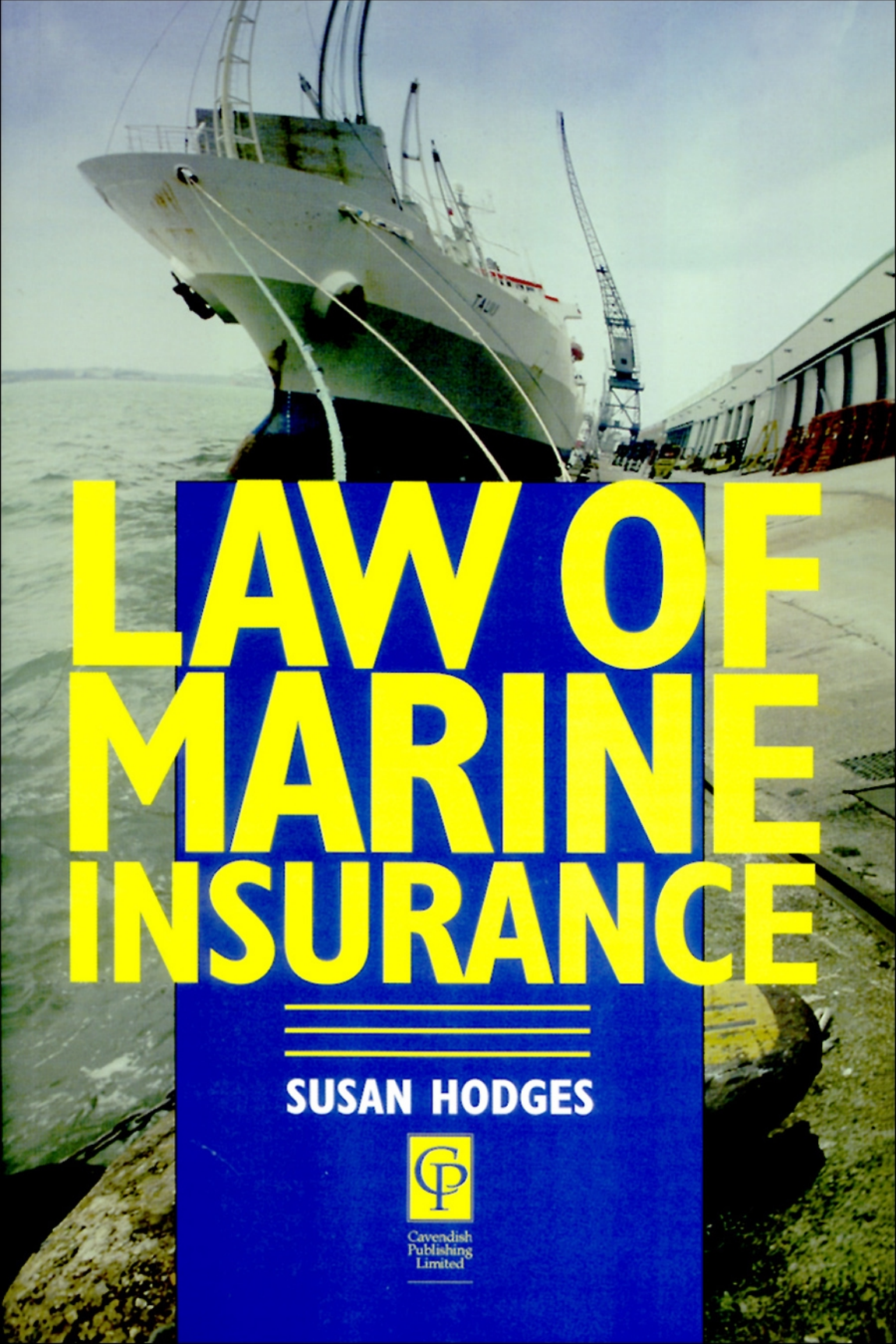

LAW OF MARINE INSURANCE

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CHAPTER 7

WARRANTIES

A – GENERAL PRINCIPLES

There are two types of warranties identified by the Act: express and implied warranties.[1] A warranty in marine insurance, whether express or implied, is indeed a very special term of the contract. In the law of marine insurance, a warranty is also referred to as a promissory warranty and this is made clear by s 33(1), which defines a warranty to mean:

> '... a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.'

There are certain features, common to both express and implied warranties, laid down by case law and the Act relating to the nature of a marine insurance warranty and the effect of its breach. These qualities have bestowed upon it its undoubted strength and importance as a contractual term:

- A promissory warranty does not have to be material to the risk;
- A promissory warranty must be exactly complied with;[2]
- There is no defence for a breach of a promissory warranty;
- A breach of a promissory warranty is irremediable;[3]
- A causal connection between breach and loss need not be shown;
- A breach of a warranty automatically discharges the insurer from liability; and
- A breach of a warranty may be waived.

Each of the above general principles will be examined separately, followed by a discussion of some of the standard examples of express warranties, and then the implied warranties.

MATERIALITY TO THE RISK

There can be no question of querying the materiality of a warranty: a warranty does not have to be material to the risk. This is what distinguishes it from non-disclosure and misrepresentation. This aspect of the law is more appropriate to an express rather than to an implied warranty, the materiality of which cannot be called into question being implied by law. Section 33(3) states that it must be exactly complied with 'whether it be material to the risk or not'. The law on the subject is more than well-established.

1 Section 33(2).
2 Section 33(3).
3 Section 34(2).

In *Union Insurance Society of Canton, Ltd v George Wills & Co*,[4] Lord Parmoor in the Judicial Committee of the Privy Council, on appeal from a judgment of the Supreme Court of Western Australia, stated that: 'If the promise amounts to a warranty it is immaterial for what purpose the warranty is introduced.'

In *Newcastle Fire Insurance Co v MacMorran and Co*,[5] it was noted that:

> '... if there is a warranty, the person warranting undertakes that the matter is such as he represents it; and unless it be so, whether it arises from fraud, mistake, negligence of an agent, or otherwise, then the contract is not entered into; there is in reality no contract … Therefore the materiality or immaterality signifies nothing. The only question is as to the mere fact.'

Lord Justice Bankes in *Farr v Motor Traders Mutual Insurance Society*[6] went so far as to say that a warranty, 'however absurd', is still binding on the parties.

EXACT COMPLIANCE

The most demanding characteristic of a promissory warranty, whether express or implied, is that it must be *exactly* complied with. Unlike a representation,[7] s 33(3) insists upon a *literal* compliance: substantial observance is not good enough. The use of the word 'must' in s 33(1) strengthens this requirement. Thus, there is no room for the application of the maxim *de minimis non curat lex*; neither is a severance of the contract possible.

During the second half of the 18th century, a pair of indeed unforgettable cases, namely, *Pawson v Watson*[8] and *De Hahn v Hartley*,[9] both presided over by Lord Mansfield, discussed the differences between a representation and a warranty in a contract of marine insurance. In the first case, Lord Mansfield's remarks regarding the nature of an express warranty were *obiter*. As the statement of fact was not inserted into the policy, the judge had no choice but to construe it as a representation.[10] Though *obiter*, his comments are nevertheless lucid and revealing, and the principle there so expressed is still good law. He stated that:[11]

> '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 …'

4 [1916] AC 281, Privy Council.

5 (1815) 3 Dow 255 at pp 259 and 262.

6 [1920] 3 KB 669 at p 673, CA.

7 A representation of fact need only be 'substantially correct' (s 20(4)) and a representation of expectation or belief is true if made in good faith (s 20(5)). See below.

8 (1778) 2 Cowp 785.

9 (1786) 1 TR 343.

10 The *Julius Caesar* was described to the underwriter as: 'she mounts 12 guns and 20 men'. When she was taken by an American privateer, she had on board 6 pounders, 4 three pounders, 3 one pounders, 6 half pounders which were called swivels, and 27 men and boys in all; but of them, 16 only were men (not 20 as the instructions mentioned) and the rest boys.

11 (1778) 2 Cowp 785 at pp 787-788.

In *De Hahn v Hartley*,[12] the clause which was written in the margin of a policy of insurance on the *Juno* stated that she had 'sailed from Liverpool with 14 six-pounders, swivels, small arms, and 50 hands or upwards; copper-sheathed'. On this occasion, as the statement was written into the policy, albeit it in the margin,[13] Lord Mansfield was able to classify it as a warranty. It is worthwhile setting out the words of the learned judge, as they accurately declare the legal position:

> '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. Supposing a warranty to sail on 1st August, and the ship did not sail till the 2nd, the warranty would not be complied with. A warranty in a policy of insurance is a condition or a contingency …'[14]

In a similar tone, Mr Justice Ashhurst stressed that[15] 'the very meaning of a warranty is to preclude all questions whether it has been substantially complied with: it must be literally so'.

The court was not, and correctly so, influenced in any way by the fact that the *Juno* was *as safe*, having set sail with 46 hands on board instead of 50 as required by the warranty. Whether the actual situation is for better or for worse makes no difference: the underwriter has the right to say, the truth of the case is not according to what he had bargained for.

The severity of the rule of literal compliance can also be seen in the case of *Overseas Commodities Ltd v Style*,[16] where the question of severance of contract was also discussed. The facts of the case involved a cargo of canned pork insured under an 'all risks' policy which contained a warranty: 'warranted all tins marked by manufacturers with a code for verification of date of manufacture'. The court held that there was a breach of warranty in that a substantial[17] number of tins were not marked with a code in accordance with the warranty.

Mr Justice McNair was not prepared to grant the assured indemnity even for the tins that were properly marked in compliance with the terms of the warranty. The whole basis of his decision rested upon the ground that there was only *one* policy of insurance for the whole consignment of the goods, and that the contract of insurance could not be severed into as many contracts as there were tins of pork that were covered by that policy. He was adamant that the

12 (1786) 1 TR 343.

13 See also *Bean v Stuppart* (1778) 1 Dougl 11.

14 The illustration with regard to dates clearly excludes the application of the *de minimis* rule.

15 (1786) 1 TR 343 at p 346.

16 [1958] 1 Lloyd's Rep 546.

17 How the court would have decided if only one or two tins were not properly marked is an interesting thought. Whether the *de minimis* rule could be invoked in such a situation is yet to be decided. On the application of the *de minimis* rule for the purpose of determining whether a loss is total or partial, see *Boon Cheah Steel Pipes Sdr Bhd v Asia Insurance Co* [1975] 1 Lloyd's Rep 452, where the Malaysia High Court refused to apply the *de minimis* rule. As exact compliance is required, any difference, however negligible or insignificant, is unlikely to be considered as inconsequential.

contract of insurance should not be re-written in order to provide coverage for some of the loss.

NO DEFENCE FOR BREACH

With the exception of the two excuses laid down in s 34, there is clearly no defence for a breach of an express or implied warranty. Though not specifically spelt out by the Act, the general principle that there is no defence for a breach of a warranty is firmly established by the common law. As there is nothing in the Act which is inconsistent with this rule, it 'shall continue to apply to contracts of marine insurance'.[18] Moreover, as only two excuses are laid down by the Act, they must be regarded as the only exceptions to the general rule allowed by law.

The application of the general rule is actually best illustrated in cases relating to a breach of the implied warranty of seaworthiness. The common law principle was first established in 1764 in the case of *Mills v Roebuck, The Mills Frigate*,[19] a prominent landmark in the legal history of marine insurance. Lord Mansfield's judgment was said to have 'hit the city of London like a thunderbolt'[20] when he held that an assured could not recover upon a policy on a ship which suffered from a latent defect unknown to both parties to the contract. The facts of the case involved the French-built *Mills Frigate* which was fastened together with bolts of iron that were liable to rust, causing the timbers of such ships to become loose without any visible signs of decay, rendering her incapable of bearing the sea. The court held that the assured could not recover even though the loss was caused by a latent defect unbeknown to both parties.

Similarly, pleas such as the exercise of care and due diligence, inevitable accident, and good faith are also of no avail. There is a long line of cases which had applied the rule.[21] To drive home the point, Lord Eldon in *Douglas v Scougall*,[22] in reference to the implied warranty of seaworthiness stressed that:

> 'It is not necessary to inquire whether the owners acted honestly and fairly in the transaction, for it is clear law that, however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not seaworthy, the underwriter is not liable.'

In *Forshaw v Chabert*,[23] the position was stated as follows: 'Now it is clear that a ship must be seaworthy at the time when she sails; the assured warrants that, and whatever physical necessities may interpose, he is not allowed to deviate from the strict terms of his warranty'.

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18 Section 91(2).

19 Reported in Park, *Insurance*, (7th edn), Chapter XI, p 334.

20 DEB Gibb, *Lloyd's of London*, 1957, p 67.

21 *Lee v Beach* (1792) Park, *Insurance*, (8th edn) at p 468; *Oliver v Cowley* (1792) *ibid*, at p 470; *Forshaw v Chabert* (1821) 3 Br & B 159; *Douglas v Scougall* (1816) 4 Dow 278; *Wedderburn & Others v Bell* (1807) 1 Camp 1; and *Quebec Marine Insurance Co v The Commercial Bank of Canada* (1870) LR 3 PC 234.

22 (1816) 4 Dow 278.

23 (1821) 3 Br & B 159.

These cases, which have firmly established that there is no defence for a breach of the implied warranty of seaworthiness, have led the said warranty to be described as being 'absolute' in nature. In this sense, the same may be said of all warranties

Excuses under section 34(1)

As mentioned earlier, there are only two statutory excuses contained in s 34(1) which may be pleaded as a defence for non-compliance of a warranty: a change of circumstance, and when compliance with the warranty is rendered unlawful by any subsequent law. The excuse of a change of circumstance is more relevant to an express warranty than to an implied warranty, though, as worded, the section applies to both. In respect of the defence of illegality, s 34(1) complements s 41, which implies a warranty of legality in all polices that not only the adventure but the performance of the adventure has to be lawful.[24]

BREACH IS IRREMEDIABLE

Another defence, to the effect that the breach of the warranty was remedied before the loss, was unsuccessfully pleaded in relation to the implied warranty of seaworthiness in *Quebec Marine Insurance Co v The Commercial Bank of Canada*,[25] the classic authority on the subject. Counsel for the assured suggested that as the defect was remedied before the loss occurred, the underwriters will remain liable. This defence, described as 'a proposition of perilous latitude', was rejected by the Privy Council. The principle of law, now contained in s 34(2), 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'.

CAUSAL CONNECTION NOT REQUIRED

The fact that a breach of a warranty has no causal connection with the loss whatsoever is also immaterial. In *Foley v Tabor*,[26] Chief Justice Erle's address to the jury on this point was:

> 'It is not necessary for the insurer to make out that the loss was caused by the unseaworthiness relied upon. The question depends upon the state of the ship at the time when she sailed upon her voyage.'

The fact that the breach of a warranty has not caused the loss is clearly of no consequence.

24 Discussed below.

25 (1870) LR 3 PC 234.

26 (1861) 2 F & F 683 at p 672.

AUTOMATIC DISCHARGE FROM LIABILITY

Section 33(3) states that, 'A warranty … is a condition which must be exactly complied with'. Though called a warranty, it is in fact, as defined by the said section, a 'condition' of a promissory nature. Thus, 'promissory condition' would be a more suitable name for it. The word 'condition' is not defined in the Act. It is, however, capable of two meanings: it could be used in the lay or non-technical sense to mean a provision, a requirement or simply a term of the contract[27] which in this case must be exactly complied with; or it could be interpreted in a strict and purely legal sense, as understood in the general law of contract, as a particular type of contractual term, a condition as opposed to a warranty or innominate term.

