

# WARRANTIES IN MARINE INSURANCE: AN UNPLEASANT NECESSITY?

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*Although there are many similarities between English and Swedish marine insurance law, there are also great differences between these legal systems. When the assured breaches the terms of the insurance policy this will have different effects depending on whether the risk is placed with a Swedish or an English insurance company. It has been said that the English insurance market tends to be more insurer-friendly whereas the Scandinavian market is more insured-friendly.*

*At present, the UK Law Commission and the Scottish Law Commission are conducting a major joint review of insurance contract law. The main thrust of the Law Commissions' current thinking upon the issue of warranties is to remove the ability for insurers to rely upon a purely technical breach of warranty (i.e. where there is no actual causation between the breach and loss) to avoid the policy. The proposed remedy put forward by the Law Commission is that a claim should be paid if the assured manages to establish that his breach of warranty had not a causative effect to the loss he suffered. This would have the effect that, contrary to the current English law position, such technical breaches of warranty could be remedied and that breach of a promissory warranty would no longer automatically discharge insurers from liability.*

*When it comes to business insurance in general, there is no suggestion to alter the strict liability placed upon the assured. However, there might still be quite substantial modifications since the Law Commissions suggest that breach of warranty must have been either material to the contract or that the loss must have been connected to the breach of warranty. In other words, the Law Commissions suggest introducing the doctrine of materiality or causality (also described as remoteness in English law) into business insurance.*

## I. INTRODUCTION

The foundation of the insurance business is that the insurer promises in return for a money consideration (the premium) to pay the assured a sum of

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money or provide him with some corresponding benefit (the cover), upon the occurrence of one or more specific events (the risks). To better face these risks, there are provisions to afford the insurer protection against pre- and post-contractual alterations of risks. By incorporating a so-called warranty into the insurance contract, the insurer can estimate the risk more properly and adjust the premium accordingly.

Different types of warranties play an important role in marine insurance and especially in how to settle disputes concerning the responsibility between the insurer and the assured. The assured must get the opportunity to overview its needs of cover and especially its right to compensation when accidents arise. On the other hand, the insurer must get the opportunity to calculate the risks of insuring the concerned property.

Another corner stone of the insurance business is that most buyers are risk averse; that is why they buy insurance in the first place. They want to minimize their exposure to risks, or transfer it to the insurer at the cost of an increased premium or stricter undertakings such as warranties.

When trying to define what a warranty is, one must start by differentiating it from other similar concepts such as representations, conditions and innominate terms. The outcome is also different if the comparison is made under contract law or insurance law. The great use of warranties in common law countries, such as England, and the lack thereof in civil law countries, such as Sweden, sometimes makes it hard and confusing to understand the similarities and the differences between the two systems.

## **2. THE CONCEPT OF WARRANTIES**

### **2.1 WHAT CONSTITUTES A WARRANTY?**

To start with, there is an important difference between the general English contract law position and the English marine insurance position. In contract law, warranties have been described to be used as a sword to impose liability on one party to the contract. In sales law, one often finds extended warranties that work as prolonged guarantees offered to consumers. This kind of warranty, which also exists in Sweden, resembles an insurance cover. In English marine insurance, warranties signify that the assured undertakes certain obligations and that the insurer becomes liable only if those obligations are complied with. Here, warranties have been described as being used by the insurer as a shield

against liability.<sup>2</sup> There are two major kinds of warranties; that states that certain facts exist, and the promissory warranty which is a true promise that pertains to the future as well as the present. These types of strict warranties used in the English marine insurance market do not exist in Sweden. Instead of having several statutory warranties, Sweden has, together with other Scandinavian countries, developed its own warranty-like regime, with a softer approach in view of the assured's burden in case of breach of its duties. The Scandinavian approach is primarily based upon safety provisions and the assured's alteration of risk followed by an amendment of the insurance policy instead of risking having it null and void. The types of warranties that do exist in Scandinavia are found in contract law, e.g. contractual guarantees, and in consumer law, e.g. product warranties, that their products are functioning.

## 2.2 WHAT DOES "EXACTLY COMPLIED WITH" MEAN?

A warranty needs to be "exactly complied with". In English law, this means that there is a heavy burden placed upon the assured due to this condition of absolute compliance. There is no question of fault on the assured and the cause of the breach does not matter, nor the materiality of the breach. This doctrine has been very much discussed ever since it was first codified. Following the UK Law Commission Consultation Paper further analysed below, this might change in the near future. The greatest difference between the English and the Swedish systems is shown in this doctrine since there is no condition of absolute compliance in Sweden.

## 2.3 WHICH SANCTION?

After a breach of warranty there is always some kind of sanction. The most severe sanction, from the assured's point of view, is when the insurer is freed from liability to cover the damage. In England, it follows from the doctrine of absolute compliance that there is freedom from liability regardless of materiality, fault, or causation, if there has not been absolute compliance. Even the smallest breach, no matter the materiality, has no exonerating effect. It also means that even if the assured is not at fault, the warranty is still breached and the assured is not covered. Finally and most important, it means that the cover is lost even if there does not exist any causation between the breach and the loss. Due to the harsh consequences of the breach and the requirement of absolute compliance, the English insurers have come to soften the system by choosing to waive the breach or to hold the assured covered despite a breach

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2 Soyer, Boris, *Warranties in Marine Insurance* (2nd edn, Cavendish, London 2006) [1.6].

of warranty. This is called “held covered clauses” and it has, together with later judicial practice in England, led to different approaches to warranties.

In Scandinavia, the sanction of breach of certain policy clauses grants the insurer freedom from liability as a main rule, but in some cases only where there is causation between the breach and the loss.

### 3. WARRANTIES AS DEVELOPED IN THE UK

#### 3.1 WARRANTIES COMPARED TO OTHER PROVISIONS

The English Marine Insurance Act from 1906 (the “MIA”) has served the English market well. This conclusion can be drawn from the great number of both marine and non-marine cases where the courts have based their judgments upon the act. However, the inflexibility and ambiguity of a more than a hundred year old codification becomes apparent when dealing with old-established legal problems, such as defining the concept of warranty in the 21st century.<sup>3</sup>

When defining what a warranty is, one need to separate it from other similar concepts, such as representations, conditions and innominate terms. The outcome is also different if the comparison is made under contract law or insurance law. This can be more than confusing and sometimes there seems to be no major difference other than than the wording.

