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Main Differences of Warranties under Marine Insurance Contract*

- with Comparisons between U.K., U.S. and Korea -

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Ⅰ. Introduction

In marine insurance contracts, a warranty is conceptually largely identical to condition of an ordinary commercial contract;[1] here, a warranty may be

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1) *Bean v. Stupart*(1778) 1 Doug 11, 14. Lord Mansfield C. J. once said that "A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract." : *De Hahn v. Hartley*(1786) 1 T. R. 343, 345-346. However, this

either a condition precedent or a condition subsequent.[2] A condition precedent may have the effect of suspending the operation of the contract until a specified time, or may be an undertaking that a certain act shall be performed or left unperformed, or an agreement whereby the existence of a particular state of facts is affirmed or negated. If such a warranty should be broken the contract is nullified completely. A condition subsequent is one that will terminate the contract should a specified contingency occur. As to warranties, generally, s.33 of Marine Insurance Act 1906 (hereafter referred to as "MIA") is as follows: "A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which by 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."

This undertaking can, therefore, be one of two types. The first in time that can arise is positioned in second place in the wording of s.33(1). It concerns the existence or non-existence of a state of affairs pertaining at or prior to the time at which the insurance contract is concluded. The second type of undertaking of the assured is that some particular thing shall or shall not be done in the future, -i.e. during the currency of the insurance contract.[3]

In this regard, the warranty is used to denote the criteria to be fulfilled by the assured;, additionally, it is used to denote limitations on, or exceptions to, the general words of the policy.[4] Thus, in the case of the warranty 'free from capture and seizure' the assured does not undertake that the ship or cargo shall not be captured.[5] Rather, there is a stipulation that the policy shall not

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formulation needs to be treated with caution. F. D. Rose(2004), *Marine Insurance: Law and Practice*, Lloyd's of London Press Ltd., p.165.

2) V. Dover(1982), *A Handbook to Marine Insurance*, 8th ed., Witherby & Co. Ltd., p.369.

3) R. Aikens(2008), "The Law Commissions' proposed Reforms of the Law of "Warranties" in Marine and Commercial Insurance: Will the Cure be Better than the Disease?" in B. Soyer(ed)., *Reforming Marine and Commercial Insurance Law*, informa, p.114.

4) J. C. B. Gilman, et al.(2008), *Arnould's Law of Marine Insurance and Average*, 17th ed. Sweet & Maxwell Ltd., pp.782-783, p.796.

apply to such a loss, and the provisions of ss.33(3) and 34 are inapplicable.

The American law of marine insurance took its cue from the English law, as there were no relevant American statutes, and English legal precedents were routinely cited in American courts. For 50 years after the English law was codified in the MIA, it truly could be asserted that English law was a part of the "general maritime law" of the United States.[6]

The unity of the English and American law, which was so beneficial to the functioning of the international marine insurance industry, was abruptly broken in 1955 by the decision of the United States Supreme Court in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*(hereafter referred to as the "*Wilburn Boat* case"),[7] a case that created controversies over the uniformity of the law which have yet to be resolved.[8]

Meanwhile, in Korea, marine insurers will not provide contents in detail to the insureds, and a contract will be concluded without explanation as follows, "A warranty is a condition which must, be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date. Where a warranty is broken, the insured can not avail himself of the defence that the breach has been remedied, and the

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5) The expression "warranted free" is no longer in current use in the new policy forms and the standard Institute Clauses. It was, rightly, seen as potentially confusing. The f.c. & s. Clause has been replaced by exclusions in less archaic and more readily intelligible language. J. C. B. Gilman, et al.(2008), op.cit., p.783.

6) See, *Queen Ins. Co. of Am. v. Globe Rutgers Fire Ins. Co.*, 263 U.S. 487, 44 S. Ct. 175 (1924) ; *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 73 S. Ct. 739, 1953 A.M.C. 952 (1953).

7) 348 U.S. 310, 75 S. Ct. 368 (1955).

8) T. J. Schoenbaum(1999), *Key Divergences between English and American Law of Marine Insurance : A Comparative Study*, Cornell Maritime Press Inc, p.12 ; T. J. Schoenbaum(2000), "Marine Insurance," *Journal of Maritime Law and Commerce*, Vol.31, No.2, p.282 ; J. K. Goldstein(1977), "The Life and Times of Wilburn Boat: A Critical Guide(Part I)," *J. Mar. L. & Com.* Vol.28, p.395 ; (Part Ⅱ), *J. Mar. L. & Com.*, Vol.28, p.555 ; M. Miller(1995), "Scrapping Wilburn Boat-The Need for Uniformity in Marine Insurance Law Outweighs Local Interests," *MLA Doc.* No. 719, p.10293.

warranty complied with, before loss."[9] Thus, in the event of a breach of warranty, the court determines whether to indemnify the claim. In concluding the contract between the parties, the court is subject to the English laws and practices specified in the applicable laws;, Korean decisions[10] are currently extant in which insureds suffer the disadvantage without precise knowledge regarding the effects of breach of warranty.

Many studies regarding the differences between the U.K. and U.S. in terms of warranties under marine insurance contracts have been conducted abroad. However, in Korea, the MIA is generally relied on as the fundamental law of marine insurance contracts, and import and export trade with the United States is responsible for a significant volumes. Therefore, despite the need to assess legal differences between the two countries in concluding marine insurance contracts, in Korea, there is still a paucity of studies regarding the differences between the two countries.[11] The principal objective of this study was to analyse the differences between the two countries in marine insurance contracts, and the results of this study will be utilized as basic data for these studies, especially in reference to warranties. We have also addressed

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9) E. G. Park(2003), "A Study on the Domestic Precedents of the Breach of Warranty," *Maritime Law Review*, Vol.15, No.2, p.158 ; E. G. Park(2003), "A Comparative Study on the Duty of Disclosure and Warranty in Marine Insurance Contract," *Journal of Korea Port Economic Association*, Vol.19, No.1, pp.94-96.

10) In Korean precedents, the effect of applicable law clause of the MIA is also admitted. See, Supreme Court of Korea, Jan.11, 1977, 71da2116. "Responsible for any problems caused by marine insurance should be in accordance with the English law and practice, the governing clause of English law is valid between the parties." See, again, Supreme Court of Korea, May 14, 1991, 90daka25314 ; Supreme Court of Korea Oct.11, 1996, 94da 60332 ; Supreme Court of Korea, Jan.17, 1998, 96da39707.

11) In Korea, most researches on the marine insurance warranty are mainly centered to English law, and the studies on the differences between England and America with respect for the warranty are just the following two. See, M. S. Pak(2003), "A Study on Differences of Marine Insurance Contract between England and America after Judgement on Wilburn Boat Case," *Journal of Korea Maritime Law Association*, Vol.25, No.1, pp.203-230 ; S. M. Park(2005), "A Legal Comparative Analysis on the Warranty of Seaworthiness between English and American Law of Marine Insurance," *Journal of Business Administration and Law*, Vol.16, No.1, The Korean Academic Society of Business Administration and Law, pp.393-427.

seaworthiness warranties, because the single most important warranty in marine insurance law is the warranty of seaworthiness.

Ⅱ. Warranty in Marine Insurance

In brief, the essential characteristics of a warranty are as follows: (1) it must be a term of the contract,; (2) the matter warranted need not be material to the risk,; (3) it must be complied with precisely,; (4) a breach entitles the insurer to repudiate the contract notwithstanding that the loss has no connection with the breach or that the breach has been remedied before the time of loss.

Under the MIA, a warranty means a promissory warranty by which by 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 denies the existence of a particular state of facts.[12] More specifically, a warranty is a term of the contract, that is usually pursuant to the express provision or operation of law[13]. 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 denies the existence of a particular state of facts.[14] Meanwhile, a warranty may be express or implied,[15] and a warranty is a condition that must be complied with precisely;, thus, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.[16]

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12) MIA, s.33(1).

13) M. A. Clarke, J. M. Burling & R. L. Purves(2009), *The Law of Insurance Contracts*, 6th ed, informa, pp.635-639.

14) M. A. Clarke(2007), "Insurance Warranties: the Absolute End?," *LMCLQ*, p.474.

15) MIA, s.33(2).

16) MIA, s.35(3).

However, the concept of the marine insurance warranty is a prodigal aberration from the European *ius communis* of marine insurance, and that the prodigal, in whatever systems it has raised its unwelcome head, ought to be brought back into the fold in the interests of the very fairness, justice and equity to which English law so properly aspires.[17]

The possibility of a reasonable interpretation was first approached by Lord Esher M.R. in *Hart v. Standard Marine Insurance Co*,[18] in which he asserted: "...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."

Ⅲ. Outline of the *Wilburn Boat* Case

Prior to the *Wilburn Boat* case, just as in other areas of marine insurance, there was once a marked uniformity between English and American laws in the context of marine warranties. Indeed, there was a tendency amongst judges to maintain the uniformity of these legal systems.[19] The principal reason

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17) J. Hare(2000), "The Omnipotent Warranty: England v. The World," in M. Huybrechts, E. V. Hooydonk and C. Dieryck(eds), *Marine Insurance at the Turn of the Millenium*, Vol.2, Intersentia, p.37.

18) [1889] 22 Q.B.D. 499, 501.

19) For example, in *Queen Insurance Co of America v. Globe & Rutgers Fire Insurance Co* 263 US 487, the court felt constrained to say that: 'There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this

underlying this uniformity was the presumption that federal law would pertain, in preference to inconsistent state law, in any action involving marine insurance and English law; the legal regime adopted primarily by the MIA, was regarded as the federal law by the majority of the American courts. However, great changes with numerous judicial implications have occurred in American law, pursuant to the Supreme Court's decision in the *Wilburn Boat* case. A summary of the facts of this case is as follows.

In May 1947, the Fireman's Fund Insurance Company issued a marine hull policy on the Motor Yacht "Wanderer", a small houseboat. The company issued this policy in the state of Illinois through an Illinois broker, to insureds residing in Iowa and Illinois. The policy, *inter alia*, provided that the vessel could neither be sold nor pledged without the insurer's consent. Furthermore, the vessel could be used "solely for private pleasure purposes," and could not be "hired or chartered", without the insurer's permission.

In June 1948, three brothers-Glenn, Frank, and Henry Wilburn-purchased the Wanderer for US$9,000. The insurer endorsed this policy in favor of the new owners doing business as a partnership known as "Wilburn's Boat Company". They moved the vessel to Lake Texoma, an artificial lake on the Texas-Oklahoma border. A policy endorsement authorized the trip and provided that the Wanderer would thereafter be confined to Lake Texoma.

In September 1948 the brothers sold the Wanderer to the "Wilburn Boat Company", an Oklahoma corporation that they owned. On three occasions, they or their corporation pledged the vessel to secure promissory notes. Finally, on several occasions, the owners leased the vessel and several occasions and carried passengers for hire. Undoubtedly, these actions of the Wilburn brothers amounted to several breaches of the policy.

On February 25th, 1949 a fire destroyed the Wanderer while it was moored approximately 90m off the Oklahoma shore of the lake. The origin of the fire remains unknown, but the insurer accepted that these policy breaches did not contribute to the losses. The Wilburn brothers thus made a claim under the

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business.'

policy, which by its terms covered loss due to fire. Fireman's Fund, however, declined to pay the claim. It argued that under the general maritime law governing marine insurance, an assured's breach of a policy warranty permits the insurer to avoid payment of a claim for a subsequent loss -even if the breach was unrelated to the loss.[20] The Wilburns on the other hand, argued that Texas law, rather than the general maritime law, governed the policy. Under Texas law, the policy breaches associated with the sale and use of the vessel would not defeat coverage unless they had contributed to the loss, and thus the anti-encumbrance provision in the policy would prove ineffective.