Under ordinary contract law, a warranty is a term of a contract the breach of which would bestow upon the innocent party the right only to damages. That an insurance warranty does not belong to such a class of warranty known in the general law of contract was made clear in *The Cap Tarifa*,[28] where it was said:

> 'The term "warranty" is used in different senses and, in insurance law, special considerations are applicable to the problem under discussion, apart from the general principles of contract law. Thus the familiar distinction between condition and warranty in the general law of contract is not applicable in the discussion of warranties in policies of insurance.'

Traditionally, a marine insurance warranty has always been recognised as a condition. However, in the past, it has also been referred to as a condition precedent to the attachment of risk; a condition precedent to the liability or further liability of the insurer; and even a condition subsequent. Recently, in *The Good Luck*,[29] it was confirmed that it is a condition precedent to the liability or further liability of the insurer.

A condition precedent

It is interesting to note that it was only as late as 1991 that the nature of a marine insurance warranty became the subject of serious and intense scrutiny in the House of Lords in *The Good Luck*. It is clearly the definitive authority on the subject of marine insurance warranties. The central and decisive consideration of the case revolved around the issue regarding the legal consequences of a breach of a promissory warranty as defined in s 33(3) of the Act. It is to be noted that, though the case was concerned directly with an express warranty, the principles enunciated therein on the effects of a breach also applies to implied warranties.

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27 In *Overseas Commodities Ltd v Style* [1958] 1 Lloyd's Rep 546 at p 558, McNair J endeavoured to explain the meaning of the word as follows: 'A condition of what? Surely, a condition of the contract of insurance'.

28 *Per* Walsh J [1957] 2 Lloyd's Rep 485 at p 490. In *W & J Lane v Spratt* [1970] 2 QB 480 at p 486, Roskill J clarified the position as follows, '… it is well known, particularly in the field of marine insurance law, that the word "warranty" is often used when those who use it in truth mean a "condition".

29 *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1991] 2 WLR 1279; [1991] 2 Lloyd's Rep 191, HL.

The facts of the case may be briefly summarised as follows. *The Good Luck* was insured under a policy which contained, *inter alia*, an express warranty (a P&I club rule) prohibiting her from entering certain declared areas. These areas were of such extreme danger that it was considered not acceptable by the insurer that they should cover vessels entering them.[30] In breach of the warranty, the vessel entered the Arabian Gulf and was struck by a missile which so badly damaged her that she became a constructive total loss. One of the main questions which the House had to consider was the legal effects such a breach would have on the policy. The controversy was whether the club had 'ceased' to insure her at the time of the breach of the warranty. It was necessary to know the answer to this question because the insurers (the P&I club) had undertaken to notify the mortgagees only 'if the ship ceases to be insured'. The answer to this debate was largely dependent upon whether the insurer was automatically discharged from liability by reason of the breach, or whether he was required to take active steps to rescind or avoid the contract, as he would have to in the case of a breach of a condition under ordinary principles of contract law. Lord Goff, referring to the wording of s 33, held that:[31]

> '… if a promissory warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, for the simple reason that fulfilment of the warranty is a condition precedent to the liability or further liability of the insurer.'

For this pronouncement, Lord Goff relied heavily on the case of *Thomson v Weems*,[32] a non-marine case decided in 1884, as the authority which had proposed that '… compliance with that warranty is a condition precedent to the attaching of the risk'. In the said case, the judge stressed the fact that the insurer only accepted the risk conditional upon the warranty being fulfilled and that that was the whole rationale for its very existence.

As can be seen from Lord Goff's speech, a promissory warranty is today to be regarded as a 'condition precedent'. Whether a promissory warranty is also a 'condition' (the term used in s 33(3)) and the legal implications of being classed as a 'condition precedent' will now have to be examined.

'Condition' and/or 'condition precedent'

In the law of contract, the variety of senses in which the expression 'condition' has been used was described by Trietal[33] as 'one of the notorious sources of difficulty in the law of contract'. It is necessary for the sake of clarity to go over some of the old ground on the law relating to conditions and condition precedents. According to Trietal,[34] the term 'condition precedent' is normally used to describe an 'event' or 'order of performance' in the sense that the performance by one party may be a condition precedent to the liability of the

30 If the owner wanted cover whilst his vessel was in the prohibited area, special arrangements had to be made.

31 [1991] 2 Lloyd's Rep 191 at p 202, HL.

32 (1884) 9 App Cas 671 at p 684.

33 *Law of Contract*, (9th edn), p 703-707.

34 'Conditions' and 'Conditions Precedent' [1990] 106 LQR 185.

other'. A 'condition,' however, is simply a term of a contract which requires conformity. Trietal warns that, though they are distinct concepts, a clause may well be a condition and a condition precedent at the same time. Regrettably, the term 'condition precedent' has been loosely used to refer to both a term of a contract and an event, that is, the prior or concurrent performance by one party before that of the other became due. This indiscriminate use of terms has generated a great deal of confusion and problems not only in the law of contract, but also in this area of marine insurance law. In the light of its dual usage, it is necessary to inquire what Lord Goff meant exactly when he used the words 'condition precedent' in relation to a promissory warranty. The question whether he had one or both of these concepts in mind has to be explored.

Under general contract law, a breach of a condition precedent normally produces the following consequences:

- the injured party can simply refuse to perform his part of the bargain without having to make any previous election; and
- the injured party is only justified in refusing to perform for so long as the failure continues.

Whether the second effect is to be applied to a breach of a promissory warranty is a question which needs to be considered.

Automatic discharge

When Lord Goff ruled that an insurance warranty was a 'condition precedent', he did not clarify whether it was to be granted both the above characteristics of a condition precedent. There is no doubt that the first applies to a promissory warranty. The basis of his decision can be ascertained from the following remarks he had made:[35]

> 'They [referring to s 33] show that discharge of the insurer from liability is automatic and is not dependent upon any decision by the insurer to treat the contract or the insurance as at an end; though, under s 34(3), the insurer may waive the breach of the warranty.'

Section 33(3), however, merely states that, '… If [a warranty] be not so complied with … the insurer is discharged from liability as from the date of the breach of warranty …'. In the light of the above speech, the word 'automatically' has now to be read before the word 'discharged'.

A condition, as an ordinary contractual term, does not possess the quality of enabling the innocent party in the event of its breach to be automatically discharged from all future liability under the contract. The legal requirement that the innocent party has to exercise the option either to affirm or rescind the contract in the event of a breach of a 'condition' is obviously incompatible with Lord Goff's rule of automatic discharge. Viewed in this light, a promissory warranty cannot thus be regarded as a condition which by definition is a term the breach of which would allow the innocent party the right of choice, either to affirm or rescind the contract. As far as Lord Goff was concerned, once a breach of a promissory warranty has been committed, the result is automatic: the

35 [1992] 2 Lloyd's Rep 191 at p 202, HL.

insurer is *spontaneously* discharged from liability as from the date of the breach, but without prejudice to any liability incurred by him before that date.

The future of the contract

In relation to a warranty on geographical limits, the second of the above consequences of a breach of a condition precedent is particularly significant to the question of whether a ship which has entered and departed from a prohibited area is covered for a loss of or damage sustained whilst traversing outside the prohibited area during the currency of the policy. In other words: is the policy revived or restored on the ship leaving the prohibited area? As *The Good Luck* was a constructive total loss, this question did not arise for consideration. If she was able to sail out of the prohibited zone, would she then, once again, be covered by the policy?

In order to ascertain the effect such a breach has on the future of the contract, reference has to be made to another crucial statement made by Lord Goff:[36]

> 'Certainly, [s 33(3)] does not have the effect of avoiding the contract *ab initio*. Nor, strictly speaking, does it have the effect of bringing the contract to an end. It is possible that there may be obligations of the assured under the contract which will survive the discharge of the insurer from liability, as for example a continuing liability to pay a premium. Even if in the result no further obligations rest on either parties, it is not correct to speak of the contract being avoided …'

It is noted that the emphasis here is that it is *liability* and not the contract which is brought to an end. With due respect, it is submitted that this statement is as ambiguous as it is confusing. If the contract is not brought to an end, then it must surely be still on foot or in force. Lord Goff may have perhaps intended to say that, though the insurer was automatically discharged from liability or future liability, the contract was, nevertheless, still operative for certain limited purposes, such as the payment of premium already accrued. The purpose of keeping the contract alive is, presumably, to give the insurer the opportunity, if he so desires, to waive the breach.

As was seen, certain parts of Lord Goff's judgment steered dangerously close to language which is more akin to a limitation of liability clause rather than a promissory warranty. The relevant parts read as follows:[37]

> '… the insurer does not avoid liability … it is only in the sense of repudiating liability (and not repudiating the policy) that it would be right to describe him as being entitled to repudiate. In truth the insurer, as the Act provides, is simply discharged from liability as from the date of the breach, with the effect that thereupon he has a good defence to a claim by the assured.'

But having said that, it has to be pointed out that he was careful in his judgment to distinguish between the two forms of warranty, *viz* 'those warranties which simply denote the scope of the cover … and those which are

36 *Ibid*.

37 *Ibid*, at p 203.

promissory warranties, involving a promise by the assured that the warranty will be fulfilled'.[38] He clarified that it is with the latter type of warranty – the subject of ss 33–34 of the Act – that he was concerned with.

Suspension of the contract?

Is it possible that the contract is suspended whilst the insured vessel is in the prohibited area? The suspension theory is consistent with ordinary contract principles applicable to a condition precedent, but not a condition which 'justifies rescission in the sense of an outright or *permanent refusal* to perform and to accept further performance from the party in breach':[39] an election to rescind the contract is required to achieve this end. Thus, if an insurance warranty is to be construed as a condition precedent in its strict sense, it is possible that the risks under the policy could be turned on and turned off by the actions of the assured. To restore coverage, all that the assured has to do is to leave the prohibited zone, provided, of course, that the policy has not expired.

Whether an insurance warranty is also to be invested with the second of the above-mentioned characteristics of a condition precedent is doubtful. Such a legal position, though consistent with the nature of a condition precedent, is, it is submitted, untenable. It is clearly incompatible with another fundamental principle relating to a promissory warranty, namely, that a breach of a promissory warranty cannot be remedied and complied with even before loss.[40] It would not, therefore, be unreasonable to conclude from this that there is no place for the suspension theory in the event of a breach of a promissory warranty. Once a breach has been committed, the insurer is automatically discharged; and unless the breach is waived, the insurer is not liable for further losses under the policy. There is clearly no place for the suspension of contract theory in Lord Goff's rule of automatic discharge. If the rule of automatic discharge is to be carried to its logical conclusion, the insurer would be discharged from liability on taking the very first step of entering the prohibited zone. The moment she enters the prohibited area, the insurer is automatically discharged from liability or further liability. This would mean that, unless the breach was waived, any damage suffered by the vessel thereafter, wherever and however sustained, would not be covered by the policy. Unless such a clause is construed as a limitation of cover, there is no question of a suspension of the policy.

A 'new approach'

Lord Goff has apparently adopted a new approach in his treatment of a marine insurance warranty. In fact, he had borrowed the idea from Lord Justice Kerr of the Court of Appeal in the case of *State Trading Corpn of India Ltd v M Golodetz Ltd*[41] who had pre-empted the legal position as follows:

38 *Ibid*, at p 201.

39 Trietal, *Law of Contract*, (9th edn) p 703.

40 Section 34(2).

41 [1989] 2 Lloyd's Rep 277 at p 287, CA.

> '… the correct analysis may lie in a new approach to the construction of the contracts in question. Thus … upon the true construct of the contract, the consequence of the breach is that the cover ceases to be applicable unless the insurer subsequently affirms the contract rather than to treat the occurrence as a breach of the contract by the insured which the insurer subsequently accepts as a wrongful repudiation.'

When Lord Goff used the term 'condition precedent' to describe the effect of a breach of a promissory warranty, he was using it only in a limited sense: the first but not the second of the two features described above. A promissory warranty is thus a special kind of condition precedent, the breach of which automatically discharges the insurer from liability, without the insurer having to take steps to rescind the contact, which he would have to do so in the case of a breach of an ordinary 'condition'. This is probably what Lord Goff had in mind when he said:[42]

> 'Even if in the result no further obligations rests on either parties, it is not correct to speak of the contract being avoided; and it is, strictly speaking, more accurate to keep to 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.'

As the insurer is entitled to refuse to perform or accept performance from the party (the shipowner) in breach, the policy is, in practical terms, at an end. Unless the breach is waived, there is no future for the contract.[43] In this respect, the effect of a breach of a promissory warranty is no different from that of a breach of a condition. The difference is that, in the case of the former, it is not dependent upon a decision by the insurer to rescind the contract, whereas in the latter, he has to take steps to end the contract.

A 'cross' of two contract law concepts, namely, a condition and a condition precedent, is inherent in Lord Goff's proposal. The marriage of one strain from a 'condition' with another from a 'condition precedent' has produced a new hybrid of contractual term, yet to be given a name of its own in the general law of contract. In marine insurance law it is known as a promissory warranty.

The legal position is somewhat peculiar in the sense that in the event of a breach of a promissory warranty the contract is neither void nor avoidable. It is by no means void,[44] as rights and liabilities accrued before the breach are expressly preserved by the Act. Neither is it voidable,[45] as the insurer does not have to take the initiative to rescind the contract. Further, the contract is neither suspended nor brought to an end.

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42 [1991] 2 Lloyd's Rep 191 at p 202, HL.

43 M Clarke, *Breach of Warranty in The Law of Insurance* [1991] LMCLQ, p 437, says that 'the only reasonable inference from silence on the part of the insurer is that the contract does not go on'.

44 In *Bond v Nutt* [1777] 2 Comp 601, Lord Mansfield explained that '… the policy was void; the contingency had not happened; and the party interested had a right to say, there was no contract between them.' In *Samuel v Dumas* [1923] 1 KB 592, HL, Viscount Cave remarked that as the insurer had waived the breach he was prevented from 'treating the marine policy on the vessel as void …'.

45 A breach of a warranty against contraband of war was described as having avoided the whole insurance in *Seymour v London & Prov Marine Insurance Co* [1872] 41 LJ CP 193; 1 Asp MLC 323. This is no longer good law in the light of *The Good Luck* [1991] 2 Lloyd's Rep, 191, HL

One principle which the rule of automatic discharge has certainly taken care of is that of the implied waiver or affirmation of a contract brought about by reason of silence or delay. An insurer who does nothing after a breach of a promissory warranty can now no longer be accused of having, by his inactivity, impliedly waived or affirmed the contract. In the absence of some overt act on his part demonstrating an intention to waive the breach, the insurer is automatically discharged from all future liability.

WAIVER OF BREACH OF WARRANTIES

Section 34(3) permits an insurer to waive a breach of warranty. Such a course of action, which is normally achieved by the insertion of either a held covered or a waiver clause, is also recognised by the phrase 'subject to the provisions in the policy' in s 33(3).[46]

Waiver and estoppel

Clarke observed that the distinction between 'waiver' and 'estoppel' is 'not drawn easily and in insurance cases, not drawn often'.[47] This is true in *Provincial Insurance Co of Canada v Leduc*,[48] where the vessel was wrecked after she had entered the Gulf of St Lawrence in breach of an express warranty. Soon after loss, the assured gave notice of abandonment, which was accepted by the insurer with full knowledge of all the facts. It was held by the Privy Council that the acceptance of the notice under the circumstances was sufficient to 'estop' the insurer from denying liability for the loss which the vessel had sustained whilst in the prohibited area. The insurer argued that as the ship was not insured when she was lost – as the policy did not extend to a loss in the prohibited area – the notice of abandonment was of no avail because there was no insurance in existence at the time of the loss. This contention was curtly rejected by the Privy Council in a brief reply that: '… the vessel was in fact insured; the loss occurred during the time and upon a voyage described in the policy, but there was a breach of one of the warranties or conditions expressed.'