To start with, representations are often given by the assured at an early stage of the negotiation, before the conclusion of the insurance contract and while his statements are still pending negotiation of contract. The terms of the contract have been divided into either conditions or warranties which are, respectively, the contract’s major and minor stipulations. We then find the innominate terms, a mixture of and in between a warranty and a condition.

The nature of warranty began to crystallize in the 18th century when some well-cited legal cases laid down the fundamental principles. In *Pawson v Watson*, a ship had been assured to be mounted with 12 guns and to sail with a crew of 20 men. However, the ship sailed carrying only 10 guns and 16 men. Despite the shortcomings, the court ruled in favour of the assured since they found that the statement only amounted to be a representation and not a warranty.

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3 Bennett, Howard, *The Law of Marine Insurance* (2nd edn, Oxford University Press, Oxford 2006).

This was mainly because the statement had not been incorporated into the insurance policy. This case founded a first distinction between representation and warranty by explaining that “a warranty inserted in a policy of insurance must be literally and strictly complied with. A representation to the underwriter need only be substantially performed.”<sup>4</sup> Much from this case was then codified into the MIA.

A few years later, in *De Hahn v. Hartley*,<sup>5</sup> a ship was underwritten a policy stating that she was to sail with a crew of 50 or more. When leaving port, she only sailed with 46 crew members and despite the fact that another 6 later joined the crew so that she sailed with a total of 52 crew members, she was held insufficiently manned and in breach of the warranty. The differences between a warranty and a representation were further outlined in the case by pointing out that:

“there is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered: but a warranty must be strictly complied with...” To conclude; “The very meaning of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally so.”<sup>6</sup>

It is therefore fundamental to understand the difference between a representation and a warranty since the scope of materiality is only relevant to a representation and not to a warranty. In *Yorkshire Insurance Co Ltd v Campbell* a horse was insured on an all-risks policy against perils of the seas. The owner had specifically stated the pedigree of the horse in the policy which later turned out to be incorrect. During the sea carriage the horse died from natural circumstances without any connection to the specific pedigree. Despite this, the owner’s claim was rejected due to breach of warranty (and not representation) when failing to provide the insurer with the correct pedigree of the horse. Another example is the *Hibbert v Pigou*,<sup>8</sup> where a ship had been warranted to sail with a convoy due to war risks during the 18th century. The ship went down due to a storm and had unfortunately sailed without a convoy,

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4 Pawson v Watson (1778) 2 Cowper’s King’s Bench Reports (1774-78) 785 (Cowp).

5 De Hahn v Hartley (1786) 1 Durnford & East’s Term Reports (1775-1800) 343 (TR).

6 ibid. 345 pp.

7 Yorkshire Insurance Co Ltd v Campbell (1917) Appeal Cases 218 (AC).

8 Hibbert v Pigou (1783) 3 Douglas’ King’s Bench Reports (1778-85) 213 (Dougl KB).

but nevertheless the ship was held to be in breach of warranty and could not obtain any cover despite the total lack of causality between the breach (sailing without a convoy) and the loss (sinking in stormy weather).

When analysing the more complex comparison between warranties and conditions, it is important to notice the different meanings of conditions, whether you find them under contract law or insurance law. In contract law, you find a clear distinction between warranties and conditions when comparing the consequences of breach. Breach of a condition entitles you to either repudiate from the contract or to affirm it and to claim damages whether repudiating or affirming. Breach of a warranty only entitles you to damages. If a contractual term relates to “a substantial ingredient in the identity of the thing sold”,<sup>9</sup> it will be classified as a condition, whereas a warranty concerns some less important or subsidiary element of the contract. In other words, when the injured party has breached a condition, he can claim damages regardless of if he affirms or terminates the contract. Breach of a warranty, however, does not give the injured party such a right to repudiate.<sup>10</sup>

From case law in marine contract law there are several interesting examples of what constitutes a condition as well as a warranty. In a charter party a ship was described as “now in the port of Amsterdam” where in fact she was elsewhere. Due to the commercial importance of the charter party, the statement was held to be a condition and the charterer could thus terminate the contract.<sup>11</sup> Other examples of statements that have been held to be conditions are statements that a ship must sail on a certain day,<sup>12</sup> “now sailed or about to sail”<sup>13</sup> and statements that a ship is “expected ready to load” about a certain day.<sup>14</sup> The nature of these stipulations and the consequences of their breach will in the end be based upon the intention of the parties as manifested in their agreement.

When analysing a warranty from a marine insurance perspective, one can start by looking at the definition in the MIA section 33 stating that “A *warranty*, as above defined, is a *condition* which must be exactly complied with (...)”. By

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9 Couchman v Hill (1947) King’s Bench Law Reports (1866-78) 544 at 559 (KB).

10 Peel, Edwin, The Law of Contract (12th edn, Sweet & Maxwell, London 2007) [18.039-18.042].

11 Behn v Burnes (1863) 3 Best & Smith’s Queens Bench Report (1861-65) 751 (B & S).

12 Glaholm v Hays (1841) 2 Manning & Granger’s Common Pleas Reports (1840-44) 257 (Man & G).

13 Bentsen v Taylor [1893] 2 Queen’s Bench Law Reports 274 (QB).

14 The Mihalis Angelos [1971] 1 QB 164.

tradition, marine insurance warranties have been recognised and interpreted as conditions by the judges. From English case law this has been elaborated 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. A condition, however, is simply a term of a contract which requires conformity.”<sup>15</sup>

Until that point in time, warranties were equal to conditions, but in 1991 a controversial case arose that would be much discussed and later made it all the way to the House of Lords. This case altered the point of view dramatically when it comes to warranties and is today one of the important fundamentals to the modern warranty. As have just been described, a warranty in marine insurance was more or less the same as a condition. One has to read this in conjunction with the last wording of the prior cited MIA s. 33(3) which states that “...the insurer is discharged from liability as from the date of the breach of warranty...”

A condition as a contractual term does not enable one party, in the event of the other party's breach, to be automatically discharged from future liability under their contract. Instead, there is a legal requirement that the party who suffers from the breach, has to either affirm or rescind the contract. The House of Lords instead concluded that a warranty has to be compared to a condition precedent. The latter has been described as “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 other party.”<sup>16</sup> The House of Lords thus discretely put in the wording “automatically” before “discharged” and should thus be read “automatically discharged”. This case, called *The Good Luck*,<sup>17</sup> will be further analysed below when discussing the effects of breach of warranty.