The Wilburn brothers and their company sued Fireman's Fund Insurance Company in a Texas state court claiming over $40,000 under the insurance contract. The insurer, Fireman's Fund, managed to have the case moved to the federal District Court the following month by asserting diversity jurisdiction.[21] In December 1951, the District Court ruled that federal maritime law, rather than Texas law, governed the policy;, thus, due to the 'literal compliance' rule, the Wilburns were not entitled to recovery. The decision of the District Court was later affirmed by the U.S. Fifth Circuit Court of Appeals.

On February 28th, 1955, six years after the fire, the Supreme Court reversed the decision of the Fifth Circuit and remanded the case to the district court "for a trial under appropriate state law". The Supreme Court's decision, which was written by Black J, needs to be carefully analysed. Two justices dissented (on an opinion by Reed J).[22]

It is always risky to speculate as to what exactly motivates a particular decision, but Professor Goldstein has found in several of the Justices' private papers a considerable amount of evidence that the result in the *Wilburn Boat* case was driven largely by the equities of the case.[23] Black J, in particular,

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20) Cf. MIA, s.33(3).

21) Diversity jurisdiction gives the Federal Court the power to hear certain cases when the parties are from different states.

22) L. J. Buglass(1991), *Marine Insurance and General Average in the United States*, 3rd ed., Cornell Maritime Press Inc., pp.34-35.

23) J. K. Goldstein, op.cit., pp.410-417.

wished to avoid the "harsh" literal compliance rule. Requiring the application of state law appeared to be an easy way to achieve this result. Formulating a new rule to replace the literal compliance rule would probably have been no more difficult than many of the other tasks that common law courts undertake on a regular basis, but the *Wilburn Boat* court may have felt that it was still not worth the effort. "Hard cases", according to the maxim, "make bad law".[24] Whether or not Professor Goldstein is correct in suggesting that the *Wilburn Boat* case was a hard case for several of the justices who decided it, almost everyone agrees that it did, indeed make bad law.[25]

The effect of the Supreme Court's decision is discussed by Gilmore & Blac k[26] who conclude:

It is utterly impossible to guess at this time [1957], how the Court will resolve these perplexities and contradictions. The *Wilburn Boat* case may show merely that the States are to have a limited competency to regulate certain terms of marine policies. It could as a matter of cold logic be read to mean that there is no federal maritime law at all. It may very well turn out to mean anything between these extremes.

Parks finds that the tendency is to restrict the *Wilburn Boat* case to cases involving policy warranties,[27] whereas Baer has ventured the prediction that this controversial decision will in time be "whittled away by future decision of the court so as to become barely recognizable."[28]

In *Lexington Ins. Co. v. Cooke's Seafood et al.*[29], one lower court circumvented the *Wilburn Boat* case by holding that, because federal maritime

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24) Cf. *Winterbottom v. Wright*, 10 M. & W. 109, 116, 152 Eng. Rep. 402, 406 (1842) (Rolge, B).

25) M. F. Sturley(2002), op.cit., p.409.

26) G. Gilmore & C. L. Black(1975), *The Law of Admiralty*, 2nd ed., The Foundation Press Inc., pp.61-63.

27) A. L. Parks, A. L. & E. V. Cattel(1994), *The Law of Tug, Tow, and Pilotage*, 3rd ed, Sweet & Maxwell Ltd., pp.471-480.

28) H. B. Baer(1969), *Admiralty Law of the Supreme Court*, 2nd ed., The Miche Co. p.280.

29) 1988 A.M.C. 574.

law strictly construes geographical warranties in marine insurance policies and Georgia state law was not to the contrary, the court was not mandated to apply the Georgia doctrine requiring a causal relationship between the breach of warranty and the loss. The insured vessel had breached the warranty in the hull policy restricting the vessel's navigation to within 100 miles offshore and had subsequently sunk during a hurricane. The insurer was therefore not liable for the loss, the policy having been void from the time of the breach of warranty.

Despite the passage of 50 years, discussions regarding the actual impact of the *Wilburn Boat* case are still ongoing in the U.S. The majority of commentators have severely criticised the judgment,[30] on the grounds that it has had a destructive effect on the uniformity and certainty of both American marine insurance law and admiralty law.[31] Some, on the other hand, regard the holding of the *Wilburn Boat* case as a necessary component of the U.S. constitutional system, which seeks to balance federal and state powers by allowing state law to prevail in certain instances. Perhaps, the Supreme Court was uncomfortable with the 'harsh' literal compliance rule and did not wish to deprive the Wilburn brothers of recovery for breaches of warranties that had no causal link to the loss. Deferring this problem to Congress or the states, with their greater expertise and experience, probably seemed far easier than formulating a new rule to replace it.[32]

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30) Of the *Wilburn Boat* case leading commentators have written: "persistently problematic and nightmarish"(G. Gilmore & C. L. Black(1975), op.cit., p.71), "surprised and puzzled the admiralty bar"(T. J. Schoenbaum(2004), *Admiralty and Maritime Law*, 4th ed., West, a Thomson Business Inc., p.945). A British insurance expert, O'May, stated that "American law has been thrown into disarray by the Wilburn Boat case, and one can only sympathize with American legal advisers on the present state of the law"(D. O'May & J. Hill(1993), *O'May on Marine Insurance*, Sweet & Maxwell Ltd., p.81).

31) See, G. Waddell(1993), "Current issues and developments in marine insurance," *University of San Francisco Maritime Law Journal*, Vol.6, p.187.

32) Professor Goldstein has found considerable evidence in several of the justices' private papers, which have since become available to scholars, that the result in Wilburn Boat was largely driven by the equities of the case. See, J. K. Goldstein(1997), op.cit., pp.410-417.

Ⅳ. Main Differences of Warranties in Marine Insurance

1. The Exact Compliance Rule

1) English Law

For a warranty to be imbued with its proper effect, its true meaning as intended by the parties must be determined as a matter of construction. This process raises the possibility that a reasonable latitude is permissible in the warranter's obligation, particularly in the light commercial practices and trade usages. Thus, it has been asserted that litigation and labour expenses, being treated by mercantile men as a particular charges rather than as a particular average loss, were not rendered irrecoverable by a warranty against a particular average.[33] However, although some attention must be paid to the surrounding circumstances, in order that the policy may be read as the parties intended it to be read, this means having some regard for the nature of the transaction and the known course of business and the forms in which such matters are carried out, and not to particular facts proven to have occurred at the inception of the transaction or during the negotiations.[34]

The first great distinction between an express warranty and a representation, is that the former is always, and the latter seldom, if ever,[35] written on the face of the policy; the second main distinction between them, is, that while a representation may be satisfied with a substantial and equitable compliance, a warranty necessitates a strict and literal fulfillment, -i.e. what it avers must be literally true, and what it promises must be performed precisely.[36] If a

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33) *Berns & Koppstein Inc. v. Orion Ins. Co. Ltd.* [1960] 1 Lloyd's Rep. 276.

34) *Yorkshire Ins. Co. Ltd. v. Campbell* [1917] A.C. 218, 225.

35) Arnould said "never" but there is no reason why a representation should be made or repeated in the policy. A slip will often contain a section headed "Information"in terms specifying that the contents are not the subject of any warranty and this may be carried into the policy. It will then be clear that the matters stated are representations, not warranties. J. C. B. Gilman, et al(2008), op.cit., p.788.

warranty is broken, only with the importance of it's risk is void the insurance contract according to the principle of immateriality[37], and the point is different.

Every policy, in fact, into which an express warranty is inserted is a conditional contract. and is subject to any questions of waiver or of the effect of policy provisions modifying from the time of breach if the warranty is not literally followed.

Hence all inquiries into the materiality or immateriality of the risk of the thing warranted are entirely precluded: so are all questions as to substantial compliance with the warranty. "It is perfectly immaterial," said Lord Mansfield in *De Hahn v. Hartley*,[38] "for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with." "The very meaning," said Ashurst J.[39] "of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally so." "It is a clear and first principle of insurance law," said Lord Eldon in *Newcastle Fire Insurance Co. v. Macmorran*,[40] "that when a thing is

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36) E. S. Lee(1990), "A Study on Warranties under Marine Insurance Act 1906," *Journal of Business College*, Vol.59, p.86 ; G. H. Shin(2009), "A Study on the Rule of Warranty in the English Law of Marine Insurance," *The International Commerce & Law Review*, Vol.42, p.279.. But the wording of a warranty may be such as to permit of a reasonable construction; thus in *Berns & Koppstein Inc. v. Orion Ins. Co. Ltd.* [1960] (1959) A.M.C. 2455; (1960) A.M.C. 1379; 1 Lloyd's Rep. 276.

37) It is convenient to bear in mind certain exceptions to the general rule that materiality is of no account in warranty law. First when the intention of the parties to give a particular term the status of a warranty is in doubt, the fact that it is material to the risk is, a good indication that a warranty was intended(*Yorkshire Ins, v. Campbell* (1917) A.C. 218 ; *Baranrd v. Fiber* [1893] 1 Q. B. 340). Secondly, the effect of breach of warranty may be cut down by a proviso which states that the policy can only be avoided for untrue statements or concealment of material facts. In that case, the materiality of the false answer is made a relevant issue(*Government v. Prudential Ins. Co. of America* (1941) S.C.R. 139). There is also a possible third exception, inasmuch as a court may be more ready to construe a warranty in the assured's favour, in order to find that he had complied with it, if the matter warranted was trivial and not fundamental to the risk(Provincial Ins. Co. v. Morgan [1933] A.C. 240)(N. Legh-Jones, et al.(1997), *MacGillivray on Insurance Law*, 9th ed., Sweet & Maxwell Ltd., p.230).

38) (1786) 1 T.R. 343, 345.

39) Ibid. 346.

warranted to be of a particular nature or description, it must be exactly what it is stated to be. It is no matter whether material or not; the only question is, is this the thing de facto I have signed?." Thus in *Yorkshire Insurance Co. v. Campbell*[41] where a horse insured by a marine policy was described as "by Soult X St. Paul(mare)" and it was determined that the pedigree was incorrectly stated, the Privy Council held that these words of description amounted to a warranty, and that the assured could not recover for the loss of the horse.

As will be apparent from the foregoing discussion, the approach that has been adopted by the English courts when dealing with warranties in insurance policies leaves little, if any, room for the application of the maxim "*de minimis non curat lex.*"[42] In some cases, the warranty may be expressed such that its literal meaning will be rejected in favor of a reasonable interpretation,[43] but this is not an application of the *de minimus* rule, although it may have the same result of preventing the underwriter from avoiding liability for a trivial departure from the literal terms of a warranty. However, in cases in which the warranty is expressed in terms such that it is capable of being fulfilled without producing an absurd result which the parties could not have intended, literal compliance is required; there appears to be no case in which the *de minimis* rule has been applied to mitigate the harshness of this doctrine.

Arnould previously stated that: "No cause, however sufficient; no motive however good, no necessity, however irresistible, will excuse non-compliance

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40) (1815) 3 Dow 255.

41) [1917] A.C. 218.

42) For a case on the application of the de minimus rule to a charterparty, see, *Margaronis Navigation Agency Ltd. v. Peabody & Co.* [1965] 2 Q. B. 430. See, also *Boon & Cheah v. Asia Ins Co. Ltd* [1975] 1 Lloyd's Rep. 452 Malaysia High Court. It was acknowledged by McNair J. in *Overseas Commodities v. Style* [1958] 1 Lloyd's Rep. 546 that the rule could in principle be applied to a breach of warranty.