How the vessel could be described as having been engaged on a 'voyage described in the policy' when she was clearly trading within the prohibited area in breach of the warranty is baffling. Presumably, the court felt that it had to keep the policy alive in order that it may be waived. It has to be said that this is an old case decided at a time when it was thought that a breach of a promissory warranty gave the insurer the right to avoid the contract. As the insurer in this case had not only *not* avoided the contract, but had in fact affirmed its existence by accepting the notice of abandonment, the court had no choice but to hold that he had waived the breach. As the right of avoidance of a contract is no longer the legal effect of a breach of a warranty, the matter has now to be considered in the light of s 33(3), read with *The Good Luck*, which lays down the

46 It is to be noted that the implied warranty of legality laid down in s 41 cannot be waived; a discussion of this warranty can be found below.

47 M Clarke, *Breach of Warranty in The Law of Marine Insurance* [1991] LMCLQ 437 at p 439.

48 (1874) LR 6 PC 224, PC.

rule that the insurer is *automatically* discharged from liability or further liability as from the date of the breach. Arnould,[49] however, states that this change in the law has not solved the problem, as it is still open to the same objection: once an insurer is discharged, or even automatically discharged, from liability as from the date of breach, it would logically be almost impossible for him to waive the breach of a contract from which he has already been discharged.

It would appear that the doctrine of estoppel is obviously the tidiest way of removing these nagging problems: an insurer may not be able to affirm a contract by waiver because he has been discharged from liability as from the date of breach, but he can certainly, by his conduct, be estopped from pleading as having been discharged from liability. The decision would have stood on firmer foundation if the court were to justify it purely on the basis of estoppel. It was the conduct of the insurer – by his acceptance of the notice – which precluded him from relying on the breach of the express warranty to exonerate him from liability for the loss. Though the word 'waiver' was not used by the court, the effect is nonetheless the same. Whether called a waiver or an estoppel, such an interpretation of the law would not be inconsistent with Lord Goff's rule of automatic discharge, in particular, with his remarks that:

> '… when, as s 34(3) contemplates, the insurer waives a breach of a promissory warranty, the effect is that, to the extent of the waiver, the insurer cannot rely upon the breach as having discharged him from liability.'

That the contract of insurance is not wholly brought to an end after a breach of a promissory warranty was a point which Lord Goff had repeatedly stressed in his judgment. Obviously, the contract of insurance had to be kept sufficiently alive for the assured to issue a notice of abandonment under it and, more importantly, for the insurer to be bound by his acceptance of it. This perhaps explains Lord Goff's relentless emphasis that the contract was not brought to an end by reason of the breach.[50]

Whilst on the subject of waiver of warranties, it is necessary to mention that each of the ICC has a waiver clause (cl 5.2) for the implied warranties of seaworthiness and fitness of the ship on which the insured cargo is carried. This will not be discussed here as it can be more appropriately examined later when the scope of the implied warranty of seaworthiness is considered.

Held covered clause

A held covered clause is a device which an assured could rely on to protect himself in the event of a breach of a warranty. Under cl 3 of the ITCH(95), breach of certain warranties, namely, 'as to cargo, trade, locality, towage, salvage services or date of sailing', is held covered by the policy, provided that the assured complies with the conditions laid down therein. In the case of the IVCH(95), 'any breach of warranty as to towage or salvage services' is held covered, provided that notice be given to the underwriters immediately after receipt of advices and any amended terms of cover and any additional premium

49 Arnould, para 708, fn 18.

50 If the contract was to be brought to an end, it was feared that there would be nothing left of the contract upon which the insurer could 'bite' on to waive the breach.

required by them be agreed.[51] Once the specified terms are complied with, the breach is waived and the assured is entitled to claim for the loss.

B – EXPRESS WARRANTIES

FORM OF WARRANTY

An express warranty, according to s 35(1) of the Act, 'must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy'.[52] Thus, provided that there is an intention to warrant, answers to questions contained in slips, proposal forms or covering notes; P&I Club rules; and declarations and statements of fact, can all become warranties if they are inserted or incorporated, either directly or indirectly by way of reference, into a policy. It is to be noted that this requirement is stated in mandatory terms, which means that oral statements made during the course of negotiations cannot be regarded as promissory warranties.[53] According to Lord Mansfield, 'if the parties had considered it as a warranty they would have had it inserted in the policy'.[54]

A representation made during the negotiations for the contract can also, by the same process of incorporation, be converted into an express warranty; it is often said that the mere fact that it has been inserted into a policy is indicative of its materiality and importance as a contractual term. The making of such a deduction is treading on dangerous ground because the materiality of the warranty to the risk is totally irrelevant.[55] Furthermore, it could mislead one to conclude that all express terms in polices are warranties.

Express warranties may be standard, such as those found in the Institute Hulls Clauses[56] and the Institute Warranties on trading limits,[57] or they may be transitory or custom-made in the sense that they were framed specially for the particular contract of insurance.[58]

A warranty may be expressed in 'any form of words'.[59] There is no special or formal wording in which it must be drafted. Thus, provided that an intention to warrant is manifested, any written statement may be construed as a warranty. The word 'warranted', however, is often used to preface an express

51 Notice given after a loss was held in *Greenock Steamship Co v Maritime Insurance Co Ltd* [1903] 1 KB 367, and *Mentz, Decker & Co v Maritime Insurance Co* [1901] 1 KB 132, sufficient to satisfy the proviso.

52 In *Bean v Stupart*, (1778) 1 Dougl 11, a warranty on the margin of a policy was considered as much as if it was written in the body of the policy.

53 They are representations: s 20.

54 *Pawson v Watson* (1778) 2 Cowp 785 at p 786.

55 Section 33(3).

56 Eg, cll 1.1 and 3 of the ITCH(95) and cl 1.1 of the IVCH(95).

57 See Appendix 17.

58 For this purpose, the Schedule to the Institute Clauses has provided space, under the heading 'Clauses, endorsements, special conditions and warranties', for their insertion as an express term of the contract.

59 Section 35(1).

warranty: but this does not mean that if the word 'warranted' is not used, an express term cannot be construed as a warranty. Unfortunately, the term 'warranted' has also been used to secure for the insurer exception or limitation of cover.

Like any other contract, the express terms in contracts of marine insurance are varied. They may be broadly divided into four categories:

- exception clauses;
- mere words of description identifying or qualifying the subject-matter;
- limitation of liability clauses defining the scope of the insurer's liability; and
- promissory warranties.

It is important to bear in mind that not all the express terms of a contract of insurance are warranties.

Exception clauses

Exception clauses in marine insurance are often prefaced with the words 'warranted free of'.[60] The use of the expression 'warranted' in exception clauses has in the past generated a degree of confusion as to whether such terms are in fact warranties. First, it is best that they be swiftly eliminated from the present discussion because, though they may look like express warranties, they clearly fall outside the realm of promissory warranties. The purpose of an exception clause is to restrict the scope of the policy and to exempt the insurer from responsibility for a particular risk. As the intention of such a clause is not to warrant, but to except liability, they are clearly not promissory warranties.

Perhaps it needs to be mentioned that in the case of an exception clause, causation plays an important role: only a loss proximately caused by the excepted peril is not covered by the policy, whereas in the case of a promissory warranty, the cause of a loss is totally irrelevant.[61] This is indeed a fundamental distinction between an exception clause and a promissory warranty. In *The Cap Tarifa*,[62] Mr Justice Walsh of the Supreme Court of New South Wales pointed out that 'the difference between a condition and an exception is that the former places some duty or responsibility on the assured, while the latter restricts the scope of the policy'.

60 Eg, 'warranted free of particular average'. In *Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1991] 2 Lloyd's Rep 191 at p 201, Lord Goff distinguished between '... those warranties which simply denote the scope of the cover (as in the familiar fc and s clause – warranted free of capture and seizure) and those which are promissory warranties, involving a promise by the assured that the warranty will be fulfilled'.

61 With the exception of s 36(2). As a rule, a breach of a promissory warranty does not have to cause the loss. However, with regard to the implied condition of proper documentation, the loss has to occur 'through' a breach of this condition before the insurer is entitled to avoid the contract.

62 *Simons v Gale* [1957] 2 Lloyd's Rep 485 at p 491, Australia Supreme Court of New South Wales; on appeal to the Privy Council, [1958] 2 Lloyd's Rep 1.

Descriptive warranty

Words describing or qualifying the subject-matter insured are particularly susceptible to being classified as a promissory warranty. The distinction between a warranty and mere words of description is best illustrated in the case of *Overseas Commodities Ltd v Style*,[63] to which reference has already been made. Mr Justice McNair held that the identification number which the tins of pork butts were to be marked was not a warranty, but were mere words of description for the purpose of identifying the goods: 'the policy only attaches to such of the goods that comply with the description'. In contrast, the term expressed as 'warranted all tins marked by manufacturers with a code for verification of date of manufacture' was held to be a warranty.

Indeed, in the classic case of *Yorkshire Insurance Co Ltd v Campbell*,[64] Lord Sumner, delivering the judgment of the Privy Council, observed that: '*Prima facie*, words qualifying the subject-matter of the insurance will be words of warranty, which in a policy of marine insurance operate as conditions.' In this case, the learned judge felt compelled to give some legal significance to the words describing the pedigree of the horse[65] – the subject-matter insured. He was convinced that since the parties had chosen to import the description of the subject-matter insured into their contract, they must presumably bear some legal effect. And when that statement is in writing and is incorporated into the policy itself, the matter is beyond doubt.

According to Lord Sumner, unless proven otherwise, words describing or qualifying the subject-matter insured are as a general rule deemed to be warranties. To rebut this presumption, evidence of intent would have to be shown. On the question of evidence, he offered some guidelines as to what may be taken into consideration. He pointed out that:[66]

> '… regard must be had, no doubt, to the surrounding circumstances, in order that the policy may be read as the parties to it intended it to be read ... but this means having regard to the nature of the transaction and the known course of business and the forms in which such matters are carried out ...'

As a rough guide, it is perhaps fair to say that a description inserted merely for the purpose of identifying the subject matter, having no relation whatsoever to the risks insured against in the particular policy, is not a promissory warranty. Each case, of course, has to be decided on its own facts.

Limitation of liability clause

The line between a clause limiting the liability of the insurer and a promissory warranty is sometimes not so easy to draw, and a degree of disarray is evident in this area of the law of marine insurance which will soon become obvious in the discussions to follow on warranties on trading or navigational limits.

63 [1958] 1 Lloyd's Rep 546 at p 559.

64 [1917] AC 218 at p 224, Privy Council.

65 The horse was described in detail as a 'Bay gelding by Soult X St Paul (mare), 5 yrs ... nr sh, 2 hind legs white, blaze on face, slight chip off knee, grey hairs nr side belly'.

66 *Ibid*, at p 225.

EXAMPLES OF EXPRESS WARRANTIES

As can be seen from the wording of s 33(1), an express warranty may be stated either in positive or negative terms, and may be divided into two broad categories:

- where the assured warrants the existence or otherwise of certain facts, or
- where he warrants that he would or would not perform certain acts.

The use of the word 'shall' in the earlier part of s 33(1) refers to future events, whilst the latter part of the section to facts existing at the date the contract was made. In any event, a duty or responsibility is placed on the assured: as he has given the promise or undertaking, he has to ensure that it is exactly complied with.

It is impossible, and a futile exercise, to describe all the different types of promissory warranties that are employed in marine policies. For the purpose of illustration, the two express warranties identified by the Act, namely, the warranty of neutrality and of good safety; the disbursements warranty, the towage and salvage warranty, the new Classification Clause of the ITCH(95) and the IVCH(95); and the well-known warranty on geographical limits of navigation will be examined.

Express warranty of neutrality

Where a policy on ship or goods contains an express warranty of neutrality, s 36 seeks to govern the express warranty by implying two terms to the express warranty, namely, that:

- 'there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk'; and
- 'there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition the insurer may avoid the contract.'

It is necessary to distinguish the effects of a breach of the two implied conditions. A breach of the first condition will naturally cause a breach of the express warranty of neutrality. This will trigger s 33(3) to *discharge* the insurer from liability as from the date of the breach. A breach of the second implied condition as regards proper documentation will, on the other hand, confer upon the insurer the right to 'avoid' the contract. But this can only take place if the loss has occurred through a breach of this condition. In other words, causation, though not generally relevant to a breach of a warranty, is relevant here. The insurer can avoid the contract only if the loss 'occurs through' or was caused by a breach of the condition.

Express warranty of good safety

Very little need be said about s 38 on the warranty of good safety except that the expression 'good safety' is also used in r 3 of the Rules for Construction. Section 38 states that, 'If the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day'.

Disbursements warranty

The ITCH(95) and the IVCH(95) each has a warranty relating to disbursements contained in cll 22 and 20 respectively. This warranty was originally introduced pursuant to *The Gunford Case*[67] discussed earlier. The purpose of the warranty is to limit the amount of insurance which the owner of a vessel may effect on disbursements, managers' commissions and a list of other items. It is now possible to insure up to 25% of the valuation stated in the policy in respect of these enumerated matters. The given percentage is to ensure that he does not over-insure by double insurance; thus, he may safely insure up to the percentage permitted without having to make a disclosure of the additional insurances to the insurer.

Clause 22.1.8 of the ITCH(95), however, permits the assured to insure 'irrespective of amount' against the risks excluded by the war, strikes, malicious acts, and the radio contamination exclusions (cll 24–27).[68]

The purpose of cl 22.2 of ITCH(95) is to protect an innocent mortgagee who has no knowledge of the breach of warranty from recovering under the policy. The insurer is prevented from setting up the breach committed by the shipowner as a defence against any claims made by a mortgagee.

Towage and salvage warranty

The above warranty on towage and salvage is tucked away in the Navigation clause, cl 1.1, of both the ITCH(95) and the IVCH(95). By cl 1.1, 'customary'[69] towage, and towage to the 'first safe port or place when in need of assistance' are excepted and, therefore, are not covered by the warranty. As the scope of cl 1.1 has already been fully discussed, very little need be said about the warranty here except that it is also governed by a held covered clause known as the Breach of Warranty clause (cl 3) in the ITCH(95), and the Change of Voyage clause (cl 2) in the IVCH(95). In the event of any breach of warranty as to towage and salvage services, the assured is held covered 'provided that notice

67 (1911) 16 Com Cas 270; 12 Asp MLC 49.

68 *Cf Samuel v Dumas* [1924] AC 431 it was held that additional insurance effected by the assured against loss of freight by war risks only in a sum exceeding the amount allowed by the warranty constituted a breach of the warranty, which stated that the amount 'insured' on freight should not exceed a certain percentage of the stated value of the hull and machinery. The House of Lords construed the word 'insured' to include insurances against marine and war risks

69 See *Russell v Provincial Insurance Co Ltd* [1959] 2 Lloyd's Rep 275, QBD for an interpretation of the words 'customary towage' in a similarly worded clause. Towing abreast was held to be common and customary in the trade for the vessels concerned.