It is from this background one should understand the development of the so called innominate terms. As described above there are major differences between conditions and warranties under contract law. The classification of

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15 Hodges, Susan, *Law of Marine Insurance* (Cavendish Publishing Limited, London 1996) 100.

16 *ibid.* 101.

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

whether a term is deemed to be a condition or a warranty can therefore be crucial. The innominate term was first enounced in the *Hong Kong Fir*<sup>18</sup> where it was held that the classification of a provision should depend upon the nature of the event to which the breach gives rise instead of from a prior classification.

A ship owner had let out the *Hong Kong Fir* to a charterer. The charter party said the ship was to be “seaworthy” and “in every way fitted for ordinary cargo service.” There was not enough crew members nor did the crew have enough knowledge about the ship’s machinery. Eventually there was a breakdown, causing delay and in total fifteen weeks of repairs to reinstate seaworthiness. Unfortunately for the charterers, freight rates fell during these weeks while the ship was under repair. The charterer terminated the contract for owner’s breach of seaworthiness warranty, while the owner argued that the termination of the contract was wrongful and that the charterer was in fact the one in breach. The Court of Appeal held that the very meaning of the term “seaworthiness” has a very broad meaning, ranging from minor trivial defects to major flaws that might result in the sinking of a ship. It is therefore impossible to determine beforehand if the seaworthiness amounts to be a condition, a warranty, or perhaps even something else. The type of breach should instead be determined on the consequences and not whether the unseaworthiness itself was serious or minor. The Court of Appeal concluded that this particular unseaworthiness did not amount to a sufficiently grave effect to allow the charterer to terminate, mostly due to the fact that they had already benefitted from the charter party for about 80% of the period. Therefore, the owner’s breach should have been remedied by claiming damages and not by repudating from the charter party.<sup>19</sup> If, for instance, an obligation should be treated not as a condition precedent to liability but only as an innominate term it means that a defence to a claim under the insurance policy is only successful if the consequences of breach were so serious enough to give the insurer a right to reject the claim. The advantage of these innominate terms allows the courts to tread a middle-path between rigid, and sometimes unjust rules on the one side, and indeterminate flexibility on the other. The disadvantage is that markets, especially the shipping market, are in need of commercial certainty and predictability so that the parties can allocate the risks of the contract at the time of its formation and not at the time of its breach.

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18 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

19 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.



Another example could clarify the practical implication of this disadvantage. Whenever loss or damage arises to the assured, there is often a claims notification clause which states that the assured must in due time notify the insurer of his claim. These notification clauses are of great importance to the insurer and this is often underlined by the inclusion of a specific term whose sole purpose is to give the clause the status of a condition precedent, breach of which will discharge the insurer from all further liability under the policy irrespective of the gravity of the breach or the consequences resulting from it. Hence the importance for insurers to explicitly spell out the consequences of a failure to comply with these clauses by making compliance with it a condition precedent to their liability and nothing else. If this is not done the insurer faces the risk of determining if the clause is a condition precedent to insurer's liability; or an innominate term, in which case a breach of it might excuse the insurer's liability, although only if it is sufficiently serious; or a term which, if breached, gives rise to a right of damages only.<sup>20</sup>

The provisions described above are often characteristic for the common law system when it comes to both contract law and insurance law. The Scandinavians have taken another approach, maybe somewhat more uniform in terms of different provisions.

### 3.3 ALTERATION OF RISK AND SPECIFIC PROVISIONS

Warranties, either expressed or implied, remain the main provisions used in England in relation to the assured's alteration of risk.

The main rule in Sweden is that, instead of warranties, one uses the concept of reporting alterations of risk to the insurer complemented by specific provisions such as safety regulations. There is an alteration of risk when the circumstances have changed so that the risk alters or increases beyond the point upon which the insurer has made his risk calculations when concluding the insurance contract.

When buying insurance on the Swedish market, the policyholder must provide everything relevant to the risk that the insurer requests or everything that the policyholder ought to have known. This duty of disclosure resembles the one in the UK. However, the Swedish regulation regarding alteration of risk is very

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20 "Claims Notification Clauses Revisited" (Waltons & Morse LLP's bulletins August 2006), <http://www.waltonsandmorse.com/Bulletins2.jsp?bulletinID=45>, accessed 17 August 2009.

similar to the regulation of duty of disclosure whereas there are clearly separate rules for warranties and duty of disclosure in the UK.

The Scandinavian perspective compares the alteration to the content of the contract. This means that the two main questions are (i) if the risk has been increased by the assured or (ii) if the alteration was caused by a third party. The two main answers to those questions depend on (i) if the alteration of risk would have led the insurer to refuse to accept insurance cover or (ii) if the insurer would have accepted insurance cover but on other conditions, say a higher premium. If the assured has breached his duty not to alter the risk, the insurer is freed from liability if he would not have provided insurance cover for that alteration, regardless of causation. At first, this seems to correspond to a warranty under English law. However, if insurance cover would have been given, the liability of the insurer will be decided in accordance with the causation principle.<sup>21</sup> Therefore, this does not correspond to a warranty due to the requirement for causation.<sup>22</sup> The same goes for the situation where the assured was unaware of the alteration himself (increase of risk not agreed to by the assured) but where he has failed to notify the insurer without delay upon him becoming aware of the situation. Where there is a situation in which the assured is totally unaware of the alteration, he can not notify the insurer thereof and the result is that the assured is neither in breach of his duty not to alter the risk nor in breach of his duty to notify the insurer. The insurer will not be held liable where the assured “without reasonable cause has omitted to inform the insurer”. If reasonable cause exists, such as the total unawareness of the breach, this implies that the insurer is fully liable for an incurred casualty and that the insurer does not have a right to cancel the contract. This is in total contrast with a warranty under English law.

