A critical comparison between English marine insurance warranty and Chinese marine insurance warranty

A case for reform

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Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.
ABSTRACT

As a special contractual term, warranties in marine insurance policy are crucial for risk assessment purpose. Warranty in marine insurance law has survived for centuries. Despite its long period of existence, the current warranty regime has been criticised by a number of scholars and the Law Commission. The main criticism is that it operates unfairly against the assured.

Due to the existing problem of the current warranty regime, the main aim of this research is to critically analyse the law of warranty in the English Marine Insurance Act 1906. Where necessary, some law reform proposals will be introduced into the Marine Insurance Act 1906. Moreover, a critical comparison between the law of warranty in the Chinese Maritime Code 1993 and the law of warranty in the Marine Insurance Act 1906 will be made. Due to the simple provisions of Article 235 of the Maritime Code which deals with the issue of warranty, some new law proposals will be introduced into this Article for clarification purpose.

In order to achieve these merits, this thesis concentrates on the critical examination as to the law of warranty under the relevant provisions of the Marine Insurance Act 1906 and the Maritime Code 1993. Some law reform proposals made by other scholars will be critically analysed. In particular, the historical development of English and Chinese marine insurance will be provided in Chapter 1 and 3 respectively. The research on the issue of warranty consists of 4 Chapters, namely Chapter 2, Chapter 4, Chapter 5 and Chapter 6. Chapter 2 provides the nature of warranty under section 33 and 34 of the Marine Insurance Act 1906 and some relevant law reform proposals. Chapter 4 consists of the discussion as to the statutory rules of warranty under Article 235 of the Maritime Code. Chapter 5 specifies the statutory rules for the creation of express warranty. Chapter 6 deals with the critical review as to the different types of implied warranty in section 39 and 41 of the Marine Insurance
Act 1906, and the author will also introduce some new statutory rules as to the implied warranties to replace the present law. Additionally, as there is no implied warranty under the Maritime Code, in this Chapter, the statutory rules as to implied warranties will be introduced and inserted into the Maritime Code. Finally, Chapter 7 provides the general conclusion of this thesis for the law of warranty in England and China.
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DECLARATION

Whilst registered as a candidate for the above degree, I have not been registered for any other research award. The results and conclusions embodied in this thesis are the work of the named candidate and have not been submitted for any other academic award.

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Introductory Chapter

Background of the study

Marine insurance, as one of the oldest form of protection against the loss of the ship and cargo, has a significantly long history. The practice of marine insurance started to develop into a global level from the 13th century in Italy. Since then the law has started to develop on a local level. It is for this reason that the Law Merchant emerged to cover commercial law and the law of marine insurance. Marine insurance was introduced into England in the 13th century. In those early days, marine insurance disputes were settled in accordance with merchant's customs. The common law rules of marine insurance in England were finally codified into the Marine Insurance Act 1906. The term ‘warranty’, which is regulated under sections 33 to 41 of the 1906 Act, is a special term of the contract of marine insurance, due to its promissory nature. However, some of the statutory rules in respect of warranties in the 1906 Act should be modified to bring this area of law in line with the modern world.

In contrast, the history of Chinese marine insurance is relatively short. Until the 19th century, the business of insurance was mainly controlled by foreign businessmen. Subsequently, a number of domestic insurance companies were set up. However, the law of marine insurance in China did not develop into its mature state until 1993 when the Chinese Maritime Code came into force. Although the provisions governing marine insurance contracts are closely modelled on the English Marine Insurance Act 1906, the provisions governing warranties in Article 235 of the Maritime Code 1993 may cause uncertainty due to its simple wording. Thus, the statutory rules as to warranties in the Maritime Code 1993 are also in urgent need of modification. Relevant

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law reform proposals would enable the assured to understand the importance of the term ‘warranty’.

Objectives and scope of the study

The English Marine Insurance Act 1906 has survived for more than one hundred years. With regard to the issue of warranty, some previous common law principles have been codified into this Act. Despite the codification, some statutory rules in respect of warranties in the 1906 Act have received criticisms from legal professions and scholars, on the basis that these statutory rules in the 1906 Act are unfair and out of date. Therefore, one of the main aims of this study is to critically analyse the relevant provisions of the Marine Insurance Act 1906 which deals with the issue of warranties. It is hoped that this study can make a significant contribution to the improvement of the relevant provisions of the 1906 Act concerning warranties.

Warranty in the Marine Insurance Act 1906 can be divided into present warranty and future warranty. While a present warranty relates to the statement of fact given by the assured, a future warranty relates to the promise made by the assured that some something will or will not be done. Research will be conducted in respect of both types of warranty, especially present warranties. Some scholars suggest that due to the harsh legal consequence of the breach of warranty, all warranties should be replaced by the concept of alteration of risk. This view will be critically examined to reveal whether this view is appropriate. The term ‘warranty’ set out in section 33 and 34 of the Marine Insurance Act 1906 has certain statutory and common law features which render it special in marine insurance contracts. These features are: a promissory warranty must be exactly complied with; a warranty does not

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2 Section 33(3) of the Marine Insurance Act 1906.
have to be material to the risk; the statutory defence for a breach of warranty; a breach of warranty cannot be remedied; no causal connection between a breach of warranty and the loss; a breach of warranty automatically discharges the insurer from liability and a breach of warranty can be waived.

The crucial issue would arise as to whether these legal features have been appropriately established.

The statutory rules as to the creation of express warranty are stipulated in section 35 of the Marine Insurance Act 1906. In particular, an express warranty can be created with any form of words from which the intention to warrant is to be inferred. Another statutory requirement in respect of the creation of express warranty is that 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. A detailed law reform proposal should be made in respect of section 35 of the 1906 Act to provide fairness for both the insurer and the assured.

In contrast, the statutory rules as to Chinese marine insurance warranties are only set out in Article 235 of the Chinese Maritime Code 1993 which requires the assured to notify the insurer in writing immediately where he has not complied with the warranties under the contract. The insurer may, upon receipt of the notice, terminate the contract or demand an amendment to the terms and conditions of the insurance coverage or an increase in the premium. Obviously, the simple provision of this Article may cause uncertainty and confusion. In particular, the shortcomings of this Article are that it lacks a

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3 Ibid.
4 Section 34(1) of the Marine Insurance Act 1906.
5 Section 34(2) of the Marine Insurance Act 1906.
6 Section 33(3) of the Marine Insurance Act 1906.
7 Section 34(3) of the Marine Insurance Act 1906.
8 Section 35(1) of the Marine Insurance Act 1906.
9 Section 35(2) of the Marine Insurance Act 1906.
statutory definition of warranty, it is unclear as to whether or not a breach of warranty can be waived and the way by which a warranty can be created and so on. Therefore, relevant law reform proposals in respect of this area of law, if introduced, are expected to bring the Chinese Maritime Code in line with international standard.

Unlike express warranties, implied warranties are deemed to apply by the operation of law. Under the Marine Insurance Act 1906, there are 4 types of implied warranty, namely the warranty of portworthiness, the warranty of cargoworthiness, the warranty of legality and the warranty of seaworthiness. In English marine insurance law, the most important type of implied warranty is the warranty of seaworthiness. Apart from the examination of the warranties of portworthiness, cargoworthiness and legality, the main objective of this part of the thesis is to concentrate on the discussion as to the warranty of seaworthiness as appears in section 39 of the 1906 Act. In the Marine Insurance Act 1906, there are generally two types of policies, namely voyage policy and time policy. While the warranty of seaworthiness applies directly to voyage policy, it has limited application in relation to time policies. In particular, as far as voyage policy is concerned, research will be conducted in respect of the statutory definition of the term ‘seaworthiness’, the application of the warranty of seaworthiness and the doctrine of stages. The warranty of seaworthiness generally has no application in time policies. But where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.\textsuperscript{10} It follows from this aspect of law that the issue as to the privity of the assured and the phrase ‘attributable to’ must be deeply analysed to determine whether section 39(5) of the 1906 Act is in need of reform. However, the current section 39 of the 1906 Act has failed to address the issue as to whether the warranty of seaworthiness should apply to mixed policies. Therefore, as a final point, the

\textsuperscript{10} Section 39(5) of the Marine Insurance Act 1906.
target of this part of the study is to introduce a detailed common law rule in respect of the application of the warranty of seaworthiness in mixed policies.

In contrast, the implied warranties of seaworthiness and legality have not been recognised under the Maritime Code 1993, although unseaworthiness is treated as an exception to the liability of the insurer. As seaworthiness is crucial for the safety of the ship and the cargo, the purpose of this part of the study is to determine whether the implied warranty of seaworthiness should be introduced into the Maritime Code. Similarly, other types of implied warranty that are recognised under the Marine Insurance Act 1906 should also be analysed to determine whether it is appropriate to insert these implied warranties into the Maritime Code.

Importance and justification of the study

Due to the existing problems of the statutory and common law rules of warranty in English law, the current warranty regime has failed to protect the contracting parties’ legitimate interests. It is for this reason that the current warranty regime is in urgent need of modification in order to make it fairer for both the assured and the insurer. The need for reform is also announced by the Law Commission, as it has made a number of law reform proposals in respect of insurance warranty. Therefore, it is necessary for the author to provide a detailed law reform proposal in respect of the current English warranty regime in this study.

The only provision governing the law of warranty in the Chinese Maritime Code 1993 is Article 235 of the Maritime Code. This provision only sets out the legal consequence for the breach of warranty. It did not provide a statutory definition of the term ‘warranty’. Nor did it set out whether causal connection should play a role between the breach and the loss. In addition, it is unclear as to whether there is any defence for a breach of warranty. In more specific
terms, Article 235 of the Maritime Code provides that the assured shall notify
the insurer in writing immediately where the assured has not complied with the
warranties under the contract. But this part of Article 235 of the Maritime Code
has also failed to take into account the situation where the assured fails to give
notice to the insurer as to the breach of warranty. These shortcomings render it
necessary to introduce some new statutory rules, so that any existing gaps in
this Article would be filled. Conversely, in the absence of these new statutory
rules, it would be rather difficult for a particular marine insurance dispute to be
settled. Thus, some new statutory provisions concerning warranties should be
introduced into the Maritime Code in order to prevent any uncertainty in the
existing law.

Research Questions

1. What are the shortcomings of sections 33 and 34 of the English Marine
   Insurance Act 1906?

2. Are there any room for the reform of these two sections? If so, how will the
   reform proposal be carried out?

3. Should warranties be replaced by the concept of alteration of risk?

4. As far as the statutory rules of express warranties are concerned, what are
   the differences between Article 235 of the Chinese Maritime Code 1993 and
   section 33 of the English Marine Insurance Act 1906?

5. What are the problems in Article 235 of the Maritime Code 1993, and how
   will these problems be resolved?

6. Should section 35 of the Marine Insurance Act 1906 be regarded as the
   appropriate statutory rule for the creation of express warranties? If not, can the
   statutory rules in section 35 of the Marine Insurance Act 1906 be replaced by
   another statutory rule?
7. Should a new statutory rule concerning the creation of express warranty be introduced into the Maritime Code 1993?

8. Should the implied warranties of portworthiness, cargoworthiness, legality and seaworthiness be modified to improve the current sections 39 and 41 of the Marine Insurance Act 1906?

9. Should different types of implied warranty be incorporated into the Maritime Code 1993?

Research Methodology

This study is undertaken by a comparative approach. This study will follow the methodology commonly adopted in comparative law research. By adopting a comparative approach, the similarity and differences between English and Chinese law of marine insurance warranty will be discovered. But as the title of the thesis comprises the phrase ‘critical comparison’, the main aim of this study is to discover the weakness of the existing law of both English and Chinese marine insurance warranty, and thereby introduce some new law reform proposals where necessary. This is because the purpose of introducing relevant law reform proposals is to improve the law of marine insurance warranty for these two countries.

In this study, as far as the law of English marine insurance warranty is concerned, before any law reform proposal is introduced, the existing law, which consists of both statute law and common law, will be critically evaluated to figure out whether the existing law has appropriately been established. In case that the existing law has proven to be unfair or unsatisfactory, law reform proposals will be made in order to improve the existing law.

Due to the simple provision of Article 235 of the Chinese Maritime Code 1993 which regulates the issue of warranty, the first task in this part of the study is to figure out whether some of the relevant statutory rules of the
English Marine Insurance Act 1906 can be appropriately adopted into the Maritime Code 1993 to fill the existing gap. The second task is to identify the existing problem in Article 235 of the Maritime Code in order to find a suitable solution to replace the existing law.

Literature survey is the method used to conduct the research. The main sources of the literature survey include the Law Commission Consultation Paper, statutes, textbooks on insurance and marine insurance law, relevant articles in law journals and other PhD theses on insurance and marine insurance law. Through the research of these resources, relevant cases and the arguments put forward by other scholars in respect of the law of marine insurance warranty, the strength and weakness of the existing law of warranty will also become obvious.

The introduction of new law reform proposals begins with the analysis of the existing law. Each aspect of law is examined by reference to relevant cases and court decisions, as well as examples. Through a critical comparison, the strength and weakness of both English law and Chinese law will be revealed, and the rationale for the strength and weakness of the law will also be provided at the end of each section.

Finally, after a critical evaluation of the existing law and relevant cases concerning marine insurance warranties, a better solution for a legal or practical problem will be introduced with a logical reason behind it for the recommendations of the amendment of both English and Chinese marine insurance warranty.

Structure of the study

This study can be divided into 7 Chapters. Chapter 1 provides the historical background of marine insurance law and warranty. It begins with the origin of marine insurance law and the historical development of marine
insurance practice. It also discusses Lord Mansfield’s approach in respect of warranties in the 18th century and the fact that the common law principles in relation to marine insurance warranty have been codified into the Marine Insurance Act 1906.

Different legal features of marine insurance warranty are covered in Chapter 2 of the study. In particular, this Chapter analyses different types of promissory warranty and other statutory and common law features of warranty. The statutory features of warranty can be found in section 33 and 34 of the Marine Insurance Act 1906. Recommendations will be introduced in relation to the current warranty regime for the purpose of improving the existing law of warranty.

Chapter 3 concerns the historical review of Chinese marine insurance law. This Chapter can be mainly divided into two parts. The first part concerns the historical development of Chinese marine insurance law before the establishment of the PRC. The second part concentrates on the historical development of Chinese marine insurance law after the establishment of the PRC, including a brief introduction as to the Insurance Law of PRC 1995 and the Maritime Code 1993. The Chinese court system is also briefly stipulated at the end of this Chapter to provide the readers with a better understanding of the Chinese judicial process of dealing with marine insurance cases.

Chapter 4 deals with the statutory rules of warranty under Article 235 of the Chinese Maritime Code 1993. A detailed discussion will be made in this Chapter to determine whether law reform proposal should be introduced for the purpose of replacing the existing law.

Chapter 5 discusses the statutory rules of the creation of express warranty under section 35 of the English Marine Insurance Act 1906. In particular, section 35(1) and (2) is critically examined in order to figure out a suitable law reform proposal. In the absence of the statutory rules as to the creation of
express warranty in the Maritime Code 1993, a new set of rules should be introduced into the Maritime Code to cover the issue as to the creation of express warranty.

Chapter 6 provides a detailed critical examination as to the different types of implied warranty. It starts with the discussion of the implied warranties of portworthiness, cargoworthiness and legality as can be found in the Marine Insurance Act 1906. Some suggestions for the reform of these three types of implied warranty will be offered in this Chapter. Most importantly, this Chapter provides a detailed analysis as to statutory rules of the implied warranty of seaworthiness as appear in section 39 of the Marine Insurance Act 1906. These statutory rules include the definition of the term ‘seaworthiness’, the application of the warranty of seaworthiness in voyage policy, time policy and mixed policy, the doctrine of stages. Apart from these aspects of law, the issue as to the burden of proof in unseaworthiness allegations, as a common law principle, will also be considered in this Chapter to reveal whether the current law on this issue is satisfactory. As the implied warranty of seaworthiness is not recognised in the Maritime Code 1993, it is also necessary, in this part of the study, to consider the issue as to whether section 39 of the Marine Insurance Act 1906 should be adopted into the Maritime Code as an implied warranty.

Finally, the general conclusion for the whole study will be drawn in Chapter 7 for the purpose of completing the study.

Contribution to the field of knowledge

In this study, the author will make some contribution as recommendations for the existing law of warranty. As far as section 33 of the Marine Insurance Act 1906 is concerned, a new statutory definition of warranty will be introduced to replace section 33(1) of the 1906 Act. The statutory rules that a warranty
must be exactly complied with and a warranty does not have to be material to the risk will also be challenged by the author on the basis that these two statutory rules may create unfairness. Recommendation will be made in respect of the common law rule that there is no causal connection between a breach for warranty and the loss, such a recommendation would ensure that the assured’s commercial interest is well protected. A new statutory rule as to the defence for a breach of warranty will be introduced in this study. A law reform proposal will be made in respect of the legal consequence for a breach of warranty. The statutory rule in relation to the waiver of a breach of warranty will be altered to prevent uncertainty.

The statutory rule as to the creation of express warranty in section 35 of the Marine Insurance Act 1906 should also be modified to make the law fairer for both the assured and the insurer.

With regard to implied warranties of portworthiness, cargoworthiness, legality and seaworthiness, the current statutory rules in sections 39 and 41 of the Marine Insurance Act 1906 will need to be modified in order to balance the conflicting interest between the assured and the insurer. The common law rule as to the burden of proof in unseaworthiness allegations will also be modified, so that it would be easier for both parties to discharge the burden of proof.

As far as Chinese marine insurance law is concerned, Article 235 of the Maritime Code 1993 is the principal provision governing the issue of warranty. In this part of the study, a statutory definition should be introduced into the Maritime Code 1993. Under this Article, the assured should notify the insurer for a breach of warranty, but it is suggested by the author that the assured should also take reasonable steps to avoid or minimise the loss of the subject matter insured. If the assured fails to do so, the contract will be automatically terminated.
With regard to the legal consequence for a breach of warranty, a distinction should be drawn between innocent breach and intentional breach. Accordingly, the legal consequence for these two types of breach should be different. In order to ensure that various situations are covered in Chinese marine insurance law, it is suggested by the author that some of the amended version of the legal features of warranty stipulated in the Marine Insurance Act 1906 should also apply to the Maritime Code 1993 for the purpose of clarifying some legal issues.

The implied warranty is not recognised in the Chinese Maritime Code 1993. Therefore, in order to bring Chinese marine insurance law in line with international standard, it is suggested by the author that the amended version of the implied warranties of portworthiness, cargoworthiness, legality and seaworthiness, as can be found in the Marine Insurance Act 1906, should all be introduced into the Maritime Code 1993.

**Literature review**

This study provides a critical analysis of the statutory rules of marine insurance warranties as appear in the English Marine Insurance Act 1906. As far as English marine insurance law is concerned, discussion will be based on section 33, 34, 35, 39 and 41 of the Marine Insurance Act 1906. It also provides a critical examination as to the law of marine insurance warranty in the Chinese Maritime Code 1993. Due to the existing uncertainty of Article 235 of the Maritime Code 1993 which regulates the issue of warranty, some suggestions for the modifications of this Article will appear in this study. Where necessary, some law reform proposals will be introduced by the author in order to improve the existing statutory provisions. The literature review of this study is mainly based on some relevant textbooks, articles and thesis completed for the area of marine insurance warranty. Some cases concerning the issue of
marine insurance warranty will also be cited in this study to emphasize a particular point of law.

The main contribution and innovation in respect of English and Chinese marine insurance warranty appear in Chapters 2, 4, 5 and 6 of the study. The main aim of this study is to discover the weakness of the existing law of both English and Chinese marine insurance warranty, and thereby introduce some new law reform proposals where necessary. Through the research of relevant resources, cases and the arguments put forward by other scholars in respect of the law of marine insurance warranty, the strength and weakness of the existing law of warranty will also become obvious.

Chapter 2 of the study deals with the statutory and common law feature of English marine insurance warranty. The statutory features of warranty appear in section 33 and 34 of the Marine Insurance Act 1906. The research in this area of law is mainly based on some cases and textbooks written by Baris Soyer, Susan Hodges, Howard Bennett, and so on. Additionally, some of the views expressed by the Law Commission in respect of the current warranty regime have been challenged in this part of the study. By way of example, according to the Law Commission’s proposal, all present warranties should be replaced by representations. But the author’s view is that this proposal may not solve the problem as to the harshness of warranty, because some statements of past or existing facts given by the assured should be regarded as crucial for the risk assessment process, whereas others may be less important for the insurer. The common law feature of warranty that there is no causal connection between a breach of warranty and the loss has been criticised by the Law Commission. According to the Law Commission, the common law rule

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that a causal connection between the breach and the loss does not have to be shown may cause unfairness from the point of view of the assured, so that the view expressed by the Law Commission is that the insurer cannot rely on a breach of warranty if the assured proves on a balance of probability that the loss in respect of which he seeks to be indemnified was not caused or contributed to by the breach. A detailed discussion in this study will reveal that such a law reform proposal may not be appropriate in all cases, because it may be unfair for the insurer, so that a different law reform proposal should be introduced. Research in the current warranty regime also includes Dr Derrington and Dr Jing's suggestion that all express warranties should be replaced by the concept of alteration of risk, so that the harshness of the existing law of warranty can be mitigated. Due to the problem of uncertainty, the discussion on this part of the study will prove that such a recommendation cannot be justified.

Chapter 4 provides an analysis of the statutory rules as to warranties in Article 235 of the Chinese Maritime Code 1993 and the concept of alteration of risk. Relevant research is conducted in respect of some Chinese journals, such as those written by Qingzhen Sun, Lei Zheng and Yuquan Li. In particular, it has been argued by Qingzhen Sun that the Maritime Code should

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set out the rule as to the time of which the contract is deemed to be terminated upon a breach of warranty, and this aspect of law, if introduced by the Chinese law drafters, should follow the legal consequence of a breach of warranty as stated in section 33(3) of the Marine Insurance Act 1906. This argument will be critically evaluated by the author in this part of the study to reveal that this is an unconvincing view due to the difference between 235 of the Maritime Code and section 33(3) of the 1906 Act. With regard to the issue of alteration of risk in Chinese insurance law, the author conducts research by looking at a textbook jointly written by Baoshi Wang and Fan Yang.\(^\text{18}\) This book provides a detailed discussion in respect of the case of *Mr Feng Liao v Ping An Insurance Co Ltd Shenzhen Branch* which will be used by the author in this part of the study to figure out whether the concept of alteration of risk has appropriately been introduced in non-marine insurance law. Due to the fact that there is no statutory definition of the term ‘warranty’ in the Maritime Code 1993, some Chinese scholars have introduced a statutory definition of warranty. This definition reads: ‘the assured promises that some particular thing shall or shall not be done, or promises the existence or non-existence of a particular state of facts under the contract.’\(^\text{19}\) But in the opinion of the author, this may not be the best statutory definition, so that a different statutory definition should be introduced into the Maritime Code 1993.

Chapter 5 concerns with the statutory rules as to the creation of express warranty in section 35 of the Marine Insurance Act 1906 and the statutory recommendation of the rules as to the creation of express warranty in the Maritime Code 1993. Section 35(1) and (2) of the Marine Insurance Act 1906 will be critically evaluated by the author through the assistance of some relevant textbooks. For instance, in the textbook jointly written by John Lowry, \(^\text{18}\) Baoshi Wang and Fan Yang, *Property Insurance Law*, 2009, p77.

Philip Rawlings and Robert Merkin,\textsuperscript{20} it has been provided that if two possible interpretations of an express term existed, one being favourable to the assured, and one being favourable to the insurer, the words will be construed narrowly against the insurer who has drafted the wording and sought to rely on it, so that the words will be construed in favour of the assured. This section clearly provides that an express warranty can be created by any form of words. But neither section 35 of the Marine Insurance Act 1906 nor legal scholars have discovered the problem that some absurd or unreasonable terms may be converted into express warranties by the insurer. Such a problem will need to be resolved in this part of the study. Apart from the standard forms, a warranty can be created with the words of the contracting parties.\textsuperscript{21} The general rule that when construing a particular warranty, the relevant commercial background should be considered is expressed in the journal written by N B Rao.\textsuperscript{22} This point will also be considered in this part of the study. As a general rule, an oral statement or a representation subsequently incorporated into the policy in written forms may be construed as a warranty provided that the parties’ intention to warrant is clear. This common law rule will need to be critically examined in this part of the study to reveal whether this aspect of law is satisfactory.

Finally, Chapter 6 of the study provides a detailed discussion as to the statutory rules of the implied warranties in section 39 and 41 of the Marine Insurance Act 1906. In addition, it also introduces some suggestions for the statutory rules of the implied warranties into the Maritime Code 1993. As far as the implied warranty of legality is concerned, Baris Soyer’s view\textsuperscript{23} is crucial for the purpose of the research, as he specifies the issue as to whether a violation

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of a particular statute or regulation would constitute an illegal marine adventure. With regard to the implied warranty of seaworthiness, the term ‘seaworthiness’ is defined by both section 39(4) of the Marine Insurance Act 1906 and common law. Under common law, the general proposition expressed by one of the academic scholars in Hong Kong is that in order to be considered seaworthy, the ship concerned and its equipment needs only to be reasonably fit to enable the ship to reach the intended destination. The issue as to whether the carrier’s obligation to provide a seaworthy ship has been breached appears in a PhD thesis written by Ahmad Hussam Kassem. Although the first part of section 39(5) of the Marine Insurance Act 1906 provides that the warranty of seaworthiness does not apply in time policies, the second part specifies the role the issue of unseaworthiness plays in time policies. As such, the insurer is not liable for any loss attributable to unseaworthiness if the ship is sent to sea in an unseaworthy state with the privity of the assured. The situation where both unseaworthiness and perils of the sea constitute the cause of loss has been dealt with by Meixian Song. As far as mixed policy is concerned, it is suggested by Baris Soyer that while the voyage part of the cover is subject to the warranty of seaworthiness, it should have no application in the time part of the cover. Although this view has gained academic support, according to the author’s view, it may not be the most satisfactory solution.

In Chinese marine insurance law, unseaworthiness is considered as the exclusion to the liability of the insurer under Article 244 of the Maritime Code 1993. The legal standard of seaworthiness in Chinese marine insurance law can be found in Wenhao Han’s thesis which also specifies the way by which

the issue of illegality of the marine insurance contract is dealt with.\textsuperscript{28} According to the author's view, in this part of the study, the issues of unseaworthiness and illegality should be introduced into the relevant provisions of the Maritime Code 1993 as two types of implied warranty, so that the insurer's commercial interest would be protected in a fair manner.

Overall, having consulted all the above textbooks, journals and theses that are relevant to this study, a critical analysis of the law of English marine insurance warranty and Chinese marine insurance warranty will be made in this study followed by some relevant law reform proposals, such that the existing law could be improved for the benefit of the English and Chinese marine insurance market.

Chapter 1

The historical review of English marine insurance warranties

1.1 Introduction

It is a widely acknowledged fact that marine insurance law plays a significant role in international trade transactions. In fact, it is worthwhile to note that the body of rules governing international trade in the 21st century derives from medieval commercial laws known as the *lex mercatoria*\(^\text{29}\) and the *lex maritima*.\(^\text{30}\) But it has generally been accepted that English marine insurance law was developed as a dominate source of law on an international basis. In other words, the legal principles adopted by other countries, including civil law countries, in relation to marine insurance warranties were closely influenced by English law. The reason for this being that the British marine insurance market has traditionally been considered and accepted as one of the most important and dominant marine insurance market on an international level. The British market consists of insurers primarily located in a number of major cities of which London was the most important. The London insurance market has been known as the ‘Lloyd’s of London’. This is an association with private individual insurers of over 14,000 in total. As a result of the historical development of marine insurance, it is not surprising that the law, policy conditions and practices developed in England are the most commonly accepted components of marine insurance contracts throughout the world.\(^\text{31}\)

However, there have been numerous criticisms on the English law of marine insurance warranties developed by academics and legal professions for many years.\(^\text{32}\) Under the current English marine insurance warranty

\(^{29}\) The term ‘*lex mercatoria*’ refers to the law for merchants on land.

\(^{30}\) The term ‘*lex maritima*’ refers to the law for merchants on sea.


\(^{32}\) See for example, Sir Andrew Longmore, *Good Faith and Breach of Warranty: Are we Moving*
regime, the term ‘warranty’ refers to a promise or undertaking made by the assured and which must be strictly complied with by the assured. In the event of a breach of warranty, the liability of the insurer will be automatically discharged as from the date of the breach.\textsuperscript{33} According to English law, a warranty has traditionally been regarded as a condition precedent to the attachment of the risk.\textsuperscript{34} However, the legal principles of marine insurance warranty have been regarded as out of date and extremely harsh from the point of view of the assured. As a result, the law relating to the warranty regime should be brought into line with acceptable practice. It is therefore suggested by the Law Commission that the law of marine insurance warranty should be reformed in order to provide fairness and balance the conflicting interests as between the assured and the insurer.\textsuperscript{35} It is clear that the doctrine of marine insurance warranty has existed for over 300 years. It is therefore worthwhile to examine the historical development of marine insurance law and the concept of warranty and consider the issues as to the initial purpose of marine insurance warranty and how the law has developed into its current position. The question as to what the law of marine insurance warranty was in ancient times will also become obvious through a historical review.

1.2 The origin of marine insurance practice and law

From the very earliest times of maritime trading, it was acknowledged by merchants that maritime risks constituted a greater hazard than those encountered for land transportation. Marine insurance, as one of the oldest forms of protection against maritime losses relating to ship and cargo, has a

\footnotesize{\textit{Forwards or Backwards?} (2004) LMCLQ 158.}


\textsuperscript{34} See the judgment of Lord Blackburn in \textit{Thomson v Weems} (1884) 9 App Cas 671 at p 684.

\textsuperscript{35} Law Commission and Scottish Law Commission, Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (LCCP No. 182, SLCDP No. 134, 2007).}
long and colorful history of great significance. Originally, merchants’ vessels and goods were protected by the earliest contracts in which the burden of the happening of unexpected events was transferred to another at a fixed price. These contracts were an extended facility of the maritime loan developed by the Babylonians in the 3rd millennium BC. Evidently, the earliest form of marine insurance emerged and developed in Europe from the Middle Ages. During this period of time, the ancient Phoenicians, the Greeks and the Romans were all in the interest of guarding themselves against some types of the risk of maritime loss by various systems of insurance, whether in the form of loans or mutual guarantee.\(^\text{36}\) It is suggested that the practice of marine insurance have been developed by Lombard merchants in Medieval Northern Italy in the late 12\(^{th}\) and early 13\(^{th}\) centuries and subsequently spread to Northern Europe.\(^\text{37}\) The law and practice of marine insurance were subsequently imported to England, as Lombard merchants were forced to migrate to England in the late 13\(^{th}\) century by the Kaiser of Germany.\(^\text{38}\) In addition, it was the Italian mercantile community and the international commercial transactions developed by Italian trade usage that influenced England, like the rest of the European countries, to introduce its own instruments of commerce, such as the bill of exchange and the bill of lading.\(^\text{39}\) After the 15\(^{th}\) and 16\(^{th}\) centuries, maritime trading activities were internationalised to a great extent.

Significantly, the use and practice of marine insurance came to be codified in a number of different ordinances and early maritime codes. In this respect, the medieval \textit{lex mercatoria} was developed by merchants as a spectacular example of transnational private ordering in respect of commercial transactions in Europe during the medieval times. The northern cities of Italy


\(^{38}\) Ibid, at p5-6.

played a crucial role in the development of the *lex mercatoria*. It follows from this perspective that the doctrine of *lex mercatoria*, which was also known as the ‘Law Merchant’ in England, was originally a medieval set of rules and customs set up by merchants voluntarily to regulate their business dealings and develop commercial relations, including the business of marine insurance, among them. With the emergence and development of the medieval *lex mercatoria*, it is thought that in ancient times, cases concerning commercial issues were generally adjudicated before merchants themselves who relied heavily on reputational enforcement without the interference of public courts. While these rules were self-referential and self-enforcing, these rules were gradually incorporated into national laws by established court systems. By way of example, the medieval *lex mercatoria* was absorbed into English common law after the 17th century and codified into various statutes at the end of the 19th century, such as the Bills of Exchange Act 1882, the Partnership Act 1890 and the Sale of Goods Act 1893.

As far as the trading activity in the 21st century is concerned, the *lex mercatoria* has been regarded as the international law of commerce. Similar to the medieval *lex mercatoria*, the modern *lex mercatoria*, developed by the international business community, is a set of trading rules consisting of trade usages, model contracts, standard clauses, general legal principles and international commercial arbitration. Thus, there is no doubt to say that the modern *lex mercatoria* has a strong connection with the medieval *lex mercatoria*. It has been pointed out that ‘international law is still largely independent of nationalised legal systems, retaining many of the basic (though...

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41 The origins of the *lex mercatoria* date back to the Middle Ages.
42 It should be noted that the law merchant was a body of international European law created by the medieval mercantile community and developed mainly after the Middle Ages.
modernised) institutional characteristics of the medieval Law Merchant.\textsuperscript{44}

Furthermore, the doctrine of \textit{lex maritima}, which was developed as part of the doctrine of \textit{lex mercatoria} for customary mercantile law, was the general maritime law governing the law of marine insurance in all Western Europe until the late 15\textsuperscript{th} century, although the existence of the \textit{lex maritima} dates back to the Rhodian law of the 8\textsuperscript{th} or 9\textsuperscript{th} century which was an unwritten body of sea law originated from the Island of Rhodes.\textsuperscript{45} The principal source of early maritime law in Europe was an oral, customary \textit{lex maritima} which directly applied to commercial transport of goods by sea. In particular, the doctrine of \textit{lex maritima} refers to a specialised body of oral rules, maritime practice, maritime customs and usage in respect of navigation and maritime commerce and was accepted and administered by merchant judges in medieval Western Europe. Besides, the \textit{lex mercatoria} and the \textit{lex maritima} are both \textit{ius commune}\textsuperscript{46} which applies in a particular state as a source of law, unless there is a specific statute limiting it. Typical examples of the \textit{lex maritima} include the attachment, maritime liens, general average, the hire of the ships and their services under charterparties, marine insurance and so on. Furthermore, the \textit{lex maritima} was gradually codified in early maritime law compilations under the laws of Wisby in the 16\textsuperscript{th} century.\textsuperscript{47} Today, the existence of the \textit{lex maritima} can be found in the United States, the United Kingdom (UK), Canada and many of the world’s shipping nations as the general maritime law.

The practice of marine insurance was introduced into England (London) and the cities of the Hanseatic League from as early as the middle of the 13\textsuperscript{th}

\textsuperscript{46} The \textit{ius commune} is a law common to a whole jurisdiction or more than one jurisdiction. It consists of general principles. At the outset, it usually exists as an oral form and then often codified into statutes.
\textsuperscript{47} http://definitions.uslegal.com/l/lex-maritima/.
century.\textsuperscript{48} It is worthwhile to note that the first form of marine insurance in Britain had been carried out by a group of Hanseatic merchants.\textsuperscript{49} While the practice of marine insurance was first started by foreigners, at the commencement of the 17\textsuperscript{th} century, the business of marine insurance had started to fall into national enterprise. By that time, marine insurance was operated to require people who wished to insure their ship or cargo to find a number of insurers who were able to accept maritime risks, and ask them to sign a policy embodying the transaction.\textsuperscript{50} As a result, in the early 18\textsuperscript{th} century, the entire business of marine insurance was conducted by two insurance companies, these are the Royal Exchange Assurance and the London Assurance.

At the outset, insurance disputes were heard in the Assurance Chamber which was established in London in 1577.\textsuperscript{51} During this period of time, disputes concerning marine insurance were still settled based on merchants’ customs rather than on points of law. In England, from the 16\textsuperscript{th} century, the law merchant was absorbed by the common law courts. A typical example would be the King’s Courts of Common Law. As a result, marine insurance was not extensively litigated in England until the 16\textsuperscript{th} century, although there was no English legislation regulating marine insurance at that time. Instead, marine insurance cases were decided by the Court of Admiralty\textsuperscript{52} and local maritime courts located in seaport towns on the basis of the use and customs of domestic merchants within the mercantile community. It has generally been

\begin{itemize}
\item \textsuperscript{52} The Court of Admiralty, also known as maritime court, deals with matters concerning maritime contracts, the transportation of passengers and goods by sea, torts, injuries and offences by virtue of the presence of a ship being in its territorial jurisdiction regardless of the ship’s nationality.
\end{itemize}
accepted that ‘the Court of Admiralty had an ancient jurisdiction in respect of
offences committed on the high seas. From these origins it commenced
hearing civil disputes connected with the sea.’\textsuperscript{53}

From the 16\textsuperscript{th} century, the Court of Admiralty had power to deal not only
with domestic cases, but also disputes concerning oversea trading matters.
Legal disputes concerning marine insurance were generally decided by both
the Court of Admiralty and the court of common law.\textsuperscript{54} Due to the fact that the
value of English overseas trade significantly increased during the 17\textsuperscript{th} century,
different set of rules concerning export trade was established by English courts.
As a result, a clear distinction was drawn between English and European
marine insurance systems from the 17\textsuperscript{th} century.\textsuperscript{55} At the outset, the existence
of marine business in England was primarily concerned with the insurance of
ships engaged in the trading of slaves,\textsuperscript{56} although underwriting was carried
out solely by private individuals who agreed to share potential marine risks
among themselves rather than by insurance corporations.\textsuperscript{57} Significant
development in relation to marine insurance law and practice appeared in the
late 18\textsuperscript{th} century where the law of marine insurance was accepted as a
separate branch of English common law.

1.3 Legal history of marine insurance warranty in English law

As the practice of marine insurance developed throughout the Europe,
certain contractual terms were introduced by the merchants in order to
circumscribe and control the risk. A number of contractual provisions

\textsuperscript{54} Holdsworth, \textit{A History of English Law}, Vol VIII, 1972, 2\textsuperscript{nd} ed., at 288.
\textsuperscript{56} Eric Williams, \textit{Capitalism and Slavery}, 1944, p 104.
\textsuperscript{57} In those early days, private individuals were often grouped together in various underwriting
syndicates as a result of the establishment of the Lloyd’s Coffee House which was originally a popular
market place providing the merchants and the shipowners with reliable shipping news, as well as
information relating to ships, trade routes and trading partners.
incorporated in the early marine insurance contracts aimed at requiring the assured to do or refrain from doing something during the currency of the policy. In English marine insurance law, such provisions have been regarded as warranties, although it is believed that the term ‘warranty’ was introduced into marine insurance contracts by laymen rather than by lawyers.\textsuperscript{58} The doctrine of warranty has been established in England for more than 200 years. The approach adopted by English law was that the insurer’s promise of cover would depend on the assured’s fulfillment of the warranties. During the early period where the issue of warranty has received judicial attention, the most common type of warranty was the undertaking that the ship would sail in convoy. The commercial purpose of a marine insurance warranty is to assist the insurer to assess and circumscribe the initial risk in an accurate way and ensure that the assured takes precautions that will reduce the maritime risk exposed to the insurer. Without the undertaking made by the assured, the insurer will not be bound to assume the risk of the goods in sea transit.

The first reported English case in respect of marine insurance warranty is the case of \textit{Jeffries v Legandra}.\textsuperscript{59} The case concerned an insurance policy which sought to protect the assured from perils of the sea, pirates, enemies, etc, from London to Venice. The policy also contained a term which read as ‘warranted to depart with convoy’. The ship initially complied with this term when she first set sail, but she was subsequently separated from the convoy as a result of severe weather and was then captured by the French. The court construed the words ‘to depart with convoy’ to mean sail with convoy for the entire voyage. However, the fact that the ship was forced to separate from the convoy for reasons other than the willful misconduct of the master or the assured did not mean that this undertaking had been breached by the assured. In reaching the decision, the court ruled that compliance with this undertaking


\textsuperscript{59} (1692) 4 Mod. 58.
was a condition precedent to the liability of the assured, but due to the fact that the master did not intend to separate the ship from the convoy, this undertaking was held not to be breached. The courts had used a similar principle in two subsequent cases to conclude that according to the doctrine of *de minimis non curat lex*, even minor discrepancies in relation to non-compliance of warranty should not prevent the assured from recovering the loss.\(^60\) However, it is regrettable that in those early days, there was no unique legal definition as to marine insurance warranty in England, due to the fact that the term ‘warranty’ was only used customarily by merchants and insurance brokers as a device to regulate their insurance contracts.\(^61\) In addition, during this period, the law of marine insurance was rather unsettled as a result of the competing jurisdictions between the Court of Admiralty and the court of common law, as well as the frequent use of marine insurance arbitration by the parties.\(^62\)

### 1.4 Lord Mansfield’s approach in the 18\(^{th}\) century

Until the 18\(^{th}\) century, English commercial law was still based upon the old doctrine of *lex mercatoria*. In the 18\(^{th}\) century, the rapid growth of export trade between England and other countries had made a great influence on the business of marine insurance. Furthermore, the growth of the British Empire provided English law with a prominence in this area which it largely retained and formed the basis of almost all modern practice.

By the middle of the 18\(^{th}\) century, the law of marine insurance had been further developed and settled as a separate branch of English common law by Lord Mansfield\(^ {63} \) who had read widely amongst the work of European jurists in

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\(^60\) See *Lethulier’s Case* (1692) 91 Eng Rep 384 and *Gordon v Morley* 93 Eng Rep 1171.


\(^63\) Lord Mansfield was widely regarded as the founder in the area of English commercial law and
the field of mercantile law and who was considered as the leading proponent for the incorporation of the doctrine of *lex mercatoria* into common law. In order to remove the inconsistency between English commercial law and the law of other European countries, Lord Mansfield had made a great effort to bring English commercial law up to the same standard as that of other European countries. More specifically, ‘striving to implement a realistic system of commercial law in England, Lord Mansfield argued for a system of commercial law which gave due regard to business custom and trade usage.’ During this period, Lord Mansfield, as well as Lord Chief Justice, decided a number of important commercial and mercantile cases with the assistance of experienced merchants, insurance brokers, adjusters and insurers. More specifically, cases in relation to the various features of express warranties had received judicial attention. Lord Mansfield’s method of dealing with marine insurance cases was to refer to Continental ordinances and codes, such as the Marine Ordinance of 1681, and the business practice of domestic merchants to find legal principles applicable to marine insurance, due to the fact that the rules relating to marine insurance contracts were mainly based upon mercantile practices. After a careful examination of each case, Lord Mansfield took major steps towards rationalising legal principles of insurance in general and introduced a detailed set of rules on the nature of express warranties, the legal consequence of the breach and the well-known principle of utmost good faith which were regarded as the foundation of the law on English marine insurance.

became the Chief Justice of the King’s Bench in the court of common law from 1756 to 1788.


66  See *Carter v Boehm* (1766) 3 Burr 1905; *Pillans & Rose v Van Mierop & Hopkins* (1765) 3 Burr 1663; *Gregson v Gilbert* (1783) Doug KB 232.

67  The principle of utmost good faith in marine insurance law was first established by Lord Mansfield in the case of *Carter v Boehm* [1766] 3 Burr 1905 where Lord Mansfield ruled that any misrepresentation or concealment of facts by either party would make a policy void.
1.5 Legal features of express warranties in the 18\textsuperscript{th} century

1.5(1) A warranty does not have to be material to the risk

In 1756, Lord Mansfield became the Chief Justice of the King’s Bench. The various legal features of warranty were ultimately established by Lord Mansfield in the court of common law. For Lord Mansfield, the term ‘warranty’ should be construed according to merchants’ customs and the parties’ intention. It should be noted that the approaches adopted by Lord Mansfield in relation to warranties are still fundamental and relevant to English law in the 21\textsuperscript{st} century. At the outset, the issue as to whether or not the warranty must be material to the risk was dealt with in the early case of \textit{Woolmer v Muilman}.\textsuperscript{68} The fact of the case was that under the insurance policy, the insured ship and cargo were warranted to be neutral, but they were in fact the property belonging to Britain. The underwriter refused to pay the assured for the loss after the ship sank during the sea voyage on the ground that the warranty was breached by the assured. Despite the assured’s contention that the warranty was not material to the risk, it was held that the underwriter was not liable for the loss, and that the contract would be terminated. Therefore, it is clear that according to Lord Mansfield, there was no materiality between the warranty and the risk, and that the legal consequence for a breach of warranty would be termination of the insurance contract as a whole because of the importance of the term ‘warranty’, and non-compliance with the warranty could also adversely affect the insurer’s opportunity to evaluate the risk in a proper manner.

1.5(2) The distinction between ‘warranty’ and ‘representation’

In the view of Lord Mansfield, the term ‘warranty’ has a special legal status in marine insurance law. This point is graphically illustrated in the case of \textit{Bean v Stupart}\textsuperscript{69} where Lord Mansfield defined a warranty to mean a condition on

\textsuperscript{68} (1763) 1 Wm Bl 427.
\textsuperscript{69} (1778) 1 Doug 11.
which the contract was found. Due to this special feature, a clear distinction had subsequently been drawn by Lord Mansfield between the term ‘warranty’ and the term ‘representation’. Thus, in the case of *Pawson v Watson*,\(^70\) it was agreed that the insured ship was to have 12 guns and 20 men on board. But in fact the ship had sailed with only 9 guns and 12 men, but such an agreement was not included in the insurance policy. During the voyage, the ship was captured by an American privateer. The insurer asserted that the warranty had been breached by the assured and therefore refused to indemnify the assured as to the loss. However, Lord Mansfield rejected this argument and made a distinction between a warranty and a representation by holding that as the statement of fact was not inserted into the insurance policy, it must be construed as a representation rather than a warranty. On the contrary, Lord Mansfield did appreciate the significance of the term ‘warranty’ by stating that ‘Where it is a part of the written policy, it must be performed: as if there be a warranty of convoy, there it must be a convoy: nothing tantamount will do, or answer the purpose; it must be strictly performed, as being part of the agreement …’\(^71\) This means that in order to constitute a warranty, the statement itself must be written or inserted into the insurance policy.