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'.[70]

By the new cl 1.2 of the 1995 version of the ITCH,[71] any contracts entered into by the assured for towage or pilotage services which are either customary or compulsory will not prejudice the insurance. The clause acknowledges the fact that the assured (or their agents) may have to enter, or be compelled to enter into such contracts in 'accordance with established local law or practice'. The insurance shall not be prejudiced even if the said contracts entered into may have limited or exempted the liability of the pilots and /or tugs and/or towboats and/or their owners.

The classification clause

The new cl 4.1 the classification clause of the ITCH(95) requires that:

- the vessel be classed with a Classification Society agreed by underwriters and to remain in class, and
- the Classification Society's recommendations, requirements and restrictions regarding seaworthiness and of her maintenance thereof be complied with by the date(s) set by the Society.

One of the objectives of the clause is to improve safety standards of vessels; it also demonstrates the underwriter's support of the endeavours of Classification Societies in promoting the seaworthiness of ships. The intention of the clause is to not only to ensure that an assured complies with the rules of Classification Society, but more importantly that a reputable Classification Society, one agreed by the underwriters, be used.

A warranty

Though not described as a warranty, and the word 'warranted' does not appear in the clause, cl 4.1 can nevertheless be classified as a warranty if there is an intention to warrant. It is understood by the market to be a warranty.[72] Furthermore, in the event of breach of any of the duties set out in cl 4.1, the underwriters will be 'discharged from liability … as from the date of the breach'.[73] Thus, the effect of a breach of cl 4.1 is the same as that stipulated in s 33(3) of the Act. The words 'unless the Underwriters agree to the contrary in writing' suggest that it is possible to waive the breach.[74] As a warranty, its terms must be exactly complied with, and its breach will attract the operation of the

70 Held covered clause is discussed above under the heading of 'Waiver of breach of warranties'.

71 This clause is similar to the pilotage and towage clause in the American Institute Hulls Clauses (2 June, 1977). Note also the new cl 1.3 where the use of helicopter for the transportation of personnel supplies and equipment to and/or from the Vessels shall not prejudice the insurance.

72 This clause was originally drafted as a 'Warranted that: the Vessel is classed with … and existing class maintained': see document 'Joint Hull 131 (30.06.89)'.

73 See cl 4.2.

74 See s 34(3).

law as set out in the case of *The Good Luck*.[75] The failure to comply would automatically discharge the insurer from liability even if such failure does not result in a claim or its breach did not cause the loss. This is so unless the vessel is 'at sea' at the time of breach, in which case the underwriters are discharged from liability upon her arrival at her next port.[76]

It is to be noted that the 'duty' imposed on the 'assured, owners and managers' is a continuous duty, commencing from the inception of and running throughout the period of the insurance.

Class and maintenance of class

By cl 4.1.1, the vessel must be classed with a Classification Society *'agreed* by the Underwriters and that her class within that Society is maintained'. In other words, any change of class or of Classification Society without the agreement of the underwriters would constitute a breach. It is observed that the word 'that' is significant: the vessel has to maintain not only her class, but her class within *that* Society.

Recommendations, requirements and restrictions of Classification Society

It needs to be emphasised that only recommendations, requirements or restrictions imposed by the vessel's Classification Society pertaining to the vessel's seaworthiness or to her maintenance in a seaworthy condition have to be complied with. Whether or not a particular recommendation, requirement or restriction relates to seaworthiness[77] is a problem which is likely to arise. The meaning of 'seaworthiness' has thus to be clear in one's mind. What the position would be if an extension were to be granted to the assured by the Classification Society for compliance with their recommendation etc is not clarified. Presumably, there will be no breach if the date of the extension is complied with.

Reporting to Classification Society

Clause 4.3 imposes a duty upon the assured to report to the Classification Society '… any incident condition or damage in respect of which the Vessel's Classification Society might make recommendations as to repairs or other action to be taken by the assured, owners or managers'. The difficulty here lies in the word 'might'. It would appear that an assured is expected to be able to anticipate what his Classification Society might or might not do in a particular circumstance. Cl 4.3 is peculiar in the sense that there is no sanction spelt out for its non-compliance.

75 [1991] 2 Lloyd's Rep 191, HL.

76 The applicability of cl 5.1 of the ITCH(95), and the possibility of conflict between the effects of cl 4.1.1 (that of discharge) and of cl 5.1 (of automatic termination) of the ITCH(95) are discussed elsewhere.

77 The meaning of the word 'seaworthiness' is discussed below.

Authorisation for release of information

The purpose of cl 4.4 of the ITCH(95) is to enable the underwriter to obtain information directly from the Classification Society which, without necessary authorisation from the assured, is not obliged to divulge on the ground of the principle of privity of contract. Through this facility, the underwriter hopes to obtain vital information regarding the condition of the ship. Some thought may, perhaps, have to be given to the question of whether the assured has the power to make such an authorisation unilaterally without first obtaining the consent of the Classification Society. Again, as in the case of cl 4.3, there is no penalty given for a breach of this clause. What would be the legal effect if the Classification Society were to refuse to comply with an authorised request of the underwriter for information and/or documents?

Warranties on geographical limits of navigation

Colledge v Harty,[78] decided in 1851, appears to be the first case to have come before a court of law for a determination as to whether a clause restricting the geographical limits of navigation of a ship is, in legal terms, an exception or a warranty. The clause in question stated that ships were 'not to sail from any port on the east coast of Great Britain to any port in the Belts between 20th December and 15th February'. After hearing arguments from both sides, the court came to the firm conclusion that such a term was a warranty and not an exception. According to the judge:[79]

> 'The reason which induces me to construe this as a warranty and not an exception is that there is no time in which the vessel is to be on the policy again; and the consequence of holding this an exception would be that the policy would cease during the voyage within the prohibited period, and after that the ship would be again on the policy.'

Why the absence of a time stipulation should make any difference is unclear. The reason for holding this a warranty and not an exception is, it is submitted, unsatisfactory. If the clause was construed not as a warranty, but as a limitation of cover defining the scope of the liability of the insurer, there should be no problem regarding the time when the policy could come on again. There is no reason why a policy could not be 'turned off' when she enters the prohibited area, and 'turned on again' when she departs from it. If some form of trigger is required to revive coverage under the policy, it could be argued that the action of the assured in sailing into and out of the prohibited area speaks for itself, performing the same function as time which seemed to have so bothered the judge. The liability of the insurer could be made dependent upon the actions of the assured.

In 1874, when *Provincial Insurance Co of Canada v Leduc*[80] was heard, neither the Privy Council nor the lower courts spent any time in studying the nature of the clause which stated that the ship was 'not allowed … to enter the Gulf of St Lawrence …'. Without any discussion, and presumably relying on *Colledge v*

78 (1851) 6 Exch 205; 20 LJ Ex 146.

79 *Ibid*, at p 212.

80 (1874) LR 6 PC 224.

Harty, the Privy Council accepted without hesitation that the clause was a warranty. On this assumption, the judges proceeded with their investigation of whether there was a waiver of the breach of the warranty.

Ten years later, in *Birrell v Dryer*,[81] an identical clause was again regarded as a warranty. On this occasion, the House of Lords was completely absorbed in determining whether the words 'Gulf of St Lawrence' included both the gulf and river of the St Lawrence.

A century later, a further opportunity arose where the matter could have been reviewed, if the House wanted to, in *The Good Luck*.[82] Regrettably, the subject was not broached and the House this time was primarily concerned with the legal effects of a breach of a promissory warranty. Any suggestion of resurrecting the issue of whether such a clause was or was not a warranty would probably have been briskly dismissed by Lord Goff who was clear in his mind that he was dealing with a warranty. It is noted that Lord Goff drew a distinction between an exception and a warranty, but did not, however, distinguish a warranty with a limitation clause. An exception, as mentioned earlier, operates differently from a clause defining the scope of the liability of the insurer. In the case of the former, only a loss proximately caused by an excepted risk is not covered by the policy, whereas in the latter, causation is irrelevant in the sense that if a loss occurs within the prohibited geographical limits, the assured is, regardless of the cause of loss, simply not covered by the insurance.

The distinction between a warranty and a clause delimiting the use of the insured property has been clarified in a series of motor[83] and household[84] policies of insurance. Such a distinction, which has never been drawn in marine insurance cases, has obviously caused Arnould some concern, provoking him to devote a section of his work to this matter.[85] In *Re Morgan and Provincial Insurance Co*,[86] Lord Justice Scrutton, with commendable clarity, described the law as follows:

> 'In many cases of this class the question has arisen whether … promises that a certain state of thing shall continue, or a certain course of conduct shall be pursued, during the whole period covered by the policy, so that if the particular promise is not kept the policy is invalidated; or whether these promises are merely *descriptive of the risk* so that if the accident happens while the promised state of thing subsists there is a valid claim, but if the accident happens while the state of thing has ceased or been interrupted there is no valid claim …'

81 (1884) 9 App Cas 345, HL.

82 [1991] 2 Lloyd's Rep 191, HL.

83 See *Farr v Motor Traders Mutual Insurance Society Ltd* [1920] 3 KB 669, CA; *Dawsons, Ltd v Bonnin* [1922] 2 AC 413; *Roberts v Anglo Saxon Insurance Assocn Ltd* (1927) 10 Ll L Rep 313; *Re Morgan and Another & Provincial Insurance Co* [1932] 2 KB 7, HL; and *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd* [1967] 2 Lloyd's Rep 550, QBD.

84 *Shaw v Robberds* (1837) 6 A & E 75; *Dobson v Sotheby* (1827) Moo & M 90; and *Simmonds v Cockell* [1920] 1 KB 843.

85 See Arnould, para 692.

86 [1932] 2 KB 70 at p 79, CA.

The difference in simple terms is between 'clauses which are conditional and those which are merely descriptive'.[87]

Limitation of liability

Arnould has, in no uncertain terms, advocated that a clause restricting the navigation of ships to certain geographical limits is not a warranty in its strict sense, but a term which defines the risk covered by the policy. He was perturbed by the fact that the legal status of such an important clause has never been seriously debated or scrutinised by the courts. From 1851 to the present day, it has always been *assumed* to be a warranty. To understand fully Arnould's[88] point of view, it is necessary to refer to some of these well-known non-marine insurance cases he cited.

In *Farr v Motor Traders Mutual Insurance Society Ltd*,[89] the statement in the proposal that the cab was only to be driven in one shift per 24 hours was held by Mr Justice Rowlatt, whose decision was affirmed by the Court of Appeal, to be merely a limitation of the risk and not a warranty. Whilst the cab is driven in one shift per 24 hours the risk will be covered, but that if, in any one day of 24 hours, the cab is driven in more than one shift, the risk will no longer be covered and will cease to attach until the owner resumes the practice of driving the cab for one shift only.[90]

Also concerned with a motor car policy of insurance, the case of *Roberts v Anglo Saxon Insurance Association Ltd*[91] is particularly relevant, as the general principles of insurance law on warranties apply to all policies including marine. The policy in question contained the clause: 'Warranted used only for the following purposes: commercial travelling'. Lord Justice Bankes of the Court of Appeal held that whenever the vehicle was not being used in accordance with the terms prescribed by the said clause, it was not covered. His comments, which are particularly pertinent to this discussion, read as follows:

> '… the parties had used that language as words descriptive of the risk, and that, as a result, when the vehicle is not being used in accordance with the description it is not covered; but it does not follow at all that because it is used on some one occasion, or on more than one occasion, for other than the described use, the policy is avoided. It does not follow at all … If the proper construction, on its language, is a description of the limitation of the liability, then the effect would be that the vehicle would be off cover during the period during which it was not

87 *Ibid*, at p 82. The Court of Appeal's decision was affirmed by the House of Lords [1933] AC 234. The statement made by the assured that the insured vehicle will be used for delivery of coal was construed as a descriptive clause, accordingly, the assured were held to be covered by the insurance while the lorry was being used for carrying coal, but not covered while being used for other purposes.

88 Arnould, para 692.

89 [1920] 3 KB 669, CA.

90 While one of the cabs was undergoing repairs, the other cab was driven in two shifts per 24 hours for a very short period of time in August; and from that time until the accident happened (in November) the two cabs were driven in one shift only.

91 (1927) 10 Ll L Rep 313.

being used for the warranted purposes, but that it would come again on the cover when the vehicle was again used for the warranted purpose.'[92]

This speech clearly supports an 'on cover' and 'off cover' type of situation, that is, a suspension of the contract.

Similarly, it is interesting to note that certain parts of Lord Goff's judgment in *The Good Luck* had also steered dangerously close to language which is more appropriate to a limitation of liability clause than to a promissory warranty. He said:[93]

'… the insurer does not avoid the policy … it is only in the sense of repudiating liability (and not repudiating the policy) that it would be right to describe him as being entitled to repudiate. In truth the insurer … has a good defence to a claim by the assured.'

However, in fairness, it has to be said that he was careful in his judgment, taking pains to distinguish the two forms of warranty: those which 'simply denote the scope of cover … and those which are promissory warranties involving a promise by the assured that the warranty will be fulfilled'.[94]

It is observed that the only judge who has ever really examined the character of a navigational limits clause is the learned Lord Justice Scrutton in the Court of Appeal in *Re Morgan and Provincial Insurance Co*[95] Though the case was not concerned with marine insurance, his comments, however, were with direct reference to a navigational limits clause. As his comments are most enlightening, it is worthwhile reciting the relevant passage:

'… if a time policy contains a clause "warranted no St Lawrence between 1st October and 1st April", and the vessel was in the St Lawrence on 2nd October, but emerged without loss, and during the currency of the policy in July a loss happens, the underwriters cannot avoid payment on the ground that between 1st October and 1st April the vessel was in the St Lawrence *(Birrell v Dryer)*. That is an example of a so-called warranty which merely defines the risk insured against.'

The choice of the word 'so-called' reveals his disapproval of the said clause being classified as a warranty. He was, in effect, stating that the clause was not a warranty in its true sense, but a term which defines the risk insured under the policy.

Lord Justice Scrutton, after analysing a host of cases on the law relating to limitation of liability clauses and promissory warranties, arrived at the same conclusion as Arnould. Their understanding of the legal position is, however, clearly in direct conflict with the reasoning of Parke B in *Colledge v Harty*, who had obviously found the uncertainty caused by any suspension of the contract disconcerting.

To complete the picture, it is necessary to mention that there are two other cases which have conspicuously refrained from describing such navigational

92 The choice of the word 'warranted' by Bankes LJ is indeed unfortunate; it is liable to cause confusion as it is clearly quite inappropriate to the point he was trying to make.

93 [1992] 2 Lloyd's Rep 191 at p 202, HL.

94 *Ibid*, at p 201.

95 [1932] 2 KB 70 at p 80, CA; [1933] AC 240, HL.

limit clauses as a warranty. In *Wilson v Boag*,[96] the clause relating to the use of a motor launch 'only on the waters of Port Stephens and within a radius of fifty miles thereof' was described by the Supreme Court of New South Wales as a 'limitation of the liability of the insurer to loss sustained while the launch is within a defined geographical area'. Nowhere in the judgment was the clause referred to as a warranty.

In similar fashion, the Court of Appeal in *Navigators and General Insurance Co Ltd v Ringrose*[97] held that the insurer's liability under the policy, which contained the clause that the vessel was insured 'whilst within the United Kingdom' was to be determined solely by the place where the accident occurred. The word 'warranty' was not mentioned in any of the judgments delivered by each of the Lords Justice.[98]

Suspension of the contract

A breach of a warranty cannot, in the light of *The Good Luck*, bring about a suspension of the contact of insurance, because the insurer is automatically discharged from liability in the event of a breach. The fundamental difference between a promissory warranty and a clause which defines the liability of the insurer is that a breach of the former discharges the insurer from liability, whilst in the case of the latter the contract is merely suspended.