#### 4. EFFECTS OF A BREACH OF WARRANTY

“No cause, however sufficient; no motive however good, no necessity, however irresistible, will excuse non-compliance with a warranty”.<sup>23</sup>

The consequences of breach of a warranty depend on the nature of the warranty breached; whether it is a warranty which is related to a period after or before

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21 *ibid.*

22 *cl. 19 SHIC.*

23 Mustill and Gilman (eds), *Arnould's Law of Marine Insurance and Average* (Volume 2, 16th edn, Sweet & Maxwell, London 1981) [687].

the attachment of risk.<sup>24</sup> The insurer will either be discharged from liability or be prevented from coming on risk. To stress the importance of what has been previously said; after the insurer has come on risk, fulfilment of the warranty becomes a condition precedent to the specific policy.<sup>25</sup> This type of fulfilment had not been judicially analysed until the *Good Luck* and as a result the principle of automatic discharge became a complete revision of old case law:

“It is often said that breach of a warranty makes the policy void. But this is not so. A void contract cannot be ratified, but a breach of warranty in insurance law appears to stand on the same footing as the breach of a condition in other branch of contract.”<sup>26</sup>

At least, this was the case back in the 18th century. A promissory warranty relates to the period after the attachment of risk and the MIA codified these warranties from prior case law. During the early 1990's there were intense discussions of what the effects of a breach of a promissory warranty would lead to. Eventually, Sir Mackenzie Chalmers, quoted above and one of the co-authors to the MIA, was proven wrong when two hundred years of case law based upon the above mentioned case *De Hahn v Hartley* was completely revised resulting in that breach of a warranty now automatically makes the policy void.

#### 4.1 AUTOMATIC DISCHARGE

In *The Good Luck*,<sup>27</sup> a vessel was mortgaged to a bank who also became the beneficiary of the insurance. The vessel was insured by a Protection & Indemnity (“P&I”) club who by a letter of undertaking promised to promptly advise the bank if they should no longer insure the ship. Under an express warranty the vessel was prohibited from sailing in certain areas of extreme danger. Nevertheless, the actual owners of the ship continuously sent her into such prohibited waters without informing the bank or the P&I club. The club later discovered what was going on but, despite the letter of undertaking, never

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24 Prof. D. Rhidian Thomas (ed), *The modern law of marine insurance* (Volume 2, Informa, London 2002) [5.21].

25 Soyer, *Warranties in Marine Insurance* (2nd edn, Cavendish, London 2006) 144-147.

26 *A Digest of the Law Relating to Marine Insurance* (1901 1st edn; 1903 2nd edn.) and *The Marine Insurance Act 1906* (1907 1st edn.) with subsequent editions in 1913, 1922 and 1932.

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

gave the actual owners any advise to stop the breach, nor did they give the bank any prompt notice. *The Good Luck*, despite her name, was then hit by Iraqi missiles when sailing in the Arabian Gulf (part of the prohibited areas) and she eventually became a total loss. The bank brought an action against the P&I club for failure in giving prompt notice. The parties agreed that the club was in fact in breach of the letter of undertaking. The difficult task for the judges was to decide whether the ship's insurance had come to an end automatically or not due to the breach from the shipowners.

The first instance accepted this contention and ruled in favour of the bank. The court of Appeal, on the other hand, assimilated breach of warranty to a breach of condition in general contract law. Accordingly, breach of warranty in contract law does not terminate the insurance contract automatically. However, the House of Lords finally held that a breach of a warranty of this nature will automatically discharge the insurer from liability as from the date of breach, thus assimilating it with a condition precedent. The effect was that since the P&I club decided to rely upon a breach of warranty defence, they came in breach of their own letter of undertaking as they were held to be automatically discharged from any further liability from the very moment the ship had entered the prohibited area.<sup>28</sup>

After *The Good Luck*, which clearly altered the common law position on warranties, there is now a clear difference between when the insurer "may avoid the contract" often used as conditions in contract law and when the insurer is "automatically discharged from liability" such as a warranty seen in marine insurance law and codified in the MIA.

If the warranty is breached before the attachment of risk, the insurer's liability is never realised since he never came on risk. These warranties are also called affirmative warranties but are not expressly defined in the provisions of the MIA. In the lack of clear provisions the effects of breach have instead been developed by case law:

"A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a

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28 Prof. D. Rhidian Thomas (ed), *The modern law of marine insurance* (Volume 2, Informa, London 2002) [5.22-5-24].

warranty is introduced; but, being inserted, the contract does not exist unless it be literally complied with.”<sup>29</sup>

In *Woolmer v Muilman*, a vessel was warranted to be neutral. It later became apparent that this vessel was not neutral property and that it therefore never was any insurance contract by the simple fact that “this was no contract, for the man insured neutral property and this was not neutral property.”<sup>30</sup>

To draw parallels with non-marine insurance law these affirmative warranties are considered as a condition precedent to the attachment of risk. In *Thomson v Weems*, a life insurance was held to be null and void since the assured had warranted his statements being correct and these statements later on clearly proved to have been untrue.<sup>31</sup>

The only Swedish provision with the effect of automatic discharge for insurer’s liability is clause 4 in the General Swedish Hull Insurance Conditions (2000) (the “SHIC”) regarding premature termination of liability. Such premature termination will apply where the vessel or the majority of the proprietary right to the vessel and/or the shipowner is transferred to another owner. The sanction is the same when the class of the vessel is withdrawn or transferred to another classification society. In the English conditions, a change of classification society is treated in the same way as a loss of classification society resulting in a breach of warranty.<sup>32</sup> On this issue, the Swedish regulation follows the warranty principle. This was also the case in the Norwegian conditions up to 2007 when it was decided to differentiate the two provisions since the old rule, equalizing change of class with loss of class, was seen as too strict. As of now, a Norwegian insurer is free from liability after a change of class, provided it may be assumed that the insurer would not have accepted the insurance, had he known the change.<sup>33</sup>

The Swedish clause on premature termination of liability uses wordings such as “terminates” and “ceases” to describe automatic discharge. However, the insurer might have expressly permitted a change of ownership or class and

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29 De Hahn v Hartley (1786) 1 TR 345 pp.

30 Woolmer v Muilman (1746) 3 Burrows’ King’s Bench Reports (1757-71) pp 1419 (Burr).

31 Thomson v Weems (1884) 9 AC 671, p 684.

32 cl. 4.1 ITCH, cl. 13 IHC.

33 § 3.8 Norwegian Marine Insurance Plan.

when the ship is at sea, the insurance does not cease to apply until it has reached the nearest safe harbour.