43) *Berns & Koppstein Inc. v. Orion Ins. Co. Ltd.* [1960] (1959) A.M.C. 2455; (1960) A.M.C. 1379; 1 Lloyd's Rep. 276 ("immediately prior to shipment"); *Australian Agricultural Co. v. Saunders* (1875) L.R. 10 C.P. 668(condition that other insurances must be notified held not to prevent recovery under a fire policy where insured failed to give notice of a marine policy with overlapping coverage at the port of shipment).

with a warranty." This principle was declared in the late 18th century and is still good law by virtue of s.91(2) of the MIA. In *Hore v. Whitmore*,[44] the insured vessel was warranted to sail on a given day; however, she was prevented from doing so by an embargo imposed by a British governor. It was ruled that this breach of the warranty was sufficient to discharge the insurer from liability, despite the fact that such an embargo fell expressly within the rubric of "restraints and detainment of kings, princes and people," which were perils expressly insured against in the policy.

An example of the manner in which the enforcement of strict literal compliance with a warranty may operate harshly against the assured is to be found in the case, of *Continental Sea Foods Inc. v. New Hampshire Fire Ins. Co.*[45] In that case the policy, which covered a consignment of frozen shrimp from Pakistan to New York, contained a warranty requiring that the shipment be inspected by the "proper Government authorities" in the country of origin prior to loading and that a certificate be issued certifying the soundness of the shipment. At the material time, there was no government organization in Pakistan authorized to issue such a certificate, and the shipper had to rely on a surveyor appointed by Lloyd's agent, who issued the required certificate. The shrimps arrived decomposed condition, and were thus rejected. This case was unique in that the warranty was impossible to fulfill, yet the court felt constrained to enforce the rule regarding strict literal compliance of with a warranty, and as a consequence the assured was unable to recover from his insurers. The court reached its decision despite the fact that a New York State insurance law provided that no breach of warranty shall void an insurance contract or defeat recovery thereunder unless such breach materially increased the risk of loss, damage, or injury within the coverage of the contract.[46]

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44) (1778) 2 Cowp. 784 : 2 Park 669.

45) (1964) A.M.C. 196.

46) Several possible solutions to the problem which arises when compliance with the literal terms of a warranty is impossible at the date of the contract can be envisaged. (1) The contract may be treated as void for mistake. The contract is void for illegality where compliance with a warranty is unlawful at the time of the contract. (2) In some cases,

English law and jurisprudence has consistently applied the strict compliance rule for over 200 years[47] to the present day. The rule was codified by the s.33(3) of the MIA and was recentley applied in *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) (The Good Luck)*[48] where the court(Goff L.J.) held that the cover under an insurance policy was automatically terminated because the assured did not fulfill a warranty to notify the insurer prior to entering a prohibited zone.[49]

2) American Law

In the United States, the law is complicated by the *Wilburn Boat* case, which involved the cover on a small houseboat used for the commercial carriage of passengers on Lake Texoma in the State of Texas: the breach of warranty was uncontested: the Wilburns had breached the policy provisions

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it may be possible to treat the warranty as severable from the rest of the contract, so that the warranty is avoided and the contract stands without it. This is the position where events after the date of the contract make performance impossible, but it is submitted that this solution can rarely be applied in cases of initial impossibility. There appears to be no authority to support such an approach. (3) In some cases, it may be possible to resolve any conflict by construing the warranty so that something less than literal compliance can be treated as performance. (4) Where the policy includes perils which would be deprived of any scope by an implied exclusion as in The Lydia Flag, above (5) The contract may be treated as valid, and the warranty as broken by the assured. This is the approach adopted in the American cases cited, and it is submitted that it is generally the appropriate answer to the problem. Compare those cases where a party contracts to manufacture goods to a specification which is impossible to achieve without breaking other terms of the contract, where it has been held that impossibility affords no defence: *Gillespie v. Howden* (1885) 22 S.L.R. 527; *Hydraulic Engineering Co. v. Spencer* (1886) 2 T.L.R.554; *Cammell Laird v. Manganese Bronze & Brass Co.*, [1934] A.C. 402. Whether the promise is an absolute one, or is qualified so sa to render the contract void for initial impossibility or frustrated by subsequent impossibility is a question of construction: see, *Joseph Constantine SS Line Ltd v. Imperial Smelting Corp.*, [1942] A.C,. 154, 184-186, 203-204. J. C. B. Gilman, et al(2008), op.cit., pp.795-796.

47) In the nineteenth century, see, especially *Newcastle Fire Ins. Co. v. Macmorran and Co.*, [1815] 3 Eng. Rep. 1057, 3 Dow 255.

48) [1988] 1 Lloyd's Rep. 514, aff'd, [1989] 2 Lloyd's Rep 238 (C.A.), reu'd on other grounds, [1992] 1 A.C. 233.

49) T. J. Schoenbaum(1999), *Key Divergences between English and American Law of Marine Insurance : A Comparative Study*, op.cit., p.142.

against the transfer, pledge, and use of the boat.

The assured filed suit, and the federal district court dismissed the action. The court reasoned that since the policy involved a vessel on navigable waters, the general maritime law, as opposed to state law, applied. Under the general maritime law the breaches of warranty voided the policy under the "exact performance" rule. The Court of Appeals affirmed, exhibiting complete agreement with the District Court: the "exact performance" rule requires the exact fulfillment of every policy warranty such that any breach bars recovery, even though a loss would have occurred and the warranty was observed to the letter.

After the *Wilburn Boat* case, the lower American courts have adopted three separate approaches to the strict compliance rule in marine insurance cases. It is worth noting that, although some courts have employed interpretive strategies or other doctrines to circumvent the full effect of the strict compliance rule, all three lines of authority affirm the rule.

One line of authority follows the teaching of the *Wilburn Boat* case and applies state law to warranties in marine insurance contracts.[50] These hold that the strict compliance rule is applicable as state law to marine insurance contracts. On remand, the lower court in the *Wilburn Boat* case itself, applied state law and the strict compliance rule to void the cover.[51]

A second line of decisions holds that the strict compliance rule still applies to warranties as a matter of federal law.[52] Strange as it may seem, these decisions chose to ignore the Supreme Court's mandate that state law applies to insurance warranties. These courts apparently take the view that the

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50) For example, *Graham v. Milky Way Barge, Inc.*, 824 F. 2d 376 (5th Cir. 1987) (Louisiana law); *Advani Enter. Inc. v. Vito Liberati*, 1989 A.M.C. 1436 (N.D.Cal.1989) (Cal.law); 5801 *Assocs. v. Continental Ins. Co.*, 983 F. 2d 662, 1993 A.M.C. 1453(5th Cir. 1993) (Missouri law).

51) 300 F. 2d 631 (5th Cir. 1962).

52) *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364, 1988 A.M.C. 1238 (11th Cir. 1988); *Aetna Ins. Co. v. Dudney*, 595 F. 2d 238 (Fla. Dist. Ct. App. 1992); *Hilton Oil Transp. v. T. E. Jonas*, 75 F. 3d 627, 1996 A.M.C. 1308 (11th Cir. 1996); *Home Ins. Co. v. Vernon Holdings*, 1995 A.M.C. 369 (S.D. Fla. 1994).

Wilburn Boat case should be confined to its particular facts, such that non-Wilburn warranties, including as navigational warranties, are subject to federal law.[53]

A third line of cases, most numerous of all, apply the strict compliance rule as a matter of both federal and state law.[54] These courts hold that there is no difference between the two.

Thus, the strict compliance rule survived the *Wilburn Boat* case, even though the cases disagree with regard to the choice of law issue. As one court stated, "the *Wilburn Boat* case did not expressly overrule the pre-*Wilburn Boat* case federal rule of strict compliance with warranties in marine insurance policies."[55]

Meanwhile, an example of how the enforcement of the strict literal compliance with a warranty may operate harshly against the assured is to be found in a subsequent case, *Continental Sea Foods Inc. v. New Hampshire Ins. Co.*[56] In that case the policy, which covered a consignment of frozen shrimp from Pakistan to New York , contained a warranty requiring that the shipment be inspected by the "proper Government authorities" in the country of origin prior to loading and that a certificate be issued certifying as to the soundness of the shipment. At the material time there was no government organization in Pakistan authorized to issue such a certificate, and the shipper had to rely on a surveyor appointed by an agent of Lloyd's, who issued the required certificate. The shrimps arrived in a decomposed condition and were rejected. This case was unique in that the warranty could not be fulfilled, yet the court felt constrained to enforce the rule regarding the strict literal compliance of a warranty, and in consequence the assurd was unable to recover from his insurers. The court reached its decision despite the fact that

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53) See, *Lexington Ins. Co. v. Cooke's Seafood*, 835 F. 2d 1366.

54) *New York Marine Gen. Ins. Co. v. Gulf Marine Towing, Inc.*, 1994 A.M.C. 976 (E.D. La. 1993); *Certain Underwriters at Lloyd's v. Montford*, 52 F. 3d 219, 1995 A.M.C. 203 (5th Cir. 1994).

55) *Cotton Blossom Corp. v. Lexington Ins. Co.*, 615 F. Supp. 87 (E.D.Mo. 1985).

56) 1964, A.M.C. 196.

a New York State insurance law provided that no breach of warranty shall avoid an insurance contract or defeat recovery thereunder unless such breach materially increased the risk of loss, damage, or injury within the coverage of the contract. But the court reached a decision as to the foregoing-namely, that ignoring the fact does not prevent the recovery of claims on the basis of the insurance contract.

The chief criticism by American authorities of the literal compliance rule related to affirmative (misrepresentation) warranties. Professor Vance, for example, was not critical of the literal compliance rule with regard to promissory warranties.[57]

2. The Effects of Breach of Warranty

1) English Law

Some warranties relate, in terms of time, to the circumstances pertaining at the inception of the risk. In such a case, the warranted event or condition must be complied with at some point before the risk attaches. For instance, the MIA implies a warranty of portworthiness in regard to a voyage policy on the hull that attaches "at and from" the place designated in the policy.[58] S.39(2) of MIA requires that such a vessel be reasonably fit to encounter the ordinary perils of the port at the commencement of the risk. Similarly, s.41 of MIA implies a warranty of legality in all policies and requires the insured voyage to be a lawful one. Express warranties can also be drafted to cover a

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57) W. R. Vance(1911), "The History of the Development of Warranty in Insurance Law," op.cit., p.532.

58) Thus, if a ship, insured "at and from" a port, sail in an unseaworthy state, this breach of the implied warranty of seaworthiness does not discharge the insurer from liability as regards her stay in port(*Annen v. Woodman* (1810) 3 Taunt. 299). And the Act now makes no distinction on this point between warranties express and implied. It is of course open to the parties to stipulate for discharge at some other time. Thus, cl.4(1) in Institute Time Clauses-Hulls(Nov.1, 1995)(the Classification Clause) and cl.13 in International Hull Clauses(Nov. 1, 2003)(Classification and ISM) which plainly amounts to a warranty provides for the insurer's discharge from liability in the event of breach to be postponed if the vessel is then at sea, until arrival at her next port(J. C. B. Gilmam, et al.(2008), op.cit., p.793).

period prior to the attachment of the risk. For instance, an express warranty of neutrality requires the vessel to be warranted as neutral, that is to have such a character at the commencement of the risk.

One may argue that the principle in relation to breach of warranties, which relates to a period prior to the attachment of the risk, has derived from a non-marine case and, therefore, does not apply in the context of marine insurance. However, this point cannot be argued forcefully for two reasons. First, Lord Blackburn, in *Thomson v. Weems*,[59] expressly stated that, in his opinion, as regards the effect of breach of warranty, the same principles applied whether the insurance was marine insurance or some other kind. Secondly, two different judgements of Lord Mansfield in relation to marine warranties delivered in the late 18th century have adopted similar language. In *Woolmer v. Muilman*,[60] the insured vessel was warranted neutral, and was lost to the perils of the sea. At the trial, evidence was presented to the effect that she was not neutral property and Lord Mansfield C.J. said that:[61] "This was no contract, for the man insured neutral property and this was not neutral property." Similarly, in *De Hahn v. Hartley*,[62] he described a marine warranty which related to a period prior to the attachment of the risk, in a very similar sense as did Lord Blackburn in *Thomson v. Weems*: A warranty in an insurance policy is a condition or contingency, and unless that be fulfilled there is no contract. The purpose for which a warranty is introduced is utterly immaterial, but, being inserted, the contract does not exist unless it is complied with literally.