If a clause restricting navigational limits were to be classed not as a warranty, but as a term which merely defines the scope of the cover, the policy would simply be suspended when the vessels enters the prohibited area. On the happening of such an event, the contract is not brought to an end, the assured is simply not covered by the policy. But when he leaves the prohibited area, coverage under the policy is restored.

One cannot help but notice that none of the marine insurance cases has queried what the understanding of the parties of the clause was. The purpose of inserting such a clause was never ascertained, and whether its wording was clear enough to permit an inference to be drawn that there was an intention to warrant was never explored. The question which should have been asked is whether it was the understanding of the parties that the future of the whole contract of insurance is conditional upon the assured not entering the prohibited area. However worded, it is the intention of the parties which is crucial.

If these issues had been debated before the courts, one would, perhaps, accept the current legal position with less resistance. However, it could be said that having been accepted as a warranty for almost 150 years, it is now probably too late in the day to turn the clock back. It has, by usage, come to be known as a warranty. The golden opportunity to address and, if necessary, redress this issue has now passed. Should an assured decide not to regard the clause as a

96 [1956] 2 Lloyd's Rep 564, Supreme Court of New South Wales.

97 [1962] 1 WLR 173.

98 See also *Winters v Employers Fire Insurance Co* [1962] 2 Lloyd's Rep 320, United States of Florida Civil Court, where the phrase 'within the limits of the continental United States of America' was simply referred to as a term and not a warranty.

warranty, but only as one descriptive of the risk, he would need to rephrase it in clearer terms manifesting an intention *not* to warrant. The decisive consideration has to be whether it is the intention of the parties to exact or to give a warranty. In this regard, it would be prudent to bear in mind the words of Lord Justice Scrutton that, 'a great deal turns upon the language of the particular policy; but it must be remembered that in contracts of insurance the word "warranty" does not necessarily mean a condition or promise the breach of which will avoid the policy'.[99]

The Institute Warranties

The Institute Warranties (1/7/76) contain a list of warranties relating to geographical limits of navigation. Navigation is prohibited during certain months of the year within certain areas the parameter of which is defined by degrees of latitude and longitude. In practice, a trading limits warranty is invariably accompanied by a held covered clause, the purpose of which is to allow an assured the right to obtain cover whilst navigating within the prohibited area, provided that prompt notice is given and additional premium arranged.

CONSTRUCTION OF WARRANTIES

Though the law is adamant that exact compliance is required of a warranty, a court of law is nevertheless sometimes prepared, where there is ambiguity, to give a warranty a reasonable construction in order to give effect to the term. Like any other contract, the terms of a contract of marine insurance have to be construed in order that their real meaning may be ascertained. But once a reasonable interpretation has been awarded to a warranty, it must be literally complied with. In *Provincial Insurance Co v Morgan*,[100] Lord Wright remarked that, '… it is clear law that in insurance a warranty or condition … though it must be strictly complied with, must be strictly though reasonably construed'.

How a reasonable interpretation may be arrived at was considered by Lord Esher MR in *Hart v Standard Marine Insurance Co*,[101] in which he said:

> '... a warranty like every other part of the 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. The next question then is, what is the ordinary sense in which the words used in this warranty would be accepted by mercantile men engaged in the business of insurance? If the words are capable of two meanings you may look to the object with which they are inserted, in order to see which meaning business men would attach to them.'

99 *Re Morgan and Provincial Insurance Co* [1932] 2 KB 70 at p 79, CA. The word 'avoid' will now have to be read as 'automatically discharge'.

100 [1933] AC 241 at p 254, HL.

101 [1889] 22 QBD 499 at pp 500 and 501, CA. See also *Bean v Stupart* (1778) 1 Dougl 11.

The rule of *contra proferentum*

The House of Lords in *Birrell & Others v Dryer & Others* ,[102] presided by the Earl of Selborne LC, in interpreting the term 'warranted no St Lawrence …' stated that there was no ambiguity or uncertainty in these words sufficient to prevent the application of the ordinary rules and principles of construction. The House of Lords felt that as a 'fair and natural meaning' could be placed on the warranty, there was no justification for invoking the *contra proferentum* rule to free the underwriters from liability. The fair and natural meaning of the words 'St Lawrence' covered the whole of the St Lawrence, both gulf and river.

In *Winter v Employers Fire Insurance Co*,[103] an American case, we are reminded by Judge Tyrie A Boyer of another fundamental principle of construction:

> 'The law is well settled that an ambiguity in a policy of insurance must be construed most favourably to the insured and most strictly against forfeiture … As in other policies, marine contracts are strictly construed against the insurer and favourably to the insured, and where two interpretations are possible, that which will indemnify the insured will be adopted. Any ambiguity in the policy will be resolved against the company ... Any construction of a marine policy rendering it void should be evaded.'

In similar vein, Mr Justice Roche in *Simmonds v Cockell*,[104] when awarding a reasonable interpretation to the term 'warranted that the said premises are always occupied' of a household insurance 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.'

Whenever there is ambiguity in a warranty, a court may employ any one or more of the above basic rules of construction to give it a sensible and plausible meaning. Rather than be the cause of bringing the contract to an end, a court would be more inclined to give a reasonable interpretation to a term. If necessary, the term would be construed against the underwriter for whose benefit it was inserted. A sensible balance has thus to be struck, but a court must never be seen to be re-writing the contract for the parties.

C – IMPLIED WARRANTIES

An implied warranty is a term of a contract regarded by law as so obviously essential and fundamental to the contract that the parties must have presumed that it applies without having to make any express provision for it. So indispensable is the term that it is tacitly understood that it is to be read into the policy even though it does not appear on the face of it. There are four warranties implied by the Act:[105]

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102 (1884) 9 App Cas 345 at p 350, HL.

103 [1962] 2 Lloyd's Rep 320 at p 323, US Ct.

104 [1920] KB 843 at p 845.

105 The implied condition of proper documentation is only implied when the policy contains an express warranty of neutrality: s 36(2).

- Implied warranty of portworthiness (s 39(2));
- Implied warranty of seaworthiness (s 39);
- Implied warranty of cargoworthiness, that is, the fitness of the ship to carry the goods (s 40(2)); and
- Implied warranty of legality (s 41).

Curiously, parliament also considered it necessary to specify the negative in s 37, that there is no implied warranty as to the nationality of a ship or, that her nationality shall not be changed during the risk; and in s 40(1) that there is no implied warranty that the goods or moveables are seaworthy.

IMPLIED WARRANTY OF PORTWORTHINESS

As was seen, the subject-matter may in a voyage policy be insured either 'from' or 'at and from' a particular place.[106] In a 'from' policy, only a single warranty, that of the implied warranty of seaworthiness, applies at the commencement of the voyage. Whilst in an 'at and from' policy, the ship has, in addition to the implied warranty of seaworthiness, to comply with the implied warranty that she be reasonably fit to encounter the ordinary perils of the port, that is, she be seaworthy for the port[107] or 'portworthy'.

In a policy which attaches while the ship is *in* port, namely, an 'at and from' policy, the ship, according to s 39(2), has to comply with the implied warranty that she shall 'at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port'. Section 39(2) is, obviously, not applicable when the subject-matter is insured 'from' a particular place, for the risk under such a policy does not attach whilst she is at that port.[108] Unless expressly excluded by the policy, s 39(2), like s 39(1), is worded to apply to all voyage policies, whether on ship, cargo or freight.

Whether a ship has to be fit enough to endure the ordinary perils of the port *throughout* the period of her stay whilst 'at' that port is an issue which has never been raised. Unlike the implied warranty of seaworthiness, there is no litigation concerning this implied term. As the implied warranty of seaworthiness is applicable only at the commencement of the voyage, it could be said that the implied warranty of portworthiness should, likewise, apply only at the commencement of the risk. The wording of s 39(2) is sufficiently clear to support the assumption that the ship need only be portworthy at a specific point in time.

106 See rr 2 and 3 of the Rules for Construction. Note that r 2 applies to all policies, whilst r 3 applies only to a policy on ship.

107 Lord Penzance in *Quebec Marine Insurance Co v Commercial Bank of Canada* (1870) LR 3 PC 234 at p 241 described this as 'seaworthiness for the port'.

108 To insure her for port risks, an assured could take out the Institute Time Clauses Hulls, Port Risks policy. See *Mersey Mutual Underwriting Association v Poland* (1910) 15 Com Cas 205 at p 209, where a policy on 'port risks' was construed to cover: '… a risk of a character peculiar to a port and which is involved in a vessel being in port for the ordinary purposes for which vessel is in port, as distinguished from the risks of a vessel on a voyage, subjecting herself to the ordinary perils of navigating on that voyage.'

In the case of an 'at and from' policy on a ship, the risk, according to r 3, attaches or commences only when she has arrived at that place in 'good safety'. The implied warranty of portworthiness thus coincides with the attachment of the risk, which occurs only when the ship is in a state of good safety at that port: At that particular moment when she is in good safety she has to be sound enough to be in port without being at risk from the ordinary perils of the port. Whether a ship is or is not 'reasonably fit' to encounter the ordinary perils of the port is, of course, a question of fact.

IMPLIED WARRANTY OF SEAWORTHINESS

The Act implies a warranty of seaworthiness in a voyage policy, but not in a time policy.[109] This does not, however, mean that the unseaworthiness of a ship insured under a time policy is totally irrelevant. A different set of rules declared in s 39(5) applies to time policies. To avoid confusion, the legal principles relating to seaworthiness applicable to a time policy will be dealt with separately later in this chapter. All the provisions contained in s 39 are derived from case law decided before the Act. There is a wealth of authorities in this area of law which, provided that they are not inconsistent with the express provisions of the Act, may be referred to for the purpose of clarifying or explaining the legal position.[110]

Implied warranty of seaworthiness in voyage policies

Section 39(1) declares in general terms 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.'

Subject-matter insured

The section does not specify the nature of the subject-matter insured. As worded, it is wide enough to be construed as being applicable to *all* voyage policies regardless of the nature of the subject-matter insured, whether it be ship, goods, freight, or any property exposed to maritime perils.[111] In the case of a policy on goods or other moveables, however, there is also another section dealing specifically with this implied term, where the general rule declared in s 39(1) is reaffirmed in s 40(2) as follows:

> '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.'

109 The rationale for this difference in the law can be found in the celebrated case of *Gibson v Small* (1853) 4 HL Cas 353.

110 See s 91(2): 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.

111 See ss 3 and 5.

'Ship'

The section refers specifically to the seaworthiness only of the 'ship'. The question as to whether the implied warranty of seaworthiness is also to be applied to lighters, crafts and the like, employed for the conveyance of the cargo to and from the ship has to be considered.

This question was raised in the case of *Lane v Nixon*.[112] The common law position is that the implied warranty of seaworthiness is not applicable to lighters employed to land or discharge the cargo. This decision is, of course, correct and logical because the warranty of seaworthiness is applicable only at the commencement of the voyage. Unless the process of the landing of cargo by means of lighters can be considered as a separate stage of the voyage, the implied warranty does not apply after the voyage has commenced. The judges could not regard it in any sense as a stage of the voyage.[113]

The fact that the word 'craft' appears in cl 5.1, but not in cl 5.2 of the ICC(A), (B) and (C), which deals specifically with waiver of the implied warranty of seaworthiness, must mean that it does not apply to craft.[114]

It is contended that, as is the position under the common law, there is, under the Act, no implied warranty of seaworthiness as to 'craft' or other means of conveyance. Section 39(1) has not expressly included other means of conveyance within its ambit. Clause 5.1 is an exclusion (not an imposition) clause laying down the rule that, if the assured or their servants are privy to such unseaworthiness of the vessel or craft at the time the subject matter is loaded onto the vessel or craft, he will not be able to claim under the policy for any loss damage or expense arising therefrom.

Meaning of seaworthiness

It may be helpful, before proceeding to analyse the nature and scope of this implied warranty, first to define the meaning of the term 'seaworthiness'.[115] Needless to say, this discussion of definition is also relevant to a time policy, as the word 'seaworthy' also appears in s 39(5). There are essentially two criteria by which the seaworthiness of a ship may be measured. The first is espoused in s 39(4), which determines the seaworthiness of a ship by her ability to encounter

112 (1866) LR 1 CP 412.

113 The damage to the goods sustained whilst they were in the lighter was held recoverable under the policy which covered 'all risks to and from the ship'.

114 Templeman, at p 49, holds the view that cl 5.1 'extends the implied warranties to craft or other means of conveyance …'. It is submitted that such an interpretation of the clause is difficult to support, especially when it is compared with cl 5.2. Though 'craft' and other means of conveyance are mentioned in cl 5.1, it is concerned only with unseaworthiness other than that relating to the implied warranties of seaworthiness which is applicable only at the commencement of the voyage.

115 'Seaworthiness' has the same meaning in marine insurance as in the law relating to carriage of goods by sea: see *Ingram and Royle Ltd v Services Maritimes du Treport* (1913) 12 Asp Mar Law Cas 493; 108 LT Rep 304; 1 KB 538; *Firemen's Fund Insurance Co v Western Australian Insurance Co Ltd* (1929) 138 LT 108, following *Becker, Gray & Co v London Assurance Corpn* [1918] AC 101 at p 114, HL, *per* Lord Sumner. Cases on carriage of goods by sea interpreting the meaning of 'seaworthiness' may thus be referred for this purpose.

the ordinary perils of the sea. The second, a common law criterion, uses the standard of the ordinary, careful and prudent shipowner.

Ability to encounter the ordinary perils of the seas

Section 39(4) provides a broad and general definition that:

> 'A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.'

This criterion is derived from the celebrated case of *Dixon v Sadler*,[116] where Baron Parke defined 'seaworthiness' in the following terms:

> '... 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.'

The ship's 'fitness to encounter the ordinary perils of the seas of the voyage' is universally accepted as the test for determining the seaworthiness of a ship.[117] The two words in the statutory definition which require elaboration are 'reasonably' and 'ordinary'. The former refers to the standard of fitness, whilst the latter describes the perils of the seas.

Standard of reasonable fitness

It is significant to note that the standard of fitness is not one of perfection, but only of 'reasonableness'. To be seaworthy, a ship is not expected to be able to weather every conceivable storm or withstand every imaginable peril of the sea. All that is required of her is that she be reasonably suitable for the particular voyage. For example, a ship which sets sail with an open port hole would clearly fail to satisfy the standard of perfection, but would be quite acceptable according to the standard of reasonable fitness.[118] Similarly, the fact that a master is not expected to be in a state of perfect health was appreciated in the case *Rio Tinto Co Ltd v The Seed Shipping Co Ltd*.[119]

Ordinary perils of the seas

That the ship need only be fit enough to encounter the 'ordinary', not extraordinary, perils of the seas[120] is another well-established aspect of the implied warranty. She need only to be capable of withstanding the normal vicissitudes of the voyage. What in each case is an 'ordinary' peril of the sea was

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116 (1839) 5 M & W 414; affd, (1841) 8 M & W 895.

117 It was applied in *Kopitoff v Wilson* (1876) 3 Asp MLC 163; *Burges v Wickham* (1863) 3 B & S 669; and received the firm approval of the House of Lords in *Steel v State Line SS Co* (1877) 3 App Cas 72; 37 LT Rep; 3 Asp MLC 516, and *Elder Dempster & Co v Paterson Zochonis & Co* [1924] AC 522.