#### 4.2 VOYAGE CONDITIONS & INCREASE OF RISK

In English law, conditions regarding the specific voyage sometimes have different effects of a breach than those of a promissory warranty. During voyages, there is an implied condition that the adventure shall be commenced within a reasonable time and that if the adventure be not so commenced the insurer may avoid the contract.<sup>34</sup> Breach of this condition does not amount to a promissory warranty since there is no automatic discharge after breach. When there has been an alteration of port of departure or when the ship is sailing for a different destination than specified in the policy, the risk never attaches.<sup>35</sup>

Where, after the attachment of the insurance, the destination of the ship is voluntarily changed, the insurer is discharged from liability as from the time of change. Deviation is where a ship, without lawful excuse, deviates from the voyage contemplated by the policy resulting in that the insurer is discharged from liability as from the time of deviation. These two sections resembles promissory warranties with automatic discharge and it is here immaterial that the ship may not in fact have left the route of voyage contemplated by the policy when the loss occurs or that the ship may have regained her route before any loss occurs.<sup>36</sup>

Whenever a promissory warranty has been breached, it becomes irreparable. This follows from s. 34(2) MIA which states 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.”

This is different in Sweden where there are provisions granting an increase of risk not affecting insurer’s liability. The SHIC s. 21 states:

“An increase of the risk does not affect the Insurer’s liability where the circumstances that have been altered have been reinstated or where the increase of the risk has otherwise ceased to be of importance.”

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34 s. 42 MIA.

35 s. 43-44 MIA.

36 s. 45-46 MIA.

Thus, alteration or increase of risk is repairable according to this condition whilst a breach of a promissory warranty is irreparable under English law.<sup>37</sup>

Many of the Swedish provisions relating to when the insurer may cancel the insurance entitle the assured a 14-day cancellation period. Only if the alteration has not ceased and the original insurance prerequisites have not been reinstated after this period, then the insurer may cancel the insurance. Therefore, breaches of trading limits occur quite rarely in Scandinavia since the ship has normally returned within insurable area before the insurer can terminate the contract. The portal clause concerning increase of risk and breaches thereof in Sweden is found in the SHIC cl. 18:

“Where through the action of the Insured (...) the Insurer’s risk is increased in excess of what the Insurer must have taken into account when effecting the insurance, he is exempted from liability if it can be assumed that on such altered basis he would not have accepted the insurance at all. (...) Insurer shall be liable for a casualty, only if it is proved that the increase of risk was without importance for the casualty or for the extent of the damage.”

There will be no difference if the risk has been increased with or without the assured’s consent if the assured without reasonable cause has omitted to inform the insurer after becoming aware thereof.<sup>38</sup> The last subsection quoted above is another example of the causality principle, lack of causation rendering the insurer liable.<sup>39</sup> There is no equivalence what so ever to this causality principle neither in the MIA nor in the English hull insurance conditions.

Breaches of duty of disclosure and alteration of risk give the insurer a right to terminate the insurance unless the insurer informs the assured, without undue delay, on what conditions he is prepared to assume the risk for the voyage. This is clearly different from the English related hull insurance conditions which state that the insurance cover shall terminate automatically unless underwriters agree to the contrary in writing.<sup>40</sup> In Sweden, if there was a deceitful or fraudulent act from the assured, then the contract is void and the insurer has

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37 See also cl. 6.7 SPL.

38 cl. 18 SHIC, see also cl. 6.3 SPL.

39 See also cl. 6.1 SPL.

40 cl. 10, 11, 14 IHC 01/11/03.

no liability for the occurred loss and the insurer is entitled to the entire agreed premium.<sup>41</sup> What is perhaps the greatest difference are the remedies afforded the insurer in Sweden when the misrepresentation was made in good faith because then the incorrectness shall have no effect upon the insurer's liability. If that would be the case, then the insurer may terminate the contract 14 days after notice of termination.

Where in other cases the insured has given incorrect information or negligently omitted to disclose any circumstances, this opens up for two alternative remedies. If the insurer never would have provided any insurance cover, the insurer is freed from liability. Let us assume that the insurer would have accepted insurance cover. Then the loss will be covered if the assured can prove that the loss or damage was not connected to his negligent or incomplete information.<sup>42</sup> This last remedy connects to the causation principle which as of today still lacks any direct application in the UK.

#### 4.4 WHEN A BREACH OF WARRANTY IS EXCUSED

Warranties can sometimes be modified due to a change of circumstances. However, it has been argued amongst other reasons, that this has a narrow field of application by virtue of the doctrine *cessante ratione, cessat lex*.<sup>43</sup> Because the very meaning of a warranty is that it shall be exactly complied with and nothing else. There is therefore little room for alternative interpretations or for the idea to excuse the breach. The exception could be applicable to warranties when the particular reason warranted against ceases to exist after the attachment of the policy. An example of this has been when a war, after the attachment of risk, turns into peace.<sup>44</sup>

As have been previously developed, there are several excuses of non-compliance of Swedish provisions corresponding to warranties. Unseaworthiness will render insurer liable if assured was not, or could not have been aware of the defects, or that the assured could not intervene. When there is an increase of risk agreed to by the insured and where the insurer might have accepted cover on such risks, insurer remains liable if it is proved that the increase of risk was without importance for the casualty. Increase of risk not affecting insurer's

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41 cl. 4.4 SPL and cl. 9.3 SHIC.

42 cl. 4.6-4.7 SPL and cl. 9.5 SHIC.

43 With the reason of the law ceasing, the law itself ceases.

44 Soyer, Warranties in Marine Insurance (2nd edn, Cavendish, London 2006) [5.12-5.15].



liability is not seen as a breach. These are examples of when breaches can be excused under Swedish law when there is lack of causation, materiality or fault.

#### 4.5 WAIVER OF BREACH OF WARRANTY

English case law pre-*Good Luck* suggested that silence or delay to act from the insurer after a warranty had been breached could in fact be interpreted as a representation where the insurer had elected to waive the breach of warranty.<sup>45</sup> However, this view of silent waiver by election is not in line with the legal doctrine of automatic discharge of insurer's liability and has probably no application after *The Good Luck*. Instead, recent case law suggests that the insurer must by a very affirmative conduct in the form of, e.g. an unequivocal representation, explicitly waive his rights. A so called waiver by estoppel<sup>46</sup> from the insurer could be the only possibility for the assured to guarantee himself having a proper claim.

In Sweden on the other hand, the insurer must demand for release from liability when the risk has been increased. Neither the waiver of election nor the waiver of estoppel seems to be necessary to guarantee the assured proper protection. The SHIC s. 20 states that:

“Where the Insurer becomes aware that the risk has increased, he must inform the Insured without undue delay if and to what extent he wishes to be released from liability. Where this is not done he cannot subsequently demand such release.”