Some warranties concern the assured's future conduct and require him to perform or not to perform a particular thing, or to fulfil some condition at

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59) In cases where the warranty relates in time to circumstances at the inception of the risk, breach will result in the insurer never coming on risk. Compliance with a warranty of this type was considered as "a condition precedent to the attaching of the risk," in *Thomson v. Weems* ((1884) 9 App. Cas. 671, 684), by Lord Blackburn.

60) (1763) 3 Burr 1419.

61) Ibid. 1420.

62) (1786) 1 T.R. 343.

some point after the attachment of the risk.[63] The warranty of seaworthiness that is implied in regard to voyage policies by the MIA[64] and most express warranties, such as locality warranties, institute warranties (as to towage and salvage services) and laid up and out of commission warranties, are examples of this type of warranty. Since the warranted event or condition relates, in time, to a period after the attachment of the risk, the breach of such a warranty has no effect on the existence of the contract, unlike the breach of warranties. The legal effect of breaches of these types of warranties is spelled out in s.33(3) as follows: "...the insurer is discharged from liability as from the date of the breach of warranty,[65] but without prejudice to any liability incurred by him before that date."

The meaning of this sub-section became the subject of judicial examination in the 1990s, in *The Good Luck*.[66] It should be noted that, although the case was directly concerned with an express warranty, -namely, a warranty of locality, -the principles enunciated therein on the effects of a breach also pertain to implied warranties. The facts of the case may be summarized as follows: *The Good Luck* was insured with the defendant club and was mortgaged to the plaintiff bank. As required by the mortgage, the benefit of the insurance was assigned to the bank and the club gave a letter of undertaking to the bank, whereby the club promised to advise the bank

63) H. Bennett(2006), *The Law of Marine Insurance*, 2nd ed., Oxford University Press Ltd., p.538.

64) MIA, s.39(1).

65) But, E. R. H. Ivamy(1993), *Chalmer's Marine Insurance Act 1906*, 10th ed., Butterworths & Co. Ltd., 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.

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

promptly if they should "cease to insure" the ship.

The rules of the relevant club involved an express warranty prohibiting the insured vessel from entering certain pre-designated areas. These were areas of such extreme danger that the club considered it an unacceptable risk to cover vessels that entered regions. If an owner desired such cover while his vessel was in a prohibited area, special arrangements had to be made. The owners of *the Good Luck* were in the practice of sending the vessel into prohibited areas, but informing neither the club nor the bank. The managers of the club later discovered what was transpiring, but they neither took steps to deter the owners of *The Good Luck* from carrying on nor did they inform the bank of what they had discovered. On her last voyage *The Good Luck* was sent to part of the Arabian Gulf in breach of warranty. She was hit by Iraqi missiles and became a constructive total loss. Both the club and bank knew of the total loss, however, whereas the club discovered the breach of warranty, the bank (negligently) did not investigate the possibility.[67] In the mistaken belief that the loss was covered, the bank extended further loans to the shipowners. Considering the breach of warranty, the insurance could not be enforced, but the bank brought action against the club for having failed to give prompt notice that they had ceased to insure the ship. Accordingly, it was contended that the club was in breach of the letter of undertaking provided by them to the bank.

The bank's case relied on three different grounds. First, they alleged that the club was liable to them for the breach of a continuing duty of good faith, as stated in s.17. The existence of such a duty was denied by both the first instance judge, Hobhouse J, and the Court of Appeal. Secondly, it was contended that the club was liable to the bank in tort for the "breach of a duty to speak." This argument, which was initially accepted, was later reversed by the Court of Appeals. The third allegation of the bank gave rise to a serious and intense judicial examination of s.33(3), as a result of which the

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67) The bank was of the opinion that an arrangement was made between the owners and the club to keep the vessel insured while she was in the prohibited area.

effects of breaches of warranties relating to a period after the attachment of the risk were clarified. The bank contended that, by virtue of s.33(3), the breach of warranty automatically brought the vessel's insurance to an end and, accordingly, the insurer was in breach of the express provisions of the letter of undertaking in failing to notify the bank as to such a breach.

This argument, which was initially accepted by Hobhouse J, was challenged by the club in the Court of Appeals. The club supported the view that the breach of a warranty does not automatically discharge the insurer from liability, but rather gives the club a right to elect to terminate it. Because the club elected to terminate the contract for the breach, at a time after the loss was made by the bank, the provisions of the letter of undertaking were not breached. Consistent with the contention of the club, the Court of Appeal held that the breach of a warranty did not automatically discharge the insurer from liability, and held that he was required to take active steps to rescind or repudiate the contract, as he would have to in the case of a breach of a condition under ordinary principles of contract law. Accordingly, because the club had not undertaken such steps to repudiate the contract before further loan were provided by the bank, they were not in breach of the letter of undertaking they had given to the bank.

From the viewpoint of the Court of Appeals, a contract that has come to an end cannot be revived by the act of one party;, namely the insurer. Revival would require the formulation of a new contract by both parties. Furthermore, the Court of Appeal found it impossible to reconcile the concepts of "condition precedent" properly so-called, non-fulfillment of which results in there being no contract, and the breach of a promissory warranty, which cannot be contended to have that result.[68]

Reversing the Court of Appeal's decision, the House of Lords held that the breach of a warranty of this nature automatically discharges the insurer from

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68) To support their view, the Court of Appeal cited the dictum of Donaldson J, in *De Maurier(Jewels) Ltd. v. Baston Insurance Co. Ltd.* [1967] 2 Lloyd's Rep. 550, 558-559.

liability from the date of the breach. Accordingly, the club was in breach of the letter of undertaking since they were automatically discharged from further liability from the moment *The Good Luck* entered the prohibited region.

Unlike the Court of Appeals, which suggested the existence of an irreconcilable contradiction between the concepts of "condition precedent" and "breach of a promissory warranty," Lord Goff, in the House of Lords, referring to the wording of s.33(3) held that: "...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 fulfillment of the warranty is a condition precedent to the liability or further liability of the insurer."

Further, in his judgement Lord Goff made the following remark as to the meaning of the expression "condition precedent" in the above passage: In the case of conditions precedent, the word "condition" is used in its classical sense in English law, under which the coming into existence of(for example) an obligation, or the duty or further duty to perform an obligation, depends on the fulfillment of the specified condition.[69]

Despite the fact that no authority has been cited to support the "condition precedent" analysis in the context of a breach of warranty, Lord Goff may have borrowed this idea from Bramwell in *Jackson v. Union Marine Insurance Co. Ltd.*[70] In that case, a voyage charterparty was held to be frustrated due to an unreasonable delay in delivering the vessel for the contracted voyage and the charter was discharged from further performance of his obligations.

Lord Goff has employed a similar solution for warranties that relate to a period after the attachment of the risk. A fulfillment of the warranty is a condition precedent to the insurer's liability and, in the case of a breach, the remedy is the automatic discharge of the insurer from his further liabilities.[71] This analysis is not only logical and consistent with the general principles of

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69) [1992] 1 A.C. 233, 262-263.

70) (1874) L.R. 10 C.P. 125.

71) These results as the legal basis of the warranty in insurance law, insurer reflects the fact that undertakes risks as presupposition to fulfill the warranty.(*The Good Luck* [1992] 1 A.C. 233, 262-263 ; M. A. Clarke(2007), op.cit., p.481).

general contract law, but also has judicial support. Thus, the Court of Appeal's decision that there is an irreconcilable contradiction between the concepts of "condition precedent" and "breach of warranty" is not accurate. At the same time, the dictum of Donaldson J, in *De Maurier(Jewels) Ltd. v. Bastion Insurance Co. Ltd.* which was cited to support the Court of Appeal's decision,[72] fails to explain the existence of an irreconcilable contradiction between these two concepts.

When equating the effect of the breach of a marine warranty with a breach of a condition in general contract law, the Court of Appeal, in the words of Lord Goff,[73] was "led astray by passages in certain books and other texts." Lord Goff has provided no explanation regarding the sources that misdirected the Court of Appeal. Thus, a careful examination in regard to the books and texts relied on by the Court of Appeals must be carried out in order to test the accuracy of Lord Goff's statement.

Reports evaluating different aspects of insurance contracts, -namely, the Fifth Report of the Law Reform Committee, *Condition and Exception in Insurance Policies*, and the Law Commission Report, *Insurance Law: Non-Disclosure and Breach of Warranty,* -were also cited by the Court of Appeal to bolster the notion that the breach of a marine warranty has the same effects as the breach of a condition in contract law. Consistent with Lord Goff's position, these reports are somewhat misleading in this context as well. The former refers to the common law position regarding the effect of breach of warranty occurring prior to the enactment of the MIA, ignoring the possible effect of s.33(3),[74] whereas the latter cites the books, that had already been considered misleading.[75]

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72) [1967] 2 Lloyd's Rep. 550.

73) [1992] 1 A.C. 233, 263.

74) In the Fifth Report of the Law Reform Committee 1957, para 8, Lord Mansfield's dicta in *De Hahn v. Hartley*(1786) 1 T.R. 343 were cited as authority when equating breach of a warranty in insurance law with breach of a condition in general contract law.

75) Law Commission, 1980, para 6.2, refers to MacGillivary when commenting on the

To sum up, the effect of s.33(3) and, accordingly, the effect of the breach of a marine warranty had been considered neither by high minds from the pantheon on common law purity, -including Chalmers, -nor by academics who had commented on the issue for over 70 years.[76] All the commentaries on the topic were based on the antecedent case law and, accordingly, as was stated accurately by Lord Goff, they led the Court of Appeal, which relied on them intensively, to aa incorrect conclusion.

Another ground relied on by the Court of Appeal, when denying the automatic discharge remedy for the breach of a warranty, was the "potential difficulties" that may arise in this context.[77] Citing a footnote from Arnoul d,[78] the Court of Appeal ruled that the remedy of automatic discharge from the contract would be inconsistent with the insurer's right to waive the breach as set out in s.34(3).

Upon strict analysis, a contract, which has come to an end, cannot be revived by the act of one party alone-rather, revival would require both parties to enter into a new contract. From this perspective, the Court of Appeal's interpretation can be viewed as accurate, as obvious inconsistency would exist between the concepts of "termination of contract" and "waiver of the breach and, accordingly, revival of the contract by the act of one party." However, Lord Goff, speaking for the House of Lords, clearly held that the Court of Appeal was wrong when suggesting that the contract comes to an end as the result of a breach of warranty.[79]

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effect of breach of an insurance warranty. N. Legh-Jones(1997), op.cit., pp.248-249.

76) B. Soyer(2006), *Warranties in Marine Insurance*, 2nd ed., Cavendish Publishing Ltd., p.147.

77) [1990] 1 Q.B. 818, 880.

78) MIA, ss.33(4), 34(2). The legal effect of a breach of the implied warranty is the same as that of a breach of express warranty. The relevant principles are clearly set out in Lord Goff's judgement in *Bank of Nova Scotia v. Hellenic Mutual War Risks Association(Bermuda) Ltd.(The Good Luck)* [1992] 1 A. C. 233. It was suggested at this point that breach of the warranty of seaworthiness would avoid the policy or give the insurers a right to avoid from the time of breach. It is now clear that passages here referred to avoidance in connection with breaches of warranty did not accurately state the law. J. C. B. Gilman, et al(2008), op.cit., p.830.