In contrast, in the case of *De Hahn v Hartley*,\(^72\) the clause written in the margin of a policy of marine insurance stated that the ship would sail from Liverpool to its destination port in the British West Indies with ‘14 six-pounders, swivels, small arms, and 50 hands or upwards; copper-sheathed’. In fact, the ship had sailed with only 46 hands, even though the ship subsequently resumed her voyage with 52 hands in Anglesey. But the ship was then captured and lost near the coast of Africa. The insurer denied liability following from the breach of this undertaking on the part of the assured, even though the warranty was subsequently remedied by the assured. This time, Lord

\(^70\) (1778) 2 Cowp 785.
\(^71\) Ibid, at pp 787-788.
\(^72\) (1786) 1 TR 343.
Mansfield construed this clause as a warranty on the ground that this clause was written into the insurance policy. In addition to this rule, Lord Mansfield also stressed the importance of the term ‘warranty’ by stating that ‘it is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with’. Similarly, Mr Justice Ashhurst took the same view and stated that ‘the very meaning of a warranty is to preclude all questions whether it has been substantially complied with: it must be literally so.’ Conversely, according to the court, it would be sufficient if a representation was substantially complied with. This exact compliance rule, which influenced the drafter of the marine insurance legislation, is indeed one of the most important legal features of warranty. Furthermore, in this case, the fact that the warranted number of crew had been recruited before the vessel sailed on the leg of the voyage during which the accident took place did not influence the court’s decision, because the proposition established by Lord Mansfield was that in the event that a warranty was not complied with, it was immaterial whether it was remedied later.

1.5(3) No excuse for a breach of warranty

Having considered the issue of exact compliance, different situations may also arise where the assured has innocently breached a warranty without any fault on his own part. Therefore, the issue may then arise as to whether or not a breach of warranty can be excused in such a case. This issue was brought into discussion in the case of Bond v Nutt\(^4\) where a ship was warranted to sail on or before a particular date. The ship in fact sailed before that date from the port of lading to the other port to join the convoy. However, the ship was subsequently detained by an embargo beyond the date of sailing warranted by the assured. When the case reached the court, the underwriter contended that compliance with the warranty formed the basis of the insurance policy, so that

\(^{73}\) De Hahn v Hartley (1786) 1 TR 343, at p 346.

\(^{74}\) (1777) 2 Cowp 601.
the underwriter would not be liable for any potential loss if the warranty was breached by the assured, and there should be no excuse for not complying with the warranty regardless of whether the breach was committed deliberately or by accident. Unlike the decision reached in the case of Jeffries v Legandra, this time, Lord Mansfield accepted the underwriter’s argument and held that a breach of a warranty could not be excused even if the assured was not at fault. Therefore, it is not surprising that the court in this case had adopted a new approach which differed from the rule established in Jeffries v Legandra. The same issue was again considered in the case of Hore v Whitmore. In this case, the insured ship was detained by an embargo and thus prevented from sailing on or before the warranted sailing date. The assured’s defence was that the insurance policy contained a clause which expressly excused the breach of warranty. In particular, the clause stated, in relevant part, that ‘free … from all restraints and detainments of kings, princes, and people of what nation, condition or quality whatsoever’. Nevertheless, this argument was rejected by the court, and it was therefore held that there was no excuse for not complying with a warranty.

1.6 The introduction of the implied warranties in the 19th century

In order to facilitate the great demand of export trade, England entered into a large number of treaties of commerce and navigation in the 19th century, such as the Treaty of Commerce and Navigation entered into between England and other countries. The significant increase of export trade in the 19th century has also led to the further development of marine insurance law in England. By way of illustration, the purchase of liability insurance from the

75 (1692) 4 Mod. 58.
76 Ibid.
77 (1778) 2 Cowp 784.
protection and indemnity clubs\textsuperscript{79} began to emerge in the 19\textsuperscript{th} century. Beside this fact, by the middle of the 19\textsuperscript{th} century, the British insurance market was wholly controlled by the Lloyd's of London as the central leading insurance and reinsurance market place, which was opened by Edward Lloyd\textsuperscript{80} originally as a Coffee House in the Tower Street of London in the late 17\textsuperscript{th} century\textsuperscript{81} and which had a remarkable influence on the business and practice of marine insurance. The rationale for this is that historically, London has been regarded as an international trading centre from the Anglo-Saxon times.\textsuperscript{82} Due to the growth of export trade with other countries, at the beginning of the 19\textsuperscript{th} century, implied warranties, as distinct from express warranties, were introduced and firmly established by the courts. Implied warranties are different from express warranties in the sense that implied warranties are deemed to apply by the operation of law without the need for parties to make specific provisions for such, although the legal consequence of the breach of these two types of warranty is the same. There were two types of implied warranty introduced in the 19\textsuperscript{th} century, namely warranty of seaworthiness and warranty of legality.

1.6(1) Warranty of seaworthiness

Until the start of the 19\textsuperscript{th} century, the implied warranty of seaworthiness was first introduced by the courts in connection with voyage policies. That is to say, apart from the express warranties, the assured was also required to comply with the implied warranty of seaworthiness. It is self-evident that the commercial purpose of introducing the warranty of seaworthiness in those early days was that in order to protect human lives and property, the shipowner

\textsuperscript{79} The P&I club is a mutual insurance association which is governed by the Marine insurance Act 1906 and which provides insurance cover as well as third party liability coverage for its members, such as shipowners or demise charterers.

\textsuperscript{80} As the founder of the Coffee House, Edward Lloyd used to place his bets on various ships and cargoes transporting from London to other countries.


was under a duty to provide a seaworthy ship which must be fit for its purpose to encounter a particular maritime adventure. The issue as to the warranty of seaworthiness was considered in the case of Wedderburn & Others v Bell.\(^{83}\) Lord Ellenborough placed emphasis on the term ‘seaworthiness’ and pointed out that the warranty of seaworthiness was a condition precedent to the liability of the underwriter, and that in the event of breach of such a warranty, the underwriter would not be liable for any loss. Nine years later, Lord Eldon set out the crucial factors which must be considered for complying with the warranty of seaworthiness and expressed his view that ‘there is nothing in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage insured … both a view to the benefit of commerce and the preservation of human life …’\(^{84}\)

The definition of the term ‘seaworthiness’ and the legal nature of the warranty of seaworthiness can be found in the case of Dixon v Sadler\(^ {85}\) where, according to Baron Parke, the warranty of seaworthiness would apply only at the commencement of the voyage, and there is no continuing warranty of seaworthiness for the entire voyage insured. Moreover, in the same case, Baron Parke also set out the legal definition of the term ‘seaworthiness’ by stating that ‘… it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it meant that she shall be in a fit state as to repairs, equipment, crew and in all other respects to encounter the ordinary perils of the sea of the voyage insured, at the time of sailing upon it.’\(^ {86}\)

Nevertheless, when determining the issue of seaworthiness, various factors must be taken into account. By way of example, in the case of Foley v Tabor,\(^ {87}\) Chief Justice Erle pointed out that ‘seaworthiness is a word which the import varies with the place, the voyage, the class of ship, or even the nature of the

\(^{83}\) (1807) 1 Camp 1.
\(^{84}\) Douglas v Scougall (1816) 4 Dow 276.
\(^{85}\) (1839) 5 M & W 405.
\(^{86}\) (1839) 5 M & W 405 at p 414; affd, (1841) 8 M & W 895.
\(^{87}\) (1861) 2 F & F 663.
cargo.'\(^{88}\) This means that the nature of the term ‘seaworthiness’ is relative and flexible. Likewise, as far as the historical origin of the warranty of seaworthiness is concerned, it is clear that in order to be considered seaworthy, the ship must also be fit to carry the cargo to the intended destination. This is because ‘the concept of seaworthiness first appears in the customs and regulations dealing with the shipment of cargo by sea and the chartering of vessels to carry cargo and concurrently in the law of marine insurance.’\(^{89}\)

1.6(2) Warranty of Legality

Apart from the warranty of seaworthiness, another type of implied warranty was introduced during the 19\(^{th}\) century, that is, the implied warranty of legality. In general, due to the notion of public policy, the warranty of legality denotes not only that the adventure insured must be legal, but also that the adventure must be carried out by the assured in a lawful manner. The general rule that the adventure must not be tainted with illegality can be found in the case of *Redmond v Smith*,\(^{90}\) where Chief Justice Tindal stated that ‘A policy on an illegal voyage cannot be enforced; for it would be singular, if, the original contract being invalid and incapable to be enforced, a collateral contract founded upon it could be enforced. It may be laid down, therefore, as a general rule, that, where a voyage is illegal, an insurance upon such voyage is illegal.’\(^{91}\) In addition to this rule, in the case of *Pipon v Cope*,\(^{92}\) the crew members had intentionally committed acts of barratry on three consecutive voyages on several occasions. As a result, the court held that the shipowner was not entitled to argue that the matter was beyond his control, because the warranty of legality also requires the performance of the adventure to be legal.

\(^{88}\) Ibid.


\(^{90}\) (1844) 7 Man & G 457.

\(^{91}\) Ibid, at p 474.

\(^{92}\) (1808) 1 Camp 434.
1.7 The statutory codification of case law – the Marine Insurance Act 1906

As mentioned earlier, the customary commercial usage and case law with regard to marine insurance warranties survived during the 18th and 19th century. However, the rules relating to warranties were further clarified and settled at the beginning of the 20th century by the enactment of the Marine Insurance Act 1906 which repealed the Marine Insurance Act 1745. At the outset, by the end of the 19th century, the Bill called the 'Marine Insurance Codification Bill', which later became the Marine Insurance Act 1906, was introduced to the House of Lords by Sir Mackenzie Dalzell Chalmers who was the drafter of the first Bill of the Act and who was chairing in the Law Commission. The Marine Insurance Act 1906, which preserved the old doctrine of *lex mercatoria*, came into effect on the 1st January 1907. This piece of legislation was intended to provide certainty to those seeking marine insurance and those providing it, and it has been relied upon by numerous countries as the basic legislative regulation of marine insurance contracts. It should be noted that most of the rules established by previous case law and other accepted practices as to marine insurance warranties, as well as warranties in the collective body of ordinary insurance law, had been retained and incorporated into the Marine Insurance Act 1906. The Act has been regarded as a codification of around 200 years of more than 2000 previous judicial decisions and opinions. Evidently, section 91(2) of the 1906 Act clearly preserves the historic sources of marine insurance law which was introduced by merchants and judges. For this reason, it is obvious that the *lex mercatoria*

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94 The principal aim of the Marine Insurance Act 1745 was to prevent the making of marine insurance policies in which the assured had no interest in respect of the subject matter insured.
95 Indeed, the *lex mercatoria* has been retained under section 91(2) of the Act which provides that the rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.
continues to play an important role in this area of maritime law.\textsuperscript{96} Despite its statutory name, the general principles have been applied widely to all non-life insurance. Most of the principles introduced by Lord Mansfield during the 18\textsuperscript{th} century were adopted into the relevant provisions of the Marine Insurance Act 1906. Nevertheless, the legal consequence of the breach of a warranty adopted by Lord Mansfield had been altered after the 1906 Act was put into effect. Furthermore, the 1906 Act also deals with the legal effect of the breach of warranty in a different way from other European countries. Despite the fact that the Act has covered all the relevant issues in relation to general insurance, sometimes it is still necessary for the courts to refer to some pre-Act authorities in order to reach a particular decision.\textsuperscript{97} This is because where a particular point is absent from the relevant provision of the Act, it will be complemented by common law principles.

In general, the statutory rules and legal features of warranties, whether express or implied, were set out in section 33 to 41 of the Act. The statutory definition of a warranty was expressly stated in section 33(1) of the Act.\textsuperscript{98} But the well-established common law rule that a causal connection between the breach of warranty and the loss suffered by the assured does not have to be shown was not spelt out in the 1906 Act. Unlike the common law rule established by Lord Mansfield regarding the legal consequence of breach, the insurer’s liability, according to section 33(3) of the Act, would be discharged if a warranty was breached by the assured, although a breach of warranty can subsequently be waived by the insurer,\textsuperscript{99} except the warranty of legality. For


\textsuperscript{98} This subsection provides that ‘A warranty … means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.’

\textsuperscript{99} Section 34(3), Marine Insurance Act 1906.
the interests of the assured, there are two statutory excuses available to the assured for the breach of warranty, namely, a change of circumstances or when compliance with the warranty is rendered unlawful by any subsequent law.\textsuperscript{100} By virtue of section 35(1) of the Act, an express warranty can be created by any form of words, provided that it is possible to draw inference from the parties’ intention to warrant. As far as the types of implied warranty are concerned, the 1906 Act has introduced another two types of implied warranty, namely, warranty of portworthiness\textsuperscript{101} and warranty of cargoworthiness.\textsuperscript{102} These provisions may, in turn, be displaced by the express agreement of the parties in their contract. However, some aspects of the law in relation to the warranty regime were clarified and confirmed by the courts in some landmark decisions even after the enactment of the 1906 Act. These court decisions would require further elaboration in subsequent Chapters.

1.8 Conclusion

Overall, this chapter has provided a historical review as to the law of marine insurance in England. It is clear that marine insurance had been introduced in northern Italy from the 12\textsuperscript{th} century. During the medieval period, the doctrine of \textit{lex mercatoria}, which has been regarded as the international law of commerce, was widely used by merchants to regulate their business dealings. Marine insurance was introduced into England in the 13\textsuperscript{th} century, although the practice of marine insurance was carried out by private individuals rather than corporations. Litigation concerning marine insurance started from the 16\textsuperscript{th} century, and these cases were generally dealt with by the Court of Admiralty and the court of common law.

\textsuperscript{100} Section 34(1), Marine Insurance Act 1906.
\textsuperscript{101} Section 39(2), Marine Insurance Act 1906.
\textsuperscript{102} Section 40(2), Marine Insurance Act 1906.
In England, marine insurance warranty had received judicial attention from the 17th century. The term ‘warranty’ was introduced to regulate the statement of fact and the promise made by the assured. The first reported case concerning warranty is the case of Jeffries v Legandra103 where it was ruled that the assured would not lose the cover if he had innocently breached the warranty.

Legal principles relating to marine insurance warranty have been developed by Lord Mansfield in the 18th century by way of case-law. In particular, it was established that there was no materiality between the warranty and the loss, and a breach of a warranty could not be excused. Lord Mansfield had also drawn a clear distinction between a warranty and a representation.

The warranty of seaworthiness and the warranty of legality, as two types of implied warranty, were established by the courts in the 19th century. With regard to the legal nature of the warranty of seaworthiness, it was settled in the case of Dixon v Sadler104 that the warranty of seaworthiness would only apply at the commencement of the voyage. In this case, the term ‘seaworthiness’ was defined by Baron Parke to mean that the vessel ‘shall be in a fit state as to repairs, equipment, crew and in all other respects to encounter the ordinary perils of the sea of the voyage insured, at the time of sailing upon it.’105

The warranty of legality, as another type of implied warranty established in the 19th century, requires the adventure insured to be legal, and the adventure must also be carried out in a lawful manner.

Legal principles relating to marine insurance warranty were finally settled in the 20th century with the enactment of the Marine Insurance Act 1906 which was drafted by Sir Mackenzie Chalmers. This piece of legislation has preserved most of the previous common law principles established by the

103 (1692) 4 Mod. 58.
104 (1839) 5 M & W 405.
105 Ibid, at p 414.
courts. The statutory rules of express and implied warranty appear in section 33 to 41 of the Act. But some new statutory rules were incorporated into the Act. Relevant provisions of the Act and cases will be critically examined accordingly in the next Chapter.
Chapter 2

A critical analysis as to the nature of English marine insurance warranty

2.1 Introduction

The principal aim of this chapter is to examine the current law of English marine insurance warranty as appears in the Marine Insurance Act 1906. In particular, it will examine the different features of marine insurance warranty, and thereby critically evaluate the problems of the current warranty regime. More importantly, this chapter will seek to introduce some law reform proposals as to the current law of warranty. The research will mainly be based upon case-law as well as the relevant provisions of the Act. As stated in the previous chapter, significant development of the law of marine insurance warranty appeared in the 18th century where important legal principles as to the nature of marine insurance warranty were established by Lord Mansfield. These legal principles have been incorporated into the Marine Insurance Act 1906 and have been regarded as good law even in the 21st century. The critical analysis as to the nature of warranty in Chapter 2 will be based upon a number of cases decided by Lord Mansfield in the 18th century, as well as some recent cases. In consequence, Chapter 2 of the thesis will therefore concentrate on the discussion of the different features of marine insurance warranty and the question as to whether the law in this area is in need of reform.

2.2 Conceptual clarification of contractual terms in marine insurance law

The term ‘warranty’ in marine insurance law, whether express or implied, has certain features which render it entirely distinct from warranty encountered in ordinary contract law. Thus, a warranty in ordinary contract law is, as
opposed to a condition, a less significant term, the breach of which will only entitle the innocent party to claim damages rather than to terminate the contract as a whole. A warranty in marine insurance law, on the other hand, is a promissory warranty either expressly or impliedly made by the assured to the insurer, and thus becomes a fundamental term of the contract with legal strength and importance binding on the assured. It follows from this point that in the absence of such a promise made by the assured, the insurer would not undertake to be bound by the terms and conditions of the insurance policy. This means that a warranty ‘will invariably affect the risk to which the insurer is subject.’ In the event of a breach of warranty, the liability of the insurer will automatically come to an end. This is because a warranty in marine insurance contracts is a very important term which forms the essence of the insurance contract. The significance of the term ‘warranty’ has been appreciated since the 18th century case-law. By way of illustration, in the case of Bean v Stupart, Lord Mansfield defined a warranty to mean ‘a condition on which the contract is founded’.

The issue may also arise as to whether or not a warranty in marine insurance law is assimilated to the term ‘condition’ in ordinary contract law. Similar to a marine warranty, ‘a condition is a term to which the parties, when making the contract, attribute such importance that it can truly be described as being of the essence of the contract.’ In the general law of contract, a breach of a condition entitles the innocent party to elect to terminate the contract. In the law of marine insurance, the insurer’s further liability will be discharged upon a breach of warranty, but the insurance contract as a whole

108 (1778) 1 Dougl 11.
remains unaffected. This is because the retention of the contract has the purpose of providing the insurer the opportunity to waive the breach.\(^{112}\)

### 2.3 Different types of promissory warranty

In addition, according to section 33(1) of the Marine Insurance Act 1906, there are two major types of promissory warranty, namely present warranty and future warranty (continuing warranty). As far as present warranty is concerned, the assured confirms that certain facts, either past or present, exist or do not exist. With regard to future warranty, the assured makes a true promise which pertains to the future. This type of warranty ‘concerns the assured’s future conduct and require him to do or not do a particular thing, or fulfil some condition at some point after the attachment of the risk’.\(^{113}\) The characteristics of present warranty can be found in the relevant part of this subsection which provides that ‘… he affirms or negatives the existence of a particular state of facts.’\(^{114}\) In addition, present warranties can be further divided into warranty of fact and warranty of opinion. The assured’s cover will be lost as soon as a warranty of fact is breached. In contrast, a warranty of opinion relates to the assured’s honest belief as to a certain statement of fact, and the insurer’s liability will not be affected if a warranty of opinion is breached, provided that the intention of the assured is honest. The same subsection also sets out the specific feature of future warranty by stating that ‘… a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled’.\(^{115}\) There is no doubt to say that both types of warranty must be exactly complied with by the assured. In the event of breach of warranty, the legal effects of the breach are slightly different as between these two types of warranty. If a present

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\(^{113}\) Baris Soyer, Warranties in Marine Insurance, 2006, 2\(^{nd}\) ed., p 141.

\(^{114}\) Section 33(1), Marine Insurance Act 1906.

\(^{115}\) Section 33(1), Marine Insurance Act 1906.
warranty\textsuperscript{116} is breached by the assured, the liability of the insurer will come to an end with regard to the entire policy, as the cover simply never commences and the risk never attaches. But in the event of a breach of a continuing warranty, the further liability of the insurer will be discharged as from the date the breach takes place.

However, although it is straightforward to distinguish between a present warranty and a representation which does not have to be inserted into the insurance policy, the insured may find it difficult, though not impossible, to comply with the present warranty. This is because the assured may sometimes answer the question in the proposal form in perfectly good faith without realising that he has in fact made a false statement. This situation may arise where a ‘basis of the contract’ clause is inserted into the policy, so that the assured’s answer and declarations in the proposal form will be converted into express warranties. In such a case, any false statement given by the assured would constitute a breach of warranty, and as a result, the assured may simply lose the cover.

This aspect of law can be supported by the case of \textit{Dawsons Ltd v Bonnin}\textsuperscript{117} which is a non-marine case. In this case, a furniture removal company in Glasgow took out insurance for one of its removal lorries. The following clause was inserted in the proposal form which read: ‘which proposal shall be the basis of this contract and be held as incorporated herein.’ This clause had the effect of converting all statements on the proposal form into warranties. One of the questions in the proposal form asked where the lorry would normally be parked. The assured answered this question by giving its business address in central Glasgow. However, in fact, the lorry was usually parked in the outskirts of Glasgow. When the lorry was destroyed by fire, the assured sought to recover the loss from the insurer. The assured’s argument

\textsuperscript{116} Warranties as to past or present facts have been abolished for consumer insurance by the Consumer Insurance (Disclosure and Representation) Act 2012.

\textsuperscript{117} [1922] 2 AC 413.
that the mistake as to the address did not increase the risk but arguably decreased it was rejected by the House of Lords, and the insurer was therefore entitled to refuse to pay the claim. In this case, it is fair to say that the breach was not sufficiently serious as to justify the termination of all liability of the insurer, and it is undisputable that there is no material distinction between central Glasgow and the outskirts of Glasgow, because the outskirts of a city form part of the city itself.

In order to limit the draconian effect of warranties, such a problem was addressed by the Law Commission with regard to warranties in a non-marine field. Accordingly, the proposal introduced by the Law Commission was that a statement made by the assured in respect of a past or existing state of affairs should be treated as a representation rather than a warranty. If the representation made by the assured is incorrect, the remedy for the insurer would depend on whether the statement was made honestly, negligently, deliberately or recklessly. But it could be argued that this may not be the best way to resolve this problem in the context of marine insurance, because in contracts of marine insurance, some statements of past or existing facts given by the assured should be regarded as crucial for the risk assessment process, whereas others may be less important for the insurer. For this reason, in order to address this problem and ease the performance of this obligation for the protection of the assureds' interest, it is proposed by the author that all present warranties should be replaced by innominate terms as created in ordinary

119 As part of contract law, the innominate term approach was firmly established in the case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1961] 2 Lloyd’s Rep 478 where the Hong Kong Fir Shipping hired out their ship under a two-year time charterparty to Kawasaki Kisen Kaisha. It was agreed between the parties that the ship was to sail from Liverpool to collect a cargo at Newport Mews and then to proceed via Panama to Osaka. A term in the charterparty agreement required the ship to be seaworthy and to be ‘in every way fitted for ordinary cargo service’. But the members of the crew were insufficient and incompetent to work on the old machinery. During the voyage from Liverpool to Osaka, the engines suffered several breakdowns and had to be repaired for a total period of 5 months.
contract law.

Unlike any other contractual term, an innominate term is known as an intermediate term between ‘condition’ and ‘warranty’, and the legal consequence of a breach of such a term would depend on the nature of the breach in question. The remedy for a breach of an innominate term will depend on the question as to whether the innocent party has substantially been deprived of the whole benefit of the contract. If he has been so deprived, he will be entitled to treat the contract as repudiated. If not, he will only be entitled to claim damages. Therefore, marine insurance law, as part of general contract law, should follow the general principles established under contract law, and such a proposal is indeed necessary to bring conformity into this area of law.

The ultimate effect of this replacement would be that if such a contractual term is breached by the assured, the issue as to whether this particular breach is sufficiently serious to provide the insurer with a suitable remedy should be considered by the courts. If the breach is sufficiently serious, the insurer will be entitled to terminate the insurance contract as a whole, and premiums paid to the insurer should be returned to the assured. Conversely, if the breach is not sufficiently serious or does not relate to the risk, the only available remedy for the insurer will be damages for breach of contract. It follows from this perspective that introducing the test of seriousness into this area of law would prevent this problem and provide the courts with a degree of remedial flexibility.

Consequently, in this part of the thesis, it is suggested that this part of section 33(1) of the Act should be modified to read as follows:

A warranty, in the following sections relating to warranties, means a

On arrival at Osaka, further repairs were needed before the ship was seaworthy again. Because of the fall of freight rates, Kawasaki terminated the contract for Hong Kong Fir’s breach. In the Court of Appeal, Lord Diplock ultimately held that in this particular instance, the term ‘seaworthiness’ was not breached in a sufficiently serious way to entitle the charterer to terminate the contract. Such a term was regarded as an innominate term, and the crucial issue to be considered is how serious the breach of the term was.

120 The parts in italics are the parts that have been inserted or modified.
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. But the statement of past or existing facts given by the assured is an innominate term. Breach of such a term may, depending on the seriousness of the breach, lead to either the termination of the insurance contract or the insurer’s right to claim damages.

It is clear that present warranties and continuing warranties are generally connected with the risk. However, there are certain types of warranty which do not relate to the risk. A typical example is the warranty requiring the assured to pay the premium instalments within the specific time limit. That is to say, the breach of this warranty has the same legal effect with the breach of present and continuing warranties. But it has been argued that the premium warranty can be easily removed from the current warranty regime, because the payment of the premium is the consideration given by the assured in return for the insurer’s promise to undertake the obligation to pay for the loss of the subject matter insured on the occurrence of an insured event. However, in the opinion of the author, it is unreasonable to say that this is a convincing argument. This is because it would be difficult for the assured to understand the importance to pay the premium within the specific time limit if the agreement on the payment of the premium is not converted into an express warranty. In consequence, it is suggested by the author that the payment of premium warranty should be retained in the current warranty regime, on the basis that paying the agreed premium is an important obligation on the part of the assured.

2.4 A critical analysis as to the proposal that warranty should be replaced by alteration of risk

Apart from the concept of warranty, the concept of alteration of risk is another mechanism for the management of risk during the insurance period, and the statutory rules as to the current warranty regime will become more obvious through a detailed discussion of the concept of alteration of risk. This concept, which can be regarded as equivalent to the concept of insurance warranties, has been commonly applied in civil law countries concerning marine and non-marine insurance policy, whereas the doctrine of warranty developed in civil law countries is commonly used to protect the insurer in case of the change of risk. However, in general, the concept of alteration of risk has no effect on the insurer’s obligation in English insurance law. But there are two exceptions to this rule, these are where there have been material changes in the circumstances which have increased the risk and where the claim falls outside the scope of the insurance agreed by the insurer.

Under English law, the terms of the policy may permit the insurer to alter the terms of the insurance contract and to charge a higher premium in the event of an increase of risk. Alternatively, the insurer will also be entitled to terminate the policy if the risk is increased on a material basis.

The common law rule in respect of the increase of risk has been developed under English law. The concept of alteration of risk has been considered in the recent case of Qayyum Ansari v New India Assurance Ltd122 where a policy term stated: ‘this insurance shall cease to be in force if there is any material alteration to the premises or business or any material change in the facts stated in the proposal form or other facts supplied to the insurer unless the insurer agrees in writing to continue the insurance’. The proposal form also stated that the premises insured were to be protected by an automatic sprinkler system. But during the currency of the policy, the sprinkler

system was not operative. The Court of Appeal held that the disabling of the sprinkler system amounted to a material increase of risk on the ground that the purpose of the sprinkler system was to protect the building. In particular, the Court of Appeal defined the term ‘material increase of risk’ to mean changes of the kind that take the risk outside that which was in the reasonable contemplation of the parties at the time of the conclusion of the contract. But according to the Court of Appeal, the term ‘material’, when used in alteration of risk clauses, does not have the same meaning as it does in respect of the facts and circumstances that must be disclosed to the insurer as required by section 18 of the Marine Insurance Act 1906. The Court of Appeal also ruled that the issue as to a material alteration should be whether or not the changed circumstances had a significant bearing on the risk. Ultimately, it was held that the insurer could only be discharged from liability if the risk had in fact altered in nature.

Indeed, it can be seen from the decision of this case that a clear distinction should be drawn between cases where the risk changes in degree and cases where the risk changes in nature. In the former case, the policy is not affected by the increase. On the other hand, in the latter case, the new risk should be regarded as a fundamental change which is outside the cover afforded by the policy.123

In addition to the common law approach in relation to the concept of alteration of risk, it is undisputable that section 42 to 49 of the Marine Insurance Act 1906 has also been introduced on the basis of the concept of alteration of risk, because these provisions deal explicitly with the issues as to the change of voyage and deviation. But in order to constitute a change of voyage, the voyage must have changed voluntarily, and the change must also be made after the commencement of the voyage.124 The application of the

124 Section 45(1), Marine Insurance Act 1906.
alteration of risk clause also extends to the Institute Cargo Clauses which cover the insured goods only if they remain in 'the ordinary course of transit'.\textsuperscript{125} For instance, matters relating to the termination of the contract of carriage\textsuperscript{126} or a change of voyage\textsuperscript{127} will need to be notified promptly to the insurer. The function of the alteration of risk clause is to ensure that the risk that the insurer agrees to cover does not change significantly from the terms of the policy. Otherwise, the assured will be required to alert the insurer by giving notice to the insurer for such a change, and different remedies will be available to the insurer depending on the nature of the increase, provided that a causal connection can be established between the loss and the increase of risk. So in general, three remedies are available to the insurer for an increase of risk, namely, charging a higher premium on a reasonable basis, changing the terms of the policy and terminating the insurance contract, provided that the increase of risk is material.

However, the rules derived from the concept of alteration of risk, such as the degree of the increase, the insured’s duty of notification, the insurer’s remedy for the increase of risk and the legal consequence for the insured’s failure of notification, vary from one jurisdiction to another. By way of illustration, under the German Insurance Contracts Act 2008 (GICA), the policyholder must disclose the aggravation of the risk to the insurer without undue delay, and the insurer may terminate the contract subject to a notice period of one month.\textsuperscript{128} A slightly different statutory rule has been provided in the Norwegian insurance law which requires the insurer to terminate the insurance contract by giving 14 day notice if an alteration of the risk occurs.\textsuperscript{129}

\textsuperscript{125} Institute Cargo Clauses, clause 8.1.
\textsuperscript{126} Institute Cargo Clauses, clause 9.
\textsuperscript{127} Institute Cargo Clauses, clause 10.
\textsuperscript{128} Section 23(2) and 24(2), German Insurance Contract Act 2008. Section 24(3) of the German Insurance Act 2008 continues to provide that the right of termination shall lapse if it is not exercised within 1 month after the insurer becomes aware of the aggravation of the risk insured.
\textsuperscript{129} Section 3-10, Norwegian Marine Insurance Plan 1996 (2010 version).
To this end, it is submitted that the notification of alteration of risk can be described as one of the assured's post-contractual duties of utmost good faith.\textsuperscript{130}

In reality, there are certain situations in which the assured is obliged to notify the insurer as to an increase of risk. Thus, an increase of risk must be material, and an immaterial increase of risk does not have to be notified to the insurer, and it is the insurer who must bear the burden of proof to show that the increase of risk is material. The obligation to notify for a material increase of risk is triggered where the increase of risk is caused by the assured himself.\textsuperscript{131}

The assured must be aware of the increase of risk before he can perform his duty to notify the insurer, and the knowledge of the assured refers to actual knowledge.\textsuperscript{132} Another situation in which the assured must notify the insurer as to an increase of risk arises where the clause requiring the assured to give notice in the event of a material increase of risk is incorporated into the policy in written forms. This means that oral agreement does not place the assured under the duty to give notice for an increase of risk.

In addition, an increase of risk must be permanent before the assured is required to give notice to the insurer. This rule suggests that an occasional or one-off increase of risk does not change in nature, so that it does not provide the insurer any statutory remedy for such an increase. This aspect of law was highlighted in the old case of \textit{Shaw v Robberds}\textsuperscript{133} where the

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\textsuperscript{131} This aspect of law can also be found in Article 59 of the Taiwan Insurance Act which provides that the policyholder is required to serve prior notice to the insurer if the material increase of risk is caused by the policyholder.

\textsuperscript{132} This rule may be illustrated in a hypothetical case where the assured entered into a fire insurance contract with the insurer for his house for private use. Later, he let his house to a third party for private accommodation. Without notifying the assured, the house was changed by the tenant to be used for storing flammable chemicals. Obviously, this has materially increased the risk of fire. However, it would be unfair to expect the assured to notify the insurer for such an increase, because the tenant did not notify this fact to the assured.

\textsuperscript{133} (1837) 6 A & E 75.
\end{flushleft}
policyholder insured his kiln which was agreed to be used only for drying corn. Such an agreement was inserted into the policy as an alteration of risk clause which required the policyholder to notify the insurer as to any increase of risk. On one occasion, the policyholder allowed his friend to dry bark in the kiln. Such a practice caused fire. The insurer refused to indemnify the loss on the basis that there was a material increase of risk on the part of the policyholder. However, the court held that the insurer was liable. The rationale for such a decision was that even though drying bark was a more hazardous activity than drying corn, the use of the kiln to dry bark was a one-off event and did not change the fact that the normal use of the kiln was for drying corn.

Due to the fact that insurance warranty and alteration of risk have a similar function for the purpose of risk management, it has been suggested by Professor Clarke that the legal consequence of a breach of insurance warranty should be replaced by the legal consequence of a material alteration of risk in order to mitigate the harshness of the existing law of warranty, because under the current warranty regime, the assured will lose cover as soon as a warranty is breached, and the assured may suddenly be left with no cover at all without being aware of it. According to Professor Clarke’s view, even in the case of a substantial breach of warranty, the assured should be given a reasonable time to negotiate with the insurer or seek an alternative cover.\footnote{M Clarke, ‘Insurance Warranties: the absolute end?’ [2007] LMCLQ 474, 481.} For the benefit of the trade, it is justifiable to say that this is a cogent argument, because it effectively ensures that the subject matter insured is well protected against the immediate loss of cover. On the other hand, in such a situation, the loss occurred between the notification and the insurer’s decision on either charging a higher premium or terminating the contract should be borne by the insurer, because before the insurer makes a decision after being notified of an increase of risk, the contract should be treated as being unaffected by such an increase. This means that the insurer is required to bear the risk of the loss
caused by the increase of risk for which the assured should be personally liable. This is clearly unfair for the insurer who has done nothing wrong.

Some academics went even further to suggest that the concept of warranty should be replaced by the concept of alteration of risk. By way of illustration, as suggested by Dr Jing, the doctrine of warranty should be replaced by the doctrine of alteration of risk on the basis that the doctrine of alteration of risk offers fairer solutions for breach than the doctrine of warranty. In addition, according to Dr Jing’s view, the doctrine of alteration of risk is not a new concept in English law on the basis that a number of cases concerning the issue of alteration of risk have been decided by English courts, so that adopting the concept of alteration of risk would not cause much uncertainty.\(^{135}\)

A similar point of view was also expressed by Dr Derrington who criticised the current law of warranty as being uncertain and unfair and suggested that the concept of warranty should be replaced by the obligation on the assured to notify the insurer as to any change in the circumstances which forms the basis of the contract of insurance and which alters the risk. In more specific terms, under this proposal, in the event that an alteration of risk occurs, the insurer would be entitled to escape liability in circumstances where the loss is attributable to the alteration of risk but only where the insurer would not have entered into the contract on any terms had the assured known of the alteration of risk at the time of the conclusion of the contract and the assured either intentionally caused or agreed to the alteration of risk, or failed to promptly notify the insurer of the alteration.\(^{136}\)

Nevertheless, in the view of the author, these two reform proposals may not be appropriate to solve the problems in relation to the current warranty


regime. This is because in the absence of clear contractual wording, while the insurer may argue that a particular increase of risk is material, the assured may deny such a view, and as such, it is difficult for the courts to determine the issue as to what constitutes material increase of risk, so that the problem of uncertainty may squeeze into the law. Furthermore, under the doctrine of alteration of risk, the assured is required to give notice to the insurer for any material increase of risk even if the increase has caused no loss or damage to the subject matter insured. There is no doubt to say that this would impose an onerous continuing duty on the assured, because it would be unreasonable to impose an obligation on the assured to notify every material increase of risk, and sometimes, the assured may be unable to recognise whether or not a particular increase of risk is material.

Last but not least, it is clear that according to the doctrine of alteration of risk, the assured is under an obligation to give notice to the insurer in the event that a material increase of risk occurs during the currency of the policy. But the problem is: in what way can the assured fulfil his duty of notification in the event of an increase of risk, by telephone, in person or in writing? Such a problem was not even dealt with by those civil law countries which applied the concept of alteration of risk into their judicial practice. Thus, the law is unclear on this issue and may cause inconsistency. In consequence, it is suggested by the author that it would be inappropriate to adopt Dr Derrington or Dr Jing’s proposal. Instead, it would be more appropriate to retain the current law as to warranty. However, this does not mean that the concept of alteration of risk should have no role to play in English insurance law at all. In the view of the author, the concept of alteration of risk should apply to consumer and life insurance as opposed to business insurance.

2.5 The distinction between warranty and suspensive condition

Furthermore, it is worthwhile to make a distinction between a warranty and
a clause which merely and temporarily suspend the operational effect of one party’s liability or obligation. These clauses have been known as suspensive conditions. A typical example of such a clause would be a geographical one: ‘No cover in the Bermuda area’. This type of clauses applies to the situation where, following a breach of a suspensive condition, the liability of the insurer is suspended during the currency of the breach, but the policy will not become voidable. If the breach is subsequently remedied by the assured, any subsequent loss will be indemnified by the insurer. Thus, in the case of Farr v Motor Traders Mutual Insurance Society, the assured took out insurance for two taxi-cabs. It was agreed that they were only driven for one shift every 24 hours. But within a short period of time, one of the cabs was driven for two shifts while the other one was repaired. After completing the repair, the cab was used in the normal way as agreed by the parties. A few months later, it was damaged in an accident. The crucial issue in this case was whether or not this clause should be regarded as a warranty. The Court of Appeal held that the clause was descriptive of the risk, so that if the cab was driven for more than one shift per day, the risk would no longer be covered, but as soon as the cab was used for one-shift working, the liability of the insurer would be restored.

However, it can be seen from this case that the distinction made by the court as between a warranty and a suspensive condition is not clear and may cause ambiguity as well as uncertainty. In order to prevent the ambiguity and uncertainty, it is proposed by the author that if a suspensive condition is to be inserted into the policy, the word ‘suspense’ or ‘suspensive’ and the legal effect of the breach of such a term should also be inserted into the relevant sections of the proposal form to assist the assured to make a distinction between a suspensive condition and a warranty.

137 [1920] 3 KB 669.
2.6 Different features of express warranty

The various legal features of marine insurance warranty, whether present or future, are set out in section 33 and 34 of the Marine Insurance Act 1906. These features are that a promissory warranty must be exactly complied with; a warranty does not have to be material to the risk; there is no defence for a breach of a warranty; a breach of a warranty is irremediable; a causal connection between the breach and the loss does not have to be shown; a breach of warranty automatically discharges the insurer from liability and a breach of warranty may be waived by the insurer. These legal features will be examined in turn with reference to case-law examples.

2.6(1) A promissory warranty must be exactly complied with

In the law of marine insurance relating to warranties, the principle that a promissory warranty must be exactly complied with is probably the most significant feature. Its significance lies upon the wording in section 33(3) of the Marine Insurance Act 1906 which provides that a warranty is a condition which must be exactly complied with. Indeed, the exact compliance rule, as one of the most demanding characteristics of marine insurance warranty, has long been established by Lord Mansfield in the 18th century. By way of illustration, in the case of *De Hahn v Hartley*, Lord Mansfield observed the legal position in respect of the compliance of warranty by stating that ‘There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered: but a warranty must be strictly complied with.’ However, it should be borne in mind that in some cases, the court would adopt a reasonable interpretation in respect of a particular warranty, rather than keep its literal meaning. So in the case of *Provincial Insurance Co Ltd v Morgan & Foxton*, the assured had warranted that his vehicle would

138 (1786) 1 TR 343.
139 Ibid.
140 [1933] AC 240.
only be used for a specified purpose. But it was held that an occasional use for the purpose other than the one specified in the policy did not constitute a breach.

The rule of exact compliance is strict in the sense that when considering any particular breach, even minor defect\(^{141}\) cannot be accepted as a defence. This point is best illustrated in the case of *Overseas Commodities Ltd v Style*\(^ {142}\) where a cargo of canned pork was insured from France to London under an ‘all risk’ policy which contained a warranty: ‘warranted all tins marked by manufacturers with a code for verification of date of manufacture’. But a number of the tins of pork butts were not marked with the code. When the tins were delivered to London, some of them were found to be broken and had no commercial value for sale. The assured claimed under the policy, but the court rejected the claim and accepted the insurer’s argument that there was a breach of warranty. The assured’s argument that the warranty should be applied separately and thereby rendering the insurer liable for those tins which were properly marked was also rejected by the court. In particular, Mr Justice McNair ruled in this case that there was only one policy for the whole consignment of the cargo and that it was not possible for the warranty to be read distributively, as this would require the insurer to rewrite the warranty, in a form such as ‘underwriters are exempt from liability in respect of any tins not marked’. The reason for this decision means that ‘as exact compliance is required, any difference, however negligible or insignificant, is unlikely to be considered as inconsequential.’\(^ {143}\)

However, it can be argued that the exact compliance rule is too rigid, as well as unfair, from the point of view of the assured. This is because any breach of warranty, no matter how minor it is, will be fatal and thus discharges

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\(^{141}\) In this context, the term ‘minor defect’ is derived from the maxim *de minimis non curat lex*. This means that the *de minimis* rule cannot be relied upon by the assured if he fails to comply with a warranty.

\(^{142}\) [1958] 1 Lloyd’s Rep 546.

the insurer from further liability. The problem of unfairness can be found in the case of *Yorkshire Insurance Co v Cambell*.\(^{144}\) In this case, a horse was insured against marine perils and risks of mortality during a sea voyage. The horse was described in the proposal form as ‘Bay gelding by Soult out of St Paul (Mare) 5 years’. But in fact, the pedigree of the horse insured was not ‘by Soult out of St Paul mare’. According to its construction, the Privy Council held that the description of the horse was a true warranty. As the horse died during the voyage, the assured was held not to be entitled to claim the loss under the policy as a result of the breach of warranty.

In this case, it is clear that the incorrect description of the horse as a breach of warranty was so minor and had no connection with the risk, so that it should be regarded as insignificant by applying the *de minimis* rule and thus entitles the assured to recover for the loss. Moreover, another disadvantage derived from the exact compliance rule is that as the insurer tends to rely unfairly on a breach of warranty with the assistance of the literal wording of section 33(3) of the Act, it is likely that the brokers may be unwilling to facilitate insurance contracts with the insurers who act unfairly in relation to minor breaches of warranty. Thus, as far as future warranty is concerned, the law in this area should be reformed so as to introduce a substantial observance rule to future warranties which have no connection with the risk, apart from the warranty to pay the premiums within the specified time limit which must still be exactly complied with.

Apart from the existing problem as to the exact compliance rule, it is rather difficult to make a clear distinction between the term ‘condition’ in this subsection and the term ‘condition’ used in ordinary contract law. Although a series of judgments given by Lord Mansfield in the 18\(^{th}\) century held that warranties in marine insurance law were equivalent to conditions and thereby requiring strict compliance,\(^{145}\) it is, in principle, incorrect to equate the legal

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\(^{144}\) [1917] AC 218.

\(^{145}\) T Schoenbaum, *Warranties in the Law of Marine Insurance: Some Suggestions for Reform of*
effect of a breach of a marine warranty with that of a breach of a condition in ordinary contract law.\textsuperscript{146} For this reason, in order to avoid confusion, it is suggested by the author that the term ‘condition’, as appears in this subsection, should be replaced by the term ‘condition precedent’ as used by Lord Goff.\textsuperscript{147} In more specific terms, in this thesis, it is suggested that the word ‘precedent’ and another additional sentence should be inserted into section 33(3) of the Act, so that this subsection should be altered to read as follows:

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

But a warranty relating to the fulfilment of future obligation can be substantially observed by the assured if such a warranty has no connection with the risk, except the warranty to pay premiums…

2.6(2) A warranty does not have to be material to the risk\textsuperscript{148}

As far as marine insurance warranty is concerned, the well-established legal feature that there is no materiality between the warranty and the risk can


\textsuperscript{146} The distinction between the legal consequence of a breach of condition in ordinary contract law and the legal consequence of a breach of warranty in marine insurance law was drawn earlier in this Chapter.

\textsuperscript{147} The expression ‘condition precedent’ was applied by Lord Goff in the case of \textit{Bank of Nova Scotia v Hellenic Mutual Risks Association (Bermuda) Ltd (The Good Luck)} [1992] 1 AC 233 where he made it clear that fulfillment of the warranty is a condition precedent to the liability or further liability of the insurer. While warranties entitle an insurer to be discharged from liability for non-compliance, condition precedents operate in a similar manner as warranties, so that compliance with certain requirements may be stipulated as a pre-condition to an insurer’s liability.

\textsuperscript{148} In the law of marine insurance, the term ‘materiality’ can also be found in the duty of disclosure under the doctrine of utmost good faith where the assured is required, under section 18 of the 1906 Act, to disclose every material circumstance, which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk. In particular, the test of materiality was clarified by the House of Lords in \textit{Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd} [1994] 2 Lloyd’s Rep 427 where it was held that in order to constitute avoidance of contract, the insurer must not only show that the undisclosed fact was objectively material with reference to the response of a prudent insurer, but also that he was actually induced by the undisclosed fact to enter into the contract on the agreed terms.
be found in section 33(3) of the Marine Insurance Act 1906.149 This means that a warranty must be literally complied with, even if it may not affect the risk in any manner. In other words, a warranty can be created for any purpose whatsoever. By way of illustration, as Lord Parmoor expressly stated in one case, ‘If the promise amounts to a warranty it is immaterial for what purpose the warranty is introduced.’150 Moreover, in the case of *Farr v Motor Traders Mutual Insurance Society*,151 Lord Justice Bankes went even further to emphasize that no matter how absurd a warranty is, it is still binding on the assured, and if the warranty is breached, the policy comes to an end.