Comparing this section with *The Good Luck* manifests that this is a striking difference from the English doctrine of automatic discharge of insurer's liability.<sup>47</sup> Swedish hull clauses thus demand the insurer to inform if he wishes to avoid the contract whereas under English law the insurer is automatically discharged from liability if the provision is held to be a warranty.

In cargo insurance, express waiver clauses are incorporated into the Institute Cargo Clauses for the purpose of waiving breach of sea- and cargo worthiness

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45 *Allen v Robles* [1969] 1 Weekly Law Reports 1193 (WRL).

46 Estoppel concerns statements and in relation to such it operates as a rule of evidence. If the insurer has made a statement of fact and the assured has relied on that statement, the insurer cannot then contradict that statement in proceedings against the assured.

47 See also cl. 6.5 SPL.

warranties. This has important practical effects since the cargo interests (i.e. the cargo owner or the consignee) usually have no means of knowing the state of the carrying vessel for his goods.<sup>48</sup>

## 5. THE CONCEPT OF WARRANTIES LEFT ASTERN?

### 5.1 INTERVENTION OF ENGLISH COURTS TO MODIFY WARRANTIES

Due to the doctrines of absolute compliance and automatic discharge, the courts interpret provisions differently to try to achieve fairness from the assured's point of view. However, these interventions may create a great deal of uncertainty and a grey zone for those practising marine insurance. There has developed a practice where the courts mitigate the harsh effects by making the warranty purely a suspensive condition. This is different from promissory warranties since by creating delimiting warranties (or descriptive warranties) the courts only suspend the cover temporarily during the breach. The following description of these warranties have emanated from case law:

“Clauses of this nature are sometimes referred to as “warranties descriptive of the risk” or “delimiting the risk”. This usage is not an accurate one, but it serves as a reminder that a court may be prepared to construe a clause as one descriptive of the risk even though the word “warranty” or “warranted” appears in it, as where a car was “warranted used only for the following purposes”. That case illustrates the point that there is no magic in the word “warranted” which is frequently used with considerable ambiguity in policies.”<sup>49</sup>

The British Maritime Law Association has said that “it should be noted that the Courts are ever more prepared to construe a non-material warranty as a suspensive or descriptive warranty.”<sup>50</sup>

When the courts construe a warranty the main rule is that the provision in question should be interpreted as a warranty if it contains a promise made by the assured. If the provision only determines the scope of the insurance contract by describing the different boundaries of cover, it should then be interpreted as

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48 Prof. D. Rhidian Thomas (ed), *The modern law of marine insurance* (Volume 2, Informa, London 2002) [5.28].

49 MacGillivray, Evan J. & Parkington, Michael, *MacGillivray & Parkington on Insurance Law* (6th edn., Sweet & Maxwell, London 1975) 263-264.

50 Law Commission, “Reforming Insurance Contract Law, A summary of Responses to Consultation” (Law Com No 182) para 4.11.

a suspensory condition delimiting the risk.<sup>51</sup> Even if by just inserting the term “warranted” does not automatically create an express warranty, it is still read *prima facie* as the parties’ intention and thus that a breach thereof should lead to a permanent or temporary bar to the insurer’s liability.

There seems to be a contradiction within this warranty system. On one hand, one finds the law with a clear doctrine of absolute compliance *vis-à-vis* warranties. On the other hand, one finds recent case law often interpreting warranties narrowly. Therefore, there is also a risk that the fine distinction between suspensory conditions and warranties as we know them today is challenged by case law that tends to strive in a different direction than the law itself.

Another solution has been to construe warranties in a purposive manner, i.e. in line with what could be described as commercial common sense. In a recent case from 2008 (*Pratt v Aigaion*), the question was how to interpret the following warranty found in the ship’s hull & machinery (“H&M”) policy: “warranted owner and/or owner’s experienced skipper on board and in charge at all times and one experienced crew member”. The vessel was later found to be on fire due to a malfunction of the deep fat fryer or the fridge, and unfortunately there were no crew members onboard at the time of fire. The discussion was how to interpret the wording “at all times”. The owner held that the clause only was directed to periods when the vessel was navigating or otherwise working. The Court of Appeal construed the clause as a delimiting warranty, a breach of which does not automatically cancel the cover for good but meaning that underwriters are not on risk as long as the insured does not comply with its terms. This is quite the opposite from the effects of breach of a promissory warranty, which was the case in the *Good Luck*.

The Court of Appeal held amongst others that there has been a shift from literal methods of interpretation towards a more commercial approach and by reading the warranty clause as a whole; the primary purpose of the warranty was to protect the vessel against navigational hazards. The ambiguity in the warranty clause was therefore construed against the insurer in accordance with the *contra proferentem* rule meaning that if the insurer wanted the owner or a crew member on board whenever (read: “at all times”) the vessel was meant

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51 Prof. D. Rhidian Thomas (ed), *The modern law of marine insurance* (Volume 2, Informa, London 2002) [5.37-5-46].

to be left unattended, the insurer should have clearly provided so.<sup>52</sup> This is also in line with a prior case where the court stated that: "...in case of doubt, wording is to be construed against the party who proposed it for inclusion in the contract: it was up to him to make it clear."<sup>53</sup>

Much of the discussion above relating to the differences between breaches of English and Swedish terms have dealt with the consequences, such as automatic discharge. It has also been said that ever since *The Good Luck* there is no longer any clear difference between a promissory warranty and a condition precedent in marine insurance when it comes to automatic discharge. However, a recent case (*Kosmar Villa*, 2008)<sup>54</sup> regarding legal liability insurance demonstrates that even a clause which is clearly classified as a condition precedent to the insurer's liability under the policy will not automatically relieve insurers from such liability should the assured fail to comply with them. In non-marine insurance, *Kosmar Villa* demonstrates that there is a difference between promissory warranties and conditions precedent.

What is clear is that if insurers would like to be certain, they should word the clause in the policy in such a way that it is made clear that any breach of its provisions will automatically discharge insurers from liability for the claim.

The English courts have made enormous efforts as to mitigate the harshness of insurance warranties. Recent case law tends to confirm that the courts will try to construe more insured-friendly clauses even if the substantive law itself still remains unchanged. One problem with this approach is that it creates unpredictability on a fragile market to what future case law might stipulate. The market players have therefore also made important efforts to find a working solution to the warranty problem. The International Hull Conditions from 2003 is a recent example of how the key market players in England have tried to design a package of insurance conditions without mentioning the old sacred warranty. To sum up, the warranty system seems to be a case for reform.