118 Provided, of course, that the port hole can be shut easily, speedily and without any inconvenience. On the subject of open port holes, see *Steel v State Line SS Co* (1877) 3 App Cas 72 HL and *Dobell & Co Steamship v Rossmore Co* [1895] 2 QB 408.

119 (1926) 134 LT 763; (1926) 24 Ll L Rep 316 at p 320. See also *Moore v Lunn* (1923) 39 TLR 526.

120 See r 7 of the Rules for Construction. The term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas. It does not include ordinary action of the winds and waves.

explained in *Kopitoff v Wilson*[121] and *The Gaupen (No 3)*.[122] In the former, incidental risks to which a ship must, of necessity, be exposed in the course of the voyage were considered 'ordinary' perils of the seas. In the latter, heavy weather of the kind expected of the voyage was held to fall within the scope of an 'ordinary' peril of the seas. Thus, even severe weather, hurricanes, cyclones and strong gales could be considered as 'ordinary' perils of the seas if they are conditions expected of a particular region.

The ordinary, careful and prudent shipowner criterion

Another more recent determinant, which has often been employed to ascertain the seaworthiness of a ship, is that offered by Mr Justice Channel in *McFadden v Blue Star Line*,[123] where the yardstick was couched as follows:

> 'To be seaworthy, a vessel must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it'.

The test is direct, objective and simple to apply:[124] a ship is seaworthy if an ordinary, careful and prudent owner would send her to sea in her present condition. Though s 39(2) has provided its own test for the purpose of ascertaining 'seaworthiness', there is no reason why the common law standard of the prudent shipowner could not also be invoked. A combined application of both methods was employed by Mr Justice Earle in *Gibson v Small*[125] as follows:

> '[Seaworthiness] expresses a relation between the state of the ship and the perils it has to meet in the situation it is in; so that a ship before setting out on a voyage is seaworthy, if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage.'

A relative term

Both the above criteria have been criticised as being too broad to be useful. As guidelines, they do not dictate any positive rules or conditions which must be complied with for a ship to attain the standard of seaworthiness. The notion of seaworthiness has long been recognised by law as a concept which allows variables to be taken to consideration. This was made clear in *Burges v Wickham*[126] by Mr Justice Cockburn when he commented that:

> '... the term seaworthiness is a relative and flexible term, the degree of seaworthiness depending on the position in which the vessel may be placed, or on the nature of the navigation or adventure on which it is about to embark.'

In *Foley v Tabor*,[127] Chief Justice Erle directed his jury in similar terms: '... seaworthiness is a word which the import varies with the place, the voyage,

121 (1876) 1 QBD 377; 3 Asp MLC 163.

122 24 Ll L Rep 355.

123 [1905] 1 KB 697 at p 706.

124 This test was applied in *Reed v Page* [1927] 1 KB 743.

125 (1853) 4 HL Cas 353.

126 (1863) 3 B & S 669.

127 (1861) 2 F & F 663.

the class of ship, or even the nature of the cargo.' In *The Queen v Freeman*,[128] 'the trade in which she was engaged, and the season of the year' were added to the list.

'Seaworthiness' is a relative and flexible term. It varies according to the nature of the voyage contemplated. Thus, a ship may be seaworthy for one voyage, but not for another. There is no fixed or absolute standard of seaworthiness, and the wording of s 39(1) itself makes this clear: it states that the ship shall be seaworthy for 'the purpose of the particular adventure insured'.

Specific matters relating to seaworthiness

An analysis of cases will reveal the fact that there are five aspects of a ship which can affect or impinge upon her seaworthiness. These matters relate to:

- design and construction;[129]
- machinery, equipment and navigational aids;[130]
- sufficiency and competence of crew;[131]
- sufficiency and quality of fuel;[132] and
- stability and stowage of cargoes.[133]

'At the commencement of the voyage'

It is important to remember that the implied warranty of seaworthiness is applicable only at a particular time, that is, 'at the commencement of the voyage'. Regardless of whether the policy is 'from' or 'at and from' a particular place, the implied warranty of seaworthiness applies only when the ship sets sail from that particular place. She does not have to be seaworthy for the voyage whilst she is lying in port. But once the warranty is fulfilled, 'the shipowner's obligation to the underwriter is at an end'.[134] There is no continuing warranty of seaworthiness. Whether a voyage has or has not commenced is, of course, a question of fact: A ship has to break ground and quit her moorings with the

128 (1875) 9 IR 9 CL 527.

129 *Anglis & Co v P & O Steam Navigation Co* [1927] 2 KB 456; *The Marine Sulphur Queen* [1973] 1 Lloyd's Rep 88, USCA; *The Torenia* [1983] 1 Lloyd's Rep 210, KBD; and *Coltman v Bibby Tankers Ltd, The Derbyshire* [1986] 1 WLR 751.

130 *The President of India* [1963] 1 Lloyd's Rep 1; *The Antigoni* [1991] 1 Lloyd's Rep 209, CA; *The Yamatogawa* [1990] 2 Lloyd's Rep 39, QBD; *The Theodegmon* [1990] 1 Lloyd's Rep 52, QBD; *The Subro Valour* [1995] 1 Lloyd's Rep 509, QBD; *The Maria* (1937) 91 Fed Rep (2d) 819; and *The Irish Spruce* [1976] 1 Lloyd's Rep 63.

131 *Wedderburn & Others v Bell* (1807) 1 Camp 1; *The Makedonia* [1962] 1 Lloyd's Rep 316; *Standard Oil Co of New York v The Clan Line Steamers Ltd* (1924) AC 100; 16 Asp MLC 273; and *The Hong Kong Fir* [1962] 2 QB 26; [1961] 2 Lloyd's Rep 478.

132 *Louis Dreyfus & Co v Tempus Shipping Co* [1931] AC 726, HL; and *Fiumana Societa Di Navigazione v Bunge & Co Ltd* [1930] 2 KB 47; *Thin v Richards & Co* [1892] 2 QB 141; *McIver & Co v Tate Steamers Ltd* [1903] 1 KB 362; and *Northumbrian Shipping Co v Timm & Son Ltd* [1939] AC 397.

133 *The Aquacharm* [1982] 1 Lloyd's Rep 7; *The Friso* [1980] 1 Lloyd's Rep 469, QBD; *Elder Dempster & Co Ltd v Paterson, Zochonis & Co* [1924] AC 522; and *Smith Hogg & Co v Black Sea & Baltic Insurance Co* [1940] AC 997.

134 *Per* Bigham J in *Greenock Steamship Co v Maritime Insurance Co* [1903] 1 KB 367 at p 373.

intention of embarking upon her voyage before she can be said to have commenced her voyage.[135] Thus, a mere intention to commence a voyage is inconsequential.

Seaworthiness by stages

The implied warranty of seaworthiness, though expressly stated to be applicable only at the commencement of the voyage – meaning the insured voyage – has to be read in the light of the doctrine of seaworthiness by stages as defined in s 39(3). This is yet another declaration of a well-founded common law principle which is also applicable in the law of contracts of affreightment. The rule of seaworthiness by stages was described as 'older than the age of steam'.[136] *Bouillon v Lupton*[137] is regarded as the creator of the rule, but in fact a hint of the concept can be sensed even earlier in 1815 in the case of *Oliver v Loughman*.[138] In *Quebec Marine Insurance Co v The Commercial Bank of Canada*,[139] Lord Penzance of the Privy Council states the rule as follows: '… there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness ... of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage.'

A distinct and well-known stage of a voyage is that for the purpose of coaling or refuelling. One need only refer to the familiar cases of *Thin v Richards & Co*,[140] *The Vortigern*,[141] and *Northumbrian Shipping Co v Timm Son Ltd*[142] to ascertain the rationale for the formulation of the rule. It is clear that the rule, specially devised to meet practical commercial necessities and exigencies, is nothing but a relaxation of the implied warranty of seaworthiness. It modifies the responsibility of the shipowner to the extent that it permits compliance in stages or by instalments. Instead of demanding fulfilment of the warranty, all at once, at the commencement of the voyage, it allows the shipowner the right to stagger the performance of this duty, but only in relation to certain matters. It is to be understood that this laxity in the execution of the promise, sanctioned by law, does not in any measure diminish or enlarge the duty of the shipowner: it merely eases the performance of his obligation, leaving the obligation itself well intact.

It is observed that under British jurisdiction, the courts are reluctant to extend the boundaries of the doctrine of seaworthiness by stages. It has invariably been restricted to matters of necessity for commercial, physical or practical reasons. The courts have always jealously guarded the limits of its

135 See *Pittegrew v Pringle* [1832] 3 B & Ad 514; *Sea Insurance Co v Blogg* [1898] 3 Com Cas 218 CA; *Hunting v Boulton* [1895] 1 Com Cas 120; and *Mersey Mutual Underwriting Association v Poland* (1910) 15 Com Cas 205.

136 *Per* Lord Porter, *Northumbrian Shipping Co v E Timm & Son Ltd* [1939] AC 397 at p 411, HL.

137 (1863) 33 LJ CP 37.

138 (1815), reported as a footnote in *Weir v Aberdeen* (1819) 2 B & Ad 320 at p 322.

139 (1870) LR 3 PC 234 at p 241, PC.

140 [1892] 2 QB 141, CA.

141 [1899] P 140, CA.

142 [1930] AC 397, HL.

application, confining it only to cases of refuelling,[143] and when circumstances justify its application, such as 'when the ship requires different kinds of or further preparation or equipment'. There has to be a physical or commercial need to warrant a division of the voyage into stages.

Effect of breach of implied warranty of seaworthiness

As was seen earlier, the House of Lords in *The Good Luck* has pronounced that a promissory warranty in marine insurance is in fact a condition precedent, the breach of which automatically discharges the insurer from liability as from the date of breach. This rule applies to all promissory warranties including the implied warranty of seaworthiness.

In fact, as early as 1807, in *Wedderburn & Others v Bell*,[144] Lord Ellenborough had already referred to the implied warranty of seaworthiness as a 'condition precedent to the policy attaching'. His remark is certainly an accurate description of the legal position, but only in so far as regards a policy which insures the subject-matter 'from' a particular port. Such a policy does not attach until the ship has commenced the voyage in a seaworthy condition from that port. No liability can be incurred before the commencement of the voyage because the policy attaches only when the ship sets sail 'from' that particular port in compliance with the implied warranty. In this context, it is true to say that it is a condition precedent to the attachment of the risk.

In the case of an 'at and from' policy, however, the position is different in the sense that the policy had already attached when the ship arrived 'at' the particular port in good safety. Any loss occurring before the vessel sets sail – whilst the vessel is *at* that place – would thus fall upon the policy. Should a breach of the implied warranty of seaworthiness be committed later when she sets sail, the insurer is only discharged from liability as from the date of breach, but without prejudice to any liability incurred by him before the breach.

Exclusion of the implied warranty of seaworthiness

The warranty of seaworthiness – absolute in its nature and capable of producing a most disastrous effect upon a policy in the event of its breach – is an important safeguard for the preservation of life at sea. Yet its creator, regarding it to be the 'bounden legal duty' of the shipowner 'towards the mariners for the safety of their lives, and towards the merchants who load their goods' to furnish a seaworthy ship, has also deemed it fit to allow for its exclusion in a policy of marine insurance.[145]

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143 In *Greenock SS Co v Maritime Insurance Co* [1903] 1 KB 367 at p 372, Bigham J remarked: 'But the warranty is one thing and the observance of it 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 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*.'

144 (1807) 1 Camp 1.

145 *Per* Baron Martin in *Gibson v Small* (1853) 4 HL Cas 353 at p 370. In a contract of affreightment, the parties are also permitted by means of a clearly worded exception clause to exclude the application of the implied warranty of seaworthiness: see *Nelson Line v James Nelson* [1908] AC 16.

To exclude the application of the implied warranty of seaworthiness in a voyage policy, the parties to the contract of insurance may either employ the use of an exception clause or waive the breach as allowed by s 34(3) of the Act. It is appropriate at this juncture to mention that a waiver of a breach generally operates as a subsequent assentment (after the breach) 'to maintain liability notwithstanding the violation of the warranty'.[146] An exclusion clause, on the other hand, is an antecedent agreement (incorporated into the policy) excepting the insurer from liability for a certain cause of loss. The result, however, is the same whether the implied warranty is excluded by an exception clause or a waiver of its breach: the effectiveness of the implied warranty is negated.

Exception clauses

Neither the common law nor the Act prohibits the use of exclusion clauses in a contract of insurance. Thus, the parties to the contract are at liberty to negotiate for a total or qualified dispensation of this implied term. In the celebrated case of *Quebec Marine Insurance Co v Commercial Bank of Canada*,[147] the Privy Council accepted the fact that:

> '... it is competent to parties by language in a contract to which, as an ordinary rule, the law attaches some implied condition, by express, pertinent, and apposite language to exclude that condition ...'

However, it was held that the stipulation in question, which excepts the underwriters from liability for 'rottenness, inherent defects and other unseaworthiness …' was not clear enough to be construed as a statement that, the insurer had intended to surrender the implied warranty of seaworthiness. The court was of the view that the express clause had in fact strengthened, not weakened, the position of the underwriters, and was a particular effort to amplify, not nullify, the rule that the insurer is not liable for unseaworthiness. Like all exclusion or exception clauses, they have to be clear and unambiguous to be enforceable.

As can be seen below, there is a variety of clauses which have been used to exclude the implied warranty. They are basically variations of either the 'seaworthiness admitted' or the 'held covered' clause.

'Allowed to be seaworthy' and 'seaworthiness admitted' clauses

A clause stating that the ship was to be 'allowed to be seaworthy for the voyage' was used in *Phillips & Another v Nairne and Another*.[148] The effect of such a clause was held to have relieved the owner of the obligation to comply with the implied warranty of seaworthiness. It excluded any objection regarding the seaworthiness of the ship, whatever may be her state of repair the ship was considered seaworthy. Such a clause is an admission of fact and acts as an estoppel: it estops the insurer from pleading unseaworthiness as a defence. According to Pollock CB, who had to interpret the same clause in *Parfitt v*

146 *Per* Lord Penzance in *Quebec Marine Insurance Co v The Commercial Bank of Canada* (1870) LR 3 PC 234 at p 244, PC.

147 *Ibid*, at p 242.

148 (1847) 4 CB 343.

Thompson,[149] the admission 'enures for all purposes, and amounts to a dispensation of the usual warranty of seaworthiness'. The assumption of seaworthiness precluded the insurer from relying upon the fact of her unseaworthiness as a defence.

The 'allowed to be seaworthy' clause was later replaced with the 'seaworthiness admitted' clause which was more directly expressed.[150] Both have now fallen into disuse, but in relation to cargo, the 'unseaworthiness and unfitness exclusion clause' (cl 5) of the ICC (A), (B) and (C) could be described as the modern equivalent.

Held covered clause

A 'held covered' is also commonly used to protect an assured in the event of a breach of a warranty. In *Greenock Steamship Co v Maritime Insurance Co Ltd*,[151] Mr Justice Bingham had to interpret the effect of a wide clause which read as follows: 'held covered in case of *any* breach of warranty ... at a premium to be hereafter arranged'. The plaintiffs had breached the implied warranty of seaworthiness in sending the ship to sea with an insufficient supply of coal. As they were unaware of her unseaworthy condition until after the loss, no arrangement for the payment of additional premium was made. The judge had no doubt whatsoever that the clause applied to a breach of the implied warranty of seaworthiness. After acknowledging the importance of the warranty, he proceeded to explain the operation of the clause:[152]

> '... 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 even in that case the clause still holds good, and the only open question would be, what is a reasonable premium for the added risk.'

