibbert v Pigou (1783) 3 Doug KB 224.

Higgins v Dawson [1902] AC 1.

HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co
[2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161.

*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The
Hongkong Fir)* [1962] 2 QB 26, [1961] EWCA Civ 7, [1962] 1 All ER 474.

Hore v Whitmore (1778) 2 Cowp 784.

Hussain v Brown [1996] 1 Lloyd's Rep 627.

Hyde v Bruce (1782) 3 Dougl 213.

International Management Group (UK) Ltd v Simmonds [2003] EWHC 177
(Comm), [2004] Lloyd's Rep IR 247, para. 154.

*Kazakstan Wool Processors (Europe) Ltd v Nederlandsche
Credietverzekering Maatschappij NV* [2000] Lloyd's Rep IR 371.

Kenyon v Berthon (1779) 1 Dougl 12(n).

Kirkaldy & Sons Ltd v Walker [1999] C.L.C. 722; [1999] Lloyd's Rep IR
410.

K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent) [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep 563.

Laing v Glover (1813) 5 Taunt 49.

Lawrence v Aberdein (1821) 5 Barnewall & Alderson 107.

Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos) [1971] 1 Q.B. 164.

Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga) [1990] 1 Lloyd's Rep 391.

Muirhead v Forth & North Sea Steamboat Mutual Insurance Association [1894] AC 72.

Muller v Thompson (1811) 2 Camp 610.

Nelson v Salvador (1829) M & M 309.

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

Provincial Insurance v Morgan [1933] AC 240.

Rich v Parker (1798) 7 TR 705.

Robertson v French (1803) 4 East 130.

Roddick v Indemnity Mutual Insurance Co Ltd [1895] 1 QB 836, [1895] 2 QB 380.

Schuler AG v Wickman Machine Tool Sales Ltd. [1974] A.C. 235.

Sea Insurance v Blogg [1898] 2 QB 398.

Seavision Investments SA v Evenett (The Tiburon) [1990] 2 Lloyd's Rep 418.

Shore v Wilson (1842), 9 Cl. & F. 355 1842.

Simpson Steamship Co v Premier Underwriting Association Ltd (1905) Com Cas 198; (1905) 10 Asp MLC 127

Svenska Handelsbanken v Sun Alliance and London Insurance plc [1996] 1 Lloyd's Rep 519.

Thomson v Weems (1884) 9 App Cas 671, 684;

Toomey v Banco Vitalicio de Espana sa de Seguros y Reasegueros [2003] EWHC 1102 (Comm); [2004] Lloyd's Rep IR 354; [2004] EWCA Civ 622; [2005] Lloyd's Rep IR 423.

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

WN Hillas & Co Ltd v Arcos Ltd (1932) 43 Ll. L. Rep. 359; (1932) 147 L.T. 503.

Woolmer v Muilman (1763) 1 Wm Bl 427.

Yorkshire Insurance Co Ltd v Campbell, [1917] AC 218.

Zeus Tradition Marine Ltd v Bell (The Zeus V) [2000] 2 Lloyd's Rep 587.

United States of America

Wilburn Boat Co v Fireman's Fund Insurance Co [1953] AMC 284,
reversed [1955] AMC 467.