Thus, under Lord Goff's solution, there remains an opportunity for the insurer to waive the breach, simply because the contract remains in force after the breach, although the insurer is discharged from further liability.

For all the arguments advanced above, Lord Goff's interpretation of the effect of s.33(3) can be considered accurate and sensible. After almost 75 years since the MIA was enacted, the effect of breach of warranty in marine insurance has finally been satisfactorily clarified.[80]

2) American Law

Breach of warranty is treated differently under American marine insurance law. A breach has two different consequences. The majority view holds that the breach merely suspends coverage, which can then be reinstated if the breach is corrected by the assured.[81] One typical case of this is *Aguirre v. Citizens Casualty Co. of New York*.[82] In holding that the assured could not recover from the insurer owing to the breach of warranty, the court made the following statement: The inescapable conclusion remains that the vessel was unseaworthy when she ran aground. Consequently, the owner's breach of their express warranty of seaworthiness suspended coverage under the insurance policy. The insurer cannot be liable for damage while coverage was suspende d.[83]

Under this view, the policy remains in effect and the insurer does not even have the option to terminate the policy. The assured gets a chance to reinstate

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79) [1992] 1 A.C. 233, 263.

80) G. H. Shin(2009), op.cit., pp.296-297 ; G. H. Shin(2009), "A Study on Some Problems and the Need for Reform of the Rule of Warranty in English Law of Marine Insurance," *The International Commerce & Law Review*, Vol.43, pp.258-260.

81) *F. B. Walker & Sons Inc. v. Valentine*, 431 F. 2d 1235, 1970 A.M.C. 2261 (5th Cir. 1970) (federal and Mississippi law); *Aguirre v. Citizens Cas. Co. of N.Y.*, 441 F. 2d 141, 1971 A.M.C. 1134 (5th Cir. 1971) (federal law); *Graham v. Milky Way Barge, Inc.*, 824 F. 2d 376 (5th Cir. 1987) (Louisiana law); *Employers Ins. of Wausau v. Trotter Towing Corp.*, 834 F. 2d 1206 (5th Cir. 1988).

82) 441 F. 2d 141, 1971 A.M.C. 1134 (5th Cir. 1971).

83) Ibid. at 145.

the policy unilaterally by curing the breach.

A second line of American cases simply declares that the insurer is "discharged" or the policy is "void" without going into detail as to what this means.[84] These courts are not very precise, simply holding that "the insurer is released form liability."[85]

A close reading of these cases shows, however, that what the courts mean when they say "void", "released", or "discharged" is that the insurer has the right to select this; in the American cases, there is no hint of the automatic termination rule. The courts' ruling to "void" coverage is consistently in response to the motion or pleading of the insurer. It is not the breach which voids the coverage but rather the insurer's pleadings and the proof of breac h.[86]

The notion that under American law, breach of warranty renders the policy voidable, rather than "void", has been previously expressed by some commentators. Professor Vance, for example, stated the traditional view when he defines warranty as: "…a statement or promise set forth in the policy, or by reference incorporated therein, the untruth or nonfulfillment of which in any respect, and without reference to whether the insurer was in fact prejudiced by such untruth or non-fulfillment, renders the policy voidable by the insurer wholly irrespective of the materiality of such statement or promise."[87]

Thus, the American rule on the consequence of breach of warranty

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84) *Hilton Oil Transp. v. T. E. Jonas,* 75 F. 3d 627, 1996 A.M.C. 1308 (11th Cir. 1996) (federal law); *Saint Paul Fire & Marine Ins. Co. v. Belle of Hot Springs, Inc.*, 844 F. 2d 550, 1994 A.M.C. 302 (8th Cir. 1988).

85) See, *Goodman v. Fireman's Find Ins. Co.*, 600 F. 2d 1040, 1979 A.M.C. 2534 (4th Cir. 1979). There is a problem of terminology here that the courts ignore. In English law "void" means void ab initio; "voidable" means liable to a retrospective remedy of rescission. The courts should be more precise in using these terms.

86) See, *Home Ins. Co. v. Vernon Holdings Inc.*, 1995 A.M.C. 369 (S.D. Fla. 1994) where the court uses the present tense "is not obligated to pay." The release of the insurer is decreed by the court; it is not automatic.

87) W. R. Vance & B. M. Anderson(1951), *Handbook on the Law of Insurance*, 3rd ed., West Publishing Co., p.408.

corresponds closely with the Court of Appeals' ruling in *The Good Luck*, which was rejected by the House of Lords.

The two lines of American cases are not inconsistent; these rules can coexist. A fair statement of the American law rule regarding the effect of breach of warranty is that the coverage is either suspended or voidable.[88]

3. Held Covered Clauses

1) English Law

The word "warranties" is frequently used in marine insurance clauses, although not all such references are true promissory warranties but, as previously stated, merely limit the scope of a policy. Thus the warranty "free from capture and seizure" does not require the assured to undertake that the ship or cargo shall not be captured; it is merely a stipulation that the policy shall not apply to such losses. It follows that the provisions of s. 33 of MIA are not applicable. Similarly, any breach of the Institute Trading Warranties, which are customarily attached to the policy to limit the areas in which the insured vessel is permitted to trade, would not result in the automatic termination of the policy but would rather call merely for an additional premium to cover the breach. On the other hand, a promissory warranty stipulating that the insured vessel must be kept classed in a specific classification society[89] if breached would presumably void the policy from the time of the breach.

Although the doctrine of alteration of risk, as developed by the common law and enshrined partially in the MIA, may be viewed as inflexible and weighted heavily in the insurer's favour, ultimately serves to provide clear and certain *prima facie* rules and a basis for the negotiation of terms relaxing the severity of the default position. The "held covered" clause is such a term. Under a held covered clause, in the event of a stipulated occurrence, typically

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88) T. J. Schoenbaum(1999), *Key Divergences between English and American Law of Marine Insurance : A Comparative Study*, op.cit., pp.148-150.

89) L. J. Buglass(1991), op.cit., pp.37-38.

one that constitutes an alteration of risk, the insurer's liability is not prospectively discharged. Rather, the assured remains ("is held") covered provided any specified conditions are fulfilled, -usually notification of the event by the assured to the insurer and agreement upon any appropriate additional premiums or changes in terms.

The modern Institute clauses contain a number of sub-clauses that mitigate the alteration of risk doctrine.[90]

Since "held covered" clauses maintains the underwriter's potential liability despite a departure from the risk agreed to be covered, not unnaturally the assured is required by such clauses to pay an additional premium. The underwriters may not, however, demand an extortionate further payment in order to escape from liability under the clause. The entitlement is to a reasonable extra premium, commensurate with any increase in the risk,[91] assessed by reference to the time of the event triggering the held covered clause.[92] Where no reasonable commercial rate exists for the altered risk, considering the full disclosure of all relevant circumstances, the held covered clause cannot operate.[93] What is reasonable with regard to the facts[94] may entitle the insurer, at one extreme, to no additional premium or, at the other extreme, to a further premium so high as to prevent the held covered clause from operating.

In *Hewitt v. London General Insurance Co. Ltd*,[95] the deviation was less significant than variations of the voyage permitted under the terms of the policy without the need for additional premium. Accordingly, the assured was

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90) ICC (A), (B), (C) 1982(cl.10) ; IVCH 1983(cl.2) ; ITCH 1983(cl.3) ; IHC 2003(cl.12). However, in ICC (A), (B), (C) 2009 avoid the technical terms "held covered", Change of Voyage Clause (cl.10) modifies in order to provide insurance coverage in the context of "phantom ship" .

91) MIA, s.31(2).

92) *Greenock Steamship Co. v. Maritime Insurance Co. Ltd.*[1903] 1 K.B. 367.

93) *Liberian Insurance Agency Inc. v. Mosse* [1977] 2 Lloyd's Rep. 560, 568.

94) What is a reasonable premium is always a question of fact: MIA, s.88.

95) (1925) 23 L.L.R. 243.

able to invoke a held covered clause without incurring any financial prejudice. By way of contrast, in *Greenock Steamship Co. v. Maritime Insurance Co. Ltd*,[96] the additional premium to which the insurer was entitled under the held covered clause exceeded the indemnity the assured sought to recover. The vessel embarked upon a stage of the voyage is an unseaworthy condition due to inadequate fuel supply. Consequently, to avert a danger of a total loss, the master burnt a quantity of the ship's fittings, spars and cargo. This constituted a general average sacrifice for which the insurer was *prima facie* liable under a clause holding the assured covered in the event of a breach of warranty. Bigham J held, however, that, where the breach was not discovered until after the ensuing loss, "the parties must assume that the breach was known to the parties at the time it happened, and must ascertain what premium it would then have been reasonable to charge."[97] The unseaworthiness having rendered the resulting sacrifice inevitable, it would have been reasonable for the underwriter to charge a premium equal to at least the probable value of the sacrifice and, indeed, a further sum in regard to the increased risk of loss of the vessel itself. Under these circumstances, therefore, the held covered clause was self-defeating.

Old wordings of held covered clauses contained no mention of any notice requirement.[98] Considering, however, that such clauses can be retrospectively invoked by the assured even after the loss,[99] and indeed even after the period covered by the policy had expired,[100] there arises a potential two-fold prejudice to the insurer. First, the insurer may be deprived of extra premium income in that the assured may naturally be tempted to refrain from giving notice unless a casualty does, in fact, occur. Secondly, additional information coming to light or an alteration of circumstances in the interval between the

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96) [1903] 1 K.B. 367.

97) *Mentz, Decker & Co. v. Maritime Insurance Co.* [1910] 1 K. B. 132.

98) *Hyderabad(Deccan) Co. v. Willoughby* [1899] 2 Q. B. 530.

99) *Greenock Steamship Co. v. Maritime Insurance Co. Ltd.*[1903] 1 K.B. 367.

100) *Overseas Commodities Ltd. v. Style* [1958] 1 Lloyd's Rep. 546, 559.

assured learning of the alteration of risk and giving notice may render it either impossible or more costly for the insurer to obtain reinsurance on the altered risk. Consequently, the majority of modern held covered clauses not only provide for the giving of notice but also deal expressly with the required rapidity of such notice. In the absence of such provisions, the courts will imply a term to the effect that the benefit of a held covered clause is conditional upon the provision of notice within a reasonable period of time.

What constitutes a reasonable time in this context reflects the reinsurance opportunities available to the insurer on the facts. Where the loss has already occurred prior to the assured learning of the departure from the agreed adventure, notice may be considerably delayed and still remains reasonable, simply because nothing practicable could be done by the insurer had the provision of notice been accelerated.[101] In *Liberian Insurance Agency Inc. v. Mosse*,[102] Donaldson J stated the following: What time is reasonable will depend on all the circumstances. Thus, if the assured learns the true facts while the risk is still current, a reasonable time will usually be a shorter period than if this occurs when the adventure has already ended. If the assured learns the true facts when the insured property is in the grip of a peril, which is likely to cause loss or damage, a reasonable time will be very short indeed.

The modern Institute hulls and freight clauses, however, override such considerations by expressly providing for the assured to give notice "immediately after receipt of advices." The provision of notice under the hull clauses of a change of voyage one month after the change is clearly too late and inefficient in the absence of a waiver of lateness, such a waiver being dependent on knowledge by the insurer of the delay in notification.[103] Modern cargo clauses contain a requirement of "prompt notice," reinforced by the following appended note: "It is necessary for the Assured when they become aware of an event which is "held covered" under this insurance to

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101) *Mentz, Decker & Co. v. Maritime Insurance Co.* [1910] 1 K. B. 132.

102) [1977] 2 Lloyd's Rep. 560, 566.