Nevertheless, it is justifiable to say that like the exact compliance rule, the application of this feature may also provide unfairness to the assured, simply because the insurer may be willing to strengthen his legal position by converting every statement of fact into warranty, regardless of whether the warranty is material to the risk and its purpose. Consequently, it is fair to say that on the one hand, the law in relation to this feature should be regarded as appropriate in the sense that the principle of freedom of contract is preserved, so that the parties are free to incorporate any warranties, regardless of what their purposes are, into the insurance policy; on the other hand, the possibility for the insurer to insert unreasonable statements as warranties may cause unfairness and renders it rather difficult for the assured to comply with the warranty. It follows from this perspective that the law in this area should be reformed so that the protection of the subject matter insured should be the only legal purpose of inserting a warranty into the insurance policy, and any other purpose does not have to be complied with by the assured. Consequently, in this thesis, it is suggested by the author that this part of section 33(3) of the Act should be altered to read as follows:

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149 The relevant part of the subsection provides that a warranty is a condition which must be exactly complied with, whether it be material to the risk or not.
151 [1920] 3 KB 669.
A warranty, as above defined, is a condition precedent which must be exactly complied with only if the purpose of this warranty is to protect the subject matter insured. But a warranty relating to the performance of future obligation can be substantially observed by the assured if such a warranty has no connection with the risk …

2.6(3) No defence for a breach of warranty

The rule that there is, in general, no defence for a breach of a warranty is one of the other features in relation to a marine insurance warranty. This rule has firmly been established as a common law principle, even though it has not been specifically stated in the relevant provisions of the Marine Insurance Act 1906. The application of this rule can be found in the case of *Hore v Whitmore* where, following a breach of a sailing warranty, the assured was held not to be entitled to rely on the embargo laid down by a British Governor which prevented the insured ship from sailing on a particular date as an excuse. It should be noted that this rule applies even when the assured has exercised due care and due diligence or has shown good faith to comply with the warranty. In addition, in the case of a breach of a warranty, the assured would not be able to recover the loss from the insurer even if the loss was caused by an unforeseen accident or a latent defect unknown to the assured. In order to emphasize this rule, Lord Eldon pointed out with reference to the implied warranty of seaworthiness that ‘it is not necessary to inquire whether the owners acted honestly and fairly in the transaction, for it is clear that, however just and honest the intentions and conduct of the owner may be, if he is mistaken in fact, and the vessel is in fact not seaworthy, the underwriter is not liable.’

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153 (1778) 2 Cowp 784.
154 *Douglas v Scougall* (1816) 4 Dow 278.
2.6(4) Statutory excuses for breach of warranty

Nevertheless, the rule that there is no defect for a breach of warranty is subject to two statutory excuses, namely a change of circumstances and when compliance with the warranty is rendered unlawful by any subsequent law. These two excuses are set out in section 34(1) of the Marine Insurance Act 1906 which can be used by the assured as a defence for non-compliance with a warranty. It should be pointed out that despite these two statutory excuses which would provide flexibility to some extent, the application of this rule is far too harsh for the assured. It follows from this point that in the event that a warranty is breached by the assured, the matter may be out of the control of the assured. So in order to mitigate the harshness of this rule, and protect the interest of the assured, the issue as to whether or not the assured has exercised due diligence\textsuperscript{155} in complying with the warranty should be taken into account for the purpose of releasing the harshness of this obligation. For this reason, an additional rule should be inserted into section 34(1) of the Act as a defence for the assured. The legal effect of this rule would be that if the assured has exercised due diligence but is still unable to avoid the breach of warranty, the insurer would be liable to indemnify the assured for any loss caused as a result of the breach of warranty. But in such a case, the burden of proof should be on the assured to show that he has made best efforts to avoid the breach of warranty. Therefore, in more specific terms, in this thesis, it is suggested by the author that this part of section 34(1) of the Act should be modified to read as follows:

Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to

\textsuperscript{155} The concept of due diligence applies to a number of specific obligations of the carrier and appears in Art. III of the Hague-Visby Rules which was incorporated into the Carriage of Goods by Sea Act 1971. But with regard to warranties of marine insurance law, it is suggested by the author that the assured should be under a more onerous obligation to exercise due diligence in complying with a warranty.
the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law. If the assured can show that he has exercised due diligence and due care in complying with a warranty, the insurer is liable to indemnify the assured for any loss as a result of the breach of this warranty.

2.6(5) A breach of warranty cannot be remedied

The rule that a breach of a promissory warranty is irremediable is indeed another feature of a marine insurance warranty which has been established since the 18th century. This feature is governed by one of the statutory provisions contained in the Marine Insurance Act 1906. In more specific terms, it declares that: ‘Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.’\(^{156}\) Put another way, ‘once a marine warranty has been breached, it is irrelevant whether the warranty is later complied with.’\(^{157}\) This aspect of law is demonstrated in the case of *Quebec Marine Insurance Co v Commercial Bank of Canada*\(^{158}\) where the vessel was insured under a voyage policy from Montreal to Halifax. After leaving Montreal, the vessel’s boiler became unmanageable owing to a defect in the boiler. As soon as the necessary repairs were carried out, the vessel resumed her voyage, but was lost during the voyage as a result of severe weather. The Privy Council held that the assured was in breach of the implied warranty of seaworthiness even though the defect was remedied before the loss occurred.

Nevertheless, it is not surprising that the law on this subject may cause unfairness and harshness from the point of view of the assured, and it may also be far too easy for the insurer to escape liability even for a breach of warranty that has been cured before loss. In order to solve this problem, it is recommended that a less stringent remedy should be provided to the insurer,

\(^{156}\) Section 34(2), Marine Insurance Act 1906.


\(^{158}\) (1870) LR 3 PC 234.
because in the event of a breach of warranty, it is clear that the assured is at fault even though the breach of warranty may be cured by the assured at a later stage. Consequently, it is proposed by the author that section 34(2) of the Act should be altered to read as follows:

Where a warranty is breached but subsequently remedied by the assured before loss, the insurer is only entitled to charge an additional premium at a reasonable rate without affecting any further liability to indemnify the loss.

2.6(6) No causal connection between breach of warranty and loss

Despite the absence in the relevant provisions of the Marine Insurance Act 1906, in the law of marine insurance warranty, it has been accepted as a common law rule that a causal connection between a breach of warranty and the loss does not have to be shown. As was indicated by Bennett, ‘there is no requirement of any causal link between a breach of a promissory warranty and the loss in respect of which the assured claims.’ This issue was brought into discussion in the 18th century case of Hibbert v Pigou where an insured ship had failed to comply with the warranty of sailing with convoy. During the voyage, the ship was lost as a result of a storm. It was held that the assured was not entitled to recover from the loss on the basis that there was no causal connection between the breach of warranty and the loss. A similar judgment was reached in the case of Forsikringsaktielselskapet Vesta v Butcher where an assured owner of a fish farm had failed to comply with a warranty whereby a 24-hour watch had to be maintained in the fish farm. The fish farm was destroyed by a storm. The assured argued that the loss caused by storm was not connected with the breach of warranty. As the warranty was breached

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159 However, as far as consumer insurance is concerned, the Financial Services Authority does not permit an insurer to reject a consumer policyholder’s claim where the breach of warranty or condition has no connection with the loss.
161 (1783) 3 Doug KB 213.
by the assured before loss, this argument was rejected by the court, even though the assured could in no way prevent the loss caused by storm.

Admittedly, there is no doubt to say that the current law in this area has generated a great deal of criticism from scholars and legal professions, in the sense that the current law in this area may create unfairness insofar as the assured is concerned. Obviously, as the Law Commission pointed out, ‘it seems unjust that an insurer should be entitled to reject a claim for any breach of even a material warranty, no matter how irrelevant the breach may be to the loss.’\footnote{Law Commission Insurance Contract Law Issues Paper 2 Warranties, 2006, para. 3.2(2).} According to the Law Commission, a causal connection test in relation to warranties should be introduced into the Marine Insurance Act 1906 to protect the assured from a breach of warranty which has no connection with the loss. Therefore, it is proposed by the Law Commission that the assured should be entitled to be indemnified for the loss if he can prove on the balance of probability that the event or circumstances constituting the breach of warranty did not contribute to the loss. But in such a situation, the assured should bear the burden of proof to show that the breach did not contribute in any way to the loss in question.\footnote{Law Commission and Scottish Law Commission, Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured (LCCP No. 182, SLCDP No. 134, 2007), para. 8.45.} Additionally, if it can be shown that a particular breach contributed to only part of the loss, it is proposed that the insurer should not deny liability to pay for the loss that is unrelated to the breach.\footnote{Ibid, para. 8.48.}

It is generally accepted that the causal connection approach proposed by the Law Commission is appropriate to a certain degree, in the sense that it may prevent the insurer from taking the opportunity to deny liability on purely technical grounds and protect the interest of the assured. On the other hand, it can be argued that the weakness of the causal connection approach is that it has failed to take into account as to the right and interest of the insurer. This is
because if a breach of a warranty has no causal connection with the loss, the insurer would be left without a remedy, but in such a case, it is undeniable that the assured was clearly at fault for the non-compliance of the warranty. Furthermore, allowing the insurer to prove causation for a breach of warranty would be time consuming in terms of the trial of each case. For these reasons, in order to simplify the matter and balance the conflicting rights and interests as between the assured and the insurer, a different proposal, as well as a different remedy available to the insurer, should be introduced for the purpose of modifying the existing law. As such, it is suggested by the author that an additional subsection, that is to say section 33(4), should be inserted into section 33 of the Act, so that section 33(4) of the Act should be introduced in the following way:

Where a breach of warranty is followed by a loss, the insurer is liable to indemnify the assured for the loss, less any damage caused as a result of the breach of warranty, if the loss in respect of which the assured seeks to be indemnified was not caused or contributed to by the breach.

2.6(7) A breach of warranty automatically discharges the insurer from liability

Unlike a breach of a warranty in ordinary contract law, a breach of a warranty, whether express or implied, in marine insurance law automatically discharges the insurer from further liability, although the insurance contract as a whole remains unaffected. To this end, it is clear that a breach of warranty does not have the effect of bringing the contract to an end, because the assured may have a continuing liability to pay the remaining premiums, and the insurer is also under an obligation to indemnify the assured for any loss occurred before the breach takes place. Put another way, in the event that a warranty is breached by the assured, the insurance contract is not void ab initio (from the time of conclusion of the contract). Losses which have accrued
prior to the breach of warranty must be paid by the insurer under the terms of the policy. This rule was spelt out in section 33(3) of the Marine Insurance Act 1906. However, the automatic discharge rule should be criticised on the basis that the in the event of a breach of warranty, the liability of the insurer automatically comes to an end, and insurer will still be entitled to claim the remaining premium until the expiration of the policy if the premium is agreed to be paid by instalments. In the opinion of the author, this is clearly unfair for the assured who would easily lose the cover as soon as a warranty is breached. For this reason, it is suggested by the author that the automatic discharge rule should be replaced by a different statutory remedy.

But according to the current law, the automatic discharge rule may not be the only remedy available for the insurer. Depending upon the terms of the policy, a breach of warranty may give rise to damages for breach of contract rather than termination of liability, provided that clear wording is used in the policy. In such a case, the insurer would only be entitled to claim damages for breach of contract. It has also been pointed out by Soyer that ‘due to the fact that section 33(3) has no connection with the notion of public policy, there is nothing preventing the parties from replacing the automatic discharge remedy spelt out by this subsection with a different one.’\textsuperscript{166} Therefore, it is fair to say that the law on this point is satisfactory, as it has preserved the common law principle of party autonomy.

Despite being incorporated into the 1906 Act, the automatic discharge rule was not clarified until the House of Lords had ultimately reached its decision in the case of \textit{Bank of Nova Scotia v Hellenic Mutual Risks Association (Bermuda) Ltd (The Good Luck)}.\textsuperscript{167} Here, a ship called ‘\textit{The Good Luck}’ was insured by the defendant club and mortgaged to the plaintiff bank. The benefit of the insurance was assigned to the plaintiff bank. The club provided the bank with a letter of undertaking whereby the club promised to inform the bank promptly if


\textsuperscript{167} [1991] 2 Lloyd’s Rep 191.
they should ‘cease to insure’ the ship. An express warranty was contained in the policy prohibiting the ship from entering into certain declared areas. The owners of The Good Luck had regularly sent the ship into prohibited areas without informing the club and the bank. Such a practice was subsequently discovered by the club, but no reasonable steps had been taken by the club to notify the bank or stop the owners of The Good Luck in doing so. During the last voyage, the ship entered into the Arabian Gulf and was hit by Iraqi missiles with the result that she became a constructive total loss. The bank made further loans to the shipowners without being aware of the fact that the loss was not covered as a result of the breach of warranty. The insurance contract could not be sustained as a result of the breach of warranty. The bank brought an action against the club for failing to notify the bank as to the breach of warranty and the fact that the club had ceased to insure the ship by relying on section 33(3) of the Marine Insurance Act 1906.

One of the crucial issues in this case arose as to whether the breach of warranty automatically discharged the liability of the bank as spelt out in section 33(3) of the Act or whether the bank was given the opportunity to terminate the contract. In the first instance, the trial judge held that by virtue of section 33(3) of the Act, the breach of warranty discharged the liability of the insurer, and the club was in breach of the letter of undertaking in failing to notify the bank as to the breach of warranty.

On appeal to the Court of Appeal, it was held that a breach of a warranty provided the club, as the insurer, with the right to choose whether or not to rescind the contract, rather than automatic termination of liability, on the basis that a breach of a marine insurance warranty shares similarity with a breach of condition in ordinary contract law.\(^{168}\) Accordingly, as the club had not taken any steps to repudiate the contract before further loans were made by the bank, they were held not to be in breach of the letter of undertaking they had given to

\(^{168}\) Indeed, the Court of Appeal’s decision was reached on the basis of the pre-1906 authorities.
the bank. In addition, the reason why the Court of Appeal did not accept the decision of the court of first instance was because the automatic discharge remedy for a breach of warranty appeared in section 33(3) of the Act clearly contradicted with the insurer’s right to waive the breach as set out in section 34(3) of the Act.

Reversing the Court of Appeal’s decision, the House of Lords held that a breach of warranty automatically discharges the insurer from liability as from the date of the breach, regardless of whether the insurer is aware of the breach, but all rights and liabilities of the parties accrued before the breach would remain unaffected. The word ‘automatic’ is of particular importance as in the event of a breach of warranty, there is no need for the insurer to take any positive steps to relieve himself from further liability under the policy, the ultimate effect of the breach is automatic. For this reason, the club was held to be in breach of the letter of undertaking, as once they chose to rely on the breach of warranty as a defence, they were automatically discharged from further liability at the time *The Good Luck* was sent to the prohibited area.

In reaching this decision, Lord Goff made it clear that the Court of Appeal’s decision on this issue was inaccurate\(^\text{169}\) and stressed that section 33(3) of the Act must be interpreted in accordance with its literal wording. In more specific terms, as Lord Goff stated, ‘Even if in the result no further obligations rest on either parties, it is not correct to speak of the contract being avoided; and it is, strictly speaking, more accurate to keep the carefully chosen words in s 33(3) of the Act, rather than to speak of the contract being brought to an end, though that may be the practical effect.’\(^\text{170}\) In his judgment, Lord Goff made it clear that compliance with a warranty is a condition precedent\(^\text{171}\) to the liability of

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\(^{169}\) The Court of Appeal’s decision on this issue was criticised by Lord Goff as being wrong and ‘led astray’ by passages in certain books and other texts which refer to the insurer being entitled to avoid or repudiate the contract for breach of a promissory warranty (*The Good Luck* [1992] 1 AC 233, at p 263-4).


\(^{171}\) For the purpose of clarification, a clear distinction must be drawn between a condition precedent
the insurer. Thus, as stated in Lord Goff’s leading judgment, ‘In the case of conditions precedent, the word “condition” is being used in its classical sense in English law, under which the coming into existence of (for example) an obligation, or the duty or further duty to perform an obligation, is dependent upon the fulfillment of the specified condition.’

In addition to the automatic discharge rule as spelt out in section 33(3) of the Act, the legal consequence of a breach of warranty is subject to any express terms set out in the insurance policy. It follows from this point that if agreed by the parties, the automatic discharge remedy can be replaced by a different remedy in case of a breach of a warranty. For instance, the parties have the right to insert a held covered clause into the insurance policy, with the effect that if a warranty is breached by the assured, the policy may still be operative, so that the assured’s loss can be covered despite the breach of warranty. The best example of such a clause can be found in the Institute Time Clause (Hull) which reads as follows:

Held covered in case of any breach of warranty as to cargo, trade, locality, towage, salvage services or date of sailing provided notice be given to the Underwriters immediately after receipt of advices and any amended term of cover and any additional premium required by them be agreed.

The operation of the held covered clause was clarified in the case of *Greenock Steamship Co v Maritime Insurance Co Ltd* where the plaintiff assured had breached the implied warranty of seaworthiness by sending the ship to sea with an insufficient amount of coal. However, a clause contained in the insurance policy stated as follows: ‘held covered in case of any breach of

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and a condition subsequent. While the former refers to an event which must take place before a party to the contract must fulfil his contractual obligation, the latter refers to the occurrence of an event which brings the obligation of a contracting party to an end.

173 Institute Time Clauses (Hull) 1995, clause 3.
174 [1903] 1 KB 367.
warranty … at a premium to be hereafter arranged’. The court had made it clear that the clause applied to a breach of the implied warranty of seaworthiness. In this case, Bingham J also expressed his view in relation to the application of the held covered clause with the following wording:

‘It entitles the shipowner, as soon as he discovers that the warranty has been broken, to require the underwriter to hold him covered. But what is to happen if the breach is not discovered until a loss has occurred? I think in that case the clause still holds good, and the only open question would be, what is a reasonable premium for the added risk.’

Therefore, it can be concluded that the law relating to the held covered clause is satisfactory, in the sense that the application of the held covered clause offers a flexible approach and can be regarded as a relaxation of the strictness of the obligation to comply with the warranty. Additionally, the held covered clause also has the practical benefit in the modern commercial world, in the sense that it would effectively protect the subject matter insured from loss or damage.

Indeed, the automatic discharge remedy has been criticised as being wrong and unjust. For instance, as the Law Commission proposed, a breach of warranty should not automatically discharge the insurer from liability, but rather, the insurer should be entitled to terminate the insurance contract as a result of the breach of warranty. In similar vein, it is important to note that the Insurance Act 2015, as the new legislation applying to marine and non-marine insurance, has also introduced a statutory provision for the purpose of abolishing the legal consequence of breach of warranty under section 33(3) of the 1906 Act. In particular, as it states, ‘any rule of law that

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175 Ibid, at pp 374-5.
177 This piece of legislation is the result of the joint review made by the Law Commission and the Scottish Law Commission. The Act will come into effect from 12th August 2016.
breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer's liability under the contract is abolished.\textsuperscript{178}

Another provision of the Insurance Act 2015 also introduced the legal consequence for breach of warranty as distinct from the one established under the 1906 Act. The new statutory rule as to the legal consequence for breach of warranty can be found in section 10(2) of the Insurance Act 2015 which has amended the previous statutory rule as to breach of warranty, so that under section 10(2) of the Insurance Act 2015,\textsuperscript{179} in the event that a warranty is breached, the insurance cover will be suspended for the duration of the breach and re-instated once the breach has been cured. It can be said that although the Law Commission’s proposal and the new statutory provision of the Insurance Act 2015 provide the practical legal consequence and protects the right of the insurers, it may be difficult for both the insurer and the assured to obtain practical benefit after the termination of the insurance contract, because in such a case, the insurer may be unable to claim the remaining premiums if the premiums were agreed to be paid by installments, and the assured may simply lose the insurance cover as a result of the termination of contract. Instead, it would be more appropriate to retain the insurance contract as a whole and create an alternative remedy in favour of the insurer. Therefore, it is suggested by the author that section 33(3) of the Act should be altered in the following way:

A warranty, as above defined, is a condition \textit{precedent} which must be exactly complied with \textit{only if the purpose of this warranty is to protect the subject matter insured}. But a warranty relating to the \textit{performance of future obligation can be substantially observed by the assured if such a warranty has no connection with the risk}. If it

\textsuperscript{178} Section 10(1), Insurance Act 2015.
\textsuperscript{179} Section 10(2) of the Insurance Act 2015 provides: ‘An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.’
be not so complied with, then, subject to any express provision in
the policy, the insurer is entitled to amend the terms of the contract
on a reasonable basis and claim damages and administrative cost
from the assured for the assessment of the alteration of risk.

2.6(8) Waiver of breach of marine insurance warranty

Despite the well-established statutory rule as to a breach of warranty, it is
also common for the insurer to elect to waive the breach. Such a waiver
may be either an act or a statement made by the insurer. More specifically, in
order to constitute waiver, ‘it must be a clear and unequivocal representation,
with full knowledge of facts, that the insurer will not use the automatic
cessation right and the other party must be aware of this. Thus there needs to
be some form of mutuality.’ It follows from this point that the ultimate effect
of waiver is that as soon as a warranty is breached by the assured, the
insurers can, by way of waiving the breach, reinstate their contractual
obligation to pay for the loss.

Nevertheless, the statutory rule that a breach of a warranty may be waived
by the insurer seems to contradict with the automatic discharge remedy as set
out in section 33(3) of the Act, because it is correct to say that if a breach of a
warranty automatically discharges the insurer from further liability, there would,
in reality, be nothing for the insurer to waive. Such a problem of inconsistency
was resolved in the case of The Good Luck where Lord Goff ruled that the
insurer would be precluded from relying on the breach of warranty to exempt
him from liability if, through his words or conduct, he had made acceptance to
the notice of the breach. This judgment appears to indicate that it is possible
that certain conduct of the insurer can preclude him from relying on the breach
of warranty. Despite the fact that the word ‘automatic’ was used in Lord Goff’s

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180 Section 34(3), Marine Insurance Act 1906.
judgment, this does not mean that the insurer is not required to make an election after a breach has occurred. Instead, the insurer must still make a choice whether or not to accept and waive the breach.

In general, there are two types of waiver for a breach of a warranty, namely waiver by election and waiver by estoppel. Both types of waiver require the insurer to make an unequivocal representation, either by express words or conduct that he will not, in the future, insist on his legal right against the assured for the breach. The doctrine of waiver by election was clarified in the non-marine case of Bolton MBC v Municipal Mutual Insurance Ltd & Commercial Union Insurance Company Ltd.\(^{184}\) The case concerned an asbestos claim made by the assured who was in breach of the condition precedent obligation to notify the insurer immediately of any accident or claim. The insurer therefore rejected the claim for coverage reasons. The key issue in this case was whether the insurer had elected to waive the right to rely on any other policy defences. The Court of Appeal pointed out that for the doctrine of waiver by election to arise, the insurer must have made a choice, with knowledge of all relevant facts giving rise to the right he is choosing to abandon, between two inconsistent courses of action, such as affirming or denying the cover. Once such a choice is made, it will be final and binding on the other party. As there was no inconsistency between both policy defences, the insurer was held not to be entitled to reject the claim.

In contrast, the doctrine of waiver by estoppel\(^{185}\) in marine insurance law concerns the situation where, following a breach of a warranty, the insurer

\(^{184}\) [2006] EWCA Civ 50.

\(^{185}\) The expression ‘estoppel’ in this context refers to equitable estoppel which, according to Lord Goff’s statement in the case of Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga) [1990] 1 Lloyd’s Rep 391, p 399, ‘occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desists from acting, in reliance upon that representation, with the effect that it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with his representation, he will to that extent be precluded from doing so.’
becomes aware of the assured’s breach and makes an unequivocal representation through his words or conduct, and by relying on this representation, the assured is of the opinion that the insurer intends to keep the insurance contract on foot. In other words, in order for a waiver of this type to arise, the insurer must have made a clear and unequivocal representation of the kind required for the breach, and some positive act of reliance would also be required on the part of the assured. Nevertheless, the crucial issue to be determined in this context is not the actual state or extent of the insurer’s knowledge, but rather how the conduct of the insurer could have an impact on the assured.\(^{186}\)

Having considered the different forms of waiver for breach of warranty in insurance law, the next issue may arise as to which form of waiver applies directly to a breach of warranty in marine insurance contracts. Recent authorities appear to hold that in marine insurance contracts, waiver by estoppel is the only appropriate doctrine to be applied under section 34(3) of the Act. This is because in the event that a warranty has been breached by the assured, the insurer is automatically discharged from liability without the need to make any choice. For instance, in the case of *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions*,\(^ {187}\) Mr Jules Sher QC confirmed that the appropriate doctrine of waiver for the purpose of section 34(3) of the 1906 Act was waiver by estoppel rather than waiver by election.

More recently, in the case of *Liberty Insurance PTE Ltd v Argo Systems FZE*,\(^ {188}\) the issue of waiver for breach of warranty was again considered by the Court of Appeal. In this case, the assured Argo arranged an insurance cover with the insurer Liberty Insurance PTE Ltd (Liberty) under a voyage policy for its floating casino to be towed from the US Gulf to India. The policy,


\(^{188}\) [2011] EWCA Civ 1572.
which was governed by English law, contained a warranty stating ‘warranted no release, waivers or “hold harmless” given to tug or towers’. The ship subsequently sank in the Caribbean Sea and became an actual total loss. Liberty refused to indemnify the assured for the loss as a result of the breach of warranty. Argo issued fresh proceedings against the insurer in England after the litigation had commenced in the US court. In the course of the English proceedings, one of the issues raised before the court was whether or not Liberty was estopped from relying on the breach of warranty as a result of the failure to plead the breach for seven years between the US proceedings and the English proceedings. In the court of first instance, it was held that there had been a breach of the ‘hold harmless’ warranty under the insurance policy, but Liberty had waived by estoppel the right to rely on the breach through its conduct.

On appeal, the issue as to whether Liberty had made an unequivocal representation to the assured that they would not rely on the assured’s breach of the ‘hold harmless’ warranty to exempt from liability was again dealt with by the Court of Appeal. Ultimately, allowing Liberty’s appeal, the Court of Appeal held that despite the fact that the insurer had taken no positive action against the breach of warranty for seven years before the commencement of the English proceedings, this did not mean that the insurer had made an unequivocal representation. Put another way, it is submitted that in the absence of special circumstances, mere silence or inaction on the part of the insurer does not constitute unequivocal representation, so that in order to waive the breach of warranty, some positive actions must be taken by the insurer. In reaching this decision, the Court of Appeal stressed that as the liability of the insurer would terminate automatically following a breach of a warranty, there was no room for the application of waiver by election or affirmation, and since there was no election for the insurer to make, the principle of waiver stipulated in section 34(3) of the Act referred to waiver by estoppel only.
It follows from this judgment that in order for the assured to establish waiver, two conditions must be satisfied: first, there must be an unequivocal representation made by the insurer,\(^\text{189}\) either by words or conduct, that the insurer will not in the future insist on his legal right against the assured for the breach, and secondly, the assured has relied upon that representation in such a way so as to render it inequitable for the insurer to go back on his representation.

Despite the fact that the law of waiver for breach of warranty has been clarified by recent case-law, the remaining problem is that it is unclear, under section 34(3) of the Act, as to how the breach of warranty can be waived by the insurer. That is to say, the way by which the insurer can choose to waive the breach of warranty was not stipulated in this subsection. The absence of such a statutory clarification in respect of waiver may cause ambiguity as well as uncertainty. In order to resolve this problem, the only form of waiver which can be used by the insurer should be inserted into this subsection. For this reason, it is suggested by the author a minimal reform of the law could clarify this issue, so that section 34(3) of the Act should be modified in the following way:

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\text{A breach of warranty may only be waived by the insurer through an unequivocal representation consisting of words or conduct.}
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2.7 Conclusion

Overall, this chapter has critically examined the nature of marine insurance warranty. The term ‘promissory warranty’, as defined by section 33(1) of the Marine Insurance Act 1906, falls into two categories, namely present warranty and future warranty. Research was conducted in respect of present warranty where it was found that the application of present warranty may render it rather difficult for the assured to observe. It is therefore proposed by the author that all present warranties should be replaced by innominate terms as regulated by

\(^{189}\) The insurer’s representation in this context can be regarded as a type of promise.
ordinary contract law, so that in case of breach, the degree as to the seriousness of the breach would be taken into account to provide an appropriate remedy to the insurer.

The research then proceeded to the legal nature of warranties. The statutory rule that a promissory warranty must be exactly complied with appears in section 33(3) of the Act. This feature can thus be distinguished from a representation which can be substantially observed. However, it is justifiable to say that this rule is rigid and unfair. It is therefore suggested by the author that if a warranty has no connection with the risk, substantial observance will be sufficient to make the insurer liable for any potential loss.

The legal feature of warranty that there is no materiality between the warranty and the risk is also provided in section 33(3) of the Act. This statutory rule has created another unfair obstacle for the assured to comply with the warranty. It is proposed by the author that such a problem can be resolved by taking into account the purpose of the warranty, so that the assured only needs to comply with the warranty if the purpose of the warranty is to protect the subject matter insured.

Despite the absence of a statutory rule, it has long been established that there is no defence for a breach of a warranty. But there are two statutory excuses for this rule as stated in section 34(1) of the Act, namely a change of circumstances and when compliance with the warranty is rendered unlawful by any subsequent law. It has been argued by the author that the harshness of the statutory rule that there is no defence for a breach of a warranty can be mitigated by adopting the notion of due diligence. The legal effect of such a modification is that if the assured can show that he has exercised due diligence in complying with a warranty, the insurer will not be entitled to avoid liability after the warranty has been breached.

One of the other well-established principles in relation to the nature of warranty is that a breach of warranty cannot be remedied by the assured. This principle is governed by section 34(2) of the Act which does not provide the
assured with the right to argue that a warranty has been complied with before loss. But in order to balance the rights and interests between the assured and the insurer, an alternative remedy is introduced by the author whereby the insurer will only be entitled to charge an additional premium if a breach of a warranty has been remedied by the assured before loss.

In the law of marine insurance, it has been established as a common law principle that there is no causal connection between a breach of warranty and the loss. However, the present law in this area has been criticised by academics and the Law Commission on the basis that it is unfair for the insurer to reject claims where the breach of warranty has no connection with the loss. Therefore, a causal connection test was introduced by the Law Commission. But in order to protect the right and interest of the insurer, it is proposed by the author that a different solution should be adopted to modify the present law, and an additional subsection, that is section 33(4) should appear after section 33(3) of the Act. The ultimate effect of this law reform proposal would be that if the loss was not caused or contributed to by the breach, the insurer will not be entitled to reject the claim, but he will be entitled to damages.

The research then proceeded to the legal consequence of a breach of warranty. As set out in section 33(3) of the Marine Insurance Act 1906, the insurer’s liability will be automatically discharged if a warranty is breached by the assured, but this does not affect the insurer’s liability incurred before the breach. Nevertheless, the law on this subject was not clarified until the House of Lords has reached its decision in the case of *The Good Luck.¹⁹⁰* The automatic discharge remedy has also been criticised as wrong and unjust. Thus, the alternative remedy proposed by the author is that the insurer is entitled to amend the terms of the contract and claim damages and administrative costs from the assured following a breach of warranty.

In addition, according to section 34(3) of the Act, the insurer can waive the

breach of warranty. In general, although there are two types of waiver, namely waiver by election and waiver by estoppel, waiver by estoppel is the only type of waiver which applies directly to marine insurance contracts. In order to constitute waiver, the insurer must have made an unequivocal representation, and the assured must have relied upon that representation. However, it can be argued that the law in respect of waiver of warranty may cause ambiguity. Such a problem can be resolved by modifying section 34(3) of the Act, and it is suggested by the author that the wording ‘unequivocal representation’ should appear in this subsection.

So far, a historical development of English marine insurance law has been examined in Chapter 1. The issue as to how the law of marine insurance and marine insurance warranty developed into the current state has been analysed. The research completed for Chapter 2 is mainly based upon the nature of English marine insurance warranty as appears in section 33 and 34 of the Marine Insurance Act 1906 and its law reform proposal where necessary. The law relating to the nature of warranty has been examined with the example of old and recent cases. For the sake of comparison, the research will then proceed to the examination as to the historical development of Chinese marine insurance law as well as the current law of marine insurance warranty in general. In particular, the research will mainly be based upon the Chinese Maritime Code 1993 and case examples. The issue as to whether the law in respect of the current warranty regime in China is satisfactory will be considered accordingly, and some law reform proposals will also be introduced where necessary.
Chapter 3

A historical review of Chinese marine insurance law

3.1 Introduction

Having considered the historical development of English marine insurance law and the nature of marine insurance warranty as appears in the relevant provisions of the Marine Insurance Act 1906, the author will then provide a historical review as to the law of Chinese marine insurance in this Chapter.

Due to the enormous growth of economy and export trade transactions in China over the past 30 years or so, the marine insurance market in China has generated a great impact both on a national and international level. The insurance industry in China has developed into its mature state as a result of the economic system reform announced by Deng Xiaoping who was the reformist leader of the Chinese Communist Party (CCP). It should be noted that China has a traditional civil law system, and statute law is the only source of law in China. Currently, the law of marine insurance in China is mainly governed by the Chinese Maritime Code 1993 which came into force from 1st July 1993. Chinese marine insurance law is also regulated by other legislations, such as the Insurance Law of PRC 1995 and the Contract Law of PRC 1999. However, the Chinese law of marine insurance was deeply influenced by the English Marine Insurance Act 1906. By way of illustration, the legal principles of warranty contained in the Marine Insurance Act 1906 were adopted into Article 235 of the Chinese Maritime Code 1993.

The aim of this Chapter is to explore a historical overview as to the developments of the Chinese insurance industry. At the outset, this Chapter

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192 Ibid.
will provide a detailed overview as to the practice of trade and law in early Chinese history. This Chapter will then examine the issue as to how the business and practice of marine insurance in China emerged from the early 19th century, although the first insurance company in China was set up by British merchants in the city of Guangzhou.\(^{193}\) This Chapter will continue to examine the issue as to how the law of marine insurance has gradually developed after the People’s Republic of China (PRC) was established. This Chapter will also evaluate the significant development of the marine insurance industry after China was opened up to the rest of the world with the economic system reform taking place in the late 1970s. In addition, this Chapter will consider the issue as to how the law of marine insurance in China has developed into its current state to meet international standards. The court system in China will also be briefly described in this Chapter to provide a better understanding as to the jurisdiction of marine insurance disputes. Last but not least, some general conclusions will be drawn at the end of this Chapter.

### 3.2: The general law of trade and the practice of maritime trading activity in early Chinese history and the impact on modern trade

According to the archaeological data, the roots of Chinese maritime trading activity can be traced back thousands of years to the Neolithic age (8000 BC).\(^{194}\) In ancient times, China was a feudal state, and as a result, the activity of maritime trading was controlled and limited by the government to a great extent. Therefore, during the ancient times, China’s economy had a relatively low degree of commercialisation. As a result, commercial law in ancient China


did not receive much legislative or judicial attention, nor was there any rule or custom equivalent to the *lex mercatoria* developed in medieval Europe. This was mainly due to the presence of Confucianism in China which regarded merchants as selfish and placed them in one of the lowest classes of the social hierarchy.\(^{195}\) However, although there was legislation in the Qin Dynasty (221-205 BC) relating to the control and taxation of commercial transactions, the government did not set out rules for the determination of liability of merchants in respect of commercial transactions.\(^{196}\) In those early days, it was common for the merchants to trade through land rather than by sea, even though maritime trade, as a different trading activity, appeared in ancient China as early as 106 BC. Evidently, in the Han Dynasty (206 BC-220 AD), a special route called the Silk Road was established as a passage for the merchants to trade with each other. In particular, the Silk Road was a route of trade in the northwest part of China where it was used by the Chinese merchants to trade and transport goods from China to Central Asia, the Middle East and Europe, including Ancient Rome.\(^{197}\) Probably, the earliest Chinese law dealing with the issue of foreign trade in ancient China was the Tang Code which was made in the Tang Dynasty between approximately 581 and 960 AD.\(^{198}\) More specifically, one of the general principles established in the Tang Code was that disputes between foreign merchants from the same country should be determined by referring to their own customs and laws, and disputes between foreign merchants of different nationalities should be resolved under the provisions of the code.\(^{199}\)

Due to the imperial hostility to any rival authority in ancient China and the fact that the Chinese governments continued to adopt strict regulations for the

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198 It is said that the earliest form of bills of exchange in China was also created during the Tang Dynasty between 806-820 AD.
purpose of restricting foreign trade, especially during the Ming Dynasty\textsuperscript{200} and the Qing Dynasty, there was no systematic foundation of commercial law or any rule equivalent to the law merchant in England to resolve commercial disputes. In other words, the medieval \textit{lex mercatoria} and the \textit{lex maritima} created by merchants and traders throughout Europe were not the most influential set of rules to be applied in ancient Chinese commercial law. Nevertheless, contemporary Chinese commercial law was, to a great extent, influenced by German and Japanese law due to the fact that the Chinese government adopted a number of commercial codes which were based on the German and Japanese model of law soon after the Opium Wars (1840-1842).\textsuperscript{201} Subsequently, in order to regulate mercantile transactions in a more efficient way, the General Rules of Merchants (Shang Ren Tong Li) were introduced in the Qing Dynasty in 1903. There were, in fact, 9 provisions in these Rules which only made direct reference to the general rules applicable to the merchants’ business conduct.\textsuperscript{202}

Generally speaking, although the history of Chinese commercial law did not generate a significant impact on the development of the existing system of international commercial law, the modern \textit{lex mercatoria}, which was created by a wide variety of entities such as the UNCITRAL and the ICC, started to play an important role in the system of the contemporary Chinese commercial law from the early 1980s. The reason for this being that as soon as the economic system reform took place in China in the late 1970s, Chinese commercial law started to link up with the recent development of international practices. As a result, a number of international conventions, such as the 1980 United Nations Convention on Contracts for the International Sale of Goods which came into effect on 1\textsuperscript{st} January 1988, were signed by the Chinese government. This means that the Convention should enjoy priority over

\textsuperscript{200} The leaders in the Ming Dynasty introduced the policy of banning overseas trade.
\textsuperscript{201} Chang et al., \textit{A History of Chinese Legal System (Zhong guo Fa Zhi Shi)}, 1987, p 244.
Chinese domestic law. In similar vein, Chinese judicial practice indicates that *lex mercatoria* can be applied in chosen by the parties. Therefore, it follows from this perspective that the modern *lex mercatoria* is now to a large extent adopted into modern Chinese commercial law and widely used by Chinese businessmen to resolve international commercial disputes.\(^{203}\)

3.3: Historical background of the Chinese insurance industry before the establishment of the People’s Republic of China

The history as to the practice of insurance in China can be traced back to the ancient times. Traditionally, as early as the 3\(^{rd}\) millennia BC, ancient people in China has adopted various means by which food and goods could be transported between inland China and its coastal cities on the Yangtze River which was regarded as the most important river in the history, culture and economy of China. However, it was soon acknowledged that the boats and goods could be exposed to risks during the river transit as a result of such a trading practice, such as fire, theft, capsizing and the weather condition and so on. In order to prevent the loss or damage to the boats and the goods, a number of collective agreements were introduced by the businessmen to distribute their goods across a number of vessels and share the potential loss of any boat with each other.\(^{204}\) A few years later, a new method of insurance was adopted by the merchants to conduct freight on the Yangtze River, namely each merchant would share the loss of goods with other merchants and place his goods on a number of different boats, and thereby minimise the

\(^{203}\) Guangjian Tu, *Private International Law in China*, 2016, p 75.

risk of loss incurred from the sinking of one boat. This method was recognised as the oldest predecessor to modern insurance.

Significant development as to the insurance industry in China appeared at the beginning of the 19th century. During this period of time, the country was still controlled by the Qing Dynasty (1644-1911) which was the last feudal dynasty of China. From 1805 to 1948, British businessmen began to expand their trade to China, and at the same time, numerous foreign insurers entered into the Chinese insurance market. As a result, the modern forms of insurance were introduced to China by foreign merchants, especially by English merchants, in the late Qing Dynasty. In 1805, the first foreign insurance company, the Guangzhou Insurance Firm (or sometimes called the Canton Insurance Society), was founded by two British firms (Davidson-Dent House and Beale-Maginie-Jardine Firm) in the city of Guangzhou which was the most important coastal city for export trade in those early days. Subsequently, in 1835, a group of traders engaged in the business of exporting goods from China formed a mutual association called the Union Insurance Society of Canton Limited. Later, more insurance companies were set up in China by English merchants, such as the Yangtze Insurance Company, the Sun Insurance Company, and the Insurance Department of Butterfield & Swire Company and so on. A large number of these insurance companies based their head offices in Shanghai. During that time, all proposal forms, insurance clauses, policies or premium rates were drafted by foreign insurance companies.

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market profitably for a long period of time until the World War II. From the middle of the 19th century, the business of marine insurance in China was in great demand as a result of the expansion of foreign trade. This is because during this period of time, foreign businessmen were permitted to conduct business freely in the treaty ports of China. This has also enabled Chinese merchants to conduct business with them. However, there was no legislation or regulation concerning the practice of marine insurance at that period of time.

As soon as the Chinese merchants realised the importance of foreign trade, the first domestic freight insurance company, the Shanghai Yihe Insurance Society, was set up by several Chinese businessmen in Shanghai in 1865.\(^\text{208}\) However, as there was no domestic marine or shipping insurance company in China then, Chinese ships had to be insured by foreign insurance companies. In order to promote the expansion of transport business and regulate domestic insurance companies, China’s first National Insurance Institute, the Insurance Bureau of Commerce, was formally established in December 1875. This has changed the situation whereby foreign insurance companies were in a dominate position over the China’s insurance market. As a result of the emergence of the first domestic insurance company, the first piece of legislation regarding the business of insurance, namely the Qing Commercial Law, was drafted by the Qing government in 1904. The principles relating to loss and life insurance, as two distinct types of insurance, were covered by this piece of legislation. But the law had never come into operation due to the collapse of the Qing Dynasty in 1911.\(^\text{209}\)

In fact, until the Qing Government was collapsed, a number of other Chinese national insurance companies, as well as other western insurance companies and agencies, were set up, and most of them were based in

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One of the most important foreign insurance companies at that period of time was the American Insurance Group established in 1919. But until this period of time, the Chinese insurance market was still dominated by a large number of foreign insurance companies operating in Shanghai. Although domestic insurance companies sought to develop their market share, it was indeed difficult for them to expand their business and compete with foreign insurance companies. This market structure was retained throughout the World War II and the civil war between the National People’s Party (Guo Min Dang) and the Communist Party (CP) until the victory of the CP and the establishment of the PRC. Soon after the Sino-Japanese War, Shanghai again became the centre of China’s insurance market. Foreign insurance companies which were forced to close down during the war time were able to re-open their business in Shanghai after the War.

The significant impact of Western legal texts (especially the German Civil Code) on Chinese law is thought to have been started under the devastation of auspices by Zexu Lin in 1839. Due to the fact that Germany was regarded as a rising power in the late 19th century, the German Civil Code has been highly influential for most of the oriental legal systems, including China. By way of illustration, in China, the German Civil Code was introduced in the later years

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of the Qing Dynasty and formed the basic law of China. Subsequently, following the Civil Revolution of 1911, China adopted Western-style legal code into its own legal system, including the German Civil Code on insurance law. More specifically, the laws governing commercial and business activities were drafted by foreign-law-trained Chinese with the assistance of Western legal scholars.\textsuperscript{215}

From 1912 to 1948, China was dominated by Guo Min Dang (GMD) which was established by Sun Yat-sen. China’s insurance industry made little progress until the KMT government came into power. In order to regulate the insurance industry in an efficient way, the Insurance Law was drafted by the GMD government in 1929 and was revised in 1937.\textsuperscript{216} This piece of legislation consisted of four chapters. These were general principles, damage insurance, personal insurance and supplementary. Another piece of legislation drafted by the GMD government was the Insurance Company Law which was published in 1935. Despite the existence of these legislations, the laws were not put into practice due to the fact that foreign insurers made objections to these insurance laws. Having appreciated the significance of export trade, the GMD government also introduced the law of marine insurance which was governed by the Maritime Law drafted in 1931.\textsuperscript{217}

3.4: Development of the Chinese insurance market and the maritime law after the foundation of the PRC

As soon as the People’s Republic of China was set up in October 1949, the People’s Insurance Company of China (PICC), as the first wholly


\textsuperscript{216} Guanghua Yu & Minkang Gu, Law Affecting Business Transactions In The PRC, 2001, p 126.

\textsuperscript{217} Ibid.
state-owned enterprise and the only domestic insurance service provider, was formed by the new Chinese government with its head office in Beijing. The PICC was in a dominant position over all domestic insurance companies and was the only insurance company specialising the business of marine insurance at that period. The PICC expanded rapidly; by the middle of 1950, it established branches and sub-branches in every province.\footnote{The statistical report of the PICC of 1950, PICC, Beijing, China.} In urban areas, the PICC conducted fire insurance, life insurance, transportation insurance and automobile insurance. In rural areas, the PICC offered crop insurance and animal insurance. From the international aspect, the PICC also provided export and import of goods, ocean marine cargo transportation insurance and war risks. Despite the fact that the PICC was directly controlled by the central government, the supervision of the Chinese insurance industry was carried out by the People’s Bank of China (PBC) which was also called the central bank of China. The PBC was also authorised to set the terms of the insurance contracts and the rates of the policies.\footnote{Qixiang Sun, Lingyan Suo and Wei Zheng, ‘China’s Insurance Industry: Developments and Prospects’ (2007) Huebner International Series on Risk, Insurance and Economic Security, Volume 26, 597 at 600.}

As a result of the establishment of the PICC, all foreign insurance companies were required to exit the Chinese insurance market by the end of 1952. Following the new Chinese government’s attempt to keep the maritime transportation system in operation, the Chinese legislative development on maritime law was partly achieved from the early 1950s when the maritime law drafting committee was set up by the Ministry of Communications, but the law drafting task came to an end as a result of the Great Proletarian Cultural
It was not until 1981 that the maritime law drafting task was resumed.