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52 John Pratt v Aigaion Insurance Company SA [2008] Court of Appeal Civil (England & Wales) 1314 (EWCA Civ).

53 Youell v Bland Welch & Co Ltd [1992] Lloyd's List Law Reports (1951-) 127 (Lloyd's Rep).

54 *Kosmar Villa Holidays v The Trustees of Syndicate* 1243 [2008] EWCA Civ 147.

### 5.3 UK LAW COMMISSION CONSULTATION PAPER: THE FINAL BATTLE?

Already thirty years ago back in 1979 there was a first proposal from the Law Commission to renew the subjects of insurance disclosure and breach of warranty. The sector was then “undoubtedly in need for reform” which had been “too long delayed”; but the reform foundered mostly due to lack of interest from politicians to legislate.<sup>55</sup>

In its report from 1980 the Law Commission recognised that the law of warranties was unsatisfactory in four respects; (i) cover could be lost for failure to comply with a term immaterial to the risk, (ii) there was no need for a causal link between the breach and any later loss, (iii) warranties, despite their significance, were not readily accessible to the assured and (iv) basis of the contract clauses were a particular problem because they deemed all statements to be warranties, whether or not they were material to the risk and without drawing the assured’s attention to them. The Law Commission’s solution was to: (a) abolish basis of the contract clauses and require insurers to give assureds a written statement of any warranties as soon as practicable after the contract was made, possibly by providing the assured with a copy of the proposal form; and (b) require insurers to pay, despite a breach of warranty if the assured could show that the breach of warranty was immaterial to the risk, that the type of loss fell within the commercial purpose of the warranty and that there was no causal connection between the breach and the loss.<sup>56</sup> These proposals from the Law Commission remained unanswered suggestions.

Today, the reasoning is more or less the same. The main thrust of the Law Commission’s current thinking upon the issue of warranties is to remove the ability for insurers to rely upon a purely technical breach of warranty (i.e. where there is no actual causation between the breach and loss) to avoid the policy. The proposed remedy put forward by the Law Commission in 2006 is that a claim should be paid if the assured manage to establish that his breach of warranty had not a causative effect to the loss he suffered. The burden of proof would be upon the assured to satisfy this test on the balance of probabilities. This would have the effect that, contrary to the current English law position,

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55 Brown, Michael, “Scoping the Law Commissions’ review of Insurance Contract Law” (practice highlights from Allen & Overy LLP in September 2006), <http://www.allenoverly.com/AOWeb/binaries/49241.pdf>, accessed 26 June 2009.

56 Merkin, Robert, *Reforming Insurance Law: Is there a case for reverse transportation?* (Professor of Commercial Law, Southampton University) [7.2].

such technical breaches of warranty could be remedied and that breach of a promissory warranty would no longer automatically discharge insurers from liability “as from the date of the breach of warranty.”

When it comes to business insurance in general, there is no suggestion to alter the strict liability placed upon the assured. However, there might still be quite substantial modifications since the Law Commission suggests that breach of warranty must have been either material to the contract or that the loss must have been connected to the breach of warranty. In other words, the Law Commission suggests introducing the doctrine of materiality or causality (also described as remoteness in English law) into business insurance.

One of the larger English law firms disagreed, meaning that insurers must be able to fully rely upon their warranties and that causality does not belong in business insurance. Other insurers stressed out the risk of an increase in moral hazard when the assured chooses to breach warranties and taking a chance in relying upon getting paid for losses without proven connection to the loss.<sup>57</sup>

One of the purposes in modifying English insurance law is to develop a more uniform set of rules on the insurance market. As a result of this, the Law Commission turned towards the shipping industry with their proposal to renew non-disclosure, misrepresentation and warranties. As many as thirty-seven out of forty-one (90 %) consultees agreed that there should not be separate rules for the shipping industry.

The insurance law in the UK today provides the possibility for insurers to avoid the contract *per se* due to the assured’s non-disclosure of a material fact. Although this can be seen as a burden upon the assured it can also be seen as a problem for the insurer since he has to establish proof of the material fact. Due to this, insurers often include in the proposal form to the insurance a declaration based upon the assured’s signature whereby he warrants the accuracy of his statements. These statements then form the “basis of the contract” between the parties and the effect is that all answers are incorporated into the contract as warranties. The outcome is that it makes no difference that the insured may have answered the questions in good faith and in the best of knowledge and belief, if his statements are in fact inaccurate.<sup>58</sup> These much discussed basis

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57 Law Commission, “Reforming Insurance Contract Law, A summary of Responses to Consultation” (Law Com No 182) [3.77-3.81].

58 Hodgkin, Ray W., *Insurance Law* (2nd edn, Cavendish, London 2006) 237.

of the contract clauses are proposed by the Law Commission to no longer be permitted in business insurance. Thus, the law should no longer give effect to such above mentioned terms based upon proposal forms which are then semi-automatically converted into warranties. Out of fifty-four consultees questioned so many as 78 % were in favour of the proposed change.<sup>59</sup>

One of the fundamentals in both Swedish and English business law not related to consumer law is the principle of freedom of contract. Since both parties in a business agreement normally are quite sophisticated when it comes to their particular business sector, there is an unspoken assumption that both parties fully understand all the risks that might follow from the agreement. One could argue that this is specifically the case in niche branches, such as the shipping business. If the Law Commission would succeed in adopting new rules for breach of warranty and implement them as a default regime, not only for consumer insurance but also for business insurance, the parties would still be free to agree upon other and maybe stricter terms and consequences if they so liked.

The Law Commission proposes that a party should be able to contract out of this default regime if either party has inserted a written term in the policy agreeing upon specific remedies for misrepresentation or that the proposer warrants that specified statements are correct. This is a very sensible topic since it clearly divides the parties between those in favour of contracting out clauses (mostly insurers) and the ones against (mostly assureds). Thirty-eight consultees (61 %) were in favour of the proposed clauses and only thirteen (21 %) were against. Professor Robert Merkin, Professor of Commercial Law at Southampton University, disagreed upon the said proposal and commented that “the test for the validity of a contracting out provision simply creates an additional layer of dispute”. The burden will most likely fall upon those businesses without sufficient negotiating power to reject the other party’s contracting out clauses and failing on insisting upon the more advantageous default regime.