103) *Fraser Shipping Ltd. v. Colton* [1997] 1 Lloyd's Rep. 586, 594.

give prompt notice to the Underwriters and the right to such cover is dependent upon compliance with this obligation." Although there remain some doubts as to whether such a note has contractual effects, it has been previously held to reflect the law accurately.[104] It may be that the phrase "prompt notice" introduces a requirement for rapid, although not necessarily immediate, notification that is independent of the availability of practicable measures to the insurer.

The London Institute Trading warranties are customarily inserted in the standard hull policy forms issued by English marine underwriters to restrict trading limits for ships that are not engaged in regular services. These trading warranties are inserted in order to enable underwriters to assess risk more accurately, and shipowners who wish to trade with ports in the prohibited areas (where there is a greater risk of damage) or to carry prohibited dangerous cargoes are free to do so, upon payment of additional premiums. These trading warranties (or navigational limits) allow for worldwide trading, subject to the specific exclusions designated in the clause. An equivalent worldwide trading warranty in the United States is the America Institute Trade Warranties (7/1/1972). This clause, in common with the majority of trading warranties limited to a specific area, holds the insured vessel to be covered in the event it operates outside the Atlantic, Gulf, and West Indies trade area subject to prompt notice being given to underwriters, who have the rights to require an additional premium should they consider it to be appropriate. Under such a "held covered" clause the assured does not necessarily need to provide notice to underwriters prior to breaking of the original trading warranties are broken. Prompt notice simply refers to reasonable notice. Policies intended for use by coastwise or small craft operating on inland waterways in the United States usually contain trading warranties which, if violated, cause the suspension of the policy until such time as the insured vessel, in a seaworthy condition, re-enters the trading area specified in the policy.[105]

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104) *Liberian Insurance Agency Inc. v. Mosse*, [1977] 1 Lloyd's Rep. 586, 594.

Implied warranties do not appear in the policy, but in England are part of the statutory law and in the United States are part of the general maritime law. They cover the seaworthiness of the vessel and the legality of the adventure.[106] Cargo policies usually contain an Illicit Trade warranty, such as the following: Warranted free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war, or the violation of any port regulation.

Before leaving the subjects of disclosures, representations and warranties, it might be useful to sum up the general position:

① Any misrepresentation or non-disclosure must be material (i.e., in influencing the underwriter to accept or reject the risk, or in fixing the premium) before it affects the validity of the policy.

② If any misrepresentation or non-disclosure is material, the underwriter may avoid the policy from inception regardless of whether or not the misrepresentaion or non-disclosure is causally connected with the loss.[107]

③ Warranties must be complied with precisely, whether material to the risk or not.

④ If a warranty is not complied with, the underwriter is discharged from liability as from the time of the breach.

However, the ITCH 1995 form provides that given "any breach of warranty as to cargo, trade, locality, towage salvage services or date of sailing," the assured shall be held covered "provided notice be given to the Underwriters immediately after receipt of advice and any amended terms and any additional premium required by them be agreed."

To take advantage of these clauses, the assured must fulfill two requirements.

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105) L. J. Buglass(1991), op.cit., pp.39-40.

106) MIA, s.39, s.41.

107) However, it should be noted that in the United States, because of the *Wilburn Boat* decision, any material misrepresentation, or any material non-disclosure, or any failure to comply with a warranty, may be subject to state laws and therefore possibly subject to some connection with the loss before the underwriter may avoid the policy.

First, adequate notice must be provided to the underwriter. Failure to give notice will terminate the extension of cover.[108] It is best to give notice directly; notice to a broker may be ineffective.[109] A dishonest notice will also terminate the cover as a breach of the duty of utmost good faith. [110]

Second, the assured must pay an additional premium in order to retain the cover. This is to be a reasonable amount as determined by the agreement of the parties.[111] In cases in which the parties cannot agree, the amount is determined by a court or arbitration.[112] To be effective, the held covered clause must relate to the particular type of warranty at issue.[113]

2) American Law

In the United States, it has been generally held that an underwriter, by actions inconsistent with non-liability, can be estopped from denying liability for a loss that occurred while the insured vessel was being operated in violation of a warranty. In *Reliance Ins. v. Yacht Escapade,*[114] an insurer was estopped from asserting forfeiture of a marine policy upon a yacht due to a breach of the private pleasure warranty, when, with full knowledge of the breach and without denying liability, it demanded that the assured incur liability for salvage by a salvor of its choice, for preservation at a repair yard, and for cleaning up in order to permit a survey; by such action the policy was

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108) *Northwestern Nat'l Ins. Co. v. Federal Intermediate Credit Bank,* 839 F. 2d 1366, 1988 A.M.C. 1839 (9th cir. 1988); *The Star Sea,* [1997] 1 Lloyd's Rep. 360 (C.A.).

109) Ibid. See, also, *Windward Traders v. Fred James Co. of N.Y.,* 855 F. 2d 814, 818 (11th Cir. 1988); *United States Fire Ins. Co. v. Liberati,* 1989 A.M.C. 1436 (N.D. Cal. 1989). But see *Kalmbach, Inc. v. Insurance Co. of State of Pa.,* 529 F. 2d 552 (9th cir. 1976).

110) *Black King Shipping Corp. v. Massie(The Litsion Pride)* [1985] 1 Lloyd's Rep. 437 (Q.B.). See, also, *The Good Luck* [1992] A.C. 233.

111) MIA, s.31.

112) MIA, s.31(2).

113) See, *Campbell v. Hartford Ins. Co. (The Tinkerbell),* 533 F. 2d 496, 1976 A.M.C. 799 (9th Cir. 1976) where the court found that the held covered clause did not apply to a breach of a winter lay-up warranty.

114) 1961 A.M.C. 2410.

revived.

A breach of warranty is excused when, by reason of a change in circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by a subsequent law; a breach of warranty may also be waived by the insurer. That a breach of warranty was repaired, and that the warranty was complied with before the loss, are no excuses.[115]

Express warranties appear in the policy or are incorporated by reference therein.[116] The warranty regarding the aforementioned shrimps is an example of an express warranty. The most important express warranties in hull insurance are the Disbursements Warranty and the Institute Warranties. Other examples of warranties can be found in the Adventure clause in the American Institute Hull Clauses, reading: "Beginning the adventure upon the Vessel, as above, and so shall continue and during the period aforesaid, as employment may offer, in port or at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all times, in all places, and on all occasions, services and trades; with leave to sail or navigate with or without pilots, to go on trial trips and to assist and tow vessels or craft in distress, but the Vessel may not be towed, except as is customary or when in need of assistance, nor shall the Vessel render assistance or undertake towage or salvage services under contract previously arranged by the Assured, the Owners, the Managers or the Charterers of the Vessel, nor shall the Vessel, in the course of trading operations, engage in loading or discharging cargo at sea, from or into another vessel other than a barge, lighter, or similar craft used principally in harbors or inlands waters. The phrase '"engage in loading or discharging cargo at sea"' shall include while approaching, leaving or alongside, or while another vessel is approaching, leaving or alongside the Vessel.

The Vessel is held covered in case of any breach of conditions as to cargo,

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115) MIA, s.34.

116) MIA, s.35.

trade, locality, towage or salvage activities, or date of sailing, or loading or discharging cargo at sea, provided ① notice is given to the Underwriters immediately following receipt of knowledge thereof by the Assured, and ② any amended terms of cover and any additional premium required by the Underwriters are agreed to by the Assured.

It will be noted that the vessel may not be towed, except as is customary or when in need of assistance; she may not render assistance or undertake towage or salvage services under a contract previously arranged. Nor shall the vessel, in the ordinary course, engage in loading or discharging cargo at sea other than to or from a barge, Lighter, or similar craft used principally in harbors or inland waters. In other words, the clause warranties that the insured vessel shall not, in the ordinary course, engage in activities for which she is not equipped or of a nature which would expose her to perils not contemplated in the insurance contract. However, breach of any of these warranties is held covered, subject to notice being given to underwriters immediately when the breach is known to the assured, and subject to the payment of an additional premium."

4. Waiver of Breach of Warranty

In *The Good Luck* case,[117] the Court of Appeal assimilated the breach of a promissory warranty with a repudiatory breach in general contract law, holding that that breach gave rise to a right of election rather than triggering an automatic discharge.[118] As as already been noted, the House of Lords overruled that decision in favor of a literal reading of s.33(3) of the MIA. For the Court of Appeal, a significant difficulty with a literal reading of s.33(3) was the statement in s.34(3) of MIA that the insurer can waive a breach of warranty. If the remedy for breach is automatic discharge, there would appear

117) [1990] 1 Q. B. 818, rvs'd [1992] 1 A. C. 233.

118) S. M. Park(2005), "A Legal Analysis on the Concept of Warranty in Marine Insurance Law and Section 5 Institute Cargo Clause and Section 706 ① of Korean Commercial Law," *Journal of Korea Maritime Law Association*, Vol.27, No.2, pp.121-122.

to be nothing to waive. According to Lord Goff, however, the effect of a waiver as contemplated by s.34(3) is simply that "to the extent of the waiver, the insurer cannot rely upon the breach as having discharged him from liability."[119] In other words, the waiver referred to in s.34(3) is a waiver by equitable estoppels, barring the insurer from raising the breach of warranty against the assured.[120] There is no scope for waiver by election.

In the context of breaches of promissory warranty, waiver by equitable estoppel requires the insurer to represent unequivocally that the automatic discharge against the assured will not be invoked. Such a representation requires the insurer to know of the assured's actual breach, or the representation will need to be that the insurer will rely on no breach of warranty whatsoever.[121] The latter is unlikely. The insurer need not, in fact, know that in law its liability under the policy is discharged, but must appear in the eyes of the assured to know this legal consequence of the act of the assured. There can be no apparent waiver of a right that one does not appear to know that one enjoys. The assured must then rely on the representation such that it would be inequitable to go back on it.[122] This reliance requires an understanding of the insurer's legal position. The need for an apparent appreciation of its legal position on the part of the insurer and knowledge of the assured was discussed by Tuckey L.J. in *HIH Casualty & General*

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119) *J. A. Chapman & Co. Ltd. v. Kadirga Denitzcilik ve Ticaret* [1998] Lloyd's Rep. I.R. 377. C. H. Han(1998), "Present State and Problem on the Principle of Special Clauses of Warranty under Marine Insurance Act 1906," *Study of Insurance Law*, Samjiwon, pp.128-132, pp.145-147 : J. H. Choi(1998), "Waiver of Right for the Breach of Special Clauses of Warranty under Marine Insurance Act 1908," *Study of Insurance Law*, Samjiwon, pp.48-49, pp.52-54.

120) *Kirkaldy(J) & Sons Ltd v. Walker* [1999] Lloyd's Rep. 410, 422 ; *HIH Casualty & General Insurance Ltd v. AXA Corporate Solutions* [2002] EWCA Civ. 1253, [2003] Lloyd's Rep. IR 1.

121) *Agapitos Laiki Bank (Hellas) S.A. v. Agnew (The Aegeon) (No 2)* [2002] EWHC 1556 ; [2003] Lloyd's Rep. 54 ; *Eagle Star Insurance Co. Ltd. v. Games Co. S.A. and others (The Game Boy)* [2004] H.C. 15, [2004] 1 Lloyd's Rep. 238.

122) *Motor Oil Hellas (Corinth) Refineries S.A. v. Shipping Corp of India(The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391, 399.

Insurance Ltd v. AXA Corporate Solutions,[123] as follows: As the Judge put it: "the essence of the plea [of estoppel] must go to the willingness of the representor to forego its rights." Unless the representation carries with it some apparent awareness of rights it goes nowhere: the representee will not understand the representation to mean that the representor is not going to insist upon his rights because he has neither said nor done anything to suggest that he has any. What I have said illustrates the difficulty in establishing this type of estoppel when neither party is aware of the right to be foregone. A representor who is unaware that is aware of the right is unlikely to make a representation that carries with it some apparent awareness that he does, in fact, have rights. Conversely, a representee who is unaware that the epresentor has a particular right is unlikely to understand the representation to mean that the representor is not going to insist on that right or abandon any rights he might have unless he asserts this expressly.