However, it was soon discovered by the PICC that there was insufficient domestic insurance business. Therefore, all transactions of domestic insurance business came to an end by 1958, except the business of aviation and export cargo transportation insurance, although foreign insurance and reinsurance business were still permitted in the insurance market. In particular, at the end of 1958, it was decided at the National Financial Meeting that domestic insurance business should stop immediately, and only small foreign insurance business would be retained. Soon after, most branches of the PICC, except Shanghai, Guangzhou and Harbin, stopped domestic insurance business. During the GPCR in China between 1966 and 1976, the only insurance business conducted by PICC was export cargo transportation insurance. However, in the late 1970s, the new leader Deng Xiaoping began to direct the whole country into economic reform. In particular, the policy of economic reform and opening the door to the outside world was announced in December 1978 at the Third Plenum of the Eleventh Congress of the CCP. Since then, China has begun to shift away from a centrally planned economy to a market economy with socialist characteristics. As such, the economic reform and the economic reconstruction became the main theme of China’s development, and this has created the necessary condition and environment for the development of China’s insurance market. At the initial stage of the economic systems reform, the government aimed at encouraging the business of domestic insurance.

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222 Guojian Xu, Guoming Lü and Tee Pek Siang, Insurance Law in China, 2007, pp 4-5.
Due to the economic system reform and the open door policy, in 1980, the PICC started to resume its dominant position and was authorised to deal with various domestic insurance transactions, such as marine insurance, property insurance, life insurance, agricultural insurance and reinsurance. This has led to the real and rapid development of modern insurance in China. From the 1980s onwards, the PICC had also gained its reputation from an international perspective. Since then, the PICC has established international branches in Western Europe, the United States, Canada and Japan. Following the economic reform, foreign insurance companies were again authorised to enter China’s insurance market. But during this period of time, there was a lack of statutory rule as to the issue of marine insurance. This is because the Chinese legislators did not have sufficient experience and skill to draft insurance law or maritime law. As a result, from the late 1970s, foreign insurance policies, proposal forms and basis of the contract clauses were relied on extensively by Chinese insurers to draft their own policy and proposal forms.

Following the economic reform and the rapid growth of the insurance industry, there has been a significant change in the China’s insurance market. Until 1986, the PICC was the only domestic insurance company and had dominated China’s insurance market. But this market structure did not last long until 1986 when more and more insurance companies were allowed to set up and compete with the PICC.\footnote{Ibid.} From the early 1990s, the fast growth in economy, the increase of personal income, the large and aging population and the acceleration of industrialisation and urbanisation were all the factors which contributed to the rapid growth of the insurance industry.\footnote{Haiping Wang, ‘The Developments and Future Prospects of Insurance Industry in China’, (2009), Vol. 4, No. 6, 150 at 151.} Due to the rapid growth of insurance market, by the end of 1990, the PICC maintained business relationships with all the leading insurance and reinsurance companies and
broker firms all around the world.\textsuperscript{226} At the same time, the PICC was also able to offer all types of foreign insurance which could only be obtained from the international insurance market in the past.

In order to create a more competitive domestic insurance market, in the mid-1980s, the central government relaxed the insurance regulations, so that it was possible for other insurance companies to exist and compete in the insurance market. By the mid-1980s, the \textit{Interim Regulations on the Administrations of Insurance Enterprises} was passed by the State Council (SC) of China in March 1985 with the aim of setting out the legal requirements for the new insurance companies to comply. At the same time, therefore, a number of domestic insurance companies were set up around the country, the most significant insurance company was the Farming Insurance Company of Xinjiang Production and Construction Group which was established in 1986. As a result of the establishment of these insurance companies, the PICC failed to retain its monopoly position in the insurance market. Subsequently, there were also other domestic insurance companies set up to compete with the PICC. By way of illustration, the Ping An Insurance Company\textsuperscript{227} and the China Pacific Insurance Company were established in 1988 and 1991 respectively. These two companies mainly specialised in the business of marine insurance.\textsuperscript{228} From the early 1990s, a number of subsidiaries were also set up by foreign insurance companies in China. These insurance companies include the American International Assurance Company which was the first foreign insurance company established in China since the economic systems reform and the Tokyo Marine & Fire Insurance Company established in Shanghai in 1994.\textsuperscript{229}

\textsuperscript{226} Foreign-related insurance, published by the PICC in 1990, Beijing, China.
\textsuperscript{227} The Ping An Insurance Company was established in Shenzhen special economic zone.
\textsuperscript{229} Yadong, Luo, \textit{China’s Service Sector: A New Battlefield for International Corporations}, 2001, p 105
In order to further facilitate the great demand of export trade transactions and regulate maritime issues, the draft bill of maritime law was adopted in November 1992, and in the following year, the Chinese Maritime Code 1993 came into force. Despite the fact that there are some areas of uncertainty, the Maritime Code serves as an important legal document for maritime law and the marine insurance industry from an international perspective, and it has been regarded as the dominant source of law in respect of maritime issues in China. But this does not prevent the parties from inserting foreign law into their insurance contracts in order to be legally effective.\footnote{230} By way of illustration, in the case of \textit{Jiansu Overseas Entrepreneur Group v Feng Tai Insurance (Asia) Co Ltd},\footnote{231} the goods were insured under the Institute Cargo Clauses (C), and the parties agreed that any dispute under the insurance policy should be resolved by referring to the English Marine Insurance Act 1906. For this reason, the Maritime Court of Shanghai upheld this clause and decided the case in accordance with English law. On the contrary, if the choice of law was not expressly specified in the contract, the Chinese courts would determine the applicable law with reference to the ‘closest connection’ test.\footnote{232} This issue should be dealt with by conflict of law which was also developed in England as an important source of law.

The Maritime Code has a total of 278 articles which regulate all aspects of maritime and admiralty issues. The Maritime Code regulates a wide range of maritime and shipping matters including vessels, crew, charters, towage, salvage, collisions, general average, limitation of liability, marine insurance and the carriage of passengers. The Maritime Code is to a large extent modelled on a number of international conventions, such as the Hague-Visby Rules, the Hamburg Rules, the International Convention on Salvage 1989 and

so on. By way of example, although the standard Hull Insurance Clauses used in the Chinese market were drafted by the PICC,\textsuperscript{233} the London Institute Clauses\textsuperscript{234} can also be used in the Chinese market.

Marine insurance, as an important aspect of law, was stipulated in Chapter XII of the Maritime Code (articles 216 to 256) which applies to both hull insurance and cargo insurance and has 41 articles. It is worthwhile to note that the provisions relating to marine insurance contracts in the Maritime Code are closely connected with the English Marine Insurance Act 1906. That is to say, some important concepts and principles of English marine insurance law were adopted when drafting the Maritime Code. There are two main reasons for this. First, there was a concerted effort in China to establish legal codes based on European models from the end of the Qing Dynasty. Secondly, by the end of the 17\textsuperscript{th} century, London started to become an important centre for export trade in respect of the business of marine insurance, and subsequently, the establishment of insurance companies in England gave English law the most significant prestige in this area which it largely maintains and forms the basis of almost all modern practice for international trade.

Despite these similarities, it should be pointed out that the underwriting process for insurance practice is completely different between these two countries, because in the Chinese insurance market, the assured normally enters into a direct contract with the insurer without the need to choose an insurance broker. Nevertheless, the position would be different in respect of marine insurance contracts in which the policy wordings are generally drafted by the insurance brokers. The outcome of this practice would be that where there is any ambiguity contained in the policy wording, it will be construed in favour of the insurer who has drafted the policy wording on the basis that the

\textsuperscript{233} These Clauses are known as the PICC Hull Clauses (1/1/86).
\textsuperscript{234} These Clauses include the Institute Cargo Clauses and the Institute Time Clauses (Hull).
broker acts as an agent of the assured.\textsuperscript{235} In addition to the Maritime Code, the relevant provisions of the Marine Insurance Ordinance\textsuperscript{236} of Hong Kong, which was enacted in 1961, can also be used by the parties as the applicable law of the insurance contracts.

But the modern Chinese insurance law did not develop into its mature state until September 1993 when the draft of the Insurance Law was completed and submitted to the SC for consideration. In October 1995, the Insurance Law of PRC\textsuperscript{237} was finally passed by the National People’s Congress (NPC).\textsuperscript{238} The Insurance Law consists of 8 parts (152 Articles) in total. The current version of this piece of legislation is the Insurance Law of PRC 2009 which regulates all types of insurance contract. Moreover, the law in respect of marine insurance contracts is governed by the relevant provisions of this piece of legislation which was created on the basis of the relevant laws of other countries. Inevitably, this is the first piece of legislation that covers every aspect of insurance, including the law of life and property insurance contracts, the rules of insurance business operations, the legal standards for insurance agents and brokers, liability issues and so on.\textsuperscript{239} In addition, the regulation and administration of insurance companies can be found in the relevant provisions of this piece of legislation. Apart from the Insurance Law of PRC, marine insurance contracts are also regulated by the Contract Law of PRC 1999 which governs the law of contract in general. The Insurance Law and the

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\item \textsuperscript{235} Nigel Brook ed., \textit{Insurance & Reinsurance}, 2012, p 177.
\item \textsuperscript{236} The primary legislative source of marine insurance law in Hong Kong is the Marine Insurance Ordinance which shares similarity with the English Marine Insurance Act 1906, although there are a number of minor differences between these two legislations.
\item \textsuperscript{237} The Insurance Law of PRC 1995 was largely modelled on the German insurance law and was amended twice in 2002 and 2009.
\item \textsuperscript{238} The National People’s Congress is the highest organ of the state power in China and has the authority to enact or amend all laws of the state, such as Criminal Law and Civil Law. In addition, the central government and the regional legislative bodies also have the authority to enact laws or regulations.
\item \textsuperscript{239} James M. Zimmerman, \textit{China Law Deskbook: A Legal Guide for Foreign-Invested Enterprises}, 3\textsuperscript{rd} ed., 2010, p 537.
\end{itemize}
\end{footnotesize}
Contract Law of PRC will only be applicable in marine insurance cases where there is a gap in the Maritime Code 1993 in respect of a relevant point of law. In the absence of the law on a particular point of legal issue, international maritime customs and practices, including the English Marine Insurance Act 1906, can also be used by Chinese courts as a dominant source of law when it is necessary. This point is illustrated in Article 268 of the Maritime Code 1993.240

Another important change as to the Chinese insurance market appeared at the end of 1998 when the PBC no longer had any authority to regulate the insurance industry. Instead, from November 1998, the task for the regulation of the insurance industry was carried out by the China Insurance Regulatory Commission (CIRC)241 which was set up by the SC as a governmental agency in 1998. At the same time, the PICC, as an important market player with a national network of over 4000 branches, was reorganised by the State Council and thus became a holding company, namely the PICC Group. As a result of such a change, three completely independent subsidiaries of the PICC were set up, and these are the PICC Property and Casualty Insurance Company, the PICC Life Insurance Company and the PICC Reinsurance Company. During this period of time, the Chinese government still remained heavily involved in the insurance industry, though not as much as before.

240 Article 268 of the Maritime Code 1993 provides that ‘International practice may be applied to matters for which neither the relevant laws of the PRC nor any international treaty concluded or acceded by the PRC contain any relevant provisions.’

241 The Insurance Regulatory Commission functioned as the Financial Supervision and Control Department.
3.5: The Chinese court system and the jurisdiction for marine insurance cases

Unlike Western countries in which the court system has been well developed for centuries, the Chinese court system was rather undeveloped and rarely used before the establishment of the PRC. Neither did the judicial and legislative systems operate effectively during the GPCR, because the judicial and legislative systems were collapsed as a result of the GPCR. As such, legal scholars and judges were forced to leave their positions. But a proper institutional legal system, including the court system, was introduced soon after the economic systems reform took place in late 1978 with the aim of facilitating the demands of the growth of export trade and dealing with domestic disputes in a proper manner. According to the Chinese Constitution, in the Chinese legal system, the judicial branch has a strict hierarchical structure and can mainly be divided into a four-level court system, these are the district or county courts, the Intermediate People’s Courts, the Higher People’s Courts and the Supreme People’s Court. These courts have been established by the people’s congresses to which they are responsible and by which they are supervised. In China, however, the power of interpreting the law is mainly exercised by the legislature rather than the courts. The role of the Chinese courts is to implement the law and apply it in a particular dispute. Occasionally, however, it is rather difficult for Chinese courts to exercise their right of implementation of the law, due to the powerful political position of the local government and the fact that judges are appointed by the local people’s government.

242 During the Cultural Revolution, Chairman Mao’s words prevailed over all laws, even some politicians instruction could also be regarded as the law which must be followed.
243 The China’s Constitution is highest and fundamental law of the PRC, which prevails over all other laws and regulations if there is a conflict between these two sources of law.
244 The Supreme People’s Court in Beijing is the highest appeal court of the PRC.
Nevertheless, in China, all disputes concerning the issue of marine insurance must be dealt with in maritime courts\textsuperscript{245} which are in the same jurisdictional level as the Intermediate People’s Courts. The jurisdiction of maritime courts is divided by their geographical territories. The reason for the establishment of maritime courts is that it would be rather difficult for the judges of an ordinary court to deal with a maritime case which often involves with complex international trade and shipping matters.\textsuperscript{246} All disputes concerning the issue of marine insurance will be heard at the first instance in a maritime court. Where necessary, appeals can be made to the appellate court which is the provincial court in the same geographical territory. The judgment made by the appeal court will be final and binding on both parties. Moreover, the innocent party generally has a two-year limitation period to bring an action in respect of marine insurance matters.\textsuperscript{247} Apart from the maritime courts, all disputes concerning the issue of marine insurance and export trade can also be dealt with by the China Maritime Arbitration Commission (CMAC) which was set up in Beijing in 1959. But the operation of CMAC currently extends to Shanghai and Guangzhou to share the workload of marine insurance and export trade disputes. The principal aim of the CMAC is to operate independently and impartially to protect parties’ legitimate rights and interests in maritime transport disputes and thereby promote the growth of the international and domestic economy.

\textsuperscript{245} The Chinese maritime court system was set up in 1984. In fact, a maritime court in China is a court which has special jurisdiction and regulates all matters relating to the sea. Currently, there are 10 maritime courts in China, namely, Maritime Court of Tianjin, Dalian, Qingdao, Shanghai, Ningbo, Xiamen, Wuhan, Guangzhou, Beihai and Haikou.


\textsuperscript{247} This time period starts from the time when the insured accident occurred.
3.6 Conclusion

Historically, trading activities were controlled by the government as early as the Qin Dynasty. Different trading routes were also set up in ancient China, the most important one is the Silk Road established in the Han Dynasty. However, as commercial law was not developed on an international standard until the end of the Qing Dynasty, ancient Chinese commercial law had no role to play in the context of medieval *lex mercatoria*. But the contemporary Chinese commercial law has been deeply influenced by the modern *lex mercatoria*.

The practice of marine insurance in China emerged as early as the 3rd millennia BC. From this period of time, in order to minimise the risk of loss or damage to the goods during the river transit, ancient Chinese merchants agreed to share the potential risk with each other by placing the goods on a number of different boats, so that all of the merchants would be liable for the potential loss of the goods.

The Chinese insurance industry was not developed until the beginning of the 19th century when a number of foreign and domestic insurance companies were set up, although foreign insurance companies were in a dominant position in the insurance market. Soon after the collapse of the Qing Dynasty, the GMD government passed the Maritime Law which also regulated marine insurance matters.

As soon as the PRC was established in 1949, the PICC, as the only state-owned insurance company during that period, was formed by the government. Due to the economic systems reform, from the late 1980s, more and more domestic and foreign insurance companies entered into the insurance market.
In order to regulate maritime issues, the Maritime Code of the PRC was passed in 1993. Marine insurance law was governed by this Code and appeared in Chapter XII of the Code. Relevant provisions of the English Marine Insurance Act 1906 were codified into the Maritime Code. Subsequently, another piece of legislation governing the law of insurance contracts was passed in 1995, namely the Insurance Law of PRC.

As the Chinese insurance industry developed into its mature state, the CIRC, as a governmental agency, was authorised to regulate the insurance industry from 1998.

Unlike the English court system, a maritime dispute in China, including marine insurance case, must be dealt with in a selected maritime court depending on the geographical location of the dispute in question. With regard to a marine insurance dispute, the parties’ legal rights can also be protected with the assistance of the CMAC.
Chapter 4

A critical analysis of the law on Chinese marine insurance warranty as appears in the Chinese Maritime Code 1993

4.1 Introduction

While Chapter 3 provided the overall development in respect of the Chinese marine insurance market and marine insurance law from a historical perspective, the aim of this Chapter is to provide a critical examination as to the law of Chinese marine insurance warranty which is governed by the relevant provisions of the Chinese Maritime Code 1993.

Surprisingly, the traditional civil law in China has no provision equivalent to the concept of warranty under the Marine Insurance Act 1906. As a result, in Chinese marine insurance law, the law of warranty was rather undeveloped and unsettled until 1993 when the Chinese Maritime Code 1993 came into force. The legal concept of warranty can be found in the relevant provision of the Maritime Code which provides that ‘The insured shall notify the insurer in writing immediately where the insured has not complied with the warranties under the contract. The insurer may, upon receipt of the notice, terminate the contract or demand an amendment to the terms and conditions of the insurance coverage or an increase in the premium.’

Although the Chinese law drafters were deeply influenced by the relevant provisions of the English Marine Insurance Act 1906 when drafting this Maritime Code, the legal principles in Article 235 of the Maritime Code have generated a large number of debates as to how the regime of Chinese marine warranty can be appropriately modified. This is because unlike the English Marine Insurance

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249 By way of example, Haibao Xing, as a Vice Chancellor of Renmin University of China, suggested that the Chinese Maritime Code 1993 should be modified in accordance with the International Hull
Act 1906 which has a well-established set of statutory rules for warranties, the law relating to warranties in the Chinese Maritime Code has caused ambiguity and uncertainty in judicial and insurance practices due to the lack of a statutory definition of warranty and the simple provision of Article 235 of the Maritime Code.

Due to the existing defects in Article 235 of the Maritime Code, law reform is urgently needed in the interests of market practice and export trade. Additionally, the concept of warranty has not received much judicial attention in China due to the fact that China has a typical civil law system, and as a result, court decisions and arbitral awards have rarely been regarded as legal binding precedents. This point indicates that when dealing with a particular case, Chinese judges normally base their judgements on their own understanding of the marine insurance law. The lack of a case reporting system in China indicates that these decisions and awards are only binding on the parties concerned and are not released to the general public. This is because unlike the English legal system, there is no legal phrase ‘ratio decidenti’ in the Chinese legal system. But for the purpose of conducting a critical examination as to the present law of warranty under Article 235 of the Maritime Code, relevant court decisions and arbitral awards will be referred to throughout this Chapter.

On the other hand, some law reform proposals concerning the current warranty regime have been proposed by various legal authorities with a view to overcome these problems. A typical example is the national legal research

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250 It should be noted that there is no statutory definition for the term ‘warranty’ in either the Insurance Law of PRC 1995 or the Contract Law of PRC 1999.


252 In English legal system, the Latin term ‘ratio decidenti’ means the reasoning of a court decision and refers to the legal principles used by a court to provide the rationale for a particular judgment in respect of a dispute.
project for the draft proposal of the Chinese maritime law which received governmental approval from the Chinese Ministry of Transportation in 2000.\textsuperscript{253} The law relating to the contract of marine insurance, including the issue of warranties, was covered in this research project. In addition, the guidance notes on the problem of uncertainty arising from the marine insurance provisions of the Maritime Code was introduced and promulgated by the Supreme People’s Court who is also authorised to issue formal judicial interpretations. These guidance notes can be found in the Opinions of the Supreme People’s Court of PRC concerning the Application of the Chinese Maritime Code (draft) which is regarded as a formal judicial interpretation in China.\textsuperscript{254}

Contrary to English law, it is submitted that the concept of warranty in China can only be applied in contract of marine insurance, due to the fact that the concept of warranty is not recognised in non-marine insurance contracts.\textsuperscript{255} For this reason, the principal aim of this Chapter is to conduct legal research which reflects the current law of marine insurance warranties in the Chinese legal system. In particular, effort will be made to introduce the term ‘warranty’ as appears in Article 235 of the Chinese Maritime Code and elaborate the existing problems of the warranty regime with relevant case examples. In addition to the exploration of the existing problems, the contribution of this Chapter will be based upon the extent to which the concept of Chinese marine insurance warranty is in need of modification. The draft proposals of the Chinese maritime law introduced by national legal researchers and the Supreme People’s Court will be critically evaluated to

\textsuperscript{253} In September 2003, the research results derived from the research project were published in the book called ““Maritime Law of the People’s Republic of China” – The Modification of the Proposed Draft Provisions, the Referential Legislative Cases and Interpretation”. The outcome of this research project has, to a great extent, assisted the modification of Chinese maritime law on a practical basis.

\textsuperscript{254} The judicial interpretations issued by the Supreme People’s Court are generally followed by the lower courts.

ascertain whether, and to what extent the present law is to be replaced by the
draft proposal. Where necessary, some law reform proposals in relation to
Article 235 of the Maritime Code will also be introduced by the author in this
Chapter to overcome the problems and clarify the uncertainty.

4.2: Conceptual analysis of the term ‘warranty’ under Article 235 of
the Chinese Maritime Code 1993

Similar to English marine insurance law, the term ‘warranty’ under Chinese
marine insurance law is a special term which goes to the nature and scope of
the risk and requires the assured to fulfil some contractual obligations, either
present or future. Despite being absent from the provisions of the Maritime
Code, it is suggested by a number of academics and legal professions256 that
warranties in Chinese marine insurance law share the same meaning as that
of the English Marine Insurance Act 1906. According to this suggestion,
section 33(1) of the Marine Insurance Act 1906 can be used as a general
definition for Chinese marine insurance warranty, that is, the assured promises
that something will or will not be done, or guarantees the existence or
non-existence of a certain state of facts. Besides the statutory definition
contained in the Marine Insurance Act 1906, a similar legal definition was
provided in the research project of the draft proposal of Chinese maritime law
which states that ‘A warranty is what the assured promises to do or not to do,
or guarantees the existence or non-existence of a certain state of facts under
the contract.’ But it should be emphasized that the above arguments as to the
definition of warranty only applies to express warranties, because the concept
of implied warranties is not generally recognised in Chinese marine insurance

256 Pengnan Wang, The Law of Marine Insurance (Chinese), 2nd ed., 2003, p 100. See also Zhengming
law and practice, with the exception of the implied warranty of legality. By way of example, it is submitted that there is no implied warranty of seaworthiness in Chinese marine insurance law.

As two important contractual duties, the relationship between warranty and utmost good faith should not be overlooked. This is because the assured is required to comply with the warranties in good faith. In other words, the principle of utmost good faith covers a wide range of issues within the whole insurance policy including warranties. By way of illustration, as pointed out by some Chinese academics, an insurance warranty constitutes an important part of the principle of utmost good faith. However, a clear distinction must be drawn between good faith and utmost good faith. This is because while the principle of good faith, which generally involves with honesty, depends mainly on the overall terms of the contract and the commercial context and requires the contracting parties to perform their fiduciary duties under the contract, a higher degree of obligation is expected from both parties to an insurance contract (especially the assured) in order to ensure the accuracy of the disclosure of all material facts which may affect the premium or the actual risk undertaken by the insurer. This point indicates that the principle of good faith is a basic legal obligation which is based on the intention of the parties and applies to all types of contract, whether expressly or impliedly. Similarly,

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260 As the assured is always in a better position of knowledge concerning the subject matter insured, it is to the assured that the principle of utmost good faith applies.
261 Traditionally, English courts have been reluctant to recognise a universal implied duty of good faith in general contract law, because the courts did not want to interfere with a contract where the terms had been freely negotiated by the parties. However, recent authorities suggest that the courts have now taken a different approach as to the duty of good faith in contract law. This point is demonstrated in the recent case of 

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in Chinese law, acting in good faith is a general requirement for all contracts, and it exists through the whole period of the contract, not only before the conclusion of the contract.\textsuperscript{262}

As far as marine insurance contract is concerned, the doctrine of utmost good faith seems to impose a more onerous burden on the assured, as the doctrine covers the duty to observe good faith from pre-contractual period to post-contractual period. Failure to do so on the part of the assured renders the contract voidable at the option of the insurance company, so that the insurer will be entitled to terminate the contract. The relevant provisions of the English Marine Insurance Act 1906 require both parties, especially the assured, to act in good faith before the conclusion of the insurance contract, and the importance of the doctrine of utmost good faith is shown in two aspects: these are the positive duty to make material disclosure and the duty not to make any material misrepresentation,\textsuperscript{263} whereas there is no express provision dealing with the issue of utmost good faith for marine insurance contracts in the Chinese Maritime Code, except Article 222 and 223 of the Maritime Code which set out the statutory requirement for the assured to disclose material circumstances to the insurer before the contract is concluded and the legal consequence for the breach of this obligation. In fact, the principle of utmost good faith is only stipulated in Article 5 of the Insurance Law of PRC 1995 which provides that the contracting parties should fulfil their obligations by observing the principle of good faith.\textsuperscript{264} However, as the parties are under a

\begin{itemize}
\item\textsuperscript{262} Yanfei Kang, Paper on Marine Insurance---CMI Guidelines for the formulation of Marine Insurance Law and China in Particular, 2005, p 3.
\item\textsuperscript{263} Sections 17-20, Marine Insurance Act 1906.
\item\textsuperscript{264} In more specific terms, Article 5 of the Insurance Law of PRC (2009 amended version) states that ‘Parties concerned with insurance activities shall follow the principle of good faith when exercising rights and performing obligations.’ If the assured fails to comply with the duty of good faith, the insurer will be entitled to terminate the contract in accordance with Article 16 of the Insurance Law of PRC. A similar statutory provision can also be found in Article 6 of the Contract Law of PRC 1999 which requires both parties to follow the principle of good faith.
\end{itemize}
more onerous obligation to follow the principle of good faith in insurance contracts than in other types of contract, it is suggested by the author that the word ‘utmost’ should be inserted into this Article.

Additionally, as far as this Article is concerned, it is justifiable to say that it has failed to state the legal consequence for the non-fulfilment of the principle of good faith. In the view of the author, the legal consequence for the failure to comply with the principle of utmost good faith should be stipulated in this Article, so that either party, especially the insurer, would be able to avoid the contract for the breach of this duty. Thus, in order to emphasize the importance of the doctrine of utmost good faith and avoid the problems of uncertainty and ambiguity, it is suggested by the author that the amended version of Article 5 of the Insurance Law should be inserted into the Maritime Code to bring this aspect of law in line with international standards and enable the contracting parties to appreciate the importance of this statutory obligation.

4.3: The concept of alteration of risk in the Insurance Law of PRC

The term ‘warranty’ is well defined in section 33(1) of the English Marine Insurance Act 1906, whereas there is no statutory definition for the term ‘warranty’ in either the Chinese Maritime Code 1993 or the Insurance Law of PRC 1995. But it is interesting to note that a similar concept, namely alteration (increase) of risk, which is also known as post-contractual change to the risk, has been developed in most European continental countries and other civil law countries, such as China. The concept of alteration of risk operates in a similar manner as the concept of warranty, because both concepts would assist the insurer to assess the risk throughout the currency of the contract.
The concept of alteration of risk was introduced into Article 52 of the Insurance Law of PRC 2009. As far as this provision is concerned, the assured is under a statutory duty to notify the insurer as to any remarkable increase of risk of the subject matter insured only if the notice of the increase of risk is contained in the relevant provision of the contract, and in such a case, the insurer will be entitled to charge a higher rate of premium from the assured, or terminate the contract in accordance with the terms of the contract. If the insurer chooses to terminate the contract, he should return the premium to the assured after deducting the amount between the time of commencement and the time of termination of the contract. But this does not mean that there is no other remedy available to the insurer in the event of a remarkable increase of risk. Equally, the insurer will also be required to notify the assured of the decision without undue delay. The remedies for the increase of risk may be different for each policy depending on the terms of the policy. However, in practice, the insurer generally chooses not to exercise the right to terminate the contract for a remarkable increase of risk, because for business purpose, the insurer wants to keep the insurance contract and the on-going commercial relationship with the assured by charging the agreed premium as a form of penalty.

In fact, another situation may arise where the assured fails to perform the duty of notification in respect of an increase of risk. In such a case, the insurer

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265 Evidently, Article 52 of the Insurance Law of PRC (2009 amended version) is provided under the heading of ‘Property Insurance Contract’. As far as this Article is concerned, the assured is under a more stringent obligation to notify the insurer timely as to any remarkable increase of risk of the subject matter insured throughout the period of the insurance contract, and the insurer is then entitled to demand a higher premium or terminate the contract accordingly. Failure of notification would discharge the insurer from liability for the loss or damage of the subject matter insured caused by the increase of risk. On the face of it, although the concept of increase of risk appears to be different from the concept of warranty, both concepts have the same legal effect of protecting the insurer in the event of an increase of the level of risk which will not be accepted by the insurer to cover at the time of the conclusion of the contract.

will be entitled to refuse to indemnify any loss caused by the material increase of risk. But it should be borne in mind that the burden of proof is on the insurer who must show clear evidence that the loss is caused by the material increase of risk. This means that a causal connection should be established between the loss and the increase of risk before the insurer can refuse to indemnify the loss. Obviously, it is true that the rationale for adopting this statutory rule into the Insurance Law is to protect the interest of the insurer and ensure that the risk of the subject matter insured does not change significantly from what the insurer agrees to cover at the time of the conclusion of the contract. It follows from this perspective that alteration of risk can be dealt with in the policy, provided that clear contractual wording is used. So in the Hong Kong insurance market, it is quite common for the insurer to insert clauses concerning notification and liability for increase of risks in the policy. Likewise, as the Insurance Law of PRC is also applicable to Chinese marine insurance law, it is clear that this concept and the concept of warranty share similar function for the risk management during the insurance period.

In Chinese insurance law, as the legal consequence for the increase of risk is severe and the assured may simply lose cover as a result of the increase of risk, Chinese courts have tended to reach decisions involving the issue of increase of risk in favour of the assured if the increase of risk is not on a permanent basis. On the other hand, Chinese courts have struggled to determine the issue as to what amounts to a permanent increase of risk, and as a result, on some occasions, unfair decisions may be reached against the assured. This issue arises in the case of Mr Li Xian v PICC Property Insurance Co (Dong Guan Branch) where Mr Li entered into an insurance contract to insure his car for private use only. One day during the currency of the policy, Li

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267 Ibid.
took four men who were waiting for hitchhike and asked them to pay 25 RMB. The car was hijacked by the men. Li claimed the loss under the policy, but the insurer refused to indemnify Li on the basis that as Li changed the use of the car from private purpose to business purpose for remuneration without notifying the insurer of such a change, the risk was therefore increased, and Li had therefore breached the duty of notification regarding the increase of risk. As Clause 15 of the policy stated, ‘In the insurance period, if the insured vehicle is modified or the use of it is changed for business, which results in an increase of risk, the insured should notify the insurer in writing. Otherwise, insurer is not liable where the loss is caused by the increase of risk.’

The Dong Guan People’s Court, however, held that the use of the car to take a number of passengers in return for remuneration was a one-off event and did not change the fact that the normal use of the car was for private purpose, because there was no evidence suggesting that the use of the car was changed permanently for business purpose. The insurer was therefore held liable for the loss. The insurer subsequently appealed and argued that the court of first instance had misinterpreted the meaning of the term ‘business use’ in the policy. In fact, the term ‘business use’ was defined in clause 17 as ‘without getting permission from the Traffic and Transport Administration Department, the use of the vehicle by the insured or any other person who is allowed to drive by the insured for taking passengers or transport of goods for making money is deemed as for business use’. The appeal court accepted the insurer’s argument and reversed the decision of the court of first instance. As far as this case is concerned, it can be argued that the appeal court has reached an unfair decision against the assured. The reason for this is that the assured’s act to take four men was only temporary, and there was no evidence to suggest that the assured has intended to change the use of his car to business purpose on a permanent basis.
Another shortcoming of Article 52 of the Insurance Law of PRC 2009 is that there is a lack of statutory definition of the term ‘remarkable increase of risk’. Such a problem may even make it difficult for the Chinese courts to determine the issue as to whether or not the risk has in fact increased. Such a problem can be found in the case of *Mr Feng Liao v Ping An Insurance Co Ltd Shenzhen Branch*. Here, Mr Liao insured his car for private use against the risk of theft and robbery. A clause contained in the policy required Mr Liao to notify the insurer of any increase of risk, such as the change of use of the car for any other purpose. In August 2003, Liao placed an advertisement in a local newspaper setting out his intention that he was looking for a job, so that he could use his car for his employment. At the end of August, a man contacted Liao and discussed the matter of employing him and his car. The man also paid a deposit to Liao. On the 8th of September, Liao and the man met the ‘Boss’ in the airport. They asked Liao to take them to a hotel where they could discuss the details of Liao’s employment. But Liao was robbed by them in the hotel, and they also drove his car away. Liao claimed the loss under the policy. But the insurer refused to indemnify Liao’s loss on the ground that Liao changed the use of his car from private purpose to business purpose without notifying the insurer of such a change, and the loss of the car was also caused by the increased risk.

The People’s Court of Futian District of Shenzhen city rejected the insurer’s argument and held that although Liao intended to use his car for business purpose, his future employment was only at the stage of negotiation, and he did not start using his car for his employment. The insurer subsequently made an appeal. On appeal, the Middle People’s Court of Shenzhen city reversed the judgment of the court of first instance and held that Liao’s advertisement and receipt of deposit showed his intention to change his car for business purpose, and during the currency of the policy, Liao used his car to

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270 Baoshi Wang and Fan Yang, *Property Insurance Law* (2009), p77. The case was cited in this book. 124
meet a stranger for business purpose. As a result, Liao changed the use of the car without notifying the insurer, and the risk has therefore increased. As far as the court decision is concerned, it can be argued that the appeal court has made an unfair decision against Liao. This is because the risk did not increase at the time when Liao took the strangers to the hotel. Moreover, the fact that Liao did not receive any remuneration for his employment would mean that the risk did not increase.

Despite the fact that the concept of alteration of risk in the Insurance Law has caused uncertainty in judicial practice, it is necessary to retain the concept of alteration of risk in the Insurance Law which only deals with non-marine insurance contracts. In contrast, marine insurance is a special type of insurance which generally involves with greater hazard, especially when the ship is sent to sea, and as a result, it is reasonable to require the assured to fulfil some more stringent obligations, such as compliance with the warranty. For this reason, a clear distinction should be drawn between the concept of alteration of risk and the concept of warranty, even though the concept of warranty also deals with alteration of risk during the insurance period. This is because the term ‘warranty’ is a fundamental term of the insurance contract. Breach of such a term would lead to more serious legal effect than the alteration of risk caused by the assured. Therefore, it is logical and reasonable to keep these two concepts separate and place them into two different legislations. This target has appropriately been achieved by the legislators under Chinese insurance law.
4.4: The introduction of a proposed statutory definition of warranty into the Maritime Code

Nevertheless, as the term ‘warranty’ in the Maritime Code is directly applicable to Chinese marine insurance contracts, a clear statutory definition of warranty should therefore be introduced into the relevant provision of the Maritime Code. In the absence of a statutory definition as to warranty, the contracting parties, especially the assured, may be unaware of what would exactly constitute a warranty. Warranty is a special term in marine insurance law which is distinct from other contractual terms. Under section 11 of the English Sale of Goods Act 1979, a clear distinction has been made between a condition and a warranty, whereas such a distinction has not been made under the Contract Law of PRC 1999. As far as the Contract Law of PRC is concerned, the only provision dealing with the issue of the breach of contractual terms appears in Article 111 which specifies the liability and legal consequence for the breach of contractual terms. But as the term ‘warranty’ is continuously used worldwide, a clear statutory definition should be adopted into the Maritime Code. As such, the effort for introducing a statutory definition into the Maritime Code has been made by a number of academics. By way of illustration, a new statutory definition of warranty has been introduced in the book entitled ‘The amendment of the draft provisions, legislative cases for reference and interpretation of the Maritime Code of the People’s Republic of China’. Under the proposed provision of the Maritime Code, the definition of warranty has been defined in the following terms:

‘The assured promises that some particular thing shall or shall not be done, or promises the existence or non-existence of a particular state of facts under the contract.’

Despite the fact that the importance of warranty was recognised and stressed by Chinese courts, the definition of warranty has not been introduced by the Chinese judiciary even in recent court decisions.  

By way of illustration, in the recent case of *SPMP v China Continent P&C Co Ltd*, it was ruled by the Shanghai Maritime Court that a warranty must be explicitly specified in the insurance contract by using the words such as ‘warrant’ or ‘promise’, and the legal consequence for a breach of warranty must also be expressly spelt out in the contract. However, simply inserting section 33(1) of the English Marine Insurance Act 1906 into Article 235 of the Maritime Code may not completely resolve the problem. According to the Chinese insurance market practice, the term ‘promissory warranty’, like English marine insurance warranty, can be categorised into two types, these are present warranty and future warranty.

As suggested by the author in Chapter 2, the statutory definition of warranty as stated in section 33(1) of the Marine Insurance Act 1906 should be modified in accordance with the general contract law principles. More specifically, a clear distinction has been drawn between present warranty and future warranty due to their distinct features. The ultimate effect of such a distinction is that while a future warranty must still be strictly complied with by the assured, a present warranty is to be replaced by an innominate term as established in the general contract law of England, the breach of such a term may lead to different legal consequence depending on the seriousness of the breach in question. To this end, in the view of the author, it is correct to say that the term ‘warranty’ in the context of marine insurance law is a promise which only relates to the future actions on the part of the assured. In consequence, in order to overcome the problem of uncertainty and provide a flexible remedy to the insurer, it is suggested by the author that the new

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272 But it is true to say that Chinese courts have a general discretion to determine what would constitute a warranty.

section 33(1) of the 1906 Act, as proposed in Chapter 2 of the thesis, should be inserted into Article 235 of the Chinese Maritime Code to provide the contracting parties with a better understanding of the term ‘warranty’. But as two distinct statutory rules, the definition of warranty and the legal consequence of a breach of warranty should be placed into different parts of Article 235 respectively as those can be found in the relevant provisions of the English Marine Insurance Act 1906. Therefore, it is suggested by the author that Article 235 of the Maritime Code should be divided into three parts with the result that Article 235(1) should only provide a statutory definition of warranty, the statutory nature of warranty should be introduced and placed in Article 235(2), and the legal consequence of a breach of warranty and other corresponding rights and obligations of the contracting parties should be stipulated in Article 235(3) of the Maritime Code.

4.5: The current problem of the statutory rule as to the assured’s notification obligation for a breach of warranty in the Maritime Code and its reform proposal

In contrast with section 33(1) of the English Marine Insurance Act 1906 which does not require the assured to notify the insurer for a breach of warranty, such a statutory obligation can be found in Article 235 of the Chinese Maritime Code which requires the assured to notify the insurer in writing immediately where the assured has failed to comply with a warranty.

274 The assured’s notification obligation also extends to the situation where the assured is required, under Article 236 of the Maritime Code, to take necessary measures to avoid or minimize the loss upon the occurrence of an insured peril.

275 The term ‘immediately’ in this part of the Article indicates that the time limit for the assured to give written notification to the insurer as to a breach of warranty is purely a question of fact to be determined by the courts according to the surrounding circumstances.
According to the wording of this Article, in such a situation, as soon as the insurer receives the notice, he has the right to make an election from 3 statutory remedies, these are the termination of the insurance contract or the amendment of the terms of the insurance policy or the demand of a higher premium.

In practice, the importance of the assureds' notification obligation in the policy as to a breach of warranty or an increase of risk was stressed in the recent case of Qais Trading Ltd v BOC Insurance Co Ltd which concerned a marine cargo insurance policy. In this case, the policy contained a warehouse to warehouse clause and covered all risks plus theft and non-delivery of a parcel of textile goods shipped from Shanghai via Jebel Ali to a warehouse in Sharjah in the United Arab Emirates. As soon as the goods had been unloaded and arrived at Sharjah, it was reported that they were missing by theft. The assured brought an action against the insurer to recover the loss. One of the defences provided by the insurer was that the assured did not comply with the notification obligation as to the loss of the cargo by theft as prescribed in the policy, breach of which provided the insurer with a defence on liability. In the first instance, this argument was accepted by the Ningbo Maritime Court, and it was held that the notification requirement in the insurance policy, if not complied with, provided the insurer with a right to avoid liability. When the assured appealed to the Zhejiang High People’s Court of PRC for other issues, the issue as to the notification obligation was not disputed. This decision thus indicates that Chinese courts would continue to adopt a strict interpretation as to the effect of such notification clauses.

It has been argued that the statutory requirement that the assured must notify the insurer immediately for a breach of a warranty is unreasonable, and in order to simplify the matter, this statutory requirement should be

\[276\] [2010] Zhe Hai Zhong Zi No. 44.
abolished. This argument has received judicial support from the Opinions of the Supreme People’s Court of PRC concerning the Application of the Chinese Maritime Code (draft) which stipulates that where the assured fails to fulfil the obligation of notification provided for in Article 235 of the CMC, the exercise of the relevant rights by the insurer pursuant to Article 235 of the CMC shall not be affected.

Furthermore, it is submitted that the assured’s written notification should be understood as based on the principle of utmost good faith, and the insurer’s statutory right as to a breach of warranty should not be restricted by the written notification on the part of the assured. This point means that in reality, the insurer is well protected against a breach of warranty even without the assured’s written notification. If this contention is correct, in what ways will the insurer be able to receive notification as to the assured’s breach of warranty? Thus, it is unjustifiable to say that this is a convincing argument, because unlike the automatic discharge rule under section 33(3) of the 1906 Act which does not give the insurer any remedial option, it is necessary, in Chinese marine insurance law, for the assured to inform the insurer immediately as to a breach of a warranty, so as to enable the insurer to exercise the right of choice without unnecessary delay. Failure to fulfil the notification obligation on the part of the assured would mean that it is impossible for the insurer to make an election as to the breach.

Apart from the notification obligation, it is, as suggested by the author, also necessary for the assured to ensure that the subject matter insured is

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277 This argument was presented by Haibao Xing in his work The Amendment of Chinese Marine Insurance Law which can be found in http://article.chinalawinfo.com/article_print.asp?articleid=66977.
reasonably safe immediately after a breach of warranty, although best effort on the part of the assured to avoid or minimize the loss should discharge such a duty. According to this law proposal, although the assured is required to fulfil a more onerous obligation which seems to be rather harsh for the assured, this proposal would be beneficial for the assured. This is because if the subject matter insured is lost or damaged as a result of a breach of warranty, it is very likely that the insurer would elect to terminate the insurance contract. If this occurs, the assured would suffer from financial loss without any form of indemnity. Indeed, this perspective is also proposed in accordance with Article 236 of the Maritime Code which requires the assured to take necessary and reasonable measures to avoid or minimize the loss even after the occurrence of the peril insured against.\(^{280}\) This requirement also appears in Clause 16.1 of the Institute Cargo Clauses which is called the Duty of Assured Clause. Under this Clause, the assured is required to take measures as may be reasonable for the purpose of averting or minimising loss, although such a clause is considered as a condition rather than a warranty.\(^{281}\) Therefore, in order to limit the risk of potential loss or damage to the subject matter, it is suggested by the author that once a warranty is breached, the assured should be obliged to take necessary and reasonable steps for the purpose of preventing potential loss to the subject matter.

Nevertheless, the crucial issue may arise as to what the insurer should do to protect his contractual rights if he did not receive any notice from the assured in the event of a breach of warranty, and on the face of it, this means that in such a situation, the insurer would be placed into a less advantageous position as he would neither be able to receive such a notice from the assured.

\(^{280}\) A similar aspect of law can also be found in the Taiwan Maritime Act (2009 amended version) which provides that in case of incurring any loss insured, it is the duty of the purchaser or assured to take such measures as may be necessary to avert or minimize a loss of the subject matter insured.

\(^{281}\) See the judgment of Hobhouse J in *Noble Resources Ltd and Unirise Developments Ltd v George Albert Greenwood (The Vasso)* [1993] 2 Lloyd’s Rep 309.
nor make any decision as to the breach of warranty, so that he cannot seek an appropriate remedy even after a warranty was breached by the assured.\footnote{Lei Zheng, ‘How to Understand the “Warranty” in Marine Insurance – And on the Interpretation of Art.235 of CMC’, [1997] Annual of China Maritime Law, pp 215-230, at 224.} This will be the case even if the insurer has already been aware of the breach through other sources. But such an outcome is obviously inconsistent with the true intention of the drafter of the Maritime Code. Therefore, the underlying problem with this part of the Article is that it has failed to set out the legal consequence for the failure of notification by the assured within a reasonable period of time. In the absence of the legal consequence for the failure of immediate notification as to a breach of warranty, the insurer’s statutory right for seeking an appropriate remedy would be unfairly postponed.