Whilst on the subject of the held covered clause, all that needs to be mentioned here is that cl 3 of the ITCH(95) and cl 2 of the IVCH(95) are of limited application and do not apply to the implied warranty of seaworthiness. Thus, a shipowner who wishes to protect himself from the consequences of a breach of this warranty would have to insert a clause specially for this purpose; otherwise, all he can hope for is for the insurer to waive the breach.

'Unseaworthiness and unfitness exclusion' clause

The held covered clause (cl 10) in the ICC(A), (B) and (C), applying to a change of destination, is not concerned with seaworthiness. The subject of

149 (1844) 13 M & W 393 at p 395.

150 The January 1912 and 1963 version read as follows: 'The seaworthiness of the vessel as between the assured and the underwriters is hereby admitted.' By admitting that the vessel is seaworthy, the insurer has precluded himself from relying on a breach of the implied warranty of seaworthiness as a defence. See *Firemen's Fund Insurance Co v Western Australian Insurance Co & Atlantic Insurance Co* (1927) 17 Asp MLC 332 for the effect of a 'seaworthiness admitted' clause in an original policy upon a policy of reinsurance.

151 [1903] 1 KB 367.

152 *Ibid*, at pp 374–375. See also *Mentz, Decker & Co v Maritime Insurance Co* [1910] 1 KB 132, where a notice given after a loss as a result of a barratrous deviation was held sufficient to satisfy a similar held covered clause.

seaworthiness is dealt with in cl 5, captioned as the 'unseaworthiness and unfitness exclusion clause' in all the ICC. Before proceeding to analyse the scope of cl 5, it would be helpful to understand the reasons for its insertion. As was seen, the implied warranty of seaworthiness declared in s 39(1) applies to all voyage policies, including a policy on goods even though it is obvious that shippers are generally not in a position to know, least of all exercise control over, the condition or fitness of the vessel on which his cargo is carried.[153] As cargo policies are normally for a voyage, it soon became clear that the statutory requirement as regards the seaworthiness of the carrying ship had to be altered. Thus, to mitigate the harshness of the application of the implied warranty of seaworthiness in relation to cargo, cl 5 is now a standard provision in all the ICC.

Clauses 5.1 and 5.2 may initially appear to be indistinct. Only cl 5.2 will be considered here as it is concerned with the implied warranty of seaworthiness and unfitness. Clause 5.2, sometimes called the 'waiver' clause, states:

> 'The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.'

The reference to 'the implied warranties of seaworthiness and fitness' is indeed significant: cl 5.2 is specifically directed at the implied warranties. By agreeing *in advance* to waive a breach of the implied warranties, the effect is to nullify both ss 39(1) and 40(2) of the Act.

Clause 5.1, on the other hand, does not mention the implied warranties. Accordingly, it has to be said that, by contrast, it is not concerned with the implied warranty of seaworthiness which operates only at the commencement of a voyage, but only with seaworthiness arising *during the course of* a voyage.[154]

That the implied warranties are not completely dispensed with or negated by cl 5.2 is clear. It is the breach, not the warranties, which is waived. The breach, however, is only waived if the assured (or his agent) is not privy to *such* unseaworthiness or unfitness. The corollary of this is that if the assured (or his agent) is privy to such unseaworthiness, he will not be able to claim under the policy. It is to be recalled that as a general rule, the lack of knowledge or privity in a *voyage* policy has never been considered a relevant consideration for the purpose of determining the liability of the insurer in the event of a breach of the

153 Unless, of course, he is shipping his own goods on board his own ship.

154 Clause 5.1 is clearly not concerned with the implied warranty of seaworthiness. It is an exception clause excluding the insurer from liability for a loss arising from unseaworthiness to which the assured or his agents are privy at the time the subject-matter is loaded on board the ship. It maintains cover against loss for all other types of unseaworthiness which arise after the initial implied warranty of seaworthiness applicable at the commencement of the voyage has been complied with. If the implied warranty of seaworthiness is not fulfilled, there can be no question of excepting the insurer from liability, because he would have been automatically discharged from further liability under the contract as from the date of breach, that is, at the commencement of the voyage. The legal effect produced by cl 5.1 is as follow: provided that the assured or his servants are not privy to such unseaworthiness, at the time the subject-matter is loaded, he is insured for any loss arising from the unseaworthiness of the vessel.

implied warranty of seaworthiness. Therefore, in this sense, the implied warranty of seaworthiness has been modified by cl 5.2.

The position under the ICC as regards the warranties of seaworthiness and unfitness, implied by ss 39(1) and 40(2) may thus be summarised as follows: cl 5.2 has to an extent changed the character of the implied warranty of seaworthiness – it is no longer absolute in nature. Provided that the cargo owner, the assured (or his servants), is not privy to the vessel's condition of unseaworthiness (existing at the time when the vessel commences on her voyage), he would be able to recover from the insurer for any loss proximately caused by an insured peril. In this light, the position of the implied warranty of seaworthiness under the ICC has become more like the rules applicable to a time policy where 'privity' is also an essential ingredient as spelt out in s 39(5) which is discussed below

Unseaworthiness and the Inchmaree clause

A latent defect in hull or machinery could well render a vessel unseaworthy, resulting in a breach of the implied warranty of seaworthiness.[155] A latent defect is one which 'could not be discovered on such an examination as a reasonably careful skilled man would make'.[156] As the implied warranty of seaworthiness is absolute in nature, the assured would not be able to plead as a defence the lack of knowledge of the defect. Any claim that he had exercised due care would be of no avail.

However, cl 6.2.1 of the ITCH(95)[157] (and cl 4.2.1 of IVCH(95))[158] provides insurance cover against loss of or damage to the subject-matter insured caused by, *inter alia*, '... any latent defect in the machinery or hull' with the proviso that such a loss or damage must not have resulted from the 'want of due diligence by the Assured, Owners or Managers or *Superintendents or any of their onshore management*'.[159] This proviso would not be difficult to fulfil, as a latent defect is by definition a defect which is not discoverable by the exercise of due diligence or ordinary care. Whether cl 6.2.1 of the ITCH(95) could be construed in a manner so as to override the implied warranty of seaworthiness has to be considered. If it is to be given its full effect, an assured would be able to recover under the policy, even though the implied warranty of seaworthiness has been breached by reason of the latent defect. As this subject can be more conveniently examined in the discussion of the Inchmaree clause, it will not be considered here.

155 A classic example is *The Mills Frigate, Mills v Roebuck*, reported in Park, *Insurance* (7th edn), Chapter XI, at p 67.

156 *Brown v Nitrate Producer SS Co* (1937) 58 Ll L Rep 188. For other definitions of latent defect, see *The Dimitrios N Rallias* (1922) 23 Ll L Rep 363, CA; *The Caribbean Sea* [1980] 1 Lloyd's Rep 338; *Miss Jay Jay* [1987] 1 Lloyd's Rep 32, CA; *Sipowicz v Wimble* [1974] 1 Lloyd's Rep 593; and *Irwin v Eagle Star Insurance Co* [1973] 2 Lloyd's Rep 489.

157 Previously cl 6.2.2 of the ITCH(83).

158 Also known as the Inchmaree clause. See Chapter 12.

159 The words in italics are not in the ITCH(83) or the IVCH(83).

Burden of proof

An insurer would naturally wish, whenever possible, to plead a breach of the implied warranty of seaworthiness as a defence to exonerate himself from liability to a claim. As he is making the allegation that the ship is unseaworthy, it is only fair and natural that he should bear the burden of proof. This is in accordance with the general principle of the law of evidence: he who alleges must prove, and the burden normally lies on the party who asserts the affirmative of the issue or question in dispute. *Parker and Others v Potts*[160] may be cited as the authority which has enunciated the general rule that 'a ship is *prima facie* to be deemed seaworthy'; thus, it lies upon the insurer to prove the contrary.

However, the burden of proof may well shift to the assured in certain circumstances. The circumstances under which the general rule may be displaced have to be examined, as such a shift in the burden of proof is an advantage of tactical importance to the insurer who is now to be relieved of the duty, which originally lies in him, to provide evidence to show that the ship was unseaworthy when she set sailed. A court would, naturally, as far as possible, prefer to leave the initial burden where it lies, and it would rarely disturb the general rule of onus of proof unless the circumstances clearly permit.

The particular facts of a case could invoke a presumption of unseaworthiness, albeit a rebuttable one, resulting in the shifting of the burden to proof to the assured, who would have to adduce evidence to refute the presumption. It is then incumbent upon the assured to show that the ship was, in fact, seaworthy when she set sail and that her condition had arisen from cause or causes arising subsequent to the commencement of the voyage.

It has been said that an appropriate scenario to raise the presumption is when a ship has to return to port, or sinks very shortly after leaving port. When such a presumption may be raised is a question of fact, and a court of law would be most disinclined to allow its operation unless it falls within the legal guidelines which sanction its application. Some guidance was offered by Parke B in *Franco v Natusch*,[161] who observed that:

> 'It was laid down in the House of Lords in *Parker v Potts* ... that it must be taken *prima facie* that a ship is seaworthy at the commencement of the risk; but that if, soon after her sailing, it appears that she is not sound or fit for sea, without adequate cause of stress of weather, etc, to account for it, the rational inference is, that, notwithstanding appearances, she was not seaworthy when the voyage commenced.'

The reluctance of the Court of Appeal to raise the presumption of unseaworthiness can clearly be seen in *Pickup v Thames Insurance Co*,[162] where the ship had to put back to port 11 days after sailing. The court held that the facts of the case did not raise the 'irresistible inference' that the ship was

160 (1815) 3 Dow's R 23.

161 (1836) Tyr & Gr 401.

162 (1878) 3 QBD 594, CA.

unseaworthy when she set sail. The trial judge was held to have misdirected the jury when he instructed them that the mere fact that the ship had to return to port so soon after sailing was in itself sufficient to raise the presumption that she was unseaworthy at the time of sailing.

The crucial point, which was made patently clear by all the judges in the Court of Appeal, is that time is only *one* of the factors, and for that matter of 'a very limited extent only' and of 'secondary consideration'[163] that may be taken into account when determining whether the presumption could be raised. Time cannot of itself, without more, give rise to the presumption to shift the onus of proof.

All the judges emphasised the fact that if the circumstances of the case is such that, 'it is possible to ascribe the result to any other cause than the condition of the vessel on starting on the voyage', the presumption cannot be invoked. In the case, there was a possibility that the ship was unable to proceed with the voyage because of severe weather arising during the course of the 11 days which had elapsed between her leaving and returning to port. Further, a period of 11 days was considered not short enough in this case to denude the onus of proof from the underwriters. The court warned that it is in each case a question of fact, not of law, for the jury to draw the necessary inference.[164]

No implied warranty of seaworthiness in time policies

English law does not impose a warranty of seaworthiness on a time policy.[165] This was confirmed in 1853 by the House of Lords in *Gibson v Small*,[166] and the principle is now firmly consolidated in s 39(5) of the Act which declares 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.'

Though there is no implied warranty of seaworthiness in a time policy, this does not, however, mean that the question of seaworthiness is irrelevant. Surprisingly, there is hardly any litigation on this section.

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163 *Per* Cockburn J, *ibid*, at p 598.

164 The Court of Appeal took the opportunity to clarify the decision of *Watson v Clark* [1813] 1 Dow 336 which has sometimes been cited as having laid down the rule that the presumption was one of law, and that the mere fact that a ship had to return to port shortly after leaving it was in itself sufficient to raise a presumption of unseaworthiness. What Lord Eldon was, in fact, saying in that case was that, 'if a ship was seaworthy at the commencement of the voyage, though she became otherwise only one hour after, still the warranty was complied with and the underwriter was liable'.

165 In America, the implied warranty applies to both time and voyage policies.

166 (1853) 4 HL Cas 353. In this case, all the pros and cons for not implying a warranty of seaworthiness in a time policy were exhaustively canvassed. Later, in *Dudgeon v Pembroke* (1877) 2 App Cas 284, HL, the final nail was driven into the coffin confirming that there is no implied warranty of seaworthiness in a time policy.

'At any stage of the adventure'

The above phrase was inserted to foreclose any arguments, such as those raised in *Jenkins v Heycock*,[167] suggesting that a warranty of seaworthiness is applicable at the commencement of each and every intermediate voyage made during the currency of the time policy. These words have put at rest any doubts which one might have as to the applicability of the implied warranty at each intermediate voyage undertaken by the insured vessel.

'Privity'

The meaning of the word 'privity' was analysed in *The Eurysthenes*[168] by the Court of Appeal. This 'old-fashioned' word, said Lord Denning, embraces not only actual knowledge but also constructive knowledge, and knowledge means:[169]

> '… not only positive knowledge, but also the sort of knowledge expressed in the phrase "turning a blind eye". If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry – so that he should not know it for certain – then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy that mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.'

Lord Justice Roskill, who was of the same mind, said:[170]

> 'If the facts amounting to unseaworthiness are there staring the assured in the face so that he must, had he thought of it, have realised their implication upon the seaworthiness of his ship, he cannot escape from being held privy to that unseaworthiness by blindly or blandly ignoring these facts or by refraining from asking relevant questions regarding them in the hope that by his lack of inquiry he will not know for certain that which any inquiry must have made plain beyond possibility of doubt.'

The court also concluded that 'privity' is not the same as 'wilful misconduct' or 'actual fault or privity'. The court has clarified that 'privity' does not carry any connotation of fault, and negligence is not equivalent to privity.[171]

Here, it is appropriate to refer to the trenchant observations made by Mr Justice Kerr in *Piermay Shipping Co SA and Brandt's v Chester, The Michael*.[172] Though his comments were in respect of the requirement of consent and privity in relation to barratry, they are nevertheless relevant to the present discussion as they offer an insight as to what constitutes 'privity'. He said:[173]

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167 (1853) 8 Moore's PC Cases 350.

168 [1977] 1 QB 49, CA. *The Eurysthenes* was very recently applied in *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd & La Reunion Europeene, The Star Sea* [1995] 1 Lloyd's Rep 651, QBD See also *Frangos v Sun Insurance Office* (1934) 49 Ll L Rep 354 and *Willmott v General Accident Fire and Life Assurance Corpn Ltd* (1935) 53Ll L Rep 35, KBD.

169 *Ibid*, at p 66.

170 *Ibid*, at p 76.

171 In *Compania Naviera Vazcongada v British & Foreign Mar Insurance Co Ltd*, *The Gloria* (1934) 54 Ll L Rep 35, it was held that mere omission to take precaution against the possibility of the ship being unseaworthy did not make the owner privy to any unseaworthiness which such precaution might have revealed.

172 [1979] 1 Lloyd's Rep 55, QBD; [1979] 2 Lloyd's Rep 1, CA.

173 *Ibid*, at p 66.

> 'It is clear that consent or privity can range from active complicity to mere passive concurrence. An owner who makes it clear that he would like to see his ship at the bottom of the sea, but does not want to know any more about it, is privy to its sinking just the same way as Henry II was privy to the murder of Thomas Becket when he said "Will no one rid me of this turbulent priest?" Even if the suggestion of scuttling comes from someone else, and the owner implies consent by saying nothing against it, he would be privy and could not say that the act was "to his prejudice".'

This colourful analogy is, in effect, no different from Lord Denning's notion of 'turning a blind eye'.