In *Kirkaldy(J) & Sons Ltd v. Walker,*[124] a warranty required both a towage survey and a condition survey. Only a towage survey was carried out. The towage survey report was tendered to the insurers and acknowledged by the deputy underwriter(the underwriter being away on holiday) as "Noted and Agreed." This was held not to be a waiver of the requirement for a condition survey. According to Longmore J.,: "The clause did not require the survey or surveys to be shown to underwriters; no insurer (let alone his deputy) can be expected to carry in his mind all the terms of all the insurances currently operative. It will only be if the insurer (or his deputy) addressed his mind to the question of the absence of a condition survey that any unequivocal representation could begin to arise."[125]

The MIA provides for waiver of breach of warranty in 34(3): "A breach of warranty may be waived by the insurer." English and American law are similar in holding that this covers estoppel.[126] as well as waiver and that this section

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123) [2002] EWCA Civ. 1253, [2003] Lloyd's Rep. IR 1. paras 21-22.

124) [1999] Lloyd's Rep. 410.

125) Ibid. 423.

is properly applied on a case-by-case judgment basis. Waiver is a voluntary and expression of the decision to forego a contract right.[127]

Waiver cannot be provided tacitly,[128] and waiver by election requires that the person authorized must be in possession of full knowledge of the breach of warranty and its circumstances.[129]

Estoppel, which is often confused with waiver by the courts, occurs in cases in which the assured is induced by the conduct of the insurer to take action to his own detriment.[130] For example, the retention of the premium by the insurer after a breach of warranty is not considered estoppel unless the assured is induced thereby to take action in reliance on the policy that remains in force.[131] However, in *The Yacht Escapade*[132], the underwriters were held estopped from invoking the benefit of a breach of warranty by insisting that the assured incur salvage expenses by using a salvor of their choice.[133]

5. The Warranty of Seaworthiness

1) The Definition of the Duty

The single most important warranty in the law of marine insurance is the

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126) An example of estoppel in American law is *Reliance Ins. Co. v. Yacht Escapade*, 280 F.2d 482, 1961 A.M.C 2410 (5th Cir. 1960).

127) *Samuel Co. v. Dumas* [1924] A.C. 431.

128) *Robinson v. Home Ins. Co.*, 73 F. 2d 345, 1934 A.M.C. 1557, 1559 (5th Cir. 1934).

129) *Gulfstream Cargo Ltd. v. Reliance Ins. Co. (M/V Papoose)*, 409 F. 2d 974, 1969 A.M.C. 781 (5th Cir. 1969); *Suydam v. Reed Stenhouse of Wash., Inc.*, 820 F. 2d 1506, 1988 A.M.C. 441 (9th Cir. 1987).

130) *Reliance Ins. Co. v. The Yacht Escapade*, 280 F. 2d at 485.

131) *Aetna Ins. Co. v. Houston Oil Transp. Co.*, 49 F. 2d 121 (5th Cir. 1923); *accord: New Orleans T. & M, Ry. Co. v. Union Marine Ins. Co.*, 286 F.32, 1923 A.M.C. 781(5th Cir. 1923) (holding that a warranty of seaworthiness was not waived by a requirement that the vessel have a certificate of inspection from the underwriters). Mere delay without prejudice is not estoppel. *Pacific employers Ins. Co. v. Sealaska Timber Co.*, 1993 A.M.C. 350(W.D. Wash. 1988).

132) 280 F. 2d 482, 1961 A.M.C. 2410 (5th Cir. 1960).

133) T. J. Schoenbaum(1999), *Key Divergences between English and American Law of Marine Insurance : A Comparative Study*, op.cit., pp.158-159.

warranty of seaworthiness, because in order to recover damages for a loss, the insured must prove that the loss resulted from a peril that was covered by the policy, and that the peril was a proximate cause of the damage.[134] The most important covered perils in marine policies are perils of the sea, which encompass "damages done by the fortuitous action of the sea."[135] The implied warranty of sea worthiness, however, puts a significant burden on the assured. An essential prerequisite of cover (except under time policies) is the seaworthiness of the vessel. This is the assured's responsibility; if it is not fulfilled, the claim will be denied. Thus, in many cases, the issue of seaworthiness is determinative.[136]

The warranty of seaworthiness may be part of the policy as an express warranty.[137] If not, the warranty is implied under both English and American law. It appears to be settled that the law relating to unseaworthiness is federal law in the United States, and thus state law rules do not apply.[138]

The basis for implying the warranty of seaworthiness has to do with the basis of the bargain and the nature of the adventure insured. In order to assess the risk, the underwriter must have the right to assume that the vessel meets a certain standard of suitability.[139]

The warranty of seaworthiness may be part of the policy, and included an express warranty. If not, the warranty is implied under both English and American law. It seems to be settled that the law relating to unseaworthiness

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134) For example, *Northwestern Mut. Ins. Co. v. Linard,* 498 F. 2d 556, 561, 1974 A.M.C. 877 (2d Cir. 1974).

135) *New York, New Haven Hartford R.R. v. Gray,* 240 F.2d 460, 464 (2d Cir. 1957)

136) An exception is cargo insurance; clauses admit the seaworthiness of the vessel. J. C. B. Gilman, et al.(2008), op.cit., p.831.

137) For example, *Windsor Mount Joy Mut. Ins. Co. v. Giragosian,* 57 F. 3d 50 1995 A.M.C. 2542 (1st Cir. 1995).

138) *Employers Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F. 2d 1422, 1993 A.M.C. 1460 (5th Cir. 1992); *Aguirre v. Citizens Cas. Co. of N. Y.*, 441 F. 2d 141, 1971 A.M.C. 1134 (5th Cir.1971); *Windsor Mount Joy Mut. Ins. Co. v. Giragosian,* 57 F. 3d 50 1995 A.M.C. 2542 (1st Cir. 1995).

139) See, H. Bennett(2006), op.cit., pp.572-573 ; see, also, M. Mustill(1988), "Fault Marine Losses," *LMCLQ,* Vol.1, pp.345-346.

is federal law in the United Sates and state law rules do not apply. The basis for implying the warranty of seaworthiness involves the basis of the bargain and the nature of the adventure insured. In order to assess the risk, the underwriter must have the right to assume that the vessel meets a certain standard of suitability.

The substantive scope of the duty of seaworthiness is the same in American and English law. S. 39(4) of the MIA states that: "A ship is deemed to be seaworthy when she is reasonable fit in all respects to encounter the ordinary perils of the seas of the adventure insured." In *Dixon v. Sadler*[140], the court defined the seaworthiness of a vessel: 'In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk; and, if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage.."

This definition encompasses several aspects.[141] First, the meaning of the term "seaworthy" is relative, varying with the vessel involved and the service in which it is employed.[142] Second, the standard is not perfection but

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140) (1839) 5 M. & W. 405, aff'd, (1841) 8 M. & W. 895 ; S. Hodges(1996), *Law of Marine Insurance*, Cavendish Publishing Ltd., p.125.

141) T. J. Schoenbaum(1999), *Key Divergences between English and American Law of Marine Insurance : A Comparative Study*, op.cit., pp.160-161.

142) For example, *Texaco, Inc. v. Universal Marine, Inc.*, 400 F. Supp. 311, 1976 A.M.C. 226 (E.D.La.1975); *Burges v. Wickham*(1863) 3 B. & S. 669; *Foley v. Tabor*(1861) 2 F. & F. 663.

reasonableness.[143] Third, the duty is imposed regardless of fault, but the standard of seaworthiness is measured by what would be required by an ordinary, careful, and prudent shipowner[144] as well as applicable objective standards such as International Safety Management Codes.[145] In both Britain and the United States, these tests are applied on a case-by-case basis. Examples of unseaworthiness in these cases include insufficiency of crew,[146] defective cargo stowage,[147] overloading,[148] a defective electrical system,[149] sailing with an open sea valve,[150] a defective fire-fighting system,[151] a defective hull,[152] and an inadequately trained master.[153]

2) Burden of Proof

In both English and American law, the assured has the burden of providing

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143) *Compania de Navegacion, Interior S.A. v. Fireman's Fund Ins. Co.*, 277 U.S. at 74; *Rio Tinto Co. v. The Seed Shipping Co.* (1926) 134 L.T. 763; 24 LI.L. Rep.316.

144) *Union Ins. Co. Philadelphia v. Smith*, 124 U.S. 408.

145) See, S. B. Goodacre(1997), "To Err is Human: An Appraisal of Some Possible Effects of the IMS on the English Marine Hull Policy," *Int'l Maritime Law*, Vol.9, p.263(concerning the International Safety Management Code for the Safe Operation of Ships).

146) *Aguirre v. Citizens Cas. Co. of N. Y.*, 441 F. 2d 141, 1971 A.M.C. 1134 (5th Cir.1971).

147) *Fireman's Fund Ins. Co. v. Western Australia Ins. Co.* (1927) 33 Com. Cas. 36; *Kopitoff v. Wilson*(1876) 1 Q.B.D.. 377. On the other hand, bad stowage that does not endanger the safety of the ship is not unseaworthiness. *Elder, Dempster Co. v. Patterson, Zochonis Co.*, [1924] A.C.522.

148) *Lloyd's U.S. Corp. v. Smallwood*, 719 F. Supp. 1540, 1994 A.M.C. 1431 (M.D.Fla. 1989), aff'd 903 F.2d 828, 1994 A.M.C. 1520 (11th Cir. 1990).

149) *Sakatchwan Gou't Ins.. Office v. Spot Pack, Ins.*, 242 F. 2d 385 (5th cir. 1957).

150) *Commercial Union Ins. Co. of N.Y. v. Daniels*, 343 F. Supp. 674, 1973 A.M.C. 452(S.D.Tex. 1972).

151) *Manifest Shipping Co. v. Uni-Polaris Ins. Co. (The Star Sea)*[1997] 1 Lloyd's Rep. 360(C.A.); *Port Lynch, Inc. v. New England Int'l Assurety of Am, Ins.*, 754 F. Supp 816, 1992 A.M.C. 225 (W.D. Wash.1991).

152) *Tropical Marine Prods., Inc. v. Birmingham Free Ins. Co. of Pa. (The Sea Pak)*, 247 F.2d 116(5th Cir.1957).

153) *The Star Sea* [1997] 1 Lloyd's Rep. 360.

his claim and that a covered peril was the cause of the loss.[154] As a general rule, the vessel is presumed to be seaworthy, and thus the burden of proving unseaworthiness is on the insurer.[155] There are two instances, however, where the burden of proof shifts to the assured. First, under U.S. law, when a vessel sinks in calm waters, a presumption arises that it was, to some extent, unseaworthy. Thus, the assured must produce convincing evidence of seaworthiness.[156] Second, the burden is shifted to the assured in the case of a mystery sinking or an unexplained loss. In such a case, the assured must demonstrate that the vessel was seaworthy at the inception of the voyage. At this point in the analysis, however, English and American law diverge. With respect to u explained losses, the American courts presume that the loss was caused by a peril of the sea if the assured carries the burden of proof regarding the seaworthiness of the vessel. The U.S. courts also hold that in the case of an unexplained loss, the unintentional incursion of water into a vessel is a peril of the sea.[157]

However, the English courts take a somewhat different approach. *The Popi M* involved an insured ship that sank in calm seas owing to an incursion of water into her engine room.