In order to clarify the issue, it is suggested by the author that an additional sentence should be inserted into Article 235 of the Maritime Code, and thereby spelling out the legal consequence for the failure of notification on the part of the assured. It follows from this perspective that the most appropriate remedy for the insurer is that in the event of the failure of notification for a breach of a warranty, unless the policy provides otherwise, the insurance contract will be automatically terminated without the need for the insurer to refund any premiums already paid, regardless of whether such a breach has caused loss or damages to the subject matter, and any loss incurred after the breach of warranty will not be covered, even if the loss has no connection with the breach. The rationale for such a statutory proposal is that it is simple and less time consuming, as it enables the insurance company to deal with other clients efficiently after the automatic termination of contract, and at the same time, the assured will also be able to find other available sources of insurance.

A different situation may also arise where a loss has occurred after the assured has given notice to the insurer as to a breach of warranty but before the insurer makes a decision for such a breach. Obviously, Article 235 of the
Maritime Code has failed to address this issue. In such a case, it is suggested by the author that the issue of causation should come into play to settle such an issue. In particular, it is proposed by the author that the issue as to whether such a loss should be covered would depend on whether the loss has a direct or indirect connection with the breach of warranty for which the notification is given. If it does, the loss would not be indemnified. If not, the insurer will be liable for the loss, and the contract is still in force. In more specific terms, it is suggested by the author that the second part of Article 235 of the Maritime Code in respect of the assured’s notification obligation as to a breach of warranty, that is Article 235(3), should be altered to read in the following way:

‘The insured\(^{283}\) shall notify the insurer in writing immediately and take necessary measures to avoid or minimize the loss of the subject matter insured where the insured has not complied with the warranties under the contract. If the insured fails to do so, then, subject to any express provision in the policy, the contract will be automatically terminated without the need for the insurer to refund any premiums and indemnify any loss resulting from the breach of warranty. The insurer is liable for the loss occurred before receiving notification from the insured as to a breach of warranty only if the loss has no connection with the breach…’

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\(^{283}\) The term ‘insured’ can be used interchangeably with the term ‘assured’. Both terms refer to the policyholder. But the term ‘insured’ has been adopted in China, especially in the Maritime Code.
4.6: The legal consequence for a breach of warranty in Chinese marine insurance law

4.6(1): A critical analysis as to the legal consequence for a breach of warranty under the Maritime Code

Once the assured fulfils his statutory obligation by notifying the insurer as to a breach of warranty, the insurer will then be entitled to choose one of the three statutory remedies, namely termination of the insurance contract, amendment of the insurance policy and demand of an increase of premium by relying on Article 235 of the Maritime Code. This aspect of law is demonstrated in the Chinese case of *The Canadian Harvest*\(^{284}\) where the vessel was insured under the conditions of the PICC Hull Clauses (1/1/1986). Policy required the vessel to sail on 20\(^{th}\) April 1995. The vessel was towed to Canada for breaking up. During the voyage, the vessel sank at sea due to severe weather. The insurer denied liability on several grounds, one of which was that the vessel had not started the voyage at the particular date prescribed in the policy. It was held that the prescribed sailing date was a warranty according to international practice, and as a result, the insurer was entitled to terminate the contract or increase the premiums or amend the terms of the contract in accordance with Article 235 of the Maritime Code.

It has been argued that the English proposition of automatic discharge of liability upon breach subject to any express provisions in the policy should be adopted as the legal consequence of breach of warranty in the Maritime Code.\(^{285}\) However, it is unjustifiable to say that this is a convincing argument, because in the opinion of the author, it can be argued that the legal

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consequence for a breach of warranty under the Maritime Code has been appropriately introduced as a flexible statutory remedy, in the sense that it has reflected the common law principle of freedom of contract.

However, the legal position is slightly different as far as Hong Kong is concerned. The issue as to the legal consequence of a breach of warranty has been considered in the recent Hong Kong case of *Hua Tyan Development Ltd v Zurich Insurance Co Ltd*[^286^] where the policy contained a deadweight tonnage warranty that provided coverage for a vessel with a deadweight tonnage of no less than 10,000 tonnes. The vessel named in the policy did not fulfil the deadweight tonnage warranty requirement, as the vessel only had a deadweight capacity of about 8,960 tons. During the sea voyage from Malaysia to China, the vessel sank and the cargo was totally lost, the insurer thus refused to indemnify the loss of the cargo on the ground of the breach of warranty. The Court of Final Appeal held that the insurer was required, under the policy, to cover the subject matter insured, provided that the deadweight tonnage warranty requirement was fulfilled by the assured. In reaching this decision, the Court of Final Appeal unanimously confirmed that by virtue of section 33(3) of the Marine Insurance Ordinance, a breach of a marine warranty would bring the insurer’s liability to an end. This will be the case even if the warranty is not material to the risk. Logically, despite being absent from Article 235 of the Maritime Code, the insurer should also be required to notify the assured of his decision as to the breach of warranty without undue delay,[^287^] so that the assured would be able to seek alternative insurance cover, particularly where the contract was terminated by the insurer.

Additionally, another important proposal which can be made by the author is that cover should be retained until the insurer makes his election as to the


[^287^]: This aspect of law is in contrast with the rule of automatic termination of contract which does not have to be communicated to the assured.
breach. This is because the insurer is provided with the statutory right to make an election as to the breach of warranty, and until he makes a choice, the insurance contract as a whole should be treated as if it was not affected by the breach. It should be pointed out that although the form of notice does not appear in the Maritime Code, the Supreme People’s Court took the view that such a notice should be in written form.\textsuperscript{288} In principle, a similar aspect of law in relation to the notification obligation can also be found in Article 27 of the Economic Contract Law of PRC which stipulates that the party intending to amend or terminate the economic contract shall promptly notify the other party.\textsuperscript{289} But the issue may then arise as to whether or not there is a time limit for the insurer to make his decision as to the breach of warranty. Such an issue was not covered under Article 235 of the Maritime Code. In the absence of this particular point of law, it is not surprising that it may take an unreasonably long period of time for the insurer to make a decision as to the breach of warranty. In such a case, it is very likely that the assured may suffer from loss as a result of the deliberate delay on the part of the insurer, and the assured may also lose the best opportunity from seeking an alternative cover. In order to prevent the insurer from standing in such an unfair advantageous position, the present law should be altered so as to introduce an additional statutory rule requiring the insurer to make a decision as to a breach of warranty within a reasonable time, as well as the legal consequence for the failure of complying with this obligation on the part of the insurer.\textsuperscript{290} As such, the new law suggested by the author is that if the insurer fails to notify the assured as to the decision for the

\textsuperscript{288} Article 9 of the Opinions of the Supreme People’s Court of PRC concerning the Application of the Chinese Maritime Code (draft).

\textsuperscript{289} Article 28 of the Economic Contract Law of PRC continues to provide that the notification for the amendment or termination of the economic contract shall be in writing.

\textsuperscript{290} The proposed statutory rule on this issue is in line with Article 95 of the Contract Law of PRC 1999 which provides that the right of the termination of contract must be exercised by the innocent party within the time limit as agreed by the parties or, if there is no specified time limit, within a reasonable time, otherwise such a right will be extinguished.
breach of warranty within a reasonable period of time, the insurer should not be entitled to use the breach of warranty as a defence to escape from liability.

Apart from this law reform proposal, it is also likely that the assured may, for any reason, innocently or negligently breach a warranty, but the breach has caused no loss to the subject matter insured. In such a case, it would be unreasonable for the insurer to be entitled to terminate the insurance contract. Instead, the most satisfactory solution introduced by the author is that provided that the above conditions are satisfied, the law should require the insurer to issue a warning notice within a reasonable time without permitting the insurer to rely upon the legal effect of breach of warranty to seek any remedy. Such a warning notice requirement, once adopted into the Maritime Code, can serve as an important solution to the assured’s innocent or negligent breach of warranty which caused no loss to the subject matter insured. However, the situation would be different where the assured intentionally breaches a warranty without reasonable excuse, but the breach did not cause loss to the subject matter. In cases like this, it would be inappropriate to adopt the warning notice requirement, because any intentional breach of warranty without reasonable excuse should not be justified, regardless of whether or not the breach has caused loss. It is also unreasonable to treat innocent or negligent breach of warranty in the same way as intentional breach of warranty. In such a situation, it is suggested by the author that such a breach should not be excused, and the most satisfactory solution is that the assured should be required to pay an increased premium as a form of penalty. It follows from these two proposals that in the event of a breach of warranty, the remedy available to the insurer should depend on the degree of the assured’s fault.

Similar to the English practice, the payment of premium warranty may also be created by the insurer under Chinese marine insurance policies. Thus, the situation may arise where the assured enters into a contract of marine insurance with the insurer, and the assured fails to pay the agreed premium
within the specific time limit. In cases like this, the issue as to whether or not the insurer is obliged to indemnify the assured for a peril of the sea insured against would depend on the terms of the insurance contract. So where a particular clause dealing with the legal consequence for the failure to pay the premium is set out in the contract, the issue will be easily resolved by the wording of the clause in question. Such a clause is generally written as ‘liability does not attach to the insurer unless the premium has been paid’ or ‘the contract will not take effect unless the premium has been paid’. Although similar wordings are used, they may result in two different legal effects. This is because as far as the latter wording is concerned, the insurer may not be entitled to claim the premium from the assured on the basis that the insurance contract has not taken effect. Under Chinese judicial practice, the courts tend to hold that payment of the premium will not affect the liability of the insurer, and the insurer will still be obliged to indemnify the assured in respect of the loss of the subject matter, even if the premium has not been paid by the assured. The main reason for the courts to adopt this approach is to protect the assured who is regarded as the weaker party. More specifically, it is suggested by the author that this part of Article 235 of the Maritime Code, that is Article 235(3), should be modified to read in the following way:

‘The insurer may, upon receipt of the notice, terminate the contract or demand an amendment to the terms and conditions of the insurance coverage or an increase in the premium without unreasonable delay. If the assured innocently or negligently breaches a warranty without causing loss to the subject matter insured, the insurer will be required to issue a warning notice to the assured. If the insured intentionally breaches a warranty without reasonable excuse, but the breach has caused no loss, the assured will be required to pay an additional premium at a reasonable rate.’
4.6(2): The legal consequence for a breach of warranty under the Hull Insurance Clauses

In Chinese marine insurance practice, the most commonly used warranty clause can be found in Clause 6(3) of the Hull Insurance Clauses of PICC 1/1/1986.291 A different legal consequence of breach of warranty is specified in Clause 6(3) which provides that in case of any breach of warranty as to cargo, voyage, trading limit, towage, salvage services or date of sailing, provided notice be given to the underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed, the insurance will continue to be valid, otherwise, the insurance will terminate automatically. In other words, where the six types of specified warranty are breached, the insurer would not be entitled to terminate the contract if the assured notifies the insurer immediately and agrees to accept the amended contractual terms and the increased premium. In this respect, it can be said that the purpose of such a clause is to enable the contracting parties to renegotiate the contract following the assured’s breach of warranty. But it is not surprising that Clause 6(3), which can be regarded as a held covered clause, is clearly inconsistent with the plain wording of Article 235 of the Maritime Code. This is because while the assured can be protected by Clause 6(3) in the event of a breach of warranty, the insurer can still use the breach of warranty as a defence to terminate the contract under Article 235 of the Maritime Code. Thus, the problem may then arise as to whether or not the legal effect of breach of warranty can be determined by relying on the express wording of Clause 6(3).

In order to avoid the contradiction and ensure that the subject matter insured is effectively protected, it is suggested by the author that if the parties

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291 This Clause is almost the same as Clause 3 of the Institute Time Clauses (Hull) 1995 which was derived from the London Institute Clauses.
have expressly agreed to insert Clause 6(3) into their insurance policy, such a clause should prevail over the express wording of Article 235 of the Maritime Code as a result of the phrase ‘subject to any express provision in the policy’ as appears in the amended version of Article 235 of the Maritime Code. Evidently, such a view has gained support in recent court decisions. By way of example, the application of a similar clause has received judicial attention in the case of *Hong Kong Nylon Enterprises Ltd v QBE Insurance (Hong Kong) Ltd*\(^\text{292}\) where the policy contained a warranty which provided ‘warranted that this is a container load shipment’. In fact, however, there was no such container shipped. Instead, the containers that were about to be shipped were devanned and their contents carried break bulk. The insurer contended that this was a promissory warranty within the meaning of section 33(3) of the Marine Insurance Ordinance\(^\text{293}\) and must be exactly complied with. But Clause 8.3 of the Institute Cargo Clauses (A) was also incorporated into the policy, and as the Clause stated, ‘This insurance shall remain in force … during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.’ The argument advanced by the assured was that this clause was essentially a ‘held covered’ clause. Obviously, there was a conflict between the express warranty and Clause 8.3 of the Institute Cargo Clauses. Stone J was of the opinion that the warranty and Clause 8.3 of the Institute Cargo Clauses should be read and considered jointly. Ultimately, the Hong Kong High Court held that Clause 8.3 took precedence over the warranty. It can be seen from this judgment that the courts have tended to protect the use of such clauses in favour of the assured.


\(^{293}\) The term ‘warranty’ is defined under section 33(1) of the Marine Insurance Ordinance as a promise by which the insured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
It follows from the above analysis that Article 235 of the Maritime Code should only be applicable where no express contrary provision can be found in the policy. The problem of the inconsistency can be resolved by inserting the phrase ‘subject to any express provision in the policy’ into this part of Article 235 of the Maritime Code. Such a phrase would indeed soften the harshness of the legal consequence of breach of warranty as appears in Article 235 of the Maritime Code. But as the phrase has already existed in the amended version of Article 235(2), in this respect, it would be superfluous to place this phrase again into this part of Article 235 of the Maritime Code.

4.6(3): The legal consequence after the termination of the contract for a breach of warranty

In addition, in the event of a breach of warranty, it is likely that the insurer may choose to terminate the contract by relying on Article 235 of the Maritime Code, although in Chinese marine insurance law, the insurer is also entitled to a statutory right of termination of the contract where the assured fails to take reasonable care as to the safety of the subject matter insured and where the risk of the subject matter insured is increased. In such a case, the issue may well arise as to at which point the contract is deemed to be terminated. As far as section 33(3) of the Marine Insurance Act 1906 is concerned, in the event of a breach of warranty, the liability of the insurer will be automatically discharged as from the date of the breach, unless there is a held covered clause or a similar provision contained in the policy. Nevertheless, such an issue was not specifically stated in the Maritime Code.

It has been argued that the Maritime Code should set out the rule as to the time of which the contract is deemed to be terminated upon a breach of warranty, and this aspect of law, if introduced by the Chinese law drafters,

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should follow the legal consequence of a breach of warranty as stated in section 33(3) of the Marine Insurance Act 1906, so that the contract will be terminated automatically as from the date of the breach of warranty.\textsuperscript{296} However, it is unjustifiable to say that this is a convincing argument. This is because in accordance with Article 235 of the Maritime Code, the insurer has another two alternative remedies to choose once a warranty is breached, these are the amendment of the terms and conditions of the contract and an increase of the premium.

Furthermore, another view held by Chinese academics is that as a marine insurance contract in China is a special type of contract which is also governed by the rules that form part of the general law of contract, where an insurer elects to terminate the contract for a breach of warranty, then according to the general principles of Chinese contract law, the termination of contract should only take effect when the assured receives the notice of termination from the insurer.\textsuperscript{297} In such a situation, the assured would have no right to argue that he has not become aware of the existence of such a notice. As the insurer is required to exercise a right of choice for a breach of warranty, it is proposed by the author that if the insurer chooses to terminate the contract, such a termination should be effective as soon as the insurer notifies the assured as to his decision in writing, regardless of whether or not the assured has received the written notification from the insurer. This means that where a marine insurance contract is terminated by the insurer on the ground of a breach of warranty, then, according to the general principles of Chinese contract law, the legal effect of such termination should be prospective,\textsuperscript{298} so

\textsuperscript{297} Liming Wang and Jianyuan Cui, General principles of contract law, 1996, p 470.
\textsuperscript{298} In principle, under Chinese contract law, there are two types of termination of contract, namely retrospective termination and prospective termination. The retrospective termination occurs where the contractual relationship between the parties is terminated from the beginning of the contract, and the economic and legal status of the parties should be restored as if the contract was not entered into,
that the parties’ contractual relationship would come to an end from the time the termination takes effect. Obviously, it follows from this law reform proposal that the premium paid to the insurer between the date when the contract is effectively terminated and the original expiry date of the insurance policy should be returned to the assured. The rationale for such a view is that as soon as the contract is effectively terminated, the insurer bears no risk of loss to the subject matter, so that it is unjust for the insurer to retain the premium.

However, it is submitted that as the termination of contract takes effect only after the notice has been served on the assured, any loss occurred before the breach of warranty should be indemnified by the insurer. It is justifiable to say that this is a cogent argument, because before the breach of warranty takes place, the assured fulfilled his entire statutory obligation, so that on the insurer’s side, any contractual obligation must still be fulfilled before the termination of the contract becomes effective. Evidently, the same proposition can also be found in Article 46 of the Opinions of the Supreme People’s Court of PRC concerning the Application of the Chinese Maritime Code (draft) which provides that where the insurer chooses to terminate the contract by relying on Article 235 of the Maritime Code, the insurer shall pay the insurance compensation in accordance with the terms of the contract for the losses of the subject matter insured which occurred before the contract is terminated and are not related to the breach of warranty.

In Chinese marine insurance law, apart from the express warranties inserted into the insurance contract, it is also possible for the parties to agree and attach a similar term, that is, condition precedent, to their insurance contract under Article 45 of the Contract Law of PRC 1999. This means that

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300 Article 45 of the Contract Law of PRC 1999 states, in relevant part, that a contract subject to a condition precedent becomes effective once such condition is satisfied.
in a marine insurance contract, if the insurer and the assured expressly agree to insert a condition precedent into the contract, failure to comply with such a term will allow the insurer to refuse from paying a related claim or automatically bring the contract to an end as from the time of the non-compliance.

4.7: The introductory proposal as to the different nature of express warranty in the Maritime Code

It has been firmly established that under section 33(3) of the Marine Insurance Act 1906, a warranty does not have to be material to the risk, but it must be exactly complied with. In contrast, the situation is different in China, as the Maritime Code is rather silent on these two issues. However, the situation appears to be different as far as the insurance law of Hong Kong is concerned. By way of illustration, in the case of Leung Yuet Ping v. Manulife (International) Ltd\textsuperscript{301} where the deceased applied for a life insurance policy in June 2006 with Manulife. He was later diagnosed with colon cancer in June 2006 and died in November 2006. The deceased’s widow applied to Manulife for payment of the benefits under the policy to her as the beneficiary. Manulife discovered that the deceased had made a visit to his doctor following experience of an episode of shortness of breath and palpitations 11 days before applying to Manulife for the relevant life insurance cover. The deceased was then advised by his doctor to consult a cardiologist but he failed to follow that advice. Manulife refused to indemnify relying on the fact that the deceased had failed to inform them in the proposal (application) form and the medical examination form of the visit to his doctor. The High Court in Hong Kong held that the information provided by the deceased in the proposal form was a condition precedent to attachment of the risk, or to the liability of Manulife under the policy, and was

\textsuperscript{301} HCA 2380/2006.
therefore a warranty. The Court found the answers given by the deceased in the proposal form and the medical form to be inaccurate and misleading. As the deceased had breached the warranties, Manulife was held to be entitled to repudiate the insurance contract. In reaching this decision, the Court made it clear that a breach of warranty would entitle the insurer to avoid liability under the policy and reinforced the need for strict compliance with warranties in insurance contracts.

Although the Marine Insurance Act 1906 can be applied by Chinese courts as a source of law where there is no relevant domestic law in China, due to the existing trouble and criticism of the concept of warranty in section 33(3) of the 1906 Act, it is inappropriate for Chinese courts to adopt section 33(3) of the 1906 Act when considering the same disputable issue. Instead, in order to clarify the issues and ensure that the right of the assured is not unfairly prejudiced, it is suggested by the author that the amended version of section 33(3) of the 1906 Act, as proposed by the author in Chapter 2 of the thesis, should be adopted and inserted into Article 235(2) of the Maritime Code.

Despite the effort made by the UK Law Commission and some academics for introducing the element of causation into the current warranty regime, the issue as to whether or not there is a causal connection between a breach of warranty and the loss has not been considered by the Chinese judicial authorities. The well-established common law principle that a causal connection between a breach of warranty and the loss does not have to be shown does not appear in the relevant provisions of the Marine Insurance Act 1906 or the Maritime Code, and as a result, it is unclear as to whether or not this common law principle can be adopted by Chinese courts to settle a particular dispute. As a warranty is a very special term of the insurance contract, the breach of which may increase the risk of loss to the subject matter insured, it is fair to say that the causal connection approach proposed by the Law Commission is unsatisfactory, in the sense that it is clearly
inconsistent with the plain wording of section 33(3) of the 1906 Act, that is, ‘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...’ Therefore, in order to protect the interest and statutory right of the insurer, it is suggested that the new section 33(4) of the 1906 Act, as introduced by the author in Chapter 2 of the thesis, should also be inserted into Article 235(2) of the Maritime Code.

Therefore, the proposed statutory rules of exact compliance, materiality of risk and causation, as three different types of the nature of express warranty, should all be adopted into a different section of Article 235 of the Maritime Code, that is Article 235(2), to cover all relevant disputable situations, in the sense that the nature of express warranty should be regarded as a different set of statutory rule from the statutory definition of warranty and the legal consequence of a breach of warranty. In more specific terms, it is suggested by the author that Article 235(2) of the Maritime Code should be introduced in the following way:

‘A warranty, as above defined, is a condition which must be exactly complied with only if the purpose of this warranty is to protect the subject matter insured. But a warranty relating to the performance of future obligation can be substantially observed by the assured if such a warranty has no connection with the risk, except the warranty to pay premiums.’

‘Where a breach of warranty is followed by a loss, the insurer is liable to indemnify the assured for the loss, less any damage caused as a result of the breach of warranty, if the loss in respect of which the assured seeks to be indemnified was not caused or contributed to by the breach.’
4.8: A proposal as to the waiver of a breach of warranty in Chinese marine insurance law

It is unclear, under Chinese marine insurance law, as to whether or not a breach of warranty can be waived by the insurer, because this aspect of law is not stipulated in the relevant provision of the Maritime Code, and there have been remarkably very few cases concerning the issue as to the waiver of a breach of warranty. A recent example of such an issue is illustrated in the Hong Kong case of *Hua Tyan Development Ltd v Zurich Insurance Co Ltd*.\(^\text{302}\)

In this case, the approach taken by the court was that where a warranty was breached, the insurer could lose the legal protection by unequivocally waiving the breach, and this may occur where the insurer, having known the breach of warranty, chooses not to avoid the cover through his words or conduct. The court has also made it clear that in order to constitute waiver by estoppel in accordance with section 34(3) of the Marine Insurance Ordinance, the burden of proof would be on the assured to show clear evidence.

Despite the lack of judicial decisions on the issue of waiver, a similar aspect of law can be found in Article 95 of the Contract Law of PRC 1999 which requires one contracting party to exercise the right of termination of contract within a reasonable time or the time limit as agreed by the parties. Failure to do so would mean that such a right will lapse. Due to the distinct nature of warranty, it may, however, be inappropriate for this aspect of law to be applied in the context of marine insurance as the law of waiver of breach of warranty. As a breach of warranty generally leads to severe legal consequence and requires the insurer to exercise a right of choice immediately, it is suggested by the author that mere silence or inaction on the part of the insurer should be sufficient to constitute waiver. This means that in the event of a breach of warranty, if the insurer fails to take any positive actions to exercise

\(^{302}\) [2014] HKEC 1489.
his statutory rights as to the breach within a reasonable time, the assured will be entitled to assume that the insurer has waived his right as to the breach, and must therefore indemnify any loss as a result of the breach. In English marine insurance law, as the legal consequence of a breach of warranty is automatic and does not require any election to be made on the part of the insurer, the doctrine of waiver set out in section 34(3) of the 1906 Act refers to waiver by estoppel rather than waiver by election. This is because there is no election for the insurer to make after a warranty is breached by the assured.

In contrast, the situation is entirely different as far as Chinese marine insurance law is concerned, because the insurer is required to make a choice immediately as to a breach of warranty. It follows from this perspective that in the event of a breach of warranty, the insurer should also be required to make an unequivocal representation as to whether or not he will waive the breach. This means that if the insurer wishes to waive a breach of warranty, the doctrine of waiver by election derived from English law should be adopted into the Maritime Code, so that the insurer, having been aware of the breach of warranty, must have made a choice between two inconsistent courses of action, such as denying the cover or accepting the breach and keep the contract on foot. Such an election, once made, is final and is not dependent upon reliance on it by the other party. Similar to the assured’s notification obligation as to a breach of warranty, it is suggested by the author that the insurer should also be required to notify the assured in writing within a reasonable time if the insurer wishes to waive a particular breach of warranty, and such an action should be sufficient to constitute an election. In consequence, it is suggested by the author that like the legal consequence of a breach of warranty, the waiver of a breach of warranty also requires the insurer to make an election for the breach; and therefore, the new Article 235(3) of the

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303 See Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchanjunga) [1990] 1 Lloyd’s Rep 391, p 399, per Lord Goff.
Maritime Code will be the proper place to accommodate the proposed law on this aspect. As such, the proposed statutory rule as to the waiver of a breach of warranty should be introduced into Article 235(3) of the Maritime Code in the following way:

‘The insurer can only waive a breach of warranty by making an election as to the breach. Such an election, once made, must be communicated to the assured in writing within a reasonable time.’

4.9 Conclusion

In consequence, although some new law reform proposals in respect of marine warranty in Article 235 of the Maritime Code has been introduced by academics and the Supreme Court’s guidance notes, it is clear that there are still certain defects in the current Article 235 of the Maritime Code. At the outset, the problem as to the lack of a statutory definition of warranty has been addressed by the author. According to the author’s view, the new section 33(1) of the Marine Insurance Act 1906 should be adopted into Article 235(1) of the Maritime Code as a statutory definition. Under the relevant provisions of the Marine Insurance Act 1906, there are three important aspects of the nature of warranty, namely a warranty must be exactly complied with, a warranty does not have to be material to the risk and a causal connection between a breach of warranty and the loss does not have to be shown. It is suggested by the author that the amended version of these three aspects of the nature of warranty should be introduced and incorporated into Article 235(2) of the Maritime Code to clarify certain issues.

Under the current version of Article 235 of the Maritime Code, the assured must notify the insurer immediately as to any breach of warranty, but in the author’s view, in such a case, the assured should also be required to take
reasonable measures to protect the subject matter insured, otherwise, subject to any express provision in the policy, the contract will be automatically terminated, with the premiums being non-refunded. Another amendment made by the author is that if the insurer fails to make an election immediately upon a breach of warranty, the assured will be entitled to assume that the insurer have waived the breach, but if, for the first time, the assured committed a minor breach of warranty, the insurer can only issue a warning notice to the assured. It is believed that these law reform proposals, if introduced into the Maritime Code, would bring Chinese marine insurance law in harmony with international maritime practice and enable more parties to choose Chinese law to be the applicable law.

Apart from the critical analysis as to Article 235 of the Maritime Code, the creation of express warranties, as another aspect of the concept of warranty, is also of great importance for the purpose of discussion. Unlike section 35 of the Marine Insurance Act 1906, the law as to the creation of express warranties was not stipulated in the relevant provisions of the Maritime Code. However, this does not mean that section 35 of the 1906 Act is as perfect as it stands. Section 35 of the 1906 Act should also be modified to a certain extent while a detailed set of statutory rules concerning the creation of express warranties should also be introduced into the Maritime Code. Therefore, these two targets will be achieved by the author in the next Chapter.
Chapter 5

A critical analysis as to the statutory rules of the creation of express warranty in English and Chinese law

5.1 Introduction

After considering the statutory rules of warranty as appears in Article 235 of the Maritime Code 1993, the author will now make a critical examination as to the statutory rules of the creation of express warranty as appear in section 35 of the English Marine Insurance Act 1906 in this Chapter. The current law in this area is also subject to a great deal of criticisms, and therefore, where necessary, law reform proposals will be made, through the assistance of relevant cases, to bring this area of law into its satisfactory state. The rules adopted by the courts over the past years as to the construction of express warranty will also be critically examined to reveal its problem. Regrettably, such a statutory rule does not appear in the relevant provision of the Maritime Code. In the absence of such a statutory rule, it is inevitable that some disagreements may arise between the parties as to whether or not a particular term of the contract can be treated as a warranty. In addition, in this Chapter, the author will analyse the issue as to whether or not the current section 35 of the Marine Insurance Act 1906 can be appropriately inserted into the Maritime Code as the statutory rules for the creation of express warranty.
5.2 A critical analysis as to section 35 (1) of the Marine Insurance Act 1906 and its reform proposal

5.2(1) The way by which an express warranty can be created

The issue as to how an express warranty can be created is well established in section 35 (1) of the Marine Insurance Act 1906. According to this subsection, a warranty can be created in any form of words as long as the intention to warrant can be inferred. Thus, the intention of the parties, as can be ascertained from the whole of the policy, will prevail. It is clear from this subsection that any form of language from which the mutual intention of the parties to warrant will be sufficient to constitute a warranty, and there is no formal or particular form of wording for an express warranty to be drafted. It follows from this perspective that an express warranty can be created in standard forms, as those appear in the Institute Clauses. Alternatively, it can be created with the words of the contracting parties. The use of the word ‘warranty’ or ‘warranted’ does not necessarily mean that the term is a true warranty, although the usual practice in the London market is to use the word ‘warranted’ to create an express warranty. A typical example of an express warranty would appear to be ‘warranted condition survey before shipment’.

The reason as to why the word ‘warranty’ or ‘warranted’ is not determinative of whether a term is a warranty is that the word is sometimes used in a different sense as opposed to a promissory warranty, and the word is only descriptive of the subject matter or of the risk, so that the insurer is only on risk at the time when the term is complied with by the assured. This type of warranty is generally referred to as a delimiting warranty. A typical example of a delimiting warranty can be found in the case of Roberts v Anglo-Saxon.

Insurance Association Ltd where a clause contained in a policy of motor vehicle insurance provided: ‘Warranted used only for the following purposes: commercial travelling’. Despite the fact that the clause was expressly agreed by the parties as a warranty, it was held that the clause should only be considered as a description of the risk. This simply means that in the event that the vehicle was not used for the purpose of commercial travelling, it would not be covered.

The situation appeared to be different in the case of Sea Insurance Co v Blogg where a clause contained in the marine policy required the assured’s vessel to sail on a specific date. This clause was held to be an express warranty, even though the word ‘warranty’ or 'warranted' was not used. These court decisions suggest that it is possible for the courts to adopt different interpretations in respect of similar policy terms. However, according to Baris, the use of these words can be regarded as good evidence to prove that the parties do have the intention to create express warranties, unless it relates to the risk insured. Equally, there are certain types of clause that are traditionally referred to as warranties and are given effect as such. A typical example would be an express warranty to pay the premium instalments within the specific time limits, even though such a warranty does not relate to the risk. The legal effect of a breach of a particular clause inserted by the parties into the policy may assist the court to determine whether or not this clause should be construed as a warranty. For instance, where the clause expressly states that if it is breached, cover will be terminated or the policy will

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306 (1927) 27 LL Rep 313.
307 [1898] 2 QB 398.
become void, then this term is likely to be construed by the courts as a warranty, even if the breach is immaterial to the risk.\textsuperscript{310}

Nowadays, the most common method to create an express warranty is to ask the assured to make a declaration on the proposal form\textsuperscript{311} to the effect that the statement given by the assured and appeared on the proposal form is to be the ‘basis of the contract’\textsuperscript{312} between the parties, provided that it is possible to ascertain the intention of the parties to warrant. This is a legal device whereby the assured’s answers and declarations in the proposal form will be converted into express warranties, irrespective of the issue as to the test of materiality. In general, breach of such a clause, however trivial, would be treated as a breach of warranty and give the insurer the right to terminate the entire contract. But it should be noted that the ‘basis of contract’ clauses apply only to the non-marine insurance field for warranties relating to past or present facts.

5.2(2) The approach adopted by English courts for the interpretation of an express warranty

Due to the harshness and unfairness of the current law as to the legal consequence of the breach of warranty, for many years, the courts have attempted, through case-law, to mitigate the harshness of the law by adopting strict interpretation against the interest of the party who has put it forward\textsuperscript{313}.


\textsuperscript{311} A proposal form is a standard document prepared by the insurer and normally contains questions relating to the policyholders personal particulars.

\textsuperscript{312} The ‘basis of the contract’ clauses began to appear in life proposal forms from the 19\textsuperscript{th} century in England. The ‘basis of the contract’ clauses normally appear at the foot of the proposal form. However, section 9 of the Insurance Act 2015 has banned the ‘basis of contract’ clauses from non-consumer insurance contracts.

This point suggests that the courts have a wide discretionary power to determine the issue as to whether or not a particular clause is a warranty, because such an issue is a question of construction. But the view expressed by the Law Commission is that while this has advantages it also introduces uncertainty into the law.\textsuperscript{314} For instance, a particular clause in the policy may be construed by the court as a suspensive condition which suspends the liability of the insurer only for the duration of the breach, even though from the wording of the clause, it appears that it is a promissory warranty.\textsuperscript{315}

5.2(2)(i) The common law rule of \textit{contra proferentum}

Occasionally, the words of a warranty may be ambiguous and capable of more than one meaning. In cases like this, the English interpretational rule of \textit{contra proferentum},\textsuperscript{316} which stands for \textit{verba caratum fortius accipiuntur contra proferentum} (a contract is interpreted against the person who wrote it), would play a crucial role. As such, if two possible interpretations of an express term existed, one being favourable to the assured, and one being favourable to the insurer, the words will be construed narrowly against the insurer who has drafted the wording and sought to rely on it, so that the words will be construed in favour of the assured. Nevertheless, this does not mean that the assured can avail himself of an apparent ambiguity as to a particular word where its meaning would be clear to a reasonable person.\textsuperscript{317}

\begin{footnotesize}
\textsuperscript{316} This Latin maxim in the insurance law context was clarified in the case of \textit{Youell v Bland Welch & Co Ltd} [1992] 2 Lloyd’s Rep 127 where Staughton LJ stated that ‘… in case of doubt, wording [in a contract] is to be construed against the party who proposed it for inclusion in the contract: it was up to him to make it clear.’
\end{footnotesize}
The rule of contra proferentum has been considered at some length in the case of Simmonds v Cockell\(^{318}\) where Mr Justice Roche stated that ‘… it is a well-known principle of insurance law that if the language of a warranty in a policy is ambiguous it must be construed against the underwriter who has drawn the policy and has inserted the warranty for his own protection.’ The same issue was also considered in the non-marine case of Re Bradley and Essex and Suffolk Accident Indemnity Society\(^{319}\) In this case, as Farwell LJ pointed out, ‘it is especially incumbent on insurance companies to make clear, both in their proposal forms and in their policies, the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses, and may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the conditions. Accordingly, it has been established that the doctrine that policies are to be construed “contra proferentes” applies strongly against the company.’\(^{320}\)

5.2(2)(ii) Other common law rules governing the creation of express warranty

In order to mitigate the harsh effects of a warranty, another principle of interpretation developed by the courts is that if the insurer wishes to stress the draconian consequences of a warranty, it will be the insurer’s responsibility to stipulate them in particularly unambiguous terms, and it is not open to the court to re-write the terms of the contract. The ambiguities can only be cured by the insurer through proper contractual wording. This common law principle was brought into discussion in the case of AC Ward & Sons Ltd v Catlin (Five)\(^{318}\) [1920] 1 KB 843.\(^{319}\) [1912] 1 KB 415.\(^{320}\) Ibid, at p 430.
where a wholesale distribution warehouse was insured under a policy which contained a protection maintenance warranty. This warranty provided that ‘the whole of the protections provided for the safety of the insured property shall be maintained in good order … all defects occurring in any protections must be promptly remedied’. The policy also contained a burglar alarm maintenance warranty which provided that ‘the burglar alarm shall have been put into full and effective operation at all times when the insured’s premises are closed for business … all defects occurring in any protections must be promptly remedied’. In March 2007, a large amount of cigarettes and tobacco were stolen from the warehouse. The ADSL line operated by BT had been disconnected for some weeks before the theft. Although it had been reconnected before the break-in, there was still an intermittent default on the line which prevented the thieves from being detected by the CCTV. The insurer refused to indemnify the assured on the ground of the breach of warranty. In the judge’s view, as the warranty required the insured to remedy any defect promptly, the assured would only be in breach if there was some fault of which the assured was aware but failed to remedy in good time. Consequently, it was held that the assured was not in breach of warranty, as the assured could not have known that there was a continuing fault on the line.

The English courts’ approach that the insurer must create the warranties in clear terms has also been adopted in the Singapore case of Marina Offshore Pte Ltd v China Insurance (Singapore) Pte Ltd and Another which concerned a maritime routing warranty. The facts of this case were that Marina Offshore insured a coastal tug for one year. The surveyor made six recommendations in the survey. One of them concerning the voyage route provided: ‘Route to follow to be tracking along nearest coast of Japan, Philippines, Sabah unless weather permitted, and to seek shelter if weather is

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bad …’ In the court of first instance, it was held that this provision was an express warranty, and as Marina Offshore had breached this warranty, they were not entitled to claim an indemnity under the policy. However, this finding was overruled by the Singapore Court of Appeal. According to the Court of Appeal’s view, this provision was simply a recommendation rather than a warranty. In particular, the Court stressed that a warranty must be constructed with express, specific and clear wording in the light of the serious legal consequence of the breach so as to ensure that the assured is aware of what he has to comply with.\(^{323}\)

Moreover, the words or phrases appeared in a warranty are generally construed by the courts in accordance with their ordinary and literal meaning as can be found in the dictionary. Nonetheless, the dictionary meanings of words may not always reflect the commercial context in which the parties reached the agreement, so that the meaning of a particular word is to be construed in the context of the relevant background that ordinary commercial persons would have understood it to mean.\(^{324}\) Put another way, the ordinary meaning of a term will not be adopted where the term has acquired a legal, technical or business meaning. By way of example, in the case of *Algemeene Bankveereniging v Langton*,\(^{325}\) it was held that the word ‘robbery’ should not be construed in accordance with any legal or technical English meaning of the word. Instead, it should be construed in the way that ordinary businessmen would have understood it.

The general approach adopted by the English courts in respect of the creation of express warranty is to construe a particular warranty in accordance with its intended purpose. Indeed, the courts will allow some degree of

\(^{323}\) Ibid, at para. 24.


\(^{325}\) [1935] 51 Lloyd’s LR 275.
flexibility in respect of the ordinary and literal meaning of the warranty. This point has been considered in the case of *GE Frankona Reinsurance Ltd v CMM Trust No 1400 (The Newfoundland Explorer)*\(^{326}\) where, under a contract of insurance, a motor yacht was insured for one year. One of the express warranties in the policy provided ‘warranted vessel fully crewed at all times’. The insurer refused to indemnify the assured when the vessel was severely damaged by fire on the ground that no crew members were aboard the vessel at the time of the fire. It was held that on the proper construction of this clause, it required the assured to keep at least one crew member on board the vessel 24 hours a day. However, taking into account the commercial purpose of this clause, it was also held that complying with this clause was subject to two exceptions; these are emergencies rendering the crews’ departure necessary, and necessary temporary departures for the purpose of performing the crewing duties or other related activities. It is clear that in reaching this decision, the judge regarded the purpose of the crews’ departure as a crucial factor.

Most importantly, the commercial purpose of the warranty will be taken into account in order to construe a particular warranty. It follows from this perspective that where the meaning of the wording is ambiguous, the courts will adopt a sensible and businesslike construction as opposed to an absurd or unreasonable construction. This means that the creation of express warranty must be for the benefit of the trade, and for the assured.\(^{327}\) Thus, in the case of *Investors Compensation Scheme v West Bromwich Building Society*,\(^{328}\) it was suggested by Lord Hoffmann that courts should place more weight upon the factual matrix surrounding the contract than the actual words used by the parties in the contract. Therefore, this means that the words appeared in the

\(^{326}\) [2006] EWHC 429 (Admlty).

\(^{327}\) *Kin Yuen Co Pte Ltd v Lombard Insurance Co Ltd* [1994] 1 SLR(R) 964.

\(^{328}\) [1998] 1 All ER 98.
clause should be interpreted according to the commercial purpose as can be
found in the contract rather than the textual meaning.

Obviously, the concept of factual matrix would include commercial
background behind the contract and also the rationale behind the need to
insert the warranty into the contract. A typical example as to the purpose of a
warranty can be found in the case of *Hart v Standard Marine Insurance Co
Ltd*.\(^{329}\) In this case, an express warranty stated that ‘… warranted no iron or
ore exceeding the net registered tonnage …’ This warranty was held to be
breached when a quantity of steel in excess of such net tonnage was shipped,
because for ordinary business purpose, the term ‘iron’ includes steel. A similar
decision was reached in the case of *Brownsville Holdings Ltd v Adamjee
Insurance Co Ltd (The Milasan)*\(^ {330}\) where one of the disputing issues
concerned an express warranty in a motor yacht policy which required
professional skippers and crew to be in charge at all times. The insurer argued
that the assured was required, under the warranty, to employ a person who
was professionally qualified to be a skipper for the motor yacht. Taking the
rationale of the warranty into account, it was held by Aikens J that the words
‘professional skipper’ referred to a person who had some professional
experience that qualified him to become a skipper, and this did not necessarily
mean that he was required to pass formal examinations in order to be a
professional skipper.

Nevertheless, a particular warranty will be construed by the court in a way
that goes no further than necessary to achieve the commercial purpose.\(^ {331}\) Again, this point is dealt with in the case of *Hart v Standard Marine Insurance
Co Ltd*\(^ {332}\) where Lord Esher MR stated: ‘a warranty like every other part of the

\(^{329}\) (1889) 22 QBD 499.


\(^{332}\) (1889) 22 QBD 499.
contract is to be construed according to the understanding of merchants, and does not bind the insured beyond the commercial import of the words … the words are not to be construed in the sense in which they would be used amongst men of science, but as they would be used in mercantile transactions.\(^{333}\)

In addition, a warranty will be construed by the courts in relation to its reasonableness. This point was addressed in the recent case of *Pratt v Aigaion Insurance Co SA*\(^ {334}\) where an express warranty required the assured to keep at least the owner or an experienced skipper on board at all times. It was held that this warranty applied only to the times when the ship was at sea, despite the fact that the phrase ‘at all times’ appeared in the warranty statement. These court decisions indicate that the courts have a wide discretionary power to determine the issue as to whether or not a particular term can be construed as a warranty, even though by ascertaining the mutual intention of the parties, it is clear that on a proper construction of the term, it should be viewed as a warranty. So in the non-marine case of *Kler Knitwear Ltd v Lombard General Insurance Co Ltd*,\(^ {335}\) a term of the policy expressly stated that the policyholder’s sprinkler system would be inspected 30 days after renewal. The contract also stated that the term was a warranty and non-compliance would bar any claim ‘whether it increases the risk or not’. In fact, the sprinkler system was inspected about 60 days late, although the late inspection showed that the system was under its normal working condition. Unfortunately, the policyholder’s factory subsequently suffered from storm damage which was wholly unconnected with the late inspection. On the face of it, it is clear that the parties did intend the term to be a warranty. Nevertheless, it was held that this term was merely a suspensive condition, with the effect

\(^{333}\) *Hart v Standard Marine Insurance Co Ltd* (1889) 22 QBD 499, at p 500.

\(^{334}\) [2009] Lloyd’s Rep IR 149.

\(^{335}\) [2000] Lloyd’s Rep IR 47.
that the insurer’s liability was temporarily suspended during the 60 days when the sprinkler system was not inspected.

As far as this case is concerned, it should be pointed out that the court has reached an unfair decision, because ‘the term itself was called a warranty and was drafted in clear and intelligible language and the legal consequences of non-compliance were spelt out.’ It follows from this perspective that as the parties’ intention to warrant was clear; this court decision contradicts with the plain wording of section 35(1) of the Act which permits an express warranty to be created in any form of words. Nevertheless, different situations may arise where it would be rather difficult for the courts to infer from the parties’ intention to warrant.

It has also been pointed out by Rix LJ that to determine the issue as to whether or not a particular clause can be construed as a warranty, three issues must be considered, these are ‘whether the term goes to the root of the transaction; whether the term bears materially on the risk of loss; and whether damages would be an inadequate or unsatisfactory remedy for the breach.’ A decision concerning these issues was reached in the case of GE Reinsurance Corporation v New Hampshire Insurance Co which dealt with reinsurance contracts. Here, a term of the film finance policy stated that the film production company would keep the employment contract with its creative inspiration, Steve Stabler, for the duration of the policy. But in fact, Mr Stabler left the production company soon after the inception of the risk. Before the expiry of the insurance policy, the film production company went into liquidation and was unable to repay the debt of US $100 million. The reinsurers argued that they were entitled to deny liability as the term in question constituted an express warranty. It was held by Langley J that the term was a

true warranty, because Mr Stabler’s role in the production company was a material factor in defining the extent of the risk. It was also confirmed that if the reinsurers were to be limited for a claim for damages as a result of the breach, it would be an unsatisfactory and inadequate remedy as it would be difficult, though not impossible, to assess how Mr Stabler’s departure could have affected the production company’s ability to repay its debt.