Another related question which the court considered was: what must the assured be privy to? Lord Justice Geoffrey Lane's answer was 'unseaworthiness' and 'not the facts which in the upshot prove to amount to unseaworthiness.'[174] On this point, Lord Denning's speech is particularly informative. He said:[175]

> 'To disentitle the shipowner, he must, I think, have knowledge not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is, not reasonably fit to encounter the ordinary perils of the sea.'

It needs to be said that it is the privity of the 'assured' which is relevant. Thus, 'the knowledge must be that of the shipowner personally, or of his *alter ego*, or in the case of a company, of its head men or whoever may be considered their *alter ego*'. In other words, the right people must have the relevant knowledge.[176]

'Attributable to unseaworthiness'

First, it is to be noted that s 39(5) does not use the words 'caused by' or 'proximately caused by' unseaworthiness. Instead the term 'attributable to' is used, the meaning of which will be discussed in greater depth later.[177] The cases of *Thomas and Son Shipping v The London and Provincial Marine and General Insurance Ltd*[178] and *Thomas v Tyne and Wear Steamship Freight Insurance Association Ltd*[179] are the two main authorities on causation relating to s 39(5). Suffice it is here to mention that if unseaworthiness is the sole proximate cause of a loss, the insurer does not have to rely on s 39(5) to free himself from liability. In a standard policy, unseaworthiness is not a peril insured against. Thus, regardless of whether the assured is or is not privy to the vessel's condition of unseaworthiness, such a loss is just not recoverable. To invoke s 39(5), the loss has first to be brought under the policy. This means that it has to

174 [1977] 1 QB 49 at p 81, CA.

175 *Ibid*, at p 68.

176 In *The Pacific Queen* [1963] 2 Lloyd's Rep 201, knowledge as to the condition of the vessel resting in one of the partners and the manager (also a partner) was sufficient to impute the company with privity. *Cf The Spot Pack* [1957] AMC 655, where acts of those in supervisory management and those in normal operation were distinguished.

177 *See* Chapter 8.

178 (1914) TLR 595, CA, hereinafter referred to as *The Thomas and Son Shipping Case.*

179 [1917] KB 938, hereinafter referred to as *The Thomas Tyne and Wear Case*.

be shown that the loss is caused by an insured peril and is, therefore, *prima facie* recoverable.[180] The insurer's defence would then be that the assured is to be disentitled of his right of claim by reason of his privity to the vessel's condition of unseaworthiness. As with the defence of wilful misconduct under s 55(2)(a), the expression 'attributable to' appearing in s 39(5) is specially chosen to cover the circumstance where unseaworthiness is either a remote cause of loss or where it is one of two or more proximate causes of loss at least one of which is an insured peril. There would be no need to apply s 39(5) if unseaworthiness is the sole proximate cause of loss or where unseaworthiness is one of two or more proximate causes of loss, none of which is an insured risk under the policy.

'Particular unseaworthiness'

The wording of s 39(5) does not state whether the insurer is to be exempted from liability for loss attributable to any kind of unseaworthiness or only to the particular unseaworthiness to which the assured is privy when he sent the vessel to sea. This uncertainty was clarified in *The Thomas Tyne and Wear Case*, where Mr Justice Atkin – who had to contend with a ship which was unseaworthy in two ways: unfitness of hull, to which the assured was not privy, and an insufficient crew, to which he was privy – observed that:[181]

> 'Where a ship is sent to sea in a state of unseaworthiness in two respects, the assured being privy to the one and not privy to the other, the insurer is only protected if the loss was attributable to the *particular* unseaworthiness to which the assured was privy.'[182]

As the assured was not privy to the particular unseaworthiness – unfitness of hull – which had caused the loss, the insurers were held liable for the loss.[183] An insurer is to be held not liable for a loss attributable to unseaworthiness only to which the assured was privy.

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180 Eg, in *George Cohen, Sons & Co v Standard Marine Insurance Co* (1925) 21 Ll L Rep 30, the loss of the battleship was proximately caused by perils of the sea and/or restraint of princes but remotely by unseaworthiness. As the assured was not aware of the ship's condition of unseaworthiness, they were able to recover for the loss. See also *The Miss Jay Jay* [1985] 1 Lloyd's Rep 264; [1987] 1 Lloyd's Rep 32, CA.

181 *Ibid*, at p 941.

182 Arnould at para 719 suggests that the word 'such' should be read before the word 'unseaworthiness'.

183 It is interesting to note that the arbitrator (whose finding of fact was accepted by the court) found that the loss of the ship was attributable solely to the unfitness of the hull. In spite of the fact that unseaworthiness was not an insured peril under the policy in question, the insurer were held liable for the loss on the basis that the assured were not privy to this particular unseaworthiness It is submitted that the decision is on this ground difficult to support. A similar result occurred in *Ashwort v General Accident Fire and Life Assurance Corpn* [1955] IR 268, and in a Canadian case, *Coast Ferries Ltd v Century Insurance Co of Canada & Others*, *The Brentwood* [1973] 2 Lloyd's Rep 232. *Cf Fawcus v Sarsfield* (1856) 6 El & Bl 192 at p 204; and *Samuel v Dumas* [1924] AC 431 at p 468, HL, *per* Lord Justice Sumner.

IMPLIED WARRANTY OF CARGOWORTHINESS

Section 40(2) has imposed two implied warranties in a voyage policy on goods or other moveables. There is an implied warranty that the ship on which the cargo is carried is:

- seaworthy at the commencement of the voyage; and
- reasonably fit to carry the good or other moveables to the destination contemplated by the policy: that is, she is also cargoworthy.

As these provisions are now overridden by the 'unseaworthiness and unfitness exclusion clause' (cl 5) of the ICC (A), (B) and (C), which has already been discussed earlier, very little need be said here about them except that the former relates to seaworthiness pertaining to the ship's ability to encounter the ordinary perils of the sea, whilst the latter is concerned with her capability to carry the particular cargo in question, commonly referred to as the implied warranty of cargoworthiness in the law of carriage of goods by sea.

The familiar distinction between uncargoworthiness and bad stowage, however, needs to drawn here. Bad stowage can, of course, cause a ship to become unseaworthy, but only if it affects her stability and ability to encounter the ordinary perils of the sea. But bad stowage which does not interfere with the ship's capability to combat ordinary sea perils is just pure and simple bad stowage and will not offend the implied warranties of seaworthiness or cargoworthiness.[184]

Though the ship has to be seaworthy, there is no implied warranty that the goods or moveables have to be seaworthy, or that they have to be able to endure the stresses or vicissitudes of the sea voyage.[185]

IMPLIED WARRANTY OF LEGALITY

The implied warranty of legality is laid down in s 41 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.'

It will be recalled that the subject of legality is also echoed in s 3, where the words 'lawful marine adventure' are used. As the wider word 'adventure' and not 'voyage' is used in s 41, it has to apply to all policies regardless of the nature of the subject-matter insured and the policy whether it be for time or voyage. Section 41 may be divided into two parts: the legality of the adventure and the performance of the adventure.

184 The distinction was made clear in *Kopitoff v Wilson* (1876) 1 QBD 377; *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co* [1924] AC 522 and *Blackett, Magalhaes & Colombie v National Benefit Assurance Co* (1921) 8 Ll L Rep 293, CA.

185 Section 40(1).

Illegality under British law

As a general rule, the legality or otherwise of an adventure is determined according to the common and statute laws of England. If the adventure to be performed is wholly or partly illegal according to English law, the contract of insurance would be affected.

Illegality under foreign law

In the day when Lord Mansfield sat on the bench, the attitude towards foreign law was quite different. It was said that: 'The courts in this country do not take notice of foreign revenue law'.[186] Whether Lord Mansfield had just foreign revenue law or all foreign laws in mind was not made clear. Holding the view that, 'one nation does not take notice of the revenue law of another', the insurance on the adventure was held not to be illegal even though the outcome of the case would in effect lead to the defrauding of a foreign legal system. This privilege of not having to take notice of any foreign laws cannot nowadays be carried too far, especially when a 'friendly' state is involved. This was made clear by the House of Lords in *Regazzoni v KC Sethia (1944) Ltd*,[187] where Viscount Simonds declared 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.'

Any adventure contravening a foreign law which had not been acted upon or enforced by its own country would not constitute a breach of the implied warranty. This was held in *Francis, Times and Co v Sea Insurance Co*,[188] where insured goods, consisting of arms and ammunition, were sent to Persia where there was an edict issued by the Persian government prohibiting the importation of arms and ammunition into Persia. It was well-known that so long as duties were paid there was no prospect of interference by the authorities who were aware that the trade was open and notorious. As this law was never implemented, Mr Justice Bingham held that the voyage was not, according to the law of Persia, an illegal voyage.

Legality of the adventure

It has to be said that it is not always easy to answer the question whether a contravention of a particular rule or regulation would render an adventure illegal. Naturally, not all breaches of rules and regulations would automatically cause the adventure to become illegal. In *Redmond v Smith*,[189] Chief Justice Tindal cautioned that in each case, the objective of the particular legislation has to be considered. In the said case, the captain was by statute forbidden to take out seamen who were not under articles. The said judge observed that:

186 *Per* Lord Mansfield, *Planche v Fletcher* (1779) 1 Dougl 251 at p 253.

187 [1958] AC 301; [1957] 2 Lloyd's Rep 289, HL.

188 (1898) Com Cas 229.

189 (1844) 7 Man & G 457.

> '… the [Act] was passed for a collateral purpose only; its intention being to give to merchant seamen a readier mode of enforcing their contracts and to prevent their being imposed upon … but it is nowhere said that such non-compliance shall make the voyage illegal; the section merely provides a remedy against the master.'

As the aim of the legislation was to protect seamen from imposition, the defence of illegality raised by the insurer has to fail.

In the light of this, it is not surprisingly that the American court in *The Pacific Queen*[190] had declined to answer the question as to whether the fact that a wooden-hulled motor vessel which carried bulk gasoline without a certificate, in breach of the Tanker Act, rendered the voyage illegal.

Legality in the performance of the adventure

Not only must the adventure be lawful, but its performance must also be lawful. The second implied warranty of s 41 is qualified with the term 'so far as the assured can control the matter'. If the assured is in a position to control the matter, then, he has to do so. The case of *Pipon v Cope*,[191] concerning barratry, is apt for the purpose of illustrating this point. Here, the crew members had committed repeated acts of smuggling on three consecutive voyages. In such circumstances, it would be difficult for the shipowner to argue that the matter was beyond his control, for he could and should have taken positive steps (for example, by replacing the ship with a new crew) to prevent the repeated acts of smuggling, thereby enabling the adventure to be carried out in a lawful manner.

Supervening illegality

An adventure could well start off as lawful, but become unlawful later as a result of war or a change of events. *The Sanday Case*[192] is a classic example of a supervening illegality where, because of the outbreak of war, the prosecution of the voyage would be illegal; in compliance with the law the assured had no choice but to be abandon the voyage. The insurer pleaded illegality as their defence to the assured's claim for indemnity for the loss or frustration of the adventure. The House held that the loss was caused by an insured peril, 'restraint of princes', and that the act by the assured of the compliance with the law did not constitute illegality. However, should the assured choose to flout the law by continuing with the voyage, he would be in breach of s 41 in having failed to exercise control over the matter to ensure that 'the adventure shall be carried out in a lawful manner'.

Legal effect of breach

The legal effect of a breach of the implied warranty of legality is not spelt out in s 41. It would appear that under ordinary contract law, no court, either of law or equity, will lend its assistance to give effect to a contract which is illegal.

190 [1963] 2 Lloyd's Rep 201, US Ct of Appeals, Ninth Circuit.

191 (1808) 1 Camp 434.

192 [1915] 2 KB 781, HL.

Language to the effect that such a contract is void, void *in toto*, nugatory, ineffective and unenforceable have been used to describe its effect. It has been said that if the illegality is 'so reprehensible', the contract is void *in toto*. But if the illegality is merely undesirable, the taint of illegality will not destroy all legal remedies. In the pre-statute case of *Redmond v Smith*,[193] the effect of illegality was considered by the Chief Justice, who expressed the legal position in the following terms:

> 'A policy on an illegal voyage cannot be enforced; for it would be singular, if, the original contract being invalid and therefore 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 invalid. Thus, during the war, policies effected on vessels sailing in contravention of convoy acts were held void.'

The general rule, said the judge, is that the contract of insurance is void. However, it is to be noted that this case was decided before the Act, and should therefore not be applied if the law contained therein is inconsistent with the Act.[194]

It is submitted that, couched in terms of a warranty, reference should be made to s 33(3) for the purpose ascertaining the effects of its breach; the consequence that the insurer is to be 'discharged from liability as from the time of the breach of the warranty' is applicable to all warranties.[195] Support for this contention can be drawn from the Canadian case of *James Yachts v Thames & Mersey Marine Insurance Co Ltd and Others*,[196] where Mr Justice Ruttan had no doubt whatsoever that, pursuant to the equivalent to our s 41, the insurers were to be *discharged* from liability as the plaintiffs had carried out an unlawful business of boat-building contrary to the by-laws and regulations of the municipality.[197]

There is a whole world of difference in saying that a contract is void, or voidable, or that the insurer is 'discharged' from liability. In the case of a 'discharge' under s 33(3), which is now to be read as 'automatic discharge' in the light of *The Good Luck*,[198] the insurer is discharged from liability only as from the date of the breach: all rights and liability accrued before the breach are preserved. When an assured 'avoids' a contract, he is avoiding the contract from the very beginning.

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193 (1844) 7 Man & G 457 at p 474.

194 Section 91(2).

195 But Chalmers, p 63, states: 'A contract to do a thing which cannot be done without a violation of the law is void, whether the parties know the law or not. But if a contract is capable of being performed in a legal manner, it is necessary to show clearly the intention to perform it in an illegal manner to enable the insurer to avoid it.' With regard to the former case, as the contract is illegal right from the very beginning, no rights or liabilities can accrue. The practical effect of a discharge in such a case is probably the same as that of holding the contract void. In relation to the latter, it has to be pointed out that totally different effects arise from the avoidance of a contract and from the discharge of liability.

196 [1977] 1 Lloyd's Rep, 206 at p 212, British Columbia Supreme Court.

197 The assured was also found guilty of non-disclosure of a material fact by which the insurers were entitled to avoid the policy.

198 [1991] 2 Lloyd's Rep 191, HL.

Breach of the implied warranty of legality cannot be waived

Though s 34(3) states that a breach of warranty may be waived, nevertheless, it has to be pointed out that a breach of the implied warranty of legality is an exception to the rule. In this sense, the use of term 'warranty' in s 41 is incongruous when read with s 34(3).

Gedge v Royal Exchange Assurance Corpn[199] is often cited as the authority which has established the principle that a breach of the implied warranty of legality cannot be waived. In this case, the policy was null and void by the presence of the ppi clause.[200] The insurer could have simply pleaded illegality as an absolute and complete defence to the claim brought by the assured, but instead he alleged concealment of material facts as the ground for their denial of liability. By taking this course of action, it could be argued that the insurer was, in effect, waiving the breach by pretending that the policy was valid and may be sued upon.

The court, however, was not prepared to allow the parties to treat the contract as if it was valid, and accordingly refused to enforce it. The fact that illegality was not pleaded made no difference whatsoever to the outcome of the case. The court's decision was not actually premised on waiver, but on the more direct basis that it would not lend its hand to such a plaintiff. It held that:[201]

> '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 brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.'

199 [1900] 2 QB 214.

200 Sections 4 (1) and 4 (2)(b).

201 [1900] 2 QB 214 at p 221.