When the Law Commission published the summary of the responses they got to their Consultation Paper, it came clear that their work would not be welcomed by the insurance market as a whole. For example, the Association of British Insurers said that “the insurance industry is not convinced of the

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59 Law Commission, “Reforming Insurance Contract Law, A summary of Responses to Consultation” (Law Com No 182) [3.72-3.76].

need for reform of the law in this area”. Others commented on the danger of changing the law that according to them was clear and well functioning. The insurance company Fortis Insurance Limited spoke for the insurance industry and pointed out that:

“businesses must be prepared to seek expert advice in the same way that they must employ accountants to organize their financial affairs and lawyers to organize their legal affairs”.

Insurance buyers (the assureds), brokers and financial institutions were much more supportive for the proposed reform. One amongst them was the company Network Rail who said that:

“while as a team we are of course aware of the principles of the law regarding disclosure, misrepresentation and warranties, we perhaps had not appreciated the full extent of the burden the law imposes on a purchaser of insurance” and that “too often a policyholder will be reliant on the insurer’s goodwill in order that a claim is not rejected due to a technical breach of the current law. The legal basis of insurance contracts needs a clear shift.”

The financial institutions made clear that even larger insurance buyers lack the ability to protect themselves due to unfair outcomes of claims and that insurance does not help to decrease the risk. One financial institution said that they see insurance more as “a right to sue an insurance company rather than a clear contract to pay after a given event”. Therefore, they are more and more seeking other solutions than placing their risk within the classic insurance industry. One solution has been placing risks in the form of so called captives, i.e. subsidiary companies created to insure or reinsure the parent companies risks. Another solution could be creating mutual insurance funds, similar to P&I clubs.<sup>60</sup>

At this time, it is impossible to say if the proposals from the UK Law Commission will be the last battle or just another struggle when it comes to renewing English insurance law. Some insurers might fear that the proposals

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60 Law Commission, “Reforming Insurance Contract Law, A summary of Responses to Consultation” (Law Com No 182) [2.7-2.18].



listed above will become reality one day. Others, such as the Association of Insurance and Risk Managers welcome the proposals that they believe will “take us beyond contract certainty and move us towards the position of contract clarity. Our only concern is that past attempts at reforming insurance law have come unstuck. This time we hope and expect to see change become a reality.”<sup>61</sup> Hopefully, we will know the answer within the next few years to come when the UK Law Commission’s proposals will either have turned into reality or, yet another time, remained purely unanswered suggestions.

## 6. PERSONAL CONCLUSIONS AND POSSIBLE OUTCOMES

“It is a striking feature of this branch of the law that other legal systems are increasingly discarding the more extreme features of the English law which allow an insurer to avoid liability on grounds which do not relate to the loss.”<sup>62</sup>

Other countries part of the common law tradition, have already left the port of warranty and started to set sail towards a different destination. One example is South Africa; an important shipping market that has introduced a materiality test for representations *and* warranties into its Short Term Insurance Act (“to be likely to have *materially* affected the assessment of the risk”).<sup>63</sup> The MIA could use such a resemblance between representations and warranties to help bring clarity.

The proposals as to a possible reform of the common law warranties could be the following:

1. Scrapping the warranty regime from the MIA and permitting the parties to agree that the insurer should not be liable for a loss caused by breach of an express term;
2. Amending the MIA to turn all warranties into suspensory terms;
3. Requiring that the breach materially affects the risk; and
4. Requiring proof of a causal link between breach and loss.

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61 “AIRMIC Gives Strong Support To Insurance Law Reforms” (AIRMIC), [http://www.airmic.com/en/Library/press\\_release\\_detail/index.cfm/news/1ADDC95C-96CB-4E21-8E4748F1406FA45F](http://www.airmic.com/en/Library/press_release_detail/index.cfm/news/1ADDC95C-96CB-4E21-8E4748F1406FA45F), accessed 17 August 2009.

62 Lord Hobhouse, *The Star Sea* (2001) 1 LLR 389 WLR.

63 s. 53.

The first proposal is the most controversial; getting rid of the whole warranty regime and maybe also scrapping the sacred MIA. Due to the controversial matter, this outcome is quite unlikely. The second option is a middle-path making the breach only suspensory. The English courts have already begun to explore this path, embracing it into their case law. The third proposal has sprung from the need of economic efficiency meaning that immaterial or trivial claims should not be considered by the insurer. Some of these proposals come from Mr. Baris Soyer, one of the most prominent experts when it comes to warranties and author of the book “Warranties in Marine Insurance”. The fourth option is the main proposal from the UK Law Commission and this is also Mr. Soyer’s personal favourite.


Personally, I find the extreme position of warranties developed in the UK quite unattractive; mostly because of its lack of ability to adapt itself to newer market practice based upon a more modern fleet and ever changing habitudes of commerce. I find provisions referred to as “warranties” confusing due to the difficulty of knowing the exact nature of the regulation since the provision tangles four different concepts: warranty, promise, condition and representation. This creates another layer of uncertainty on the market.

The warranty concept has partly been remedied by held covered clauses and waivers by the insurers. However, nothing comes for free. This suggests that this seems to be an expensive system for the assured and that there is an economical ineffectiveness of trying to heal warranties instead of seeking alternative and more flexible solutions in the long run.

It seems that the market perspective have little understanding for the peculiarities of warranties. Some players on the English market, with the UK Law Commission as a front-runner, appear to have taken upon this position and realize that there is a need for a desperate and dramatic change. The future can only tell us if this eventual change came too late or not.

As a Scandinavian, one is proud of having sailed and that one continues to sail towards a common port of destination. The effectiveness of an ever increasing Nordic market will definitely step up the competition between other rival markets. Perhaps, we will one day see a more common framework as to commitments, undertakings, obligations, duties, guarantees, promises

or whatever you might describe as similar to a “warranty”. But, until then I summarize this paper with the words of Professor John Hare<sup>64</sup>:

“Let natural reason again prevail. Let the same results again flow from the breach of an essential term (whatever its name may be in all countries alike). Let us consign the toxic English warranty to the obscurity of history where it belongs...”. 

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64 Prof. John Hare, *The Omnipotent Warranty: England v The World*, <http://web.uct.ac.za/depts/shiplaw/imic99.htm>, accessed 18 August 2009.