5.2(3) The law reform proposal as to the statutory rule of the creation of express warranty

In order to avoid the problem of identifying warranties, it is suggested by the author that the existing section 35(1) of the Act should be replaced by a new statutory mechanism. In particular, it is proposed by the author that when creating an express warranty, the importance of warranty and the legal consequence for the breach must be set out in the policy with clear wording in order to draw the assured’s attention, so that the assured will be able to understand the legal purpose of the warranty and comply with the warranty by taking extra care. If the insurer fails to do so, such a term will not be construed as a warranty. If this law reform proposal is to be implemented, it will also assist the courts to determine the issue as to whether or not a particular term can be treated as a warranty. Indeed, this law reform proposal is consistent with the relevant provision of the Insurance Law of PRC which provides that where an insurance contract contains terms and conditions concerning exclusion of the liability of an insurer, the insurer shall warn the insured in the proposal form or other insurance documents to notice such terms and conditions and shall clearly explain orally or in writing such terms and conditions to the proposer at the time of concluding the contract. Where such terms and conditions are not clearly explained, they shall not be effective.339

In addition, the purpose of a warranty is indeed another factor which must be taken into account in order to determine whether or not a particular term can be treated as a warranty. Words describing or qualifying the subject matter of the insurance have been held to be warranties in the classic case of Yorkshire Insurance Co Ltd v Campbell, even though these words had nothing to do with commercial or risk-related purpose. In this case, the view taken by Lord Sumner was that subject to the mutual intention of the parties, a description inserted into the policy for the purpose of identifying the subject matter insured are deemed to be warranties. This decision is clearly unfair as far as the assured is concerned, particularly where a loss has occurred as a result of the perils of the sea, because in such a situation, the assured would in no way recover his loss due to the breach of the descriptive warranty which has no connection with the risk insured.

In order to prevent the insurer from converting every statement into warranty, in the opinion of the author, therefore, a new statutory proposal should be introduced into section 35(1) of the Act, that is, a warranty should only be created with commercial or risk-related purpose in order to be effective; terms created by the insurer with other purposes should not be treated as warranties. In other words, a warranty should be created to ensure that it is fair and reasonable for the assured to comply with, and any absurd or unreasonable terms inserted into the policy should not be treated as warranties, but this does not mean that these terms should not appear in the policy as less stringent contractual terms.

Both of these two law amendment proposals should be inserted into section 35(1) of the Act, so that it would be more straightforward for the courts to determine whether or not a particular term can be construed as a warranty without reaching an unfair decision. But in the author’s view, this does not

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mean that the existing wording of section 35(1) of the Act should not be retained, as they do not appear to contradict with each other. Moreover, if these two law amendment proposals were to be implemented, the assured’s interest and the subject matter insured would be protected in a more effective way. In more specific terms, it is suggested by the author that the new section 35(1) of the Act should be introduced to read as follows:

An express warranty may be in any form of words from which the intention to warrant is to be inferred. In order for an express warranty to be valid, the importance of warranty and the legal consequence for the breach must appear in the policy. A warranty must be created with commercial or risk related purpose to be valid.

5.3 Different types of clause other than warranties

Despite the fact that some types of contractual terms are similar to express warranties, these terms should not be treated as such. A typical example is exclusion clauses which simply limit the extent of the coverage and use similar wording to express warranties, such as: ‘Warranted free of capture and seizure’. The purpose of such a clause is to discharge the insurer from liability if the insured vessel is seized. Obviously, these wordings do not constitute true warranties, because the purpose of these wordings is simply to define the extent of the policy and exclude the insurer’s liability for a particular risk of loss where necessary. Nevertheless, similar to warranties and condition precedents, the insurer does not have to show a causal connection between the assured’s non-compliance and the loss.341 Unlike a promissory warranty,

an exclusion clause does not represent a promise on the part of the assured; rather, it only gives rise to a temporary increase in the risk.\textsuperscript{342}

The legal distinction between a warranty and an exclusion clause has been drawn in the case of \textit{De Maurier (Jewels) Limited v Bastion Insurance Co Ltd}\textsuperscript{343} where Donaldson J stated: ‘… In the marine field “warranted free from capture and seizure” is a warranty of the former character [i.e. an exclusion] leaving the contract effective in respect of loss by other perils. “Warranted to sail on or before a particular date” is, however, of a promissory character … The commercial reasoning behind this legal distinction is clear, namely, that breach of the former type of warranty does not affect the nature or extent of the risks falling outside the terms of the warranty; breach of a promissory warranty may, however, materially affect such risks.’ A typical example of such an exclusion clause can be found in the case of \textit{Roberts v Anglo Saxon Insurance Co}\textsuperscript{344} where a clause of a motor policy provided: ‘warranted used only for … commercial travelling’. This clause was held to be an exclusion clause which simply defined the risk. This means that the vehicle was off risk when it was used for other purposes, but cover would resume as soon as the vehicle was again used for commercial travelling. Despite the clear distinction between a warranty and an exclusion clause, the use of the word ‘warranted’ in marine policies may still cause confusion on some occasions. For this reason, the insurers should be extremely cautious to choose the appropriate wording when creating an express warranty.

\textsuperscript{343} [1967] 2 Lloyd’s Rep 550.  
\textsuperscript{344} (1927) 27 Ll L Rep 313.
5.4 The evaluation of the requirement that an express warranty must be in written forms

Despite the fact that no specific wording is necessary to create an express warranty, as required by section 35(2) of the Act, a warranty must be included in, or written upon, the policy, or contained in some documents incorporated by reference into the policy.\textsuperscript{345} It follows from this perspective that a warranty may be written in any part of the policy, either at the top or bottom. Besides, it can also appear on the margin\textsuperscript{346} or on the back of the policy. But if the warranty is written on the back of the policy, particular attention should be drawn to the assured on the face of the policy. This is because if the warranties are completed on the face of the policy, the assured would be entitled to assume that all the warranties appeared on the face constitute the whole contract between the parties.\textsuperscript{347} Thus, provided that the parties' intention to warrant is clear, answers to questions contained in slips, proposal forms or covering notes can all become warranties. That is to say, a particular clause, if properly drafted by the insurer, can become an express warranty, provided that it is inserted or incorporated, either directly or indirectly by way of reference, into the policy. This statutory rule was originally established by Lord Rozanes v Bowen (1928) 32 LlL Rep 98, it was confirmed that warranties written in a slip pasted onto the policy should be considered as being included in the policy. A more recent example can be found in the case of Amlin Corporate Member Ltd v Oriental Assurance Corp [2013] EWHC 2380 (Comm) where the policy provided: ‘Notwithstanding anything contained in this policy or clauses attached hereto, it is expressly warranted that the carrying vessel shall not sail or put out of Sheltered Port when there is a typhoon or storm warning at that port nor when her destination or intended route may be within the possible path of the typhoon or storm announced at the port of sailing, port of destination or any intervening point. Violation of this warranty shall render this policy void.’ The vessel sailed despite the typhoon warning and was lost during the voyage. The assured was held to be in breach of this express warranty.

\textsuperscript{345} For instance, in the case of Bean v Stupart (1778) 1 Doul 11, Lord Mansfield made it clear that a warranty appeared on the margin of the policy must be regarded as a true warranty as if it was written in the body of the policy.

Mansfield in the case of *Pawson v Watson*\(^{348}\) where he stated: ‘if the parties had considered it as a warranty they would have had it inserted in the policy.’\(^{349}\) It must also be made clear, however, that oral statements made during the course of negotiations will not be considered as express warranties. This is because oral statements can only give rise for avoiding the policy on the basis of misrepresentation which is governed by section 20 of the 1906 Act.

But the situation would be different where an oral statement or a representation is subsequently incorporated into the policy in written forms. In such a case, it may be construed as a warranty provided that the parties’ intention to warrant is clear. However, this aspect of law should be criticised on the basis that oral statements or representations should be distinguished from express warranties which are created by the insurer as special terms of the insurance contract. The reasoning behind this argument is that oral statements or representations made by the assured before the conclusion of the contract generally involve with past or present facts which, according to the author’s point of view, should not be regarded as express warranties,\(^{350}\) even though these statements or representations are subsequently set out in written forms and incorporated into the policy.

Furthermore, as far as marine insurance law is concerned, a clear distinction should be drawn between a warranty and a representation. While a warranty must be strictly complied with by the assured, a representation is only required to be substantially true. In terms of the legal consequence for the breach, the insurer is automatically discharged from liability for the breach of warranty unless the breach is waived by the insurer, whereas a misrepresentation will render the contract voidable, so that the contract will

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\(^{348}\) (1778) 2 Cowp 785.

\(^{349}\) Ibid, at p 786.

\(^{350}\) This view was expressed by the author earlier in Chapter 2.
remain in force unless and until the insurer exercises his right to avoid it. For this reason, in the opinion of the author, it is suggested that oral statements or representations made by the assured should not be included into the policy by the insurer as express warranties. As such, it is proposed by the author that section 35(2) of the Act should be amended to read in the following way:

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. But oral statements or representations subsequently incorporated into the policy shall not be considered as warranties.

5.5 The lack of a statutory rule as to the creation of express warranty in the Maritime Code

Under Chinese marine insurance practice, every express warranty must be written into the policy in order to be effective, and the word ‘warrant’ or ‘promise’ is generally used for the construction of a warranty. But a warranty should be created reasonably by taking into account the interests of the assured. In Chinese legal practice, no reported cases have so far been found on the issue as to the creation of express warranties. Unlike section 35 of the Marine Insurance Act 1906 which provides a detailed set of statutory rules as to the creation of express warranty, such an issue has not been set out in the relevant provisions of the Maritime Code. Due to the simple provisions of Chapter XII of the Maritime Code, it may sometimes lead to uncertainty and unnecessary disputes as to whether or not a particular clause can be construed as an express warranty.
In China, however, as far as the practice of insurance is concerned, an express warranty can also be created by the basis of the contract clause as the English practice. That is to say, some of the statements made by the policyholder relate to past or present facts, which can be converted into express warranties by the basis of the contract clause. In general, most of the basis of the contract clauses can be found at the bottom of the proposal form. Breach of such a clause will give the insurer the right to reject the policyholder’s claim. In China, it is undisputable that the existence of the basis of the contract clause would harm the interest of the assured. This is especially true where an innocent assured may honestly give wrong information. Alternatively, the false information given by the assured may be trivial rather than material. In such a case, the insurer would be entitled to reject the assured’s claim by relying on the basis of the contract clause. This is clearly unfair for the assureds, because many assureds in China do not even understand the meaning and the legal effect of the basis of the contract clause. In other words, the basis of the contract clause may operate as a potentially dangerous trap for the assured. Nevertheless, in the absence of any decided cases on the issue as to the application of the basis of the contract clauses in China, Chinese courts will reject a particular contractual term in the proposal form where they think that term is unfair for the policyholder. But it can be concluded that the retention of the basis of the contract clauses in China would not be beneficial for the insurer. This is because once the insurer rejects the policyholder’s claim for a breach of the basis of the contract clause which was created unfairly against the policyholder, it is very likely that the insurer's

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351 In China, the basis of the contract clause has been widely used by the insurers in various insurance proposal forms for both consumer and commercial insurances. Such a clause has, for example, been adopted by the Ping An Insurance Company of China, Hua Tai Insurance Company, Taiping Life Insurance Company and so on.


353 Ibid, at 175.
business reputation will be damaged accordingly. In consequence, in the opinion of the author, the basis of the contract clause should be abolished for both marine and non-marine insurance from the Chinese insurance industry. This means that all warranties created by the insurers through the use of the basis of the contract clauses should have no effect on the assured.

In Chinese marine insurance law, when construing an express warranty, the English interpretational rule of contra proferentem can be adopted by the courts to resolve a particular dispute. The doctrine of contra proferentem has also been adopted in the relevant provision of the Chinese Insurance Law which provides: ‘If there is any dispute between the insurer and the applicant, the insured or the beneficiary, over the terms of an insurance contract, the people’s courts or arbitration organisations shall interpret such disputed terms in favour of the insured and the beneficiary.’

The judicial practice of the courts to adopt the rule of contra proferentem can be found in Hong Kong. By way of illustration, in the case of Hong Kong Nylon Enterprises Ltd v QBE Insurance (Hong Kong) Ltd, an express warranty appeared in the policy provided: ‘Warranted that this is a container load shipment’. One of the disputing issues was whether or not this wording could be construed as a warranty. The insurer argued that this was a promissory warranty within the meaning of section 33(3) of the Marine Insurance Ordinance, so that it had to be exactly complied with. The assured, on the other hand, contended that the warranty was ambiguous and that the word ‘shipment’ could mean the act of shipping the goods on board or merely a consignment of goods intended for shipment. This would only mean that the goods had to be in containers at the time of inception of the risk, and therefore, the warranty had been complied with. However, this argument was rejected by

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354 Article 31, Insurance Law of PRC 1995. A similar statutory provision can also be found in Article 41 of the Contract Law of PRC 1999.
Stone J who interpreted the warranty as requiring the goods to be shipped in a container without any temporal limitation to the moment of the inception of risk. This case is in contrast with the *ELAZ* case\(^{356}\) where the insurance policy in question was issued ‘subject to full container load’. The policy also contained an express warranty that the goods would at all times be in a container. After a careful consideration of this wording, Stone J held that the wording did not constitute an express warranty that there could never be transhipment between containers. As a result, the insurer was not entitled to rely on the breach of the alleged warranty as a defence.

5.6 The introduction of the statutory rule as to the creation of express warranty in the Maritime Code

In order to overcome the problem of uncertainty, it is suggested by the author that a detailed statutory rule should be introduced into the relevant provision of the Maritime Code. In the view of the author, the amended version of section 35(1) and 35(2) of the Marine Insurance Act 1906, as proposed by the author earlier in Chapter 2, are the most appropriate statutory rules which can be inserted into Article 235 of the Maritime Code as the creation of express warranties. It follows from this proposal that a new Article should also emerge from the Maritime Code, that is, Article 235(4) which should deal explicitly with the rules as to the creation of express warranties.

Apart from this law proposal, it is suggested by the author that a warranty should also be created with legal purpose in order to prevent the insurance company from inserting illegal warranties into the policy. In other words, a warranty should be created to enable the assured to comply with the warranty in a lawful manner. By way of example, let us assume that a warranty

appearing in the policy requires the insured vessel to enter into an area which is strictly prohibited by the local government, this warranty will clearly be an illegal warranty which should not be complied with by the assured. It follows from this perspective that in order to constitute an express warranty, the commercial, risk-related and legal purpose should all be taken into account. In consequence, it is suggested by the author that this part of Article 235(4) of the Maritime Code should be introduced to read as follows:

An express warranty may be in any form of words from which the intention to warrant is to be inferred. In order for an express warranty to be valid, the importance of warranty and the legal consequence for the breach must appear in the policy. A warranty must be created with commercial, risk-related or legal purpose to be valid.

5.7 Conclusion

In conclusion, the statutory rules as to the creation of express warranty under section 35 of the Marine Insurance Act 1906 have been critically examined by the author in this Chapter. As far as section 35(1) of the Marine Insurance Act 1906 is concerned, there is no statutory requirement for the insurer to create an express warranty. It follows from this aspect of law that it is possible for a warranty to be created with ambiguity. In such a case, the words will be construed in favour of the assured. In addition, the purpose of the warranty is another factor which has to be considered by the courts. It is sometimes difficult for the courts to identify a particular warranty. Therefore, in the author’s view, in order for an express warranty to be valid, the importance of the warranty and the legal consequence for the breach must appear in the policy to assist the assured to comply with the warranty. An express warranty
should also be created with commercial or risk-related purpose. These two law amendment proposals should be inserted into section 35(1) of the Marine Insurance Act 1906. As far as section 35(2) of the Marine Insurance Act 1906 is concerned, an express warranty must be set out in writing and included in the policy. It has also been established that oral statements and representations made by the assured may become express warranties if these statements and representations are subsequently incorporated into the policy in written forms. But as these statements and representations generally involve with past or existing facts, it is suggested by the author that they should not be considered as express warranties. In contrast, the rules as to the creation of express warranties were not covered in the Maritime Code. Therefore, it is proposed by the author that the amended version of section 35(1) and 35(2) of the Marine Insurance Act 1906 should be inserted into Article 235 of the Maritime Code, but the legal purpose of the warranty must also be taken into account by the insurer when creating an express warranty.

Having critically examined the statutory nature of express warranties under the Marine Insurance Act 1906 and the Chinese Maritime Code, the author will then provide a detailed analysis as to the statutory rules of the implied warranties in Chapter 6. The warranty of seaworthiness is the most important type of implied warranty. Therefore, a lengthy discussion will be provided in Chapter 6 to reveal whether or not the current law in this area is in need of modification. Apart from the implied warranty of seaworthiness, other types of implied warranty will also be critically examined in the next Chapter. Equally, the law as to the implied warranties between English law and Chinese law will also be critically compared.
Chapter 6

A critical examination as to implied warranties in respect of the

6.1 Introduction

In the previous Chapter, the author has analysed the rules as to the creation of express warranty in the Marine Insurance Act and the Maritime Code. It is appropriate, at this stage, to examine another type of warranty which was created by English law and Chinese law, that is, the implied warranty. Unlike express warranties which can be created by the parties and which must be included in or written upon the policy, implied warranties are deemed to apply by the operation of law without the need for the insurer to insert these warranties into the insurance contract. As far as the Marine Insurance Act 1906 is concerned, there are generally 4 types of implied warranty; these are warranty of portworthiness, warranty of cargoworthiness, warranty of legality and warranty of seaworthiness.

There is no doubt to say that the warranty of seaworthiness is the most important type of implied warranty. This is because the term ‘seaworthiness’ has a strong connection with the condition and quality of the ship which should be regarded as a crucial factor for the liability of the insurer to indemnify any potential loss to the ship or the cargo. As such, the term ‘seaworthiness’ will be analysed to reveal whether the current statutory definition of the term ‘seaworthiness’ is appropriate. The doctrine of stages as appears in section 39(3) is another important issue which should be considered in this Chapter. In

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357 It should be noted that there is no implied warranty in non-marine insurance.
358 Section 39(2), Marine Insurance Act 1906.
359 Section 40(2), Marine Insurance Act 1906.
360 Section 41, Marine Insurance Act 1906.
361 Section 39(1), (3), (4) and (5), Marine Insurance Act 1906.
addition, the issue as to the burden of proving unseaworthiness will also be critically analysed in this Chapter. Last but not least, while the warranty of seaworthiness directly applies to voyage policies, there is, in general, no implied warranty of seaworthiness in time policies unless the assured is aware of the unseaworthiness when the ship is sent to sea. However, the current section 39 of the 1906 Act has failed to address the issue as to whether or not the warranty of seaworthiness has a role to play in mixed policies. This area of law will also be critically examined to reveal whether or not the current law is in need of modification or clarification.

In contrast, seaworthiness is treated as an exception to the liability of the insurer rather than an implied warranty under the Maritime Code. The current problem in respect of the law of unseaworthiness under the Maritime Code is that it has failed to provide a statutory definition as to the term ‘seaworthiness’. In addition, it is unclear, under the Maritime Code, as to whether or not unseaworthiness applies to voyage policies and time policies. These problems and uncertainty will be also addressed by the author in this Chapter through a critical comparison between English law and Chinese law. Where necessary, some new law reform proposals will also be introduced for the purpose of replacing the existing law.

6.2 Warranty of portworthiness

In English marine insurance law, there are a number of statutory obligations under the Marine Insurance Act 1906 that the assured must fulfil in order to be entitled to claim the loss of the subject matter insured. One of these obligations is the warranty of portworthiness which can be found in section 39(2) of the 1906 Act. In particular, this sub-section provides that where the policy attaches while the ship is in port, there is an implied warranty that she
shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port. The warranty of portworthiness generally applies to the ‘at and from’ policy with the result that the ship insured must be seaworthy for the port\textsuperscript{362} or portworthy.

In practice, the warranty of portworthiness applies to all voyage policies, provided that it is not excluded by the terms of the policy.\textsuperscript{363} The express wording of this sub-section indicates that the insured vessel in question only needs to be reasonably fit to encounter the ordinary perils of the port as soon as the risk attaches. This means that the warranty of portworthiness does not have to be complied with throughout the life time of the policy. Rather, it is sufficient that the assured complies with the warranty of portworthiness at a specific point of time. This point is illustrated in the case of \textit{Mersey Mutual Underwriting Association Ltd v Poland}\textsuperscript{364} where a vessel called Sunlight was insured under a time policy with the plaintiff underwriters. The plaintiffs then entered into a contract of reinsurance with the defendants, so that the Sunlight was covered for a port risks policy until leaving Shannon. When leaving Shannon, the Sunlight struck the bottom and was seriously damaged. The plaintiffs indemnified the owners of the Sunlight. But when the plaintiffs sought to recover on their port risks policy from the defendants, the defendants rejected their claims. The court held that the plaintiffs were not entitled to recover under the port risks policy on the basis that risks associated with the port terminated when the Sunlight left her moorings. In particular, as Hamilton J stated, ‘I think that the risk under a port risk policy ceases when the ship, being fitted and equipped for sea, and possessed of her clearances, crew, and,

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\textsuperscript{362} The wording ‘seaworthy for the port’ was stated by Lord Penzance in the case of \textit{Quebec Marine Insurance Co v Commercial Bank of Canada} (1870) LR 3 PC 234 at p 241.\textsuperscript{363} Susan Hodges, \textit{Law of Marine Insurance}, 1996, p 122.\textsuperscript{364} (1910) 15 Com Cas 205.
if necessary, her cargo, commences to navigate upon her voyage, and no longer remains moored in the port in the course of preparing for the voyage.\textsuperscript{365}

Furthermore, it is clear that the express wording ‘reasonably fit to encounter the ordinary perils of the port’ indicates that in order to determine the issue as to whether or not a particular vessel is portworthy, a number of factors should be taken into account. These factors would include the class of the vessel, different types of the port, different types of the year and the weather conditions. This means that the issue as to whether or not the warranty of portworthiness has been complied with is a question of fact. It is not surprising that port risks generally constitute a less serious hazard than that of the sea voyage. For this reason, the assured may find it easier to comply with the warranty of portworthiness as opposed to the warranty of seaworthiness. Additionally, as regular surveys and controls are carried out by classification societies, complying with the warranty of portworthiness may not be a heavy burden for the assured when the risk attaches. Therefore, it can be argued that the statutory requirement that the warranty of portworthiness must be complied with may sometimes be superfluous. As such, it is suggested by the author that in certain circumstances, the assured’s duty to comply with the warranty of portworthiness can be discharged. This means that the current section 39(2) of the 1906 Act should be modified in the following way:

\textit{In voyage policy and time policy, there is no implied warranty of portworthiness provided that regular surveys are carried out by an approved classification society.}

\textsuperscript{365} Ibid, at p 211.
6.3 Warranty of cargoworthiness

In contract of marine insurance, it is not sufficient for the assured to ensure that the ship is in a reasonably good condition to encounter the ordinary perils of the sea. The assured is also required to comply with the implied warranty of cargoworthiness, so that the original nature of the goods transported can be protected throughout the entire voyage. This warranty indicates that the ship must be fit enough to carry the contractual goods to the intended destination in a safe manner. In carriage of goods by sea, the requirement of cargoworthiness falls within the scope of the implied warranty of seaworthiness. This point is well illustrated in the Carriage of Goods by sea Act 1971. In contrast, in the law of marine insurance, the term ‘cargoworthiness’ is defined in a different way from the term ‘seaworthiness’. Evidently, the statutory definition of the term ‘cargoworthiness’ can be found in section 40(2) of the Marine Insurance Act 1906 which requires the ship to be reasonably fit, at the commencement of the voyage, to carry the goods or other moveables to the destination contemplated by the policy. It can be seen from this subsection that whether or not a vessel is sufficiently fit to carry the particular kind of cargo to the destination contemplated by the policy would depend on the vessel’s physical state which includes the design of the ship and the equipment available on the ship. So while a ship may be reasonably fit to carry frozen meat, the ship would probably be uncargoworthy for the transport of steel rails. By way of example, in the case of Sleigh v Tyser, it was held that to be considered as cargoworthy, a vessel carrying livestock was required to have sufficient ventilation and stockmen to care for the cargo.

\footnote{In particular, Rule 1 of Article III of the Carriage of Goods by Sea Act 1971 provides that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (a) make the ship seaworthy; (b) Properly man, equip and supply the ship; (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.}{366}

\footnote{[1900] 2 QB 333.}{367}
But it should also be emphasized that the warranty of cargoworthiness only applies at the time the voyage commences. So like the warranty of seaworthiness, the fact that the ship is uncargoworthy after the commencement of the voyage does not mean that the warranty of cargoworthiness is breached. This rule is introduced in accordance with Rule 1 of Article III of the Carriage of Goods by Sea Act 1971 which provides, in relevant part, that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. In other words, if the cargo was damaged as a result of the uncargoworthiness of the vessel at one point during the sea voyage, the insurer will still be liable to indemnity the assured for the damage of the cargo, provided that the warranty of cargoworthiness has been complied with at the commencement of the voyage.

While the application of the warranty of cargoworthiness has been made clear in section 40(2) of the 1906 Act, it has failed to take into account the issue as to the vessel’s physical state to carry the particular kind of cargo in time policies. In the absence of such a statutory rule, it is not surprising that the insurer does not wish to accept loss or damage of the cargo if the ship is unsuitable for the transport of a particular type of cargo in time policies. In order to ensure that the cargo transported is well protected, it is suggested by the author that the warranty of cargoworthiness should also apply to time policies. However, as far as time policy is concerned, the ship may be insured for only one calendar month which should be regarded as a short period of time. It is also likely that the ship is insured for a long period of time, such as one year. As such, it would be unreasonable to require the assured to ensure that the ship is cargoworthy, especially when the ship is insured for a long period of time. This is because such an obligation would be a heavy burden for the assured. But in the opinion of the author, this does not mean that the
assured should not be required, under the 1906 Act, to comply with the warranty of cargoworthiness in time policies. Logically, it would be easier for the assured to comply with the warranty of cargoworthiness while the ship is moored at a port. This is because in such a case, the cargo will need to be protected by necessary equipment which can be easily loaded onto the ship, such as refrigerating machinery. But this may not be the case after the ship has commenced her voyage. Put another way, during the ocean transit, it would be almost impossible to load necessary cargo equipment onto the ship or maintain the cargo equipment in good condition.

Therefore, in order to achieve fairness between the assured and the insurer, in the opinion of the author, the warranty of cargoworthiness should also apply to time policies, but it should apply only when the ship is moored at a port. As such, it is proposed by the author that an additional sentence should be inserted into section 40(2) of the 1906 Act, so that the new version of section 40(2) of the 1906 Act should be introduced in the following way:

In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy. In a time policy, there is an implied warranty that the ship is reasonably fit to carry the goods or other moveables only when the ship is moored at a port.

6.4 Warranty of legality

In order to ensure that the subject matter insured is well covered by the insurer, the assured must also comply with the implied warranty of legality
which is spelt out in section 41 of the Marine Insurance Act 1906. In more specific terms, this section provides that there is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner. As far as this section is concerned, it is clear that not only the subject matter insured must be legal, but also the adventure insured must be legal and must be performed legally. It can be seen from the express wording of this section ‘the adventure shall be carried out in a lawful manner’ that the warranty of legality is a continuing warranty, so that as long as the assured can control the matter, the warranty of legality will be breached if there is any subsequent illegality which arises during the currency of the policy. In addition, unlike other types of the implied warranty which apply only in voyage policies, the warranty of legality applies to voyage policy as well as time policy. This is because the term ‘adventure’ used in this section clearly covers the term ‘voyage’. To be more specific, section 41 of the 1906 Act should be divided into 2 aspects of law, namely the legality of the adventure and the performance of the adventure.

Where the adventure insured is illegal from the outset, the assured will be in breach of the implied warranty of legality. This aspect of law is illustrated in the case of *Redmond v Smith*. In this case, as Chief Justice Tindal said, ‘A policy on an illegal voyage cannot be enforced; for it would be singular, if, the original contract being invalid and incapable to be enforced, a collateral contract founded upon it could be enforced. It may be laid down, therefore, as a general rule, that, where a voyage is illegal, an insurance upon such voyage is illegal.’ In order to determine the issue as to whether or not a violation of a particular statute or regulation would constitute an illegal marine adventure, the statute or regulation in question has to be interpreted by the courts. If the intention of the legislator is to prohibit such an adventure, there will clearly be a

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368 It has been confirmed by the Court of Appeal in the case of *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 that there is no implied warranty of legality in non-marine insurance contracts.

369 (1844) 7 Man & G 457.
breach of the warranty of legality. In cases where the degree of the breach of the statute or regulation would only constitute the infliction of a penalty, the insurer will not be entitled to deny the assured’s claim by reason of a breach of the warranty of legality.370

Another situation where a marine adventure insured may be rendered unlawful is when trading with a particular country is prohibited by international law. By way of illustration, under the UN Resolution 1990/661, an embargo was introduced by the United Nations (UN), so that trading with Iraq was prohibited, and all the members of the UN were required to enact legislation that complies with the embargo of the UN. In this situation, the implied warranty of legality will be breached by the assured where a voyage sailing to that country was insured under the policy.

In order to ensure that the adventure insured is a lawful one, the assured must also prepare a valid safety management certificate and document of compliance showing that the management system of the ship insured complies with the requirements of the International Safety Management (ISM) Code.371

The second part of section 41 of the 1906 Act also requires the adventure insured to be performed legally if the assured is able to exercise control over the matter. This aspect of law indicates that in order to ensure that there is no breach of the implied warranty of legality, statute or regulation should not be violated during the performance of the adventure. A typical example of this aspect of law is demonstrated in the Canadian case of James Yachts Ltd v Thames & Mersey Marine Insurance Co Ltd and Others372 where the assured violated the bylaws and regulations of the local authority during the performance of the adventure insured. Ultimately, the Supreme Court of British Columbia held that the performance of the adventure insured was illegal on the

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basis that according to the objective of these regulations the performance of such a business in that particular place was prohibited.

Under the second part of section 41 of the 1906 Act, the issue as to whether or not the assured is able to control the matter is a question of fact. So in the case of *Pipon v Cope*,\(^{373}\) the crew members had committed repeated acts of barratry on three consecutive voyages. In such a situation, it was held that the shipowner was not entitled to argue that the matter was beyond his control, because he was under an obligation to ensure that the adventure insured was performed in a lawful manner.

As far as the warranty of legality is concerned, another issue that must be considered here is when the parties enter into an insurance contract that involves foreign elements. In such a case, the issue as to which set of legal rules govern the transaction would arise. Depending on the choice of law agreement of the contract, such an issue should be determined by the contracting parties through the concept of party autonomy which refers to the power of the parties to a contract to choose the law that governs that contract, such that the principle of the choice of law comes into play to reconcile the differences between the laws of different legal jurisdictions. However, if the parties choose a foreign law as their applicable law by virtue of the concept of party autonomy with the intention to avoid the mandatory applicability of certain legal rules, such as the Hague-Visby Rules, the choice of law agreement would be considered void by the courts. This issue arose in the case of *The Hollandia*\(^{374}\) where the House of Lords made it clear that the Carriage of Goods by Sea Act 1971 gives effect to the Hague-Visby Rules, which have the force of law in the United Kingdom (UK). In this case, the House of Lords held that a choice of forum clause in a bill of lading would not be given effect to by English Court if its enforcement would result in the Hague

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\(^{373}\) (1808) 1 Camp 434.

\(^{374}\) [1983] 1 AC 565.
Visby Rules not being applied. According to the House of Lords, by virtue of Rule 8 of Article III of the Carriage of Goods by Sea Act 1971, the choice of forum clause would be null and void if its application had the effect of lessening the liability of the carrier as compared with the standard of liability under the Hague-Visby Rules. Therefore, it can be seen from this case that applying this type of clause to the insurance contract should be considered as an action which must be invalidated by the courts.

In addition to the statutory rule as to the implied warranty of legality as appears in section 41 of the 1906 Act, it has been developed as a common law principle that breach of the implied warranty of legality cannot be waived. This common law rule indicates that section 34(3) of the 1906 Act does not apply to breach of the implied warranty of legality. Indeed, this point is demonstrated in the case of Gedge v Royal Exchange Assurance Corp where a breach of the implied warranty of legality was involved in this case. The insurer attempted to rely on the concealment of material fact as a defence to deny liability rather than illegality. However, according to the decision of the court, illegality would render the whole contract void, regardless of whether the insurer uses any other defence for the denial of liability. In more specific terms, as the court stated in this case:

‘No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly

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375 Rule 8 of Article III of the Carriage of Goods by Sea Act 1971 provides that any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

376 [1900] 2 QB 214.
brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.’

In general, it is clear that the current implied warranty of legality as appears in section 41 of the 1906 Act has been appropriately introduced as a statutory rule, in the sense that the courts should not assist the assured who has committed any illegal act to gain advantage in respect of the adventure insured or the performance of the adventure. Nevertheless, as far as section 41 of the 1906 Act is concerned, the problem may arise as to whether the adventure insured or the performance of the adventure must also be legal according to the law of another state.377

As the Marine Insurance Act 1906 was enacted in the UK, it is clear that under this section, the common law and statute law of England will play a crucial role in order to determine whether or not the adventure insured or the performance of the adventure is legal. But this section has failed to address the issue as to whether any adventure contravening a foreign law will constitute a breach of the implied warranty of legality. It can be argued that in such a case, a breach of the implied warranty of legality will also need to affect the contract of insurance. The rationale behind such a view is that the assured should have no excuse to argue that he is not aware of the current statute laws of other states. This view suggests that apart from English laws, the assured is also under an obligation to ensure that any foreign laws which are directly connected with the adventure insured or the performance of the adventure are complied with. This means that any foreign laws which are in no way

377 This point was considered by Lord Mansfield during the 18th century when he sat on bench. Evidently, in the case of Planche v Fletcher (1779) 1 Doug! 251, Lord Mansfield stated: ‘The courts in this country do not take notice of foreign revenue law.’ However, as far as the laws of a foreign state are concerned, the decision of this case cannot be justified nowadays. This proposition has been proved by the House of Lords in the case of Regazzoni v KC Sethia (1944) Ltd [1958] AC 301 where Viscount Simonds said that: ‘Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign State and it will do so because public policy demands that deference to international comity.’
connected with the adventure insured or the performance of the adventure fall outside the scope of the warranty of legality. Ignorance of foreign laws on the part of the assured may adversely affect the friendly relationship between states in the long term. Therefore, it is suggested by the author that taking notice as to any foreign laws in respect of the marine adventure should be placed into section 41 of the 1906 Act as another statutory requirement. In consequence, in the view of the author, the amended version of section 41 of the 1906 Act should be introduced to read as follows:

There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner. The obligation to comply with this warranty applies to English law and foreign laws which only regulate the adventure insured or the performance of the adventure.

6.5 Warranty of seaworthiness

6.5(1) General issues as to the warranty of seaworthiness

It is a widely acknowledged fact that the seaworthy state of the ship plays a crucial role for the purpose of ensuring that the ship, cargo, environment and human life are not exposed to danger during the ocean transit. It is for this reason that in English marine insurance law, another type of implied warranty, that is, the warranty of seaworthiness, has been introduced into the Marine Insurance Act 1906. In England, an absolute warranty of seaworthiness implied by law has been widely applied to contracts of affreightment and marine insurance since the 19th century. In contrast, under the Carriage of
Goods by Sea Act 1971, the duty to provide a seaworthy ship is relative, as the carrier is only required to exercise due diligence to provide a seaworthy ship.

It has been generally accepted that the warranty of seaworthiness is the most important type of implied warranty in contracts of marine insurance. The reason for this is that the issue as to whether or not the insured ship is suitable to sail to the intended destination has a direct impact on the insurer’s liability to indemnify the assured for any potential loss or damage to the ship or the cargo. This point can be proved by section 39(1) of the 1906 Act which specifies that in a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. This subsection clearly indicates that the warranty of seaworthiness applies to voyage policies, regardless of the subject of insurance, so that voyage policies insuring the ship, freight or any other goods are all subject to the warranty of seaworthiness under this subsection. So in general, the shipowner or the assured’s claim for the loss or damage to the insured ship or the cargo under a marine insurance policy may be denied by the insurer if the ship concerned was unseaworthy regardless of whether the assured was negligent or not, unless the warranty of seaworthiness was subsequently waived by the insurer under section 34(3) of the Marine Insurance Act 1906. Additionally, it must also be noted that if the unseaworthiness of the ship is caused or brought about by the negligence of the master or latent defects in the machinery or hull, under the Inchmaree Clause, the insurer will not be entitled to deny liability as a result of such

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378 Rule 1 of Article III of the Carriage of Goods by Sea Act 1971 provides that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy.
380 The origin of the Inchmaree Clause appeared in the case of Thames & Mersey Marine Insurance Co Ltd v Hamilton Fraser & Co (1887) 12 App Cas 484. Since this case, some new clauses were introduced into the marine policy, so that shipowners were given the additional coverage against losses
unseaworthiness. Nevertheless, if the assured is aware of the negligence of the master or a latent defect, the loss or damage will not be recoverable even if it falls within the scope of the Inchmaree Clause.381

Due to the practical importance of the warranty of seaworthiness, express seaworthiness clauses are often incorporated into marine hull insurance policies. However, the general legal principles relating to the warranty of seaworthiness may vary depending on the terms of the policy in issue, such as in the case of the Institute Cargo Clauses and Institute Hull Clauses. The general principles relating to the warranty of seaworthiness, as contained in section 39 of the 1906 Act, have received judicial attention in a number of aspects which will be evaluated by the author from the next section.

6.5(2) Statutory definition as to the term ‘seaworthiness’

The first issue in relation to the warranty of seaworthiness may arise as to the meaning of the term ‘seaworthiness’. In reality, it is not surprising that the term ‘seaworthiness’ may cause confusion as far as lay people are concerned. For the non-jurists, the term ‘seaworthiness’ has been defined as ‘the fitness of a vessel in all respects to undertake a particular voyage which is a matter of concern to shipowners who contract for carriage of goods by sea, and marine insurance underwriters.’382 A similar definition of the term ‘seaworthiness’ has been provided in section 39(4) of the Marine Insurance Act 1906. Under this subsection, in order for a ship to be considered seaworthy, the ship must be ‘reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured’. At the outset, it is necessary, at this stage, to consider the

resulting from the loss or damage to the machinery or hull through the negligence of the master, or the latent defects in the machinery or hull, provided that such loss or damage was not the result of the assured’s want of due diligence. These clauses have been known as Inchmaree Clauses and appeared in Clause 6.2 of ITCH(95) and Clause 4.2 of IVCH(95).

meaning of the phrase ‘reasonably fit in all respects’ in this subsection. In fact, the word ‘reasonably’ clearly indicates that the ship insured does not have to be in a perfect condition to perform a particular voyage. In other words, it is sufficient that the ship provided by the assured is suitable for the intended voyage as stipulated in the insurance policy. This point is supported by the case of *President of India v West Coast Steamship Co*[^383^] where District Judge Kilkenny held that the standard required for a ship to be seaworthy ‘is not an accident-free ship, nor an obligation to provide ship or gear which might withstand all conceivable hazards. In the last analysis the obligation, although absolute, means nothing more or less than the duty to furnish a ship and equipment reasonably suitable for the intended use or services.’[^384^]

Moreover, the phrase ‘ordinary perils of the seas’ as appears in section 39(4) of the 1906 Act is another aspect of law which must be examined in detail. The phrase ‘ordinary perils of the seas’ suggests that the implied warranty of seaworthiness will be satisfied if the ship insured has the ability to withstand ordinary weather conditions during the course of the voyage. This means that as far as the warranty of seaworthiness is concerned, the ship in issue is not required to withstand the stress of wind or waves that are not expected for a particular voyage. Nevertheless, the fact that a ship is in a seaworthy state for a particular voyage does not necessarily mean that the ship is seaworthy in another voyage. Equally, different time of year is indeed another factor which must be taken into account when considering whether or not a particular ship has in fact satisfied the seaworthiness requirement. By way of example, a ship may be seaworthy for a summer voyage, but unseaworthy for the same voyage undertaken in winter times, because she may be in an unseaworthy condition to encounter perils under severe weather conditions, such as strong wind and waves or iceberg. Another factor which

[^384^]: Ibid, at p 281.
would affect the seaworthy state of the vessel is the different types of navigational water she would sail in. As a result, a higher standard of seaworthiness is required for a vessel which sails in ocean or sea voyages than a vessel which sails in inland waters. Thus, it can be seen from the above analysis that the term ‘seaworthiness’ is a relative and flexible term. The issue as to whether or not a ship is seaworthy would depend on the nature of the ship, the nature of the designated voyage concerned, different seasons and other surrounding circumstances. The 1906 Act has defined seaworthiness by using broad terms, such as the phrase ‘in all respect’, and as a result, the courts have the discretion to determine the issue as to what would constitute seaworthiness in each case, having regard to the facts and the circumstances surrounding each case.  

In practice, the seaworthy state of a ship may be affected by a number of internal factors. Generally speaking, these factors would include the design and construction of the ship; the machinery and other technical equipment which are closely related to the use of the ship; the navigational aids; sufficiency and competence of the crew; the appropriate documents ensuring that the ship can enter and leave the ports without any problem, sufficient amount of fuel or coal and stowage, the loading of the cargoes and the adequately trained master.

More specifically, in order to be considered seaworthy, the physical condition of the ship must be in good order. In this respect, the vessel’s hull,

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386 In the UK, apart from the master of the ship who manages the ship and keeps the ship’s record, there are generally two types of qualified seamen, namely an able-bodied seafarer which is also called Seaman Grade 1, and an ordinary seafarer which is also known as Seaman Grade 2. While an able-bodied seafarer is a member of the deck crew, an ordinary seafarer has less experience and spends less time on the ship than an able-bodied seafarer.

machinery, hatches, pipes, pumps, tackle and steering mechanism, as well as other technical equipment, must be tight and in good working condition. For instance, in the case of *The Theodegmon*,\(^{388}\) the failure of the steering gear caused the stranding of the ship, and as a result, the ship was held to be unseaworthy. In similar vein, in the case of *The Makedonia*,\(^{389}\) it was held that the inefficient chief engineer was a factor that rendered the ship unseaworthy.

The above analysis clearly shows that the assured or the shipowner is under an onerous obligation to ensure that the ship is in a seaworthy status by taking into account all the surrounding circumstances. It is indisputable that this would be a heavy burden for the assured or the shipowner. This is clearly unfair for the assured who will be placed under enormous pressure, and at the same time, he must also bear the risk of the loss of the ship or cargo if he has failed to satisfy the seaworthiness requirement in any respect, even after the premium has been paid to the insurer. For this reason, in the opinion of the author, the implied statutory obligation to satisfy the seaworthiness requirement should be eased by amending the statutory definition of the term ‘seaworthiness’ under section 39(4) of the Marine Insurance Act 1906. In particular, according to the author’s point of view, a ship must sail with a sufficient number of crew members, and these crew members must be competent so as to deal with any serious or dangerous incident which is likely to affect the ability of the ship to sail to the intended destination.

Apart from this statutory requirement, it is suggested by the author that as far as the ship insured has the ability to commence the intended voyage, the seaworthiness requirement should be deemed to be satisfied. However, this does not mean that the external factors which are likely to affect the fitness of the ship during the voyage, such as the nature of the voyage and different time of year, should not be considered. As a result, there is no doubt to say that the

\(^{388}\) [1990] 1 Lloyd’s Rep 52.

seaworthiness of the ship would include not only external factors, but also internal factors, such as the physical condition of the ship. But as far as internal factors are concerned, it would be rather difficult, though not impossible, for the assured to ensure that every part of the ship is strong and tight enough to withstand the ordinary perils of the seas. In similar vein, it would be unreasonable to require the assured to provide a ship with all the necessary equipment in good working order. In contrast, a different statutory obligation in respect of seaworthiness can be found in Rule 1 of Article III of the Carriage of Goods by Sea Act 1971 which requires the shipowner to make the ship seaworthy and fit to receive and carry cargo. This statutory obligation is sufficiently wide to include the fitness of the ship to receive and carry cargo. However, as the issue of seaworthiness and cargoworthiness are dealt with separately under the Marine Insurance Act 1906, a fair and reasonable statutory definition of seaworthiness, as opposed to the statutory obligation under the Carriage of Goods by Sea Act 1971, should be introduced into the 1906 Act.

In consequence, taking all these perspectives into account, it is proposed by the author that the problem as to the unfairness and uncertainty of the seaworthiness obligation, as appears in section 39(4) of the 1906 Act, should be removed from this subsection, so that a new subsection should be introduced to replace the existing one. The ultimate effect of such a law reform proposal is that both the internal factors including the sufficiency of the crew and all other relevant factors which may affect the seaworthiness of the ship and external factors including the nature of the voyage and different seasons should be taken into account in order to determine whether a particular ship is seaworthy. Obviously, under this statutory reform proposal, the assured would be required to comply with a more onerous statutory obligation. However, in the author’s view, the proposed statutory definition of the term ‘seaworthiness’ would provide a fair solution to the existing problem and enable the assured to
understand how to satisfy the statutory seaworthiness obligation, so that any uncertainty as to the performance of the seaworthiness obligation can be removed. As such, it is suggested by the author that the amended version of section 39(4) of the 1906 Act, which provides a more appropriate statutory definition of the term ‘seaworthiness’, should be introduced to read in the following way:

_Taking external factors into account, a ship, with sufficient number of crew, is deemed to be seaworthy if she has the ability to commence the voyage as contemplated by the policy._

6.5(3) Definition of the term ‘seaworthiness’ at common law

In certain circumstances, the term ‘seaworthiness’ is also defined under common law, in a similar fashion as defined in section 39(4) of the Marine Insurance Act 1906, in order to assess whether or not a ship is in a seaworthy state to commence her voyage, taking into account all the surrounding factors. The common law test relating to the seaworthy state of a ship applies an objective test by looking at the state of mind of the ordinary, careful and prudent shipowner at the time he sends the ship to sea. Unlike a subjective test, as far as the common law test of seaworthiness is concerned, it is no defence for the shipowner to argue that he did not intend to provide an unseaworthy ship for the intended voyage. This issue was considered in the case of _Steel v State Line Steamship Co._

In this case, Lord Blackburn expressly pointed out that the implied obligation to provide a seaworthy ship under common law constituted an undertaking ‘not merely that they should do their best to make the ship fit, but that the ship should really be fit.’

The decision of the court in this case indicates that the duty of seaworthiness at common law constitute an absolute obligation. This means that ‘if the ship is in

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390 (1877) 3 App Cas 72.
391 Ibid, at p 86.
fact unfit at the time when the seaworthiness obligation begins, it does not matter that its unfitness is due to some latent defect which the shipowner does not know of, and it is no excuse for the existence of such a defect that he used his endeavours to make the ship as good as it could be made’.\textsuperscript{392} But the standard for the seaworthiness is a relative one, in the sense that the ship provided by the shipowner does not have to be in a perfect condition. In order to be considered seaworthy, the ship concerned and its equipment needs only to be reasonably fit to enable the ship to reach the intended destination.\textsuperscript{393} It follows from these two aspects of law that under common law, the seaworthiness obligation is considered as both absolute and relative. The standard that the ship must meet in order to be seaworthy is relative. But the shipowner’s obligation to make the ship fit for the intended purpose is absolute. At common law, another feature of the duty to provide a seaworthy ship is that such a duty is absolute and non-delegable, so that it is no defence for the shipowner to argue that the unseaworthy condition of the vessel is caused by a third party, rather than the shipowner.

It has been recognised under common law that the legal effect for the breach of the seaworthiness obligation may vary depending on the seriousness of the breach. In certain circumstances, the cause of the unseaworthiness may be so trivial that it can be remedied quickly without delay, such as an open hatch. On the other hand, other factors may also constitute unseaworthiness, and these factors can be so serious that they cannot be remedied within a reasonable time, and these factors would render the ship unfit for its intended purpose and deprive the cargo owner from the whole benefit of the contract. Therefore, under common law, in order to determine the issue as to whether or not the seaworthiness obligation is breached by the carrier, a legal test has been established. As far as the test is concerned, the

\textsuperscript{392} McFadden v Blue Star Line [1905] 1 KB 697, at p 703.
relevant question that must be considered is whether the unseaworthiness deprived the cargo owner substantially from the whole benefit of the contract. If the answer is yes, then the cargo owner will be entitled to terminate the contract. This test has been applied in the case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[^394] where it was confirmed by Lord Diplock that the carrier’s obligation to provide a seaworthy ship could be classified as an innominate or intermediate term which fell between warranty and condition. This means that the common law obligation to provide a seaworthy ship is absolute, as this obligation indicates that the ship provided by the assured must be fit in an objective sense. But the breach of this obligation may, depending on the seriousness of the breach, lead to different legal consequence. This means that the nature of the problem and the speed to remedy it should be taken into account in order to determine whether the carrier’s obligation to provide a seaworthy ship has been breached.[^395]

At common law, there is an implied obligation which requires the shipowner to provide a seaworthy ship in contract of affreightment. So in the case of *Kopitoff v Wilson*,[^396] Field J expressly stated that the carrier should provide a vessel ‘fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage’[^397]. Under this implied obligation, the shipowner must ensure that his ship, with sufficient number of crew and sufficient amount of fuel, is suitable to commence the intended voyage. But another issue that is relevant for consideration at this point is the application of the duty of seaworthiness. Such an issue was highlighted in the case of *Maxine Footwear Co Ltd v Canadian*

[^396]: (1876) 1 QBD 377.
[^397]: Ibid, at p 380.
Government Merchant Marine Ltd\textsuperscript{398} where the court made it clear that by virtue of Rule 1 of Article III of the Carriage of Goods by Sea Act 1971, the duty of the carrier to provide a seaworthy ship applied from the commencement of loading until the commencement of the voyage. Consequently, the carrier owed a duty to the shipper to exercise due diligence to ensure that the ship remained seaworthy throughout this period.

In addition to this legal requirement, in order to be considered seaworthy, the shipowner must also provide the facility necessary and appropriate for the carriage of the cargo.\textsuperscript{399} Thus, it has been held that the unfitness of the hull to receive cargo could also be a factor which rendered a ship unseaworthy.\textsuperscript{400} It can be seen from this perspective that the common law obligation requiring the shipowner to provide a seaworthy ship is far too harsh for the shipowner. The reason for this argument is that it would be unreasonable for the concept of seaworthiness to include the fitness of the ship to receive and carry cargo. Put another way, the fact that the ship is unsuitable to carry the cargo does not necessarily mean that the ship is unable to withstand the ordinary perils of the seas. The unfairness on this aspect of law appears in the old case of \textit{Stanton v Richardson}\textsuperscript{401} where the shipowner contracted to carry wet sugar, but the ship was not in a good condition to carry it. The court held that the shipowner had an obligation to ensure not only that the ship was in a seaworthy condition, but also that the ship was fit to receive and carry the cargo. The decision of this case indicates that this common law rule would place the shipowner under a more onerous seaworthiness obligation. It is also likely that the shipowner’s commercial interest will be unfairly prejudiced as a result of a minor breach of the seaworthiness obligation. Therefore, in the view of the author, the obligation of the assured to ensure that the ship is fit to carry the cargo should

\begin{itemize}
\item \textsuperscript{398} [1959] AC 589.
\item \textsuperscript{400} \textit{Rathbone Brothers v Mackver} [1903] 2 KB 378.
\item \textsuperscript{401} (1872) LR 7 CP 421, affd (1874) LR 9 CP 390.
\end{itemize}
be dealt with as a separate common law principle in order to mitigate the harshness of the seaworthiness obligation. As such, the breach of such a common law obligation, on the part of the shipowner, should lead to less serious legal consequence than the breach of the implied obligation to provide a seaworthy ship. In more specific terms, it is suggested by the author that the shipowner will only be required to pay damages if the ship he has provided is unsuitable to receive or carry the cargo to the intended destination.

6.5(4) The application of the warranty of seaworthiness under section 39(1) of the Marine Insurance Act 1906

Having examined the statutory definition of the term ‘seaworthiness’, the next issue that should be borne in mind is when the warranty of seaworthiness applies under section 39 of the 1906 Act. Put another way, as far as the assured is concerned, he will be interested to know what he has to do in order to satisfy the statutory requirement to provide a seaworthy ship, and when the implied obligation to comply with this warranty will terminate. Obviously, the application of the warranty of seaworthiness is expressly stated in section 39(1) of the 1906 Act which provides that in a voyage policy, there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. It can be seen from the phrase ‘at the commencement of the voyage’ that the ship concerned should only be seaworthy at the time as she sets sail.\(^{402}\) This point indicates that the ship does not have to be seaworthy for the entire voyage. As such, the assured will only be required to comply with the warranty of seaworthiness by ensuring that the ship he has provided is seaworthy for the voyage insured

\(^{402}\) It has been pointed out by Dr Baris Soyer that the voyage may be considered as commenced when the ship sails, or alternatively, when she leaves the port and proceeds to open sea. However, it should be noted that mere movement of the ship does not mean that the ship has commenced the voyage. For a detailed discussion of this issue, see *Sea Insurance Co v Blogg* [1898] 2 QB 398.
when she sails on it. It can be seen from this perspective that there is no implied warranty that the ship should continue to be seaworthy. This aspect of law was originally established by Lord Mansfield in the 18th century. In particular, as Lord Mansfield stated, 'every ship must be seaworthy when she first sails on the voyage insured, but she needs not continue so throughout the voyage.'

As far as this aspect of law is concerned, the position appears to be different in respect of Rule 1 of Article III of the Carriage of Goods by Sea Act 1971 where exercising due diligence to provide a seaworthy ship on the part of the shipowner applies before and at the commencement of the voyage. So it is clear that the statutory obligation to provide a seaworthy ship under the Carriage of Goods by Sea Act 1971 is wider in scope than the application of the warranty of seaworthiness as appears in section 39 of the Marine Insurance Act 1906.

Despite the fact that the statutory rule as to the application of the warranty of seaworthiness has survived for more than hundred years, in the opinion of the author, the law is likely to cause unfairness as far as the insurer is concerned. The rationale for such a view is that requiring the assured to comply with the warranty of seaworthiness only at the commencement of the voyage would mean that the assured’s statutory obligation in respect of seaworthiness can be easily discharged, and as a result, there will be a high possibility that the insurer is required to indemnify the loss of the subject matter. This is particularly unfair for the insurer where the vessel insured is lost or damaged soon after the commencement of the voyage, because in such a case, there is a high possibility that the vessel insured is unseaworthy at the time she commences the voyage. Therefore, in order to remove the unfairness from the current section 39(1) of the 1906 Act, a new statutory requirement

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404 Bermont v Woodbridge (1781) 2 Doug 781 at p 788. A similar decision was reached in the case of Watson v Clark (1813) 1 Dow 336.
should be introduced into this subsection. In the opinion of the author, during the voyage, the seaworthy condition of the vessel should be associated with different weather conditions. It follows from this perspective that during the voyage, the assured should, under the new statutory requirement, ensure that the vessel insured remains its seaworthy state under ordinary weather conditions. But this does not mean that the assured must also ensure that the vessel is seaworthy under extraordinary weather conditions. Last but not least, the issue as to whether a particular weather condition is ordinary or extraordinary should be considered as a question of fact, and such an issue should be left to the court to determine. In more specific terms, this proposed statutory rule should be inserted into section 39(1) of the 1906 Act in order to balance the interests between the insurer and the assured, so that the amended version of section 39(1) of the 1906 Act should be introduced to read in the following way:

In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. During the voyage, the ship must remain its seaworthy state under ordinary weather conditions.

6.5(5) The application of the doctrine of stages as appear in section 39(3) of the Marine Insurance Act 1906

In some cases, the distance of the voyage may indicate that it would be impossible for the ship insured to proceed directly to the intended destination as shown in the policy. In a voyage policy, this is particularly the case where the intended voyage is so long that the ship is unable to reach the intended destination with sufficient amount of bunkers or fuel. In such a situation, it would be necessary for the ship to call at intermediate ports to obtain more bunkers, fuel or other necessary equipment in order to complete the voyage. It
is for this reason that the Marine Insurance Act 1906 has established another well-known principle, that is, the doctrine of seaworthiness by stages. In more specific terms, this doctrine is expressly defined by section 39(3) of the 1906 Act which states: Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

Originally, the doctrine of stages was established in the 19th century. The doctrine was said to have created in the case of Bouillon v Lupton\(^\text{405}\) where a vessel was insured under a voyage policy from Lyons to Galatz. The assured had warranted to the insurer that the vessel was to sail before a specific date. The vessel left Lyons on time with full equipment for the river voyage to Marseilles, but not for the sea voyage thence to Galatz. In accordance with international shipping practice, the vessel was then rigged out for the sea voyage in Marseilles with the result that the ship had sailed after the warranted sailing date as specified in the policy. The court held that as the distance of the voyage was so long, it was impossible not to divide the entire voyage into two different stages, so that the implied warranty of seaworthiness had not been breached by the assured on the ground that the vessel in question had been reasonably fit for each stage of the voyage at the commencement thereof.

The doctrine of stages was subsequently observed in a number of cases decided in the early 20th century. By way of illustration, in the case of Greenock SS Co v Maritime Insurance Co,\(^\text{406}\) the application of the doctrine of stages was considered by Bigham J when he said: ‘But the warranty is one thing and the observation of it is another. It is clear that in such an adventure, it is practically impossible for the ship to sail with sufficient coal for the whole of the

\(^{405}\) (1863) 33 LJ CP 37.

\(^{406}\) [1903] 1 KB 367.
contemplated voyage. She would have to call at convenient ports on her route for the purpose of replenishing her bunkers, and therefore, though the warranty at starting is that she shall be seaworthy for the whole voyage, the warranty is sufficiently observed if the voyage is so arranged as that the ship can and shall coal at convenient ports en route." However, as far as English courts are concerned, the application of the doctrine of stages has been confined to commercial, physical or practical needs. Depending on the circumstances of each case, the application of the doctrine of stages is only limited to cases of refuelling, and when its application can be justified with regard to the surrounding circumstances, such as when ‘the ship requires different kinds of or further preparation or equipment’.408

In the opinion of the author, the application of the doctrine of stages under section 39(3) of the 1906 Act appears to be appropriate on the basis that the existence of long voyages and the different conditions and design of the ship would mean that it is more appropriate and necessary for the entire voyage to be divided into a number of different stages. To this end, it is clear that the doctrine of stages governed by section 39(3) of the 1906 Act has provided a flexible approach, so that the doctrine can be regarded as a statutory relaxation of the strictness of the implied warranty of seaworthiness. As such, requiring the assured to comply with the warranty of seaworthiness by stages would mean that the interest of the insurer is well protected for the voyage insured, in the sense that the doctrine minimises the risk of the insurer in respect of the subject matter insured. On the other hand, despite the strength of the doctrine of stages, another view expressed by the author is that the application of the doctrine of stages would mean that the statutory obligation to comply with the warranty of seaworthiness can be easily fulfilled by the assured on an unjust basis. The rationale for such a view is that according to

the doctrine of stages, the assured is only required to comply with the warranty of seaworthiness at the commencement of each stage. The potential unfairness in respect of the doctrine of stages may arise where the ship is permitted to complete the voyage through different stages. In this particular instance, if the ship is found to be unseaworthy soon after the voyage commences but before it reaches the first intermediate port, the insurer must still bear the risk of the loss or damage of the ship during this period by virtue of the doctrine of stages. As a result, it would not be surprising that the insurer is standing on an unfair disadvantageous position. In such a situation, it is suggested by the author that the insurer should be entitled to assume that the ship is unseaworthy at the commencement of the voyage if there is no clear evidence on the part of the assured to show that the loss or damage of the ship is caused by a peril of the sea insured against.

Apart from the above point of view, it would be extremely unfair for the insurer to indemnify the loss or damage of the ship, particularly where the voyage is so long and must be divided into different stages. This is because in such a case, the insurer must bear the risk for the loss or damage of the ship for a long period of time. In consequence, in order to ensure that the insurer’s commercial interest is well protected against unnecessary risk under the 1906 Act, it is suggested by the author that in order to comply with the warranty of seaworthiness by stages, the assured must also be obliged to comply with the warranty of seaworthiness between the time the voyage commences and the time the ship reaches the first intermediate port. Indeed, the above analysis clearly shows that the doctrine of stages as appears in section 39(3) of the 1906 Act should be modified to balance the conflicting interest between the insurer and the assured. Thus, it is suggested by the author that the current section 39(3) of the 1906 Act should be modified in the following manner:

Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further
preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage. **There is also an implied warranty that the ship shall remain its seaworthy state between the commencement of the voyage and the first intermediate port.**

6.5(6) The statutory rule of the warranty of seaworthiness in time policies and the concept of privity in section 39(5) of the Marine Insurance Act 1906

According to the above analysis, it is clear that the implied warranty of seaworthiness applies directly to voyage policies by virtue of section 39 of the 1906 Act. The rationale for this statutory rule is that under a voyage policy, it would be reasonably easy for the assured to exercise control over the ship before the ship commences the voyage, so that complying with the warranty of seaworthiness on the part of the assured should be regarded as a strict statutory requirement. But the issue may also arise as to whether or not the warranty of seaworthiness has a role to play in time policies.409 This issue has also been addressed in section 39(5) of the 1906 Act410 which can be divided into two parts. The first part of this subsection sets out the general principle that there is no implied warranty of seaworthiness in a time policy,411 whereas

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409 The statutory definition of the term ‘time policy’ is provided in section 25 of the Marine Insurance Act 1906 which states that where the contract is to insure the subject-matter for a definite period of time the policy is called a ‘time policy’. In general, a time policy is issued for the period of one year, but it may sometimes be issued for more than a year or be extended beyond a year to enable the ship to complete the voyage.

410 Section 39(5) of the Marine Insurance Act 1906 specifically provides that in a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

411 The rule that there is no implied warranty of seaworthiness in time policy was established before the enactment of the Marine Insurance Act 1906. Evidently, in the 19th century case of *Dudgeon v*
the second part specifies the special role which seaworthiness plays in a time policy.

As far as time policy is concerned, under section 39(5) of the 1906 Act, it has been established as another statutory rule that the issue of seaworthiness has no application in time policies. This is because the risk under a time policy commences on a particular date rather than on a particular voyage. However, common law has provided an exception to this rule, so that under common law, parties are at liberty to incorporate an express warranty of seaworthiness into time policies. That is to say, ‘just as it is possible for the parties in a voyage policy to negate the warranty of seaworthiness implied by section 39(1), it is also possible for the parties in a time policy to insert an express warranty of seaworthiness in spite of the statutory declaration that there is no implied warranty of seaworthiness in such a policy.’

Nevertheless, it can be seen from the subsequent wording of section 39(5) of the 1906 Act that the application of the warranty of seaworthiness does have a connection with time policies. In more specific terms, it declares that ‘but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.’ Therefore, it is clear that the warranty of seaworthiness has limited application in time policies in the sense that its application depends mainly on the requirement of the knowledge of the assured to the unseaworthiness of the ship at the time the ship is sent to sea and the issue as to whether any loss is attributable to the unseaworthiness.

_Pembroke_ (1877) 2 App Cas 284, it was observed as a common law principle that the implied warranty of seaworthiness did not apply to time policies.


At the outset, in order to determine the issue as to whether or not the warranty of seaworthiness applies to time policies, the privity of the assured to the unseaworthiness of the ship must be taken into account. It should be emphasized that according to case-law, the term ‘privity’ includes not only positive knowledge, but also knowledge that have been expressed by the courts as ‘turning a blind eye’. So in the case of *Compania Naviera Vascongada v British & Foreign Marine Insurance Co Ltd (The Gloria)*, it was held that the term ‘privity’ was not confined to the actual knowledge of the assured in respect of the unseaworthiness of the ship. More precisely, as Branson J expressly stated in this case, ‘I think that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy, and deliberately refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness of his ship. But the mere omission to take precautions against the possibility of the ship being unseaworthy cannot, I think, make the owner privy to any unseaworthiness which such precaution might have disclosed.’

Obviously, the decision of the court in this case indicates two points. The first point is that the insurer will be entitled to assume that the assured has knowledge as to the unseaworthiness of his ship if the assured deliberately turns a blind eye to the truth. The second point is that gross negligence or mere omission to take precautions on the part of the assured should not be equated with the knowledge that the ship is unseaworthy when she is sent to sea.

Indeed, subsequent court decisions have confirmed the proposition that the negligence of the assured for not knowing the unseaworthiness of the ship should be treated differently with the concept of privity as established in section 39(5) of the 1906 Act. So for instance, in the case of *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association*

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414 (1935) 54 LIL Rep 35.
415 Ibid, at p 58.
(Bermuda) Ltd (The Eurysthenes), the assured shipowner entered into an insurance contract with a P&I club to cover against the damage to or loss of the cargo. When much of the cargo was lost at sea, the assured sought to claim the loss from the insurer. But the insurer refused to indemnify the assured by relying on section 39(5) of the 1906 Act and arguing that the ship was sent to sea in an unseaworthy condition with the privity of the assured. In this case, it was stressed by Lord Denning that negligence in not knowing the truth is not equivalent to knowledge of it.  

In addition, in this case, another important point was considered by the Court of Appeal, that is, the extent to which the concept of privity applies. As far as this point is concerned, the Court held that that the relevant knowledge as to the unseaworthiness of the ship must be held either by the assured himself in the case of an individual assured or of his alter ego, and in the case of a company, the relevant knowledge refers to the knowledge possessed by the person who can be considered as the alter ego of the company. But the person who merely acted as the servants of the assured must be excluded from being the alter ego.

In reality, there are two situations to which the concept of privity applies. The most straightforward situation appears where the assured is an individual who runs his own business. In cases like this, the knowledge of that individual assured, as well as the alter ego of the assured, which consists of both positive knowledge and knowledge that could be expressed as ‘turning a blind eye’, should be taken into account in order to determine whether or not that individual assured is privy to the unseaworthiness.

A more complex situation may arise where the company is regarded as the assured when signing the insurance contract. In such a case, the task for the identification of the relevant knowledge within the company is based on the person who has direct control over the corporate policy, and such a person is

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417 Ibid, at p 66.
to be regarded as the *alter ego* of the company. Unlike an individual assured, the company is an artificial entity and does not possess any relevant knowledge. As such, the person who has direct control over the corporate policy should sign the insurance contract with the insurer. For this reason, the concept of the ‘directing mind and will’ of the company has been adopted through early case-law. This point can be found in the case of *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd*\(^{418}\) where the test of the ‘directing mind and will’ for attributing knowledge to the company was adopted by Viscount Haldane LC. This aspect of law indicates that a company’s ‘directing mind and will’ would normally be the company’s board of directors or the head men of the company who are in direct possession of executive powers in relation to the corporate management.

However, subsequent case-law has altered the concept of the ‘directing mind and will’ of a company. By way of illustration, in the case of *Meridian Global Funds Management Asia Ltd v The Securities Commission*,\(^ {419}\) the Privy Council replaced the concept of the ‘directing mind and will’ with a more flexible approach. The ultimate effect of such a replacement is that in certain circumstances where the company is regarded as the assured, the concept of privity is to be determined by the persons in the company who are directly involved in the decision making process as required for sending the ship to sea. This new approach suggests that the agent or employees of the company, as well as the board of directors, may also sign the insurance contract as the *alter ego* of the company.

As indicated earlier, the concept of privity includes not only positive knowledge, but also knowledge that could be expressed as ‘turning a blind eye’. This rule was observed in the case of *Manifest Shipping Co Ltd v*

\(^{418}\) [1915] AC 705.

\(^{419}\) [1995] 3 WLR 413.
Uni-Polaris Insurance Co Ltd (The Star Sea)

where a time policy was issued for the ship called ‘The Star Sea’. When the ship was sent to sea from Corinto in Nicaragua with a full cargo of bananas, mangoes and coffee, a fire accidentally started in the ship’s engine room. Due to the fact that the master was incompetent and did not know how to use the CO2 fire suppression system to pull out the fire, the fire soon spread to other parts of the ship. As a result, the ship was destroyed by fire as she approached to the Panama Canal and became a constructive total loss. The insurer refused to indemnify the loss of the assured’s ship on the ground that the assured was privy to the fact that the ship was unseaworthy when she was sent out to sea. In particular, the insurers alleged that the ship was made unseaworthy as a result of the ineffective sealing of the engine room. In addition, the insurers also contended that the ship was in an unseaworthy state on the basis that the master was incompetent in that he was unaware of the need to use the CO2 system as soon as he realised that the fire could not be fought in any other way.

In the High Court, it was held by Tuckey J that the fact of this case showed that the master did not want to know about the unseaworthiness of the ship, so that the master was held to have ‘blind eye knowledge’. As the master was the alter ego of the assured in the circumstances of the case, the court ruled that the assured was privy to the unseaworthiness. According to the High Court, the master showed suspicion as to the ship’s unseaworthiness, but deliberately decided not to take effective steps to remedy the unseaworthiness.

Nevertheless, on appeal, the decision of the High Court was overturned by both the Court of Appeal and the House of Lords. This is because there was no clear evidence to show that the assured suspected the incompetence on the part of the master of ‘The Star Sea’. In fact, the assured was only negligent in

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the sense that he failed to take positive steps to ensure that the master was aware of how to use the CO2 fire suppression system. As far as the issue of privity is concerned, in the House of Lords, Lord Hobhouse examined the assured’s state of mind in respect of the issue of privity. According to the House of Lords, in order to establish privity, the assured must have knowledge not only of the facts constituting unseaworthiness, but also knowledge that the ship is made unseaworthy as a result of those facts. His Lordship considered the obvious question as to why the assured did not check the condition of the ship. This point can be covered by two different situations. The first situation arises where the assured becomes aware of the unseaworthiness of the ship but deliberately chooses not to enquire and remedy the unseaworthiness. In such a situation, the privity of the assured to the unseaworthiness of the ship must be established. A different situation would also arise where the assured did not enquire because he was grossly negligent or believed that there is nothing wrong with the seaworthy state of the ship. In cases like this, there will be no privity on the part of the assured.

In the present case, Lord Hobhouse adopted a subjective test to consider the privity of the assured. The test is based on the assured’s actual state of mind at the time he sends the ship to sea. As the master of ‘The Star Sea’ did not have any knowledge as to how the CO2 fire suppression system works, this only constituted gross negligence of the master, and there was no room for the ‘blind eye knowledge’ to be established. Therefore, the insurer’s defence failed on the basis of the privity of the assured. In order to constitute ‘blind eye knowledge’, there has to be an appreciation of the problem and a decision not to address it for fear of what might be learnt on the part of the assured. To break it down, the test to be applied in order to establish privity in the form of ‘blind eye knowledge’ requires three elements. The first element is a suspicion of the fact giving rise to unseaworthiness. The second element is the knowledge that if such a fact existed, it would render the vessel unseaworthy.
Finally, there must also be a conscious decision not to solve the problem in relation to the ship.\footnote{Jeremy M Joseph, ‘The Implied Warranty of Seaworthiness in Marine Insurance’, [2002] MLJ xlix, p 5.}

Indeed, the issue of seaworthiness in time policies under section 39(5) of the 1906 Act has been regarded as appropriate by a number of scholars.\footnote{By way of example, it has been pointed out by Dr Baris Soyer that English law has implied a seaworthiness warranty in voyage policies and a somewhat lesser provision in respect of seaworthiness in time policies for the purpose of maintaining the balance between the assured and the insurer. But according to the author’s view, the current statutory rule for the seaworthiness obligation in time policies would cause unfairness to the insurer, because any negligent act of the assured may cause or contribute to the loss or damage of the ship. To make the insurer liable for the assured’s negligent act seems to be too harsh. If no statutory reform is carried out, it is very likely that the insurer would be reluctant to issue a time policy to the assured. Therefore, the author believes that a different statutory rule should be introduced into the 1906 Act to maintain a satisfactory commercial relationship between the parties.}

However, the requirement for the privity of the assured clearly indicates that the cover provided by the insurer would be lost only if the assured was privy to the unseaworthiness at the time he sends the ship to sea. So where the ship is sent to sea in an unseaworthy state due to the gross negligence of the assured, he can still claim loss or damage to the ship from the insurer even if he has no positive knowledge or blind eye knowledge to the unseaworthiness. In other words, according to the author’s view, the current section 39(5) of the 1906 Act would make it far too easy for the assured to discharge the seaworthiness obligation in time policies.

For this reason, with regard to time policies, the view expressed by the author is that the application of the seaworthiness obligation under section 39(5) of the 1906 Act should be extended to cover the commencement of the first stage of the adventure, regardless of the vessel’s sailing route. This view indicates that apart from the current seaworthiness obligation under section 39(5) of the 1906 Act, if the ship in issue is unseaworthy at the commencement of the first stage of the adventure, then, the insurer will also be entitled to deny
liability as to any loss or damage of the ship, provided that the loss or damage of the ship is caused by or attributable to the unseaworthiness. In such a situation, the liability of the insurer should be terminated irrespective of whether the assured is privy to such unseaworthiness. The reasoning behind such a view is that where the ship is lost or damaged at the commencement of the first stage of the adventure, it is very likely that the ship is in an unseaworthy condition at the time she sets sail. Thus, in such a case, even in the absence of clear evidence as to the cause of the loss, the insurer should be entitled to assume that the ship is in an unseaworthy state. It follows from this point of view that an additional sentence should be inserted into the second part of section 39(5) of the 1906 Act. As it stands, the new section 39(5) of the 1906 Act should be introduced to read in the following manner:

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

6.5(7) The meaning of the phrase ‘attributable to’ as appears in section 39(5) of the 1906 Act

As analysed in Chapter 2 of the thesis, according to the nature of express warranty, the rule that a causal connection between the breach and the loss does not have to be shown has been established as a common law principle. But the situation is different as far as the seaworthiness obligation in time policy is concerned. So under a time policy, in order for the insurer to escape from liability, he is also required to prove that the loss is attributable to
unseaworthiness rather than a peril of the sea. This rule has also been inserted into the second part of section 39(5) of the 1906 Act which provides, in relevant part, that but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. It can be seen from this statutory rule that the issue of causation does have a role to play in time policies concerning the seaworthiness obligation. This means that the insurer must bear the risk of loss in the absence of clear evidence that the loss was attributable to the unseaworthiness, even though the assured has been privy to the unseaworthiness when the ship was sent to sea. This statutory rule can also be contrasted with the implied warranty of seaworthiness in time policies as appears in section 39(1) of the 1906 Act where the issue of causation does not apply.

But under this part of section 39(5) of the 1906 Act, the issue as to the application of the term ‘attributable to’ has given rise to a number of controversial debates. That is to say, it would be rather difficult to ascertain the meaning of the term ‘attributable to’ in a legal context. According to the ordinary dictionary meaning, the term ‘attributable to’ simply means caused by.\textsuperscript{423} Nevertheless, in the context of marine insurance, the term ‘attributable to’ should not be equated with the term ‘caused by’. This is because if the term ‘attributable to’ is equivalent to the term ‘caused by’, the drafter of the 1906 Act would have simply use the term ‘caused by’ in this part of section 39(5) of the Act instead of ‘attributable to’ in order to avoid confusion.

Moreover, it should be emphasized that a cause of loss can be divided into two types, namely a proximate cause of loss and a remote cause of loss. According to Dr Susan Hodges, the term ‘attributable to’ covers not only the proximate cause of loss, but also the remote cause of loss. Put another way,

the term ‘attributable to’ is much wider in scope than ‘proximately caused by’ and will ensnare any loss which is in some measure (however minor or remote) brought about or contributed to by the unseaworthiness of the ship.\textsuperscript{424} It follows from this perspective that the ultimate effect of introducing the term ‘attributable to’ into section 39(5) of the 1906 Act is that as long as the loss was caused by the unseaworthiness to which the assured is privy when sending the ship to sea, the liability of the insurer would come to an end, even though the cause of the loss was remote. This point denotes that the liability of the insurer will be discharged if the unseaworthiness to which the assured is privy constitutes a cause of the loss, but the unseaworthiness that affects the liability of the insurer does not have to be the proximate cause under the condition of the privity of the assured.\textsuperscript{425} This issue may be demonstrated by a practical example. So let us suppose that in a time policy, if the ship, during any stage of the adventure, is lost due to a number of factors and one of them is unseaworthiness with the privity of the assured, he will not be entitled to claim the loss. It can be seen from this example that in time policies, unseaworthiness has a tangled relationship with perils of the sea in situations where both of them constitute the cause of the loss.\textsuperscript{426} But in certain circumstances where unseaworthiness itself constitutes the proximate cause of loss, the issue as to the privity of the assured to the unseaworthiness would become superfluous, as the insurer is not liable for any loss which is not proximately caused by an insured peril in accordance with section 55(1) of the 1906 Act.\textsuperscript{427}

\textsuperscript{424} Susan Hodges, \textit{Law of Marine Insurance}, 1996, p 138. The same view has been expressed by Howard Bennett.


\textsuperscript{427} In more specific terms, section 55(1) of the 1906 Act provides that subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately
However, although it is fair to say that the term ‘attributable to’ has been carefully and appropriately chosen by the drafter of the 1906 Act as a less demanding criterion for the requirement of causal connection, in the absence of a clear statutory definition as to the term ‘attributable to’, it may still be difficult for the non-jurists to make a distinction between the term ‘attributable to’ and the term ‘caused by’. The lack of a statutory definition may also cause unfairness from the point of view of the assured. Thus, in order to remove the problem of ambiguity and simplify the matter, in the view of the author, this part of section 39(5) of the 1906 Act should be modified, so that it would be easier for the assured to understand the meaning of the term ‘attributable to’. As the term ‘attributable to’ includes both direct cause and indirect cause, it is suggested by the author that this part of section 39(5) of the 1906 Act should be altered to read in the following manner:

In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss either directly or indirectly caused by unseaworthiness. Where the ship is unseaworthy at the commencement of the first stage of the adventure, the insurer is not liable for any loss either directly or indirectly caused by unseaworthiness, regardless of the privity of the assured to unseaworthiness.

6.5(8) The common law rule as to the burden of proof in relation to unseaworthiness

In a voyage policy, where the ship insured is lost or damaged during the voyage, the crucial issue would automatically arise as to who should bear the
burden of proving that the ship in question was in a seaworthy or unseaworthy condition. Such an issue has not been dealt with in the relevant part of the 1906 Act. Nevertheless, the burden of proof in unseaworthiness allegations has been developed by common law, so that as a common law principle, the general proposition is that a ship is prima facie to be deemed seaworthy.\textsuperscript{428} If the insurer claims that there has been a breach of the warranty of seaworthiness on the part of the assured, then the insurer will be the party who is required to prove that the ship insured is unseaworthy at the relevant time. If the existence of the unseaworthy state of the ship has successfully been proved by the insurer, then, according to the doctrine of \textit{Res Ipsa Loquitur},\textsuperscript{429} the evidential burden will shift to the assured to prove the contrary, such as the proof of the loss of the ship by a peril of the sea insured against.

But the situation may be different where the ship sank or became disabled shortly after the commencement of the voyage, and the cause of the loss was uncertain. In such a situation, the insurer will be entitled to assume that the ship was in an unseaworthy condition at the commencement of the voyage, and this inevitably constitutes a presumption of fact in respect of the unseaworthiness. In other words, the burden of proof in case of unseaworthiness should be based on presumed default on the part of the assured, only if the actual cause of the loss cannot be discovered. The burden of proof will then shift to the assured who must rebut the presumption of unseaworthiness by providing evidence that the loss was in fact caused by a peril of the sea insured against. But it should be noted that in each case, it is a question of fact, not of law, to draw the necessary inference as to the unseaworthiness of the ship.\textsuperscript{430} This proposition is evidenced in the case of

\textsuperscript{428} See the House of Lord’s judgment in the case of \textit{Parker and Others v Potts} (1815) 3 Dow’s R 23.

\textsuperscript{429} The Latin phrase \textit{res ipsa loquitur} literally means the thing speaks for itself. This is a legal doctrine that refers to situations where there is a presumption that an injury was caused as a result of negligence, because it is the negligence that caused the injury.

\textsuperscript{430} See \textit{Pickup v Thames & Mersey Marine Insurance Co} (1878) 3 QBD 594.
Eridania SPA v Oetker (The Fjord Wind)\textsuperscript{431} where Moore Bick J took the view that a presumption of fact that the ship was unseaworthy soon after sailing might be established, even though it was in fact impossible and impractical to ascertain the actual cause of the loss which rendered her unfit to perform the intended voyage. Additionally, another situation where a ship is presumed to be unseaworthy at the commencement of the voyage is when the ship sinks in calm waters. In such a case, the assured must produce convincing evidence to show that the ship was seaworthy at the relevant time.\textsuperscript{432}

According to the common law rule as to the burden of proof in unseaworthiness allegations, even if the insurer fails to establish unseaworthiness as a defence, in order for the assured to succeed in his claim, he must also prove that the loss was caused by a peril of the sea rather than unseaworthiness. This aspect of law has been confirmed in the case of Rhesa Shipping Co SA v Edmunds (The Popi M)\textsuperscript{433} where the House of Lords ruled that the assured must bear the burden of proof to show that the subject matter insured was caused by a peril of the sea. Likewise, this approach has been reaffirmed in the case of Lamb Head Shipping Co Ltd v Jennings (The Marel)\textsuperscript{434} where the vessel called ‘The Marel’ sank in the coast of Spain. The members of the crew claimed that he had heard a bump followed by which sea water started to enter into the vessel. Ultrasonic tests had been carried out on the shell plating before the vessel commenced its voyage. Despite the fact that the insurers had failed to establish unseaworthiness as a defence, the Court of Appeal agreed with the decision of the court of first instance and held that the owners of the vessel had also failed to prove that the loss was caused by collision or that the vessel was lost as a result of a peril of the sea insured

\textsuperscript{433} [1985] 2 Lloyd’s Rep 1.
\textsuperscript{434} [1994] 1 Lloyd’s Rep 624.
against, and that consequently, the assured was held not to be entitled to recover the loss from the policy, even though the actual cause of the loss could not be ascertained.

In general, it can be concluded that the common law rules as to the burden of proving unseaworthiness have been appropriately adopted by English courts. This point of view can be supported by two reasons. The first reason is that as the insurer is required to prove that there has been a breach of warranty of seaworthiness to deny the assured’s claim, the law on this point has been introduced appropriately in accordance with the general principle of the law of evidence which specifies that ‘he who alleges must prove’. The second reason is that the common law rule as to the presumption of fact in unseaworthiness allegations serves as a satisfactory mechanism, as it effectively protects the interest of the insurer in cases where the actual cause of the loss was uncertain. On the other hand, as far as the current common law principle of the burden of proving unseaworthiness is concerned, the assured would face a heavy burden to prove that the loss was caused by a peril of the sea, even in the absence of clear evidence as to the actual cause of the loss. Thus, the law in this area would cause unfairness from the point of view of the assured, especially when the dispute is being settled in a court where an inference of fact in relation to unseaworthiness is likely to be considered. It is for this reason that the current common law position on this issue should be altered in order to remove the unfairness. As such, the presumption of fact in relation to the unseaworthiness of the ship should be replaced by another common law rule. For this reason, it is proposed by the author that the burden of proof on the part of the assured should be discharged as long as the assured is able to show clear evidence that the ship insured is seaworthy at the commencement of the voyage, regardless of whether or not the actual cause of the loss can be ascertained. This law reform proposal, if introduced,
would apply where the ship insured is lost soon after the commencement of the voyage or during the voyage.

6.5(9) The application of the warranty of seaworthiness in mixed policy

Under the 1906 Act, it is not surprising that the insurer and the assured may agree to include both voyage policy and time policy into the same policy which generally insures the ship. This type of policy is known as a mixed policy which is defined in the second part of section 25(1) of the 1906 Act. A mixed policy normally covers the ship, especially the hull of the ship, for a particular voyage. In addition to this, it also covers the ship for a certain period of time other than the voyage.\(^435\) Evidently, in the case of Lombard Insurance Co Ltd v Kin Yuen Co Pte Ltd,\(^436\) the Court of Appeal used the term ‘mixed policy’ to mean a policy in which a vessel is insured in the same policy for a voyage ‘at and from’ or from one place to another or others and also for a definite period of time. As analysed by the author earlier in this Chapter, the implied warranty of seaworthiness has a direct application in voyage policies, but it has a limited role to play in time policies. But the issue would then arise as to whether the assured is required to comply with the warranty of seaworthiness in mixed policies. Such an issue has not been dealt with as a statutory rule under the relevant provision of the 1906 Act.

So far, there have been remarkably very few English authorities settling the issue as to the application of the warranty of seaworthiness in mixed policies. However, such an issue has been dealt with in Singapore. By way of illustration, in the case of Almojil (M) Establishment v Malayan Motor &

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\(^{435}\) A mixed policy does not apply where a ship is covered for a period of time within certain specified geographic limits.

General Underwriters (Private) Ltd (The Al-Jubail IV),\(^{437}\) a British naval ship was used for coastal defence, but in 1975, the ship was completely refitted in Singapore. Subsequently, it was insured for a voyage from Singapore to the Persian Gulf and 12 months from her arrival. The ship sailed from Singapore to Damman on 30\(^{th}\) May 1975, and a time policy of a 12-month period of cover was also fixed from that date. Despite the fact that the ship intended to proceed directly to Damman, she suffered damage as a result of the heavy monsoon weather and had to be repaired in Sri Lanka. After a careful survey, the ship was certified fit by the government engineer in Colombo and sailed again to proceed to Damman. But during the voyage, the ship was capsized and became a constructive total loss. The insurer refused to indemnify the loss on the ground that the ship was not in a seaworthy state at the commencement of the voyage. The contract was considered by the Singapore Court of Appeal as a mixed policy. The Court took the view that as far as a voyage policy is concerned, as the assured is generally in control and possession of the ship, he is capable of making the ship seaworthy, and therefore, he should be responsible to provide a seaworthy ship at the commencement thereof. Accordingly, the Court of Appeal held that the warranty of seaworthiness should be implied in mixed policies only in respect of the voyage part of the cover. In similar vein, in a mixed policy, as far as the voyage stage is concerned, it is logical that the voyage part of the cover is subject to the warranty of seaworthiness as if the assured must comply with the warranty of seaworthiness in an ordinary voyage policy under section 39(1) of the 1906 Act.

The decision of the Singapore Court of Appeal in this case has received academic attention among scholars. Evidently, according to Dr Soyer's view, the approach adopted by the Singapore Court of Appeal in this case should be regarded as satisfactory, in the sense that it draws a clear distinction between

\(^{437}\) [1982] 2 Lloyd’s Rep 637.
the voyage part of the cover and the time part of the cover. The ultimate effect of such a distinction is that as far as a mixed policy is concerned, while the voyage part of the cover is subject to the warranty of seaworthiness, it has no application in the time part of the cover. This approach has also been adopted in accordance with section 39 of the 1906 Act. Therefore, it is suggested by Dr Soyer that this approach should also be adopted by English courts as a common law principle.\(^{438}\)

On the other hand, in the opinion of the author, it is unjustifiable to say that the view expressed by Dr Soyer’s is cogent. This is because a mixed policy consists of both the voyage part of the cover and the time part of the cover, and in a mixed policy, it is patently clear that the insurer should accept the risk of loss for a longer period of time than voyage policy or time policy. In a mixed policy, as the period of cover has been extended, the subject matter insured can also be covered by the policy for a longer period of time. It follows from this perspective that a higher standard of obligation should be required for the assured to comply with. Thus, it is suggested by the author that apart from the warranty of seaworthiness which must be complied with for the voyage part of the cover, the obligation to provide a seaworthy ship should also be extended to the time part of the cover, so that the risk of the subject matter insured would be distributed in a fair manner as between the insurer and the assured.

As suggested by the author in Section 6.4(6) above, the seaworthiness obligation should have a role to play in time policies. In the view of the author, a similar law reform proposal should also be advanced in respect of the time part of the cover in a mixed policy. But as it would be rather difficult for the assured to keep in control of the seaworthy condition of the ship in the time part of the cover, requiring the assured to comply with the warranty of seaworthiness for the entire time part of the cover would be unreasonable and

unfair. Therefore, a less stringent obligation should be complied with by the assured as far as the time part of the cover is concerned. In more specific terms, it is suggested by the author that in a mixed policy, the time part of the cover should be subject to the warranty of seaworthiness only at the commencement of each stage of the adventure. This inevitably means that the assured should be required to comply with the warranty of seaworthiness with regard to the time part of the cover each time the ship leaves the port. According to the author’s proposal, if the assured fails to do so, then the insurer will not be liable for any loss caused by the unseaworthiness, unless the assured is able to deduce evidence that he has exercised due care in complying with the warranty. If this law proposal is to be implemented by English courts, the commercial interest between the insurer and the assured will be balanced in a fair manner. It is thought that this law proposal is also introduced fairly from the point of view of the insurer who generally possesses less knowledge as to the condition of the ship than the assured.

6.6 The application of the implied warranties in the Chinese Maritime Code 1993

Under section 39 of the 1906 Act, the statutory definition of the term ‘seaworthiness’ and the statutory rule as to the warranty of seaworthiness have been specified in clear terms. This means that the warranty of seaworthiness is an important marine insurance warranty which has been implied by the operation of law. In contrast, as far as Chinese marine insurance law is concerned, the implied warranty of seaworthiness has not been recognised in either the voyage policy or time policy. Instead, under the Maritime Code and the PICC Hull Insurance Clauses, the unseaworthiness

439 See Article 244 of the Maritime Code and Clause 2(1) of the PICC Hull Insurance Clauses 1/1/1986 222
of a ship is considered as an exception to the liability of the insurer. So breach of the seaworthiness obligation would lead to the termination of the liability of the insurer. The insurance contract as a whole, however, remains on foot. This means that the implied warranty of seaworthiness does not apply in either the Maritime Code or the PICC Hull insurance Clauses. By virtue of Article 244 of the Maritime Code, unless otherwise agreed in the insurance contract, the insurer shall not be liable for the loss of or damage to the insured ship arising from unseaworthiness of the ship at the commencement of a voyage unless under a time policy the assured has no knowledge thereof. From the express wording of this Article, it is obvious that the breach of the seaworthiness obligation on the part of the assured does not provide the insurer with the right to terminate the insurance contract.

It follows from this aspect of law that a clear distinction has been drawn between Article 244 and Article 235 of the Maritime Code. While the former statutory provision deals with the issue of unseaworthiness as an exclusion clause to the liability of the insurer, the latter specifies the statutory rules as to express warranties and the legal consequence for the breach. A similar contractual provision concerning the exclusion of unseaworthiness can be found in Clause 2(1) of the PICC Hull Insurance Clauses 1/1/1986\textsuperscript{440} which states that the insurer is not liable for the loss, damage, liability or expense caused by unseaworthiness, including the fact that the ship is not properly manned, equipped or loaded, provided that the assured knew, or should have known such unseaworthiness when the ship was sent to sea. Accordingly, the legal consequence of unseaworthiness under Article 244 of the Maritime Code is the same as Clause 2(1) of the PICC Hull Insurance Clauses.

\textsuperscript{440} The PICC Hull Insurance Clauses 1/1/1986 contains 11 clauses in total and was amended in recent years. It is now known as the PICC P&C Hull Clauses 2009 which is currently used by most of the Chinese marine insurance companies.
6.6(1) The legal standard of seaworthiness in Chinese marine insurance law

As far as Chinese marine insurance law is concerned, the standard of seaworthiness of a ship has not been expressly provided in either the Maritime Code or the PICC Hull Insurance Clauses like the statutory provision of section 39(4) of the 1906 Act. As such, there is no legal definition of the term ‘seaworthiness’ in Chinese marine insurance law. But in Chinese marine insurance practice, the seaworthy condition of the ship is generally regulated by 5 aspects of rules, some of which are derived from the Maritime Code, namely that the ship is properly designed and constructed for the purpose of the maritime adventure; the ship is properly manned with qualified master and seamen; the ship is equipped with the necessities to enable the normal operation of the ship; the holds, refrigerated or cooling equipment and other parts of the ship used for carrying the cargo are fit and safe for its intended purpose; and the dangerous nature of the cargo for transportation must be informed to the master before the commencement of the voyage. The final aspect of law is demonstrated in the case of People’s Insurance (Guangxi) Company v Shipping Company Ltd of Tianjin. In this case, both the trial court and the appeal court took the view that the vessel was unseaworthy for the reason that the carrier had not informed the master of the dangerous nature of the cargo of zinc concentrate prior to the commencement of the voyage, and this resulted the vessel being capsized during the voyage.

It is suggested by one Chinese scholar that in Chinese marine insurance law, the ship concerned also needs to be properly loaded and stowed in order

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441 See Articles 47 and 48 of the Maritime Code.
443 The case is reported in Vol. 37 (1998), No 3, Maritime Trial (Chinese) pp. 36-40.
to be seaworthy.\textsuperscript{444} It can be seen from this point of view that the way by which the ship is loaded and stowed will have an impact on the seaworthy condition of the ship.

Apart from the above legal requirements, as far as the Chinese shipping practice is concerned, after the rectification of the ISM Code in 2002,\textsuperscript{445} in order to be considered seaworthy, the ship concerned must also have two certificates as required by the ISM convention, namely the Document of Compliance and the Safety Management certificate. The purpose of having these two certificates is to ensure that the ship can be managed in a safe manner. The ship insured would be unseaworthy if the ISM Code is breached by the assured.\textsuperscript{446}

In consequence, although the rules concerning the seaworthy condition of the ship in Chinese marine insurance law is limited to a certain extent compared with the English common law rules, these rules provide a clear guideline as to the way by which the seaworthiness obligation can be satisfied by the assured. However, other external factors considered by English courts, such as the type of the voyage concerned and the different time of year, may also affect the seaworthy condition of the ship. Therefore, in order to prevent the assured from enhancing his legal position in an unfair manner, it is suggested by the author that the external factors mentioned above should also be inserted into the relevant provision of the Maritime Code as the statutory standard of seaworthiness, and thereby requiring the assured to comply with the seaworthiness obligation in a more stringent sense.

\textsuperscript{444} Prof. Wang Pengnan, Modern Marine Insurance Law and Practice (Chinese), 2004, p. 175.
\textsuperscript{445} The ISM Code provides an international standard for the safe management and operation of ships as well as the prevention of ocean pollution and human injury or loss of life.
6.6(2) A critical evaluation of Article 244 of the Maritime Code

Despite the fact that unseaworthiness of the ship is considered as the exclusion of the insurer’s liability under Article 244 of the Maritime Code, this statutory rule is subject to an exception which is stated at the beginning of this Article. In particular, it reads: ‘unless otherwise agreed in the insurance contract…’ It can be seen from this part of the Article that the unseaworthiness of the ship, as an exception to the liability of the insurer, can be replaced by the parties with another contractual term through clear contractual wording. This means that the parties can agree to use a different contractual term other than the one provided by Article 244. According to the author’s view, this part of the Article can be treated as a sound statutory rule, in the sense that it has preserved the parties’ right of choice.

The subsequent wording of Article 244 of the Maritime Code clearly indicates that the liability of the insurer will be discharged for the loss of or damage to the insured ship arising from unseaworthiness at the commencement of the voyage. Although this part of the Article is considered as the exclusion of the insurer’s liability to the unseaworthiness, the legal consequence for the breach of the seaworthiness obligation is the same as that of the English Marine Insurance Act 1906. Under Article 244 of the Maritime Code, in order for the insurer’s liability to be discharged, the ship concerned only needs to be unseaworthy at the commencement of the voyage. This statutory rule is also equivalent to section 39(1) of the 1906 Act.

In addition, under this part of Article 244 of the Maritime Code, the phrase ‘arising from unseaworthiness of the ship’ clearly indicates that there must be a causal connection between the unseaworthiness of the ship and the loss claimed by the assured. In other words, if the insurer wishes to deny liability for the loss or damage of the ship, he will be required to prove that the loss or damage of the ship is proximately caused by the unseaworthiness of the ship.
This aspect of law can be contrasted with section 39(5) of the English Marine Insurance Act 1906 where, in a time policy, the insurer is not liable for any loss attributable to unseaworthiness, provided that the assured is privy to the unseaworthiness. If these two statutory provisions are compared with each other, it will be obvious that as far as Article 244 of the Maritime Code is concerned, the insurer will be under a more onerous obligation in respect of the burden of proof to show that the loss or damage of the ship is proximately caused by unseaworthiness. Even if the unseaworthiness of the ship is a remote cause of the loss, the insurer’s defence as to the exclusion of liability will fail. For this reason, according to the author’s view, this statutory rule would make it rather difficult for the insurer to discharge the burden of proof. As such, the insurer’s commercial interest would be unfairly prejudiced.

The problem of unfairness in respect of the issue of causation is best illustrated in the case of Hainan Yangpu Hengtong Shipping Co v PICC Haikou Branch,447 where the assured entered into a contract with PICC Haikou Branch to insure the ship ‘Henghai’ on domestic hull clauses for 12 months from 25th March 1993. According to the insurance contract concluded by the assured and the insurer, the insurer should be liable for the loss or damage caused by fire. On 10th June 1993, when the ship was sailing for a voyage from Chanzhou to Beihou, a fire was deliberately set on board the ship by the third officer, and as a result, the ship was damaged. The assured claimed the damage of the ship from the insurer on the ground of the fire which was a peril insured against. But the insurer refused to pay and argued that there was no master on board the ship, and the first officer was appointed as the acting master at the commencement of the voyage. It was also discovered that the third officer had an argument with the first officer, the appointment of the first officer as the acting master led to the fire which was set by the third officer to

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destroy the ship, and the first officer also failed to take actions to prevent the wrongdoing effectively. Accordingly, the insurer contended that the lack of the master and the appointment of the first officer as the acting master constituted the unseaworthiness of the ship, and that unseaworthiness was the proximate cause of the damage. Moreover, due to the fact that the assured was aware of such unseaworthiness when the ship was sent to sea, the insurer should not be liable for the damage of the ship.

The crucial issue in this case arises as to whether or not the unseaworthiness of the ship was the proximate cause of the damage of the ship. Despite the insurer’s defence, the Haikou Maritime court held that the damage of the ship was proximately caused by the fire which was an insured risk, and there was no causal connection between the arson of the third officer and the unseaworthiness of the ship. Therefore, the insurer was held liable for the damage of the ship.

On appeal, the High People’s Court of Hainan Province held that the insurer failed to adduce evidence to establish the causal connection between the damage and the unseaworthiness, and thus the decision of the court of first instance was upheld. In reaching this decision, the judges took the view that where a particular loss was caused by a number of factors, the proximate cause of the loss should be the cause which operated directly or dominantly, the remote cause of the loss should not be used by the insurer to deny liability. It can be seen from the fact of this case that the fire set by the third officer is directly connected with the damage of the ship. The insurance clauses in this case clearly provide that the loss or damage caused by fire, including the fire caused by the arson of a third party, shall be covered. As the unseaworthiness of the ship was not directly caused by the arson of the third officer, the insurer was held liable for the damage of the ship which was proximately caused by

448 Ibid.
the fire rather than unseaworthiness. From the author’s point of view, it is justifiable to say that although the court in this case has reached a decision which was in accordance with Article 244 of the Maritime Code, this part of the Article was introduced unfairly against the insurer on the basis that the causation requirement in this Article would make it extremely difficult for the insurer to prove the proximate cause, especially where several causes are involved. Therefore, in order to provide a fair and satisfactory solution to the existing problem, it is suggested by the author that the causation requirement in this part of Article 244 of the Maritime Code should be abolished.

In the view of the author, as far as Article 244 of the Maritime Code is concerned, treating unseaworthiness of the ship as the exclusion of the insurer’s liability may not be the appropriate statutory rule to regulate the seaworthiness obligation. The rationale for such a view is that if the assured fails to ensure that his ship is in a seaworthy state at the commencement of the voyage, he will simply lose his cover on the basis of the express wording of Article 244 of the Maritime Code. For this reason, it is suggested by the author that the warranty of seaworthiness should be introduced into Article 244 of the Maritime Code to replace the exclusion of liability. It follows from this law reform proposal that the legal consequence for a breach of the warranty of seaworthiness should be introduced in accordance with Article 235 of the Maritime Code. This is because according to Article 235 of the Maritime Code, in the event of a breach of warranty, there is a high possibility that the insurer will keep the cover by charging an increased premium or amending the terms and conditions of the insurance contract. As such, the sound argument for converting the exclusion clause of unseaworthiness into a warranty is that the ship insured will still be covered without the need for the assured to seek an alternative cover, even though the warranty was breached by the assured. Put another way, if the exclusion clause for unseaworthiness is to be replaced by warranty, the possibility for the loss of or damage to the ship will be minimised.
to a great extent. Taking this advantage into account, it is proposed by the author that this part of Article 244 of the Maritime Code should be amended to read in the following way:

‘The insured shall notify the insurer in writing immediately where the insured has not complied with the warranty of seaworthiness under the contract. The insurer may, upon receipt of the notice, terminate the contract or demand an amendment to the terms and conditions of the insurance coverage or an increase in the premium without unreasonable delay.’

Furthermore, the subsequent wording of Article 244 of the Maritime Code provides, in relevant terms, ‘unless where under a time policy the insured has no knowledge thereof.’ This part of the Article clearly indicates that in a time policy, if the ship concerned is unseaworthy, the insurer will still be required to cover any loss of or damage to the ship resulting from the unseaworthiness, provided that the assured has no knowledge as to the unseaworthy condition of the ship when sending the ship to sea. Thus, it is clear that the application of this statutory rule is equivalent to section 39(5) of the English Marine Insurance Act 1906 where the insurer is not liable for the loss attributable to the unseaworthiness if the assured is privy to the unseaworthiness when the ship was sent to sea. In a time policy, as the period of cover is normally longer than the period of cover in a voyage policy, it would be rather difficult for the assured to maintain control over the insured ship and possess relevant knowledge as to all the circumstances that would affect the seaworthy condition of the vessel. It is probably for this reason, the draftsman of the Maritime Code introduced Article 244 of the Maritime Code, such that the insurer in a time policy has no right to reject the assured’s claim for the loss or damage of the insured ship if the assured has no knowledge as to the unseaworthiness of the ship at the commencement of the voyage. Like English law, the knowledge of the assured to the unseaworthiness under Article 244 of
the Maritime Code would include both actual knowledge and blind-eye knowledge. As such, the assured is deemed to know the unseaworthy condition of the ship if he suspects the truth but deliberately turns a blind eye as to the ship’s actual condition.

Despite the fact that the current Article 244 of the Maritime Code is modelled on section 39(5) of the English Marine Insurance Act 1906, in the opinion of the author, the current statutory rule in respect of Article 244 of the Maritime Code is still unsatisfactory in the sense that requiring the assured to comply with the warranty of seaworthiness at the commencement of the voyage would render it far too easy for the assured to discharge his statutory obligation in respect of the warranty of seaworthiness. Therefore, according to the author’s view, the statutory rule under Article 244 of the Maritime Code that the seaworthiness obligation will be satisfied as long as the ship is seaworthy at the time of the commencement of the voyage should be amended on a fair basis. In order to achieve this goal, it is suggested by the author that the assured’s obligation to comply with the warranty of seaworthiness should not be limited to the commencement of the voyage. Rather, the warranty of seaworthiness should be extended to cover certain circumstances during the voyage. As such, it is suggested by the author that as far as the Maritime Code is concerned, the warranty of seaworthiness should apply to voyage policy. So in the view of the author, the new version of section 39(1) of the English Marine Insurance Act 1906, as introduced by the author earlier in this Chapter, should be regarded as the most appropriate statutory rule which should be inserted into Article 244 of the Maritime Code to protect the interest of the insurer in the event that during the voyage, the insured ship is lost or damaged as a result of unseaworthiness. In consequence, it is suggested by the author that Article 244 of the Maritime Code should be modified to read in the following manner:

In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. During the voyage, the ship must remain its seaworthy state under ordinary weather conditions. The insured shall notify the insurer in writing immediately where the insured has not complied with the warranty of seaworthiness under the contract. The insurer may, upon receipt of the notice, terminate the contract or demand an amendment to the terms and conditions of the insurance coverage or an increase in the premium without unreasonable delay.

Despite the statutory law reform proposal introduced by the author in respect of Article 244 of the Maritime Code, according to the author’s point of view, the application of the warranty of seaworthiness and the legal consequence for the breach of the warranty of seaworthiness, as two distinct statutory rules, should be introduced separately rather than being combined together in a single Article. Therefore, taking into account the long provision of the new Article 244 of the Maritime Code, it is suggested by the author that the new Article 244 of the Maritime Code should be divided into two parts, so that the amended version of Article 244 of the Maritime Code will be simplified. The ultimate result of such a law reform proposal is that Article 244(1) should provide the issue as to when the warranty of seaworthiness would apply, while Article 244(2) should specify the legal consequence for the breach of the warranty of seaworthiness.

6.6(3) The application of the warranty of legality in Chinese marine insurance law

In English marine insurance law, the implied warranty is provided in section 41 of the 1906 Act which requires not only the adventure insured to be lawful, but also the adventure insured to be carried out in a lawful manner. In
contrast, the implied warranty of legality is not mentioned in any of the relevant provision of the Maritime Code. Nevertheless, in the general contract law of China, it has been established as a general principle that the purpose of every contract must be lawful, and that the contract must also be performed in a lawful manner. In China, as marine insurance contract is a special type of contract, it can be argued that some of the relevant provisions of the Contract Law of PRC and Insurance Law of PRC, for the purpose of dealing with the legality of the contract, can be adopted by Chinese courts and applied into Chinese marine insurance law and practice to regulate the issue as to illegality. This point is demonstrated by Article 7 of the Contract Law of PRC 1999 which specifies the general statutory rules of the parties’ obligation as to the formation and performance of the contract. In particular, this Article provides:

In concluding and performing a contract, the parties shall abide by the laws and administrative regulations, observe social ethics. Neither party may disrupt the socio-economic order or damage the public interests.

A more detailed provision for the purpose of regulating the legality of the contract can be found in Article 52 of the Contract Law of PRC 1999 which states:

A contract shall be null and void under any of the following circumstances:

(1) A contract is concluded through the use of fraud or coercion by one party to damage the interests of the State;

(2) Malicious collusion is concluded to damage the interests of the State, a collective or a third party;

(3) An illegitimate purpose is concealed under the guise of legitimate acts;
(4) Damaging the public interests;

(5) Violating the compulsory provisions of the laws and administrative regulations.

Due to the fact that there is no statutory rule as to the warranty of legality under the Maritime Code, the statutory rule that the insurance contract must be carried out in a lawful manner has been provided in the Insurance Law of PRC 1995 (2009 amended version). As the Maritime Code is silent as to the legality of the performance of the insurance contract, it must be the case that the statutory rule as to the legality of the contract and the performance of the contract provided under the Contract Law of PRC 1999 and the Insurance Law of PRC can be applied by Chinese courts to settle a dispute concerning the issue of legality. More specifically, with regard to the Insurance Law of PRC, the relevant provision governing the legality of the insurance contract deals with the issue of good faith, and this provision specifies that ‘parties concerned with insurance activities shall follow the principle of good faith when exercising rights and performing obligations.’

Despite the existence of the provisions concerning the legality of the contract and performance of the contract under the Contract Law and the Insurance Law, these provisions have failed to provide the legal consequence for the breach of the legality obligation. However, as far as Chinese judicial practice is concerned, if the insurance contract is tainted with illegal purpose, the contract will be considered as void.

In Chinese marine insurance law, as the warranty of legality has not been established as a statutory rule, when the Chinese courts deal with disputes concerning the issue of legality, uncertainty may occur. This is because when settling the disputes like this, the Chinese courts generally have a huge amount of discretion. So it is submitted that illegality in Chinese marine

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insurance does not, in all situations, render the contract void. The termination of the insurance contract depends on the seriousness of the illegality. The insurance contract can only be terminated when the illegality of the insurance is sufficiently serious to damage the public interests of the state or violate any legislation or administrative regulations.\(^{452}\) A typical example can be found in the Chinese case of *The Fu Da*\(^{453}\) where the insured vessel sank after a collision accident. The assured sought to recover the loss from the insurer. The insurer denied liability on the ground that the assured was in breach of the Ocean Vessel Registry Regulations of the PRC. In the court of first instance, the Maritime Court of Tianjin held that the assured had violated the law and damaged the social-economic order in the shipping industry, and therefore the warranty of legality was breached. On appeal, the High Court of Tianjin reversed the decision of the court of first instance and held that such a breach was not sufficiently serious to exclude the liability of the insurer.

However, as the Maritime Code has failed to introduce the statutory rule as to the warranty of legality, it would be difficult for the assured to appreciate the importance of the warranty of legality. It follows from this perspective that the assured may innocently violate a piece of legislation or administrative regulation without noticing the legal consequence of the violation. Under the English Marine Insurance Act 1906, the warranty of legality is a very important type of implied warranty, and its legal purpose is to ensure that any relevant statutes and regulations are complied with throughout the currency of the policy.

Therefore, in order to prevent the parties, especially the assured, from violating legislation or administrative regulation, it is suggested by the author that a detailed statutory rule as to the implied warranty of legality and the legal

\(^{452}\) Ibid, at pp 195-196.

consequence for the breach of this warranty should be introduced into Article 244 of the Maritime Code. It is suggested by the author that section 41 of the English Marine Insurance Act 1906 provides an appropriate statutory rule as to the implied warranty of legality, such that it should be adopted into Article 244 of the Maritime Code. Moreover, in order to preserve international harmony, it was argued by the author in Chapter 6.3 of the thesis that contravening a foreign law should also constitute a breach of the implied warranty of legality. Accordingly, it is thought by the author that this law reform proposal should also be introduced as a statutory rule of the warranty of legality into Article 244 of the Maritime Code.

As proposed in Chapter 6.4(10) of the thesis, the application of the implied warranty of seaworthiness and the legal consequence for the breach of this warranty should be introduced in Article 244(1) and Article 244(2) of the Maritime Code respectively. As the warranty of legality is another type of implied warranty, it is suggested by the author that the warranty of seaworthiness and the warranty of legality, as two types of implied warranty, should be dealt with in Article 244 of the Maritime Code, such that the proposed statutory rule as to the warranty of legality and the legal consequence for the breach of this warranty should appear in Article 244(3) and Article 244(4) of the Maritime Code respectively. All of the above points of view provided by the author suggest that the new version of Article 244(3) of the Maritime Code should be introduced to read as follows:

There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner. The obligation to comply with this warranty applies to Chinese law and foreign laws.

The new version of Article 244(4) of the Maritime Code should be introduced to read in the following manner:
A breach of the warranty of legality shall be subject to the same legal consequence as a breach of the warranty of seaworthiness.

6.7: Conclusion

To conclude, this Chapter has provided a critical comparison between the implied warranties in English law and Chinese law. There are 4 types of implied warranty in the Marine Insurance Act 1906, namely warranty of portworthiness, warranty of cargoworthiness, warranty of legality and warranty of seaworthiness. The warranty of portworthiness under section 39(2) of the 1906 Act requires that at the commencement of the risk, the ship is reasonably fit to encounter the ordinary perils of the port. As regular surveys are generally carried out by classification society, it is suggested by the author that the warranty of portworthiness is deemed to be satisfied if regular surveys in respect of the ship are carried out by an approved classification society.

The warranty of cargoworthiness is regulated in section 40(2) of the 1906 Act which requires the ship in a voyage policy to be reasonably fit to carry the goods to the intended destination. In the author’s opinion, in order to provide fairness to the insurer, the warranty of cargoworthiness should also apply to time policy when the ship is moored at a port.

The warranty of legality, as another type of implied warranty, is governed by section 41 of the 1906 Act which requires both the adventure insured and the performance of the adventure to be lawful. The adventure insured may be rendered unlawful if a domestic law is breached. This warranty can also be breached if the assured fails to comply with international law. Under the second part of section 41 of the 1906 Act, if the assured can control the matter, statute or regulation should not be violated during the performance of the adventure. Under common law, a breach of the warranty of legality cannot be
waived. It was argued by the author that apart from English laws, the assured should also be required to comply with foreign laws.

The warranty of seaworthiness is governed under section 39 of the 1906 Act. The term ‘seaworthiness’ is defined under section 39(4) of the 1906 Act, such that the ship shall be reasonably fit in all respect to encounter the ordinary perils of the sea. This statutory definition indicates that the term ‘seaworthiness’ is relative, so that the issue as to whether a particular ship is seaworthy should be determined by external factors and internal factors. However, this statutory definition may cause uncertainty and unfairness. So the author’s view is that both external factors and the sufficiency of the crew should be taken into account to determine whether a ship is seaworthy.

The term ‘seaworthiness’ was also defined under common law. Under common law, in order to be considered seaworthy, the ship must also be fit to carry the cargo. But in the author’s opinion, the obligation to provide a suitable ship to carry the cargo should be dealt with separately. This means that the unfitness of the ship to carry cargo should not be equated with the unfitness of the ship to withstand the ordinary perils of the seas.

The application of the warranty of seaworthiness appears in section 39(1) of the 1906 Act which provides that in a voyage policy, the ship shall be seaworthy at the commencement of the voyage. But this statutory rule may cause unfairness to the insurer. So it is suggested by the author that during the voyage, the ship must also remain its seaworthy state under ordinary weather conditions.

The doctrine of stages under section 39(3) of the 1906 Act allows the ship to call at intermediate ports, such that the warranty of seaworthiness will be complied with if the ship is seaworthy at the commencement of each stage of the adventure. In the author’s view, this statutory rule was introduced unfairly against the insurer, as he must accept the risk of loss for a long period of time.
It is suggested by the author that another statutory rule should be introduced into this subsection, that is, the ship must also be seaworthy between the commencement of the voyage and the first intermediate port.

In general, there is no warranty of seaworthiness in time policy. But under section 39(5) of the 1906 Act, the insurer is not liable for any loss attributable to unseaworthiness where, with privity of the assured, the ship is sent to sea in an unseaworthy state. It has been established under common law that the term ‘privity’ includes positive knowledge and blind eye knowledge, and privity is different from negligence. The concept of privity applies to the knowledge of the individual assured and the assured’s alter ego. In the case of a company, the knowledge of the persons possessing the decision making power should be taken into account to determine whether those persons possess the relevant knowledge. In order to balance the interests between the assured and the insurer, the author proposed that in time policies, the seaworthiness obligation should be extended to cover the commencement of the first stage of the adventure.

The phrase ‘attributable to’ in section 39(5) of the 1906 Act covers proximate cause and remote cause. To simplify the matter, it is suggested by the author that the term ‘attributable to’ should be replaced by the phrase ‘directly or indirectly caused by’.

The common law rule as to the burden of proving unseaworthiness is connected with the presumption of fact. In order to mitigate the harsh effect as to the rule of burden of proof, the author suggested that the presumption of fact should be replaced by the rule which requires the assured to prove that the ship is seaworthy at the commencement of the voyage.

The current law is silent as to the application of the warranty of seaworthiness in mixed policy. The author's view is that the warranty of seaworthiness must be complied with in the voyage part of the cover, and the
seaworthiness obligation should apply to the commencement of each stage of the adventure for the time part of the cover.

There is no implied warranty in the Maritime Code. For the benefit of the insurance market, the author’s view is that the amended version of section 41 of the 1906 Act should be introduced into the Maritime Code.

In Article 244 of the Maritime Code, unseaworthiness is treated as an exclusion clause. This law is unfair from the insurer’s point of view. Therefore, it is suggested by the author that the warranty of seaworthiness should be introduced into this Article, and the legal consequence for the breach of this warranty should be the same as Article 235 of the Maritime Code. In order to protect the interests of the insurer, the author suggested that the warranty of seaworthiness should apply to ordinary weather conditions during the voyage. The author also proposed that the application of the warranty of seaworthiness and the legal consequence for the breach of this warranty should be placed into different parts of Article 244 of the Maritime Code, such that the Article can be simplified.

So far, the author has provided a critical comparison between the law as to English marine insurance warranty and Chinese marine insurance warranty. Some law reform proposals have also been provided where necessary. Therefore, the author will provide some general conclusions for this thesis in the next Chapter.
Chapter 7

Conclusion

Overall, Chapter 1 provided a historic review as to the law of marine insurance in England. A detailed analysis revealed that in Europe, the practice of marine insurance emerged from the Middle Ages. The development of marine insurance practice can be traced back to Northern Italy in the late 12\textsuperscript{th} and early 13\textsuperscript{th} century. The practice of marine insurance was subsequently introduced into England.

In order to regulate export trade transactions and the business of marine insurance, European merchants developed \textit{lex mercatoria} during the medieval times. The doctrine of \textit{lex mercatoria} was known as the ‘Law Merchant’ in England and absorbed into English common law after the 17\textsuperscript{th} century.

The medieval \textit{lex mercatoria} has a strong connection with the modern \textit{lex mercatoria}, because the latter, developed by the international business community, is a set of trading rules including trade usages, model contracts, standard clauses, general legal principles and international commercial arbitration.

The doctrine of \textit{lex maritima} was developed as part of the doctrine of \textit{lex mercatoria} for customary mercantile law. The doctrine of \textit{lex maritima} refers to a specialised body of oral rules, maritime practice, maritime customs and usage in respect of navigation and maritime commerce.

During the 16\textsuperscript{th} and 17\textsuperscript{th} century, marine insurance disputes were decided in the Court of Admiralty and the court of common law, but the practice of marine insurance was not regulated by any legislation during this period.

In early English marine insurance law, the contractual provisions requiring the assured to do or refrain from doing something were known as warranties.
From the 18th century, Lord Mansfield developed a set of common law rules through a number of cases for the purpose of regulating the practice of marine insurance. These common law rules include the nature of express warranty, the legal consequence for the breach of warranty, utmost good faith and so on.

With regard to the nature of express warranty, Lord Mansfield introduced the common law rule that a warranty does not have to be material to the risk. Lord Mansfield made a distinction between a warranty and a representation, such that a warranty must be inserted into the policy, but a representation can be made orally. Lord Mansfield also made it clear that a breach of warranty should not be excused, and introduced the common law principle that a breach of warranty would make the contract void.

From the 19th century, the implied warranties were introduced into common law. During that period of time, there were two types of implied warranty, namely warranty of seaworthiness and warranty of legality. As far as the warranty of seaworthiness is concerned, it was established that this warranty would apply only at the commencement of the voyage.

In the early 20th century, the Marine Insurance Act 1906 was enacted. Most of the common law rules established by Lord Mansfield were adopted into this Act. The statutory rules of warranty, whether express or implied, were set out in section 33 to 41 of the 1906 Act. In particular, section 33 and 34 set out the legal features of express warranty, section 35 provides the rules for the creation of express warranty. With regard to implied warranties, the 1906 Act has introduced the warranty of portworthiness and the warranty of cargoworthiness. A critical examination as to the statutory rules and common law rules of warranties was made by the author in subsequent Chapters.

Chapter 2 provides a critical analysis as to the nature of express warranty in section 33 and 34 of the 1906 Act. There is a clear distinction between the
term ‘warranty in marine insurance law and the term warranty in ordinary contract law. While the former is regarded as a term with promissory nature, the latter is a less significant term which only entitles the innocent party to claim damages in the event of breach. A breach of marine warranty will lead to the termination of the insurer's liability, whereas a breach of condition in ordinary contract law will lead to the termination of the contract.

Express warranty in section 33(1) of the 1906 Act can be divided into present warranty and future warranty. To comply with present warranty, the assured must confirm that certain facts, either past or present, exist or do not exist. A future warranty concerns the future promise made by the assured. As the legal consequence for a breach of warranty is harsh for the assured, the Law Commission proposed that all present warranties should be replaced by representations. But the author’s view is that all present warranties should be replaced by innominate terms, so that the legal consequence for the breach of such a term may vary depending on the seriousness of the breach.\(^\text{454}\)

It has been suggested by some scholars that warranties should be replaced by the concept of alteration of risk which has been applied in some civil law countries, so that the harshness of the existing law as to warranty can be mitigated. But in the view of the author, the concept of alteration of risk may cause uncertainty. The duty to notify the insurer as to an increase of risk would be an onerous one for the assured, as he must fulfil the duty even if the increase of risk causes no loss. The current law as to the concept of increase of risk is unclear as to the way by which the assured can fulfil the duty of notification for an increase of risk. These arguments suggest that it would be inappropriate to adopt the concept of alteration of risk into English marine insurance law.\(^\text{455}\)

\(^{454}\) See Chapter 2.3.

\(^{455}\) See Chapter 2.4.
In English marine insurance law, a suspensive condition temporarily suspends the liability of the insurer, but the policy is not voidable. If the breach is subsequently remedied by the assured, any subsequent loss will be indemnified by the insurer. Therefore, such a clause is different from a warranty. In order to prevent uncertainty, the author suggested that if a suspensive condition is inserted into the policy, the word ‘suspende’ or ‘suspensive’ and the legal effect of the breach of this term should also be inserted into the policy.456

A marine warranty has various legal features. One feature is that a warranty must be exactly complied with. This feature is provided in section 33(1) of the 1906 Act. A common law principle associated with this aspect of law is that minor defect cannot be accepted as a defence. In the author’s opinion, as far as future warranty is concerned, a substantial observance rule should be introduced into this subsection if a warranty has no connection with the risk, except the warranty to pay premiums. Additionally, the term ‘condition’ used in this subsection may cause confusion, because the legal consequence of a breach of condition should not be equated with the legal consequence of a breach of marine warranty. So the author’s view is that the term ‘condition’ in this subsection should be replaced with the term ‘condition precedent’.457

The statutory rule that a warranty does not have to be material to the risk appears in section 33(3) of the 1906 Act. But according to the author’s view, the legal purpose of inserting a warranty into the policy should be limited to the protection of the subject matter insured.458

It has been established as a common law principle that there is no defence for a breach of warranty, but under section 34(1) of the 1906 Act, there are two exceptions to this rule, namely a change of circumstances and when

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456 See Chapter 2.5.
457 See Chapter 2.6(1).
458 See Chapter 2.6(2).
compliance with the warranty is rendered unlawful by any subsequent law. In the author’s view, due diligence should also be taken into account to determine whether a breach of warranty should be excused.459

Section 34(2) of the 1906 Act provides that a breach of warranty cannot be remedied. It is suggested by the author that this statutory rule should be replaced by a less stringent one, such that where a warranty is breached but subsequently remedied by the assured before loss, the insurer is only entitled to charge an additional premium at a reasonable rate without affecting any further liability to indemnify the loss.460

As a common law rule, there is no causal connection between a breach of warranty and the loss. This common law rule has received criticisms from scholars on the basis that this common law rule may cause unfairness to the assured. But according to the author’s view, in order to balance the interest between the assured and the insurer, a new subsection, that is, section 33(4) should be introduced into the 1906 Act. According to the author’s proposal, this subsection should read: where a breach of warranty is followed by a loss, the insurer is liable to indemnify the assured for the loss, less any damage caused as a result of the breach of warranty, if the loss in respect of which the assured seeks to be indemnified was not caused or contributed to by the breach.461

The legal consequence for a breach of warranty is stated in section 33(3) of the 1906 Act which provides that subject to any express provision in the policy, the insurer’s liability would be discharged as from the date of the breach of warranty. But the remedy for a breach of warranty can be replaced by a different remedy, such as a held covered clause, provided that the parties’ intention is clear. The automatic discharge rule was clarified in the case of The

459 See Chapter 2.6(4).
460 See Chapter 2.6(5).
461 See Chapter 2.6(6).
**Good Luck** where Lord Goff confirmed that compliance with the warranty is a condition precedent to the liability of the insurer. The legal consequence of a breach of warranty has been criticised by the Law Commission. It is thought by the author that a different approach should be introduced into section 33(3) of the 1906 Act, that is, if a warranty is breached, then, subject to any express provision in the policy, the insurer is entitled to amend the terms of the contract on a reasonable basis and claim damages and administrative cost from the assured for the assessment of the alteration of risk.

By virtue of section 34(3) of the 1906 Act, a breach of warranty can be waived. The waiver in this subsection refers to waiver by estoppel. In order to constitute waiver, the insurer must have made an unequivocal representation, and the assured must have relied upon that representation. However, it can be argued that this subsection may cause ambiguity. Such a problem can be resolved by modifying this subsection, and in the author's view, the wording 'unequivocal representation' should appear in this subsection.

Chapter 3 provided a historic review of Chinese marine insurance law and practice. Historically, although commercial transactions were regulated by various legislations, trading activities were controlled and limited by the government from the Qin Dynasty. In order to promote trading activities, different trading routes were also set up in ancient China, such as the Silk Road established in the Han Dynasty. However, as commercial law was not regulated on an international standard until the end of the Qing Dynasty, ancient Chinese commercial law has no role to play in the context of medieval *lex mercatoria*. But the contemporary Chinese commercial law was deeply influenced by German and Japanese law, especially after the Opium Wars.

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463 See Chapter 2.6(7).
464 See Chapter 2.6(8).
The practice of marine insurance in China emerged from as early as the 3rd millennia BC. From this period of time, in order to minimise the risk of loss or damage to the goods during the inland river transit, ancient Chinese merchants agreed to share the potential risk with each other by placing the goods on a number of different boats.

The Chinese insurance industry was not developed until the beginning of the 19th century when a number of foreign and domestic insurance companies were set up to compete with each other, although foreign insurance companies were in a dominant position at that time. All proposal forms, insurance clauses, policies or premium rates were drafted by foreign insurance companies. Soon after the collapse of the Qing Dynasty, the government of the National People’s Party passed the Maritime Law which also regulated marine insurance issues. But the Insurance Company Law drafted by the National People’s Party did not come into effect.

As soon as the People’s Republic of China was established in 1949, the PICC was set up by the government. Due to the economic systems reform, from the late 1980s, more and more domestic and foreign insurance companies entered into the insurance market. Since then, the PICC has established international branches in other countries.

In order to regulate maritime issues, the Maritime Code of the PRC was passed in 1993. Marine insurance law was governed by this Code. Relevant provisions of the English Marine Insurance Act 1906 were codified into the Maritime Code. Subsequently, another piece of legislation governing the law of insurance contracts was passed in 1995, namely the Insurance Law of PRC. Additionally, the Contract Law of PRC 1999 can also be adopted to settle a particular marine insurance dispute.

As the Chinese insurance industry developed into its mature state, the China Insurance Regulatory Commission was set up by the State Council as a
governmental agency and was authorised to regulate the insurance industry from 1998.

Unlike the English court system, a maritime dispute in China, including marine insurance case, must be dealt with in a particular maritime court depending on the geographical location of the dispute in question. With regard to a marine insurance dispute, the parties’ legal rights and interests can also be protected by way of arbitration with the assistance of the CMAC.

Chapter 4 provided a critical analysis as to the current statutory rule of warranty as appears in Article 235 of the Maritime Code. Although some new law reform proposals in respect of marine warranty in Article 235 of the Maritime Code has been introduced by scholars and the Supreme Court’s guidance notes, it is clear that there are still certain defects in the current Article 235 of the Maritime Code. At the outset, the problem as to the lack of a statutory definition of warranty has been addressed by the author. In the absence of a clear statutory definition of warranty, uncertainty may squeeze into the law. So according to the author’s view, the new section 33(1) of the Marine Insurance Act 1906 should be adopted into Article 235(1) of the Maritime Code as a statutory definition.465 In Chinese marine insurance law, warranty is directly associated with the principle of good faith which is only provided in Article 5 of the Insurance Law 1995. As good faith is an important statutory duty, it is suggested by the author that the word ‘utmost’ and the legal consequence for the breach of this duty should be inserted into this Article.

Under the relevant provisions of the Marine Insurance Act 1906, there are three important aspects as to the legal feature of warranty, namely a warranty must be exactly complied with, a warranty does not have to be material to the risk and a causal connection between a breach of warranty and the loss does not have to be shown. It is suggested by the author that the amended version

465 See Chapter 4.4.
of these three aspects of the statutory feature of warranty should be introduced and incorporated into Article 235(2) of the Maritime Code to clarify certain issues.\footnote{See Chapter 4.7.}

Under the current version of Article 235 of the Maritime Code, the assured must notify the insurer immediately as to any breach of warranty, but in the author’s view, in such a case, the assured should also be required to take reasonable measures to protect the subject matter insured. If he fails to do so, then subject to any express provision in the policy, the contract will be automatically terminated, with the premiums being non-refundable.\footnote{See Chapter 4.5.} Another amendment made by the author is that if the insurer fails to make an election immediately upon a breach of warranty, the assured will be entitled to assume that the insurer have waived the breach, but if, for the first time, the assured committed a minor breach of warranty, the insurer can only issue a warning notice to the assured.\footnote{See Chapter 4.6(1).} It is believed that these law reform proposals, if introduced into the Maritime Code, would bring Chinese marine insurance law in harmony with international maritime practice, so that the parties will have a better understanding as to the statutory rules of warranty under the new version of the Maritime Code.

In Chapter 5, the author provided a critical examination as to the statutory rules of the creation of express warranty under section 35 of the Marine Insurance Act 1906. As far as section 35(1) of the Marine Insurance Act 1906 is concerned, an express warranty can be created with any form of words without the need for the parties to use the word ‘warranty’ or ‘warranted’. It follows from this aspect of law that the creation of an express warranty may cause ambiguity and uncertainty. In such a case, the common law rule of
contra proferentes will come into play, such that the words will be construed against the insurer.

In addition, the purpose of the warranty is another factor which has to be considered by the courts in order to determine whether or not a particular clause is a warranty. It is sometimes difficult for the courts to identify a particular warranty, especially when the parties' intention is unclear. Therefore, in the author's view, in order for an express warranty to be valid, the importance of the warranty and the legal consequence for the breach must appear in the policy to assist the assured to comply with the warranty.\footnote{See Chapter 5.2(3).} Such a law reform proposal may also assist the court to determine whether or not a particular term is a warranty. Another law reform proposal made by the author is that an express warranty should also be created with commercial and risk-related purpose in order to be valid. These two law proposals should all be inserted into section 35(1) of the Marine Insurance Act 1906.\footnote{Ibid.}

According to section 35(2) of the Marine Insurance Act 1906, an express warranty must be set out in writing and included in the policy. It has also been established as a common law rule that oral statements and representations made by the assured may become express warranties if these statements and representations are subsequently incorporated into the policy. But as these statements and representations generally involve with past or existing facts, it is suggested by the author that they should not be considered as express warranties.\footnote{See Chapter 5.4.} In contrast, the rules as to the creation of express warranties were not covered in the Maritime Code. Therefore, it is proposed by the author that the amended version of section 35(1) and 35(2) of the Marine Insurance Act 1906 should be inserted into Article 235 of the Maritime Code, but the legal
purpose of the warranty must also be taken into account by the insurer when creating an express warranty.472

Finally, the author in Chapter 6 provided a critical comparison between the implied warranties in English law and Chinese law. There are 4 types of implied warranty in the Marine Insurance Act 1906, namely warranty of portworthiness, warranty of cargoworthiness, warranty of legality and warranty of seaworthiness. The warranty of portworthiness under section 39(2) of the 1906 Act requires the ship to be reasonably fit to encounter the ordinary perils of the port. As regular surveys are generally carried out for the ship, it is suggested by the author that the assured should not be required to comply with the warranty of portworthiness if regular surveys in respect of the ship are carried out by an approved classification society.473

The statutory rule as to the warranty of cargoworthiness appears in section 40(2) of the 1906 Act which requires the ship in a voyage policy to be reasonably fit to carry the goods to the intended destination. In the author’s opinion, in order to provide fairness to the insurer, the warranty of cargoworthiness should also be extended to time policy when the ship is moored at a port.474

The warranty of legality is governed by section 41 of the 1906 Act which requires both the adventure insured and the performance of the adventure to be lawful. The adventure insured may be rendered unlawful if a domestic law is breached. This warranty can also be breached if the assured fails to comply with international law. Under the second part of section 41 of the 1906 Act, if the assured can control the matter, statute or regulation should not be violated during the performance of the adventure. Unlike other types of warranty, breach of the warranty of legality cannot be waived. It was argued by the

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472 See Chapter 5.6.
473 See Chapter 6.2.
474 See Chapter 6.3.
author that in order to promote international harmony, the assured should also be required to comply with foreign laws and regulations.\textsuperscript{475}

The implied warranty of seaworthiness is governed under section 39 of the 1906 Act. The term ‘seaworthiness’ is defined under section 39(4) of the 1906 Act which provides that the ship shall be reasonably fit in all respect to encounter the ordinary perils of the sea. This statutory definition indicates that the issue as to whether a particular ship is seaworthy should be determined by external factors and internal factors. However, this statutory definition may cause uncertainty for the assured. So the author’s view is that this subsection should be altered as follows:

\hspace{1cm} \textit{Taking external factors into account, a ship, with sufficient number of crew, is deemed to be seaworthy if she has the ability to commence the voyage as contemplated by the policy.}\textsuperscript{476}

The term ‘seaworthiness’ was also defined by common law. Under common law, apart from the fitness of the ship to encounter the ordinary perils of the sea, the ship must also be fit to carry the cargo. But in the author’s opinion, the fitness of the ship to carry the cargo should be dealt with separately as another common law principle, so that the unfitness of the ship to carry cargo should not be equated with the unfitness of the ship to withstand the ordinary perils of the seas.\textsuperscript{477}

The issue as to when the warranty of seaworthiness applies appears in section 39(1) of the 1906 Act which only requires the ship to be seaworthy at the commencement of the voyage. But this statutory rule may cause unfairness to the insurer. So it is suggested by the author that during the

\textsuperscript{475} See Chapter 6.4.
\textsuperscript{476} See Chapter 6.5(2).
\textsuperscript{477} See Chapter 6.5(3).
voyage, the ship must also remain its seaworthy state under ordinary weather conditions.478

The doctrine of stages under section 39(3) of the 1906 Act allows the ship to call at intermediate ports, such that the warranty of seaworthiness will be complied with if the ship is seaworthy at the commencement of each stage of the adventure. In the author’s view, this statutory rule was introduced unfairly against the insurer, as he must accept the risk of loss for a long period of time. It is suggested by the author that another statutory rule should be introduced into this subsection, that is, the ship must also be seaworthy between the commencement of the voyage and the first intermediate port.479

Under the first part of section 39(5) of the 1906 Act, there is no warranty of seaworthiness in time policy. But under the second part of this subsection, the insurer is not liable for any loss attributable to unseaworthiness where, with privity of the assured, the ship is sent to sea in an unseaworthy state. It has been established under common law that the term ‘privity’ includes positive knowledge and blind eye knowledge, and a clear distinction must be drawn between privity and negligence. The concept of privity applies to the knowledge of the individual assured and the assured’s alter ego. In the case of a company, the knowledge of the persons possessing the decision making power should be taken into account. In order to balance the interests between the assured and the insurer, the author proposed that in this subsection, the seaworthiness obligation should be extended to cover the commencement of the first stage of the adventure.480

The phrase ‘attributable to’ in section 39(5) of the 1906 Act covers proximate cause and remote cause. To ensure that the assured understands the meaning of the term ‘attributable to’, it is suggested by the author that the

478 See Chapter 6.5(4).
479 See Chapter 6.5(5).
480 See Chapter 6.5(6).
term ‘attributable to’ should be replaced by the phrase ‘directly or indirectly caused by’.

The common law rule as to the burden of proving unseaworthiness is connected with the presumption of fact. In order to mitigate the harsh effect as to the rule of burden of proof, the author suggested that the rule as to the presumption of fact should be replaced by another common law rule, such that the assured will only be required to prove that the ship is seaworthy at the commencement of the voyage.

The current law is silent as to the application of the warranty of seaworthiness in mixed policy. The author’s view is that the warranty of seaworthiness must be complied with in the voyage part of the cover, and the seaworthiness obligation should only apply to the commencement of each stage of the adventure for the time part of the cover.

There is no implied warranty in the Maritime Code. For the benefit of the insurance market, the author’s view is that the amended version of section 41 of the 1906 Act should be introduced into the Maritime Code as the warranty of legality.

In Article 244 of the Maritime Code, unseaworthiness is treated as an exception to the insurer’s liability. But according to this Article, in a time policy, the insurer is not liable for any loss resulting from unseaworthiness, unless the assured has no knowledge as to the unseaworthiness. However, this Article is introduced unfairly from the insurer’s point of view. Therefore, it is suggested by the author that the warranty of seaworthiness should be introduced into this Article, and the legal consequence for the breach of this warranty should be the same as Article 235 of the Maritime Code. In order to protect the interests

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481 See Chapter 6.5(7).
482 See Chapter 6.5(8).
483 See Chapter 6.5(9).
484 See Chapter 6.6(3).
of the insurer, the author suggested that the amended version of section 39(1) of the 1906 Act, as proposed by the author earlier in this Chapter, should be inserted into Article 244 of the Maritime Code to deal with the issue as to the application of the warranty of seaworthiness. The author also proposed that the application of the warranty of seaworthiness and the legal consequence for the breach of this warranty should be placed into different parts of Article 244 of the Maritime Code in order to simplify this Article.485

Overall, the author has provided some law reform proposals and introduced some new laws as to the current warranty regime between the English Marine Insurance Act 1906 and the Maritime Code of PRC 1993. It has been argued by a large number of scholars that some statutory rules in respect of warranties should be reformed to promote fairness within the current insurance market. But in this thesis, these views have been challenged by the author on several grounds. The law reform proposals and new laws introduced by the author in this thesis should not be regarded as the perfect method to modify the existing law. Rather, these law reform proposals and new laws should be reviewed and scrutinized by relevant research bodies. However, the main purpose of this thesis is to draw the attention of relevant legislative bodies to review and make some law reform proposals as to the current warranty regime.

485 See Chapter 6.6(2).
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ABBREVIATIONS

CCP, Chinese Communist Party

CIRC, China Insurance Regulatory Commission

CMAC, China Maritime Arbitration Commission

GICA, German Insurance Contracts Act 2008

GMD, Guo Min Dang

GPCR, Great Proletarian Cultural Revolution

NPC, National People’s Congress (PRC)

PBC, People’s Bank of China

PICC, People’s Insurance Company of China

PRC, People’s Republic of China

SC, State Council (PRC)

UK, United Kingdom