The trial court was unable to determine whether the ship was seaworthy or unseaworthy before her loss, but accepted the theory put forth by the assured that it must have collided with an unknown and unidentified submarine. The Court of Appeal rejected the "submarine theory" as having no foundation in fact, but held that the ship was lost to a peril of the sea: namely, the sudden

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154) For example, *International Ship Repair Marine Seru. Inc. v. Saint Paul Fire Marine Ins. Co.*, 944 F. Supp. 886, 1997 A.M.C.1419 (M.D.Fla. 1996); G. Brice(1991), "Unexplained Losses in Marine Insurance," *Tul. Mar. L.J.*, Vol.16, p.105.

155) *Parker Other v. Potts*(1815) 3 Dow's R 23; *The Star Sea* [1997] 1 Lloyd's Rep. 360; *Austin v. Servac Shipping Line*, 794 F. 2d 941, 1987 A.M.C. 666 (5th Cir, 1986).

156) *Reisman v. New Hampshire Fire Ins. Co.*, 312 F. 2d 17, 1963 A.M.C. 1151 (5th Cir, 1963); *Commercial Union Ins. Co. of N.Y. v. Daniels*, 343 F. Supp. 674, 1973 A.M.C. 452(S. D. Tex. 1972); *Kilpatrick Marine Piling v. Fireman's Fund Ins. Co.*, 795 F. 2d 940 (11th Cir. 1986).

157) *Cotton Blossom Corp. v. Lexington Ins. Co.*, 615 F. Supp. 871 (E.D.Mo. 1985).

and fortuitous incursion of seawater. The House of Lords allowed the appeal in favor of the insurers. The sudden incursion of seawater alone did not constitute a peril at sea, and thus the assured had not proven his case. As stated by Lord Brandon: The Judge is not always bound to make a finding one way or the other with regard to the facts averred by the parties. He has opened to him a third alternative of saying that the party upon whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No Judge likes to decide cases, however, in which owing to unsatisfactory stats of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.[158]

The decision in *The Popi M* was followed by the Court of Appeal in *The Marel*[159] Even though the ship was found to be seaworthy at the beginning of the voyage the assured's claim was properly denied in an unexplained sinking case because he did not establish a case of loss by a peril of the sea. Thus, the American courts deal with case of unexplained loss on the basis of presumptions, whereas English courts apply burden of proof rules in order to reach a decision.[160]

3) The Scope of the Duty

(1) English Law

S.39 of the MIA defines the scope of the implied warranty of seaworthiness under English law. Subsections (1), (2), and (3) of this scheme apply to voyage policies, whereas subsection (5) applies to time policies.[161] According to the

158) *The Popi M* [1985] 2 Lloyd's Rep. at 6. The case is subject to criticism, however, in that an assured is not required to prove what force gave rise to a peril of the sea; it is enough that the loss was caused fortuitously by a peril of the sea. The Law Lords, however, were not convinced.

159) *Lamb Head Shipping Co. v. Jennings (The Marel)* [1994] 1 Lloyd's Rep. 624. See, also, *National Justice Compania Naviera S.A. v. Prudential Assurance Co. (The Ilarian Reefer)*[1995] 1 Lloyd's Rep.455

160) T. J. Schoenbaum(1999), *Key Divergences between English and American Law of Marine Insurance : A Comparative Study*, op.cit., pp.161-163.

161) In details, see, H. Bennett(2008), "Reflections on Values: The Law Commissions'

MIA, 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 (s.39). MIA s.39(5)[162] : "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 assured, the ship is sent to sea in an unseaworthy stats, the insurer is not liable for any loss attributable to unseaworthiness." English law does not recognize an absolute implied warranty of seaworthiness in time policies because the insured vessel may be at sea at the time at which the policy attaches and her condition is uncertain, and the shipowner also cannot control the state of his ship. In practice, however, the British insurance market compensates for the absence of the absolute implied warranty by requiring the assured to pay for a survey prior to the issuance of coverage. As a substitute for a general implied warranty of seaworthiness in time policies, the English courts adopted the rule now codified in s.39(5) of MIA, namely that "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."[163]

In England, 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.[164] However, the insurer must demonstrate that the loss was attributable to an unseaworthiness of which the assured was aware. This is exemplified by the actions of the English courts in the case of *The Eurysthenes*.[165] It was held that "privity" meant that

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proposal with Respect to Remedies for Breach of Promissory Warranty and Pre-Formation Non-Disclosure and Misrepresentation in Commercial Insurance", in B. Soyer(ed)., *Reforming Marine and Commercial Insurance Law*, informa, p.177 ; H. Bennett(2007), "Fortuity in the Law of Marine Insurance," *LMCLQ*, pp.341-342.

162) R. J. Lambeth(1986), *Templeman on Marine Insurance*, 6th ed., Pitman Publishing Ltd., op.cit., p.44.

163) The rule comes from the *Thompson v. Hopper*(1856) 119 E.R. 828(Q.B.D.) ; *Fawcus v. Sarsfield*(1856) 6 E. & B. 192, 119 E.R. 836(Q.B.D.).

164) MIA, s.39.

the assured personally knew beforehand of the ship being sent to sea in an unseaworthy state.[166] The breach did not need to amount to wilful misconduct (although that would be conclusive). In his judgement Lord Denning asserted: If the ship is sent to sea in an unseaworthy state, with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable to unseaworthiness, that is, to unseaworthiness of which he was aware and in which he concurred. 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 endure the ordinary perils of the sea.

In other words, only if the vessel is partly or wholly lost through unseaworthiness within the reasonable knowledge of the owner is coverage denied. Thus, if the owner had reason to believe that the vessel was unseaworthy and deliberately refrained from examination which would have turned belief into knowledge, the insurer is not liable for any loss attributable to unseaworthiness. In English law, the fact that a vessel is sent to sea under a time policy in an unseaworthy condition does not constitute a breach of warranty. Nor is it a breach of warranty if the assured is privy to such an action. However, the underwriter would be released from liability if such unseaworthiness contributed to the loss. The doctrine in the case of *the Eurysthenes* was applied by the Court of Appeal in its 1997 judgment in the case of *the Star Sea.*[167] "Blind eye" knowledge was interpreted as "a suspicion or realisation in the mind of at least one of the relevant individuals that *the Star Sea* was unseaworthy in one of the relevant aspects."[168] Mere negligence

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165) *Compania Maritima San Basilio S. A. v. Oceanus Mut. Underwriting Assn (Bermuda). (The Eurysthenes).* 2 LLR. 1976, p.171.

166) In the case of a corporation, "personally" refers to its directors or head men-such as managing director, or head of the traffic department, or whoever might be the right person to be considered as later ego-but not to its servants. L. J. Buglass, op.cit., p.42.

167) *Manifest Shipping & Co. v. Uni-Polaris Ins. Co. (The Star Sea)* [1997] Lloyd's Rep. 360.

that did not amount to suspicion was held to be insufficient, and the insurers were held liable for the loss.[169]

Meanwhile, the reference to innocent insureds arose as a consequence of the case of *P. Samuel & Co. v. Dumas*,[170] in which it was held that the loss of a ship by scuttling was not a loss attributable to perils of the seas. It was realized that under such circumstances cargo owners would not be able to recover from their insurers even though in most cases they were innocent of any fraudulent act of the shipowner. It was to correct this inequity that the word "innocent" was introduced into the Bill of Lading, etc., clause. Thus the words "innocent insured" apply to participation in the "wrongful act or misconduct of the shipowner or his servants" -not to the seaworthiness of the vessel. Furthermore, an insured's (cargo owner's) duty of disclosure under a "seaworthiness admitted" clause[171] does not apply to unseaworthiness that

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168) Ibid. 377.

169) For a critical view of *The Star Sea* decision, see S. Hodges(1998), "Seaworthiness and Ship Management," *Int'l J. Ins. L.* p.162. An appeal of The Star Sea will be decided by the House of Lords in 1999 ; Domestic literatures on detailed analyses of *The Star Sea* case are as follows. N. H. Han(2007), "A Study on the Warranty of Seaworthiness and the Principle of Utmost Good Faith in the Marine Insurance Act 1906-With Judgement of the Star Sea Case-," *International Commerce and Law Review*, Vol.33, pp.191-219 ; C. G. Lee(2006), "A Study on the Interpretation and Implication of the Meaning of "Privity" contained in Article 39(5) of the Marine Insurance Act(1906)," *Journal of Korea Maritime Law Association*, Vol.28, No.2, pp.97-133 ; W. J. Lee & T. W. Kim(2007), "A Study on the Decision in the Star Sea in respect of Section 39(5) and Section 17 of the Marine Insurance Act 1906," *Korea Trade Review*, Vol.32, No.2, pp.263-285 : D. Chung(2005), "A Study on the Star Sea Case in England and the Duty of Utmost Good Faith in a Contract of Marine Insurance," *Maritime Law Review*, Vol.17, No.2, The Korea Institute of Maritime Law, pp.109-138.

170) [1924] 18 L. L. R. No.7, 211.

171) ICC(FPA, WA, All Risks)(1963). The seaworthiness of the vessel as between the assured and the underwriters is hereby admitted. In the event of loss the assured's right of recovery hereunder shall not be prejudiced by the fact that the loss may have been attributed to the wrongful act or misconduct of the shipowners or their servants, committed without the privity of the assured ; The implied warranty can rarely be invoked under a cargo policy, however, because of express provisions in the Institute Cargo Clauses. Until recently, these clauses incorporated what was known as the Seaworthiness Admitted Clause providing, in one form or another, that the seaworthiness of the vessel was admitted as between the assured and the underwriters.

develops after the issuance of the policy.[172] The "innocent cargo owner" clause enables innocent cargo interests to recover under a cargo policy even when the cargo is lost by the intentional act of the shipowners or their servants in scuttling the vessel. However, according to English law, the clause relates solely to losses caused by scuttling and was framed to remedy an obvious injustice. The clause achieves its objective by treating the loss of cargo due to scuttling as a loss attributable to perils of the seas, excluding from consideration the privity of the shipowner to the scuttling. However, the clause does not extend to losses of cargo due to a dishonest taking of the vessel and its cargo by a shipowner.[173]

(2) American Law

The law of the U.S. lends a wide extent to the implied warranty of seaworthiness. In the case of voyage policies, it has been asserted that the assured is bound not only to have his vessel seaworthy at the commencement of the voyage but also to keep her so, insofar as it depends on himself and his agents, throughout the voyage.[174]

The breach of this warranty had similar consequences as in English law except that certain American cases termed the coverage of the policy "suspended,"[175] thus raising the possibility of a cure. Nevertheless, the American courts follow the rule of English law that the warranty is absolute:

One of the main effects of this clause was that it precluded the underwriter from relying on unseaworthiness of the vessel as a breach of warranty. The seaworthiness admitted clause has now been replaced, under the ICC(1982) and ICC(2009), by the Unseaworthiness and Unfitness Exclusion clause(cl.5) which provides (in part) that the underwriters waive any breach of the implied warranties unless the assured or their servants are privy to the unseaworthiness or unfitness of the vessel.(J. C. B. Gilman, et al.(2008), op.cit., p.831, pp.862-866 ; J. Dunt(2009), *Marine Cargo Insurance*, informa, pp.163-165).

172) *Escambia Trading Co. v. Aetna Casualty & Surety Co.*, 1977 A.M.C. 1285.

173) *The Salem*, 2 A.C. (1983) 375.

174) L. J. Buglass(1991), op.cit., p.42.

175) See, *McLanahan v. The Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (1828), 1998 A.M.C 285 (Retrospect) at 295 citing the English case *War v. Aberdeen*, 2 Barn. & Ald. 320.

it can be breached without regard to any knowledge or fault of the insured, and the results are not dependent on the loss being attributable to unseaworthiness.[176]

As to time policies, the American practice is distinct in that there is an implied warranty of seaworthiness as of the moment that the risk attaches.[177] This is not so much an "American" rule as a continuance in the United States of the application of the original English rule. This rule has been fairly roundly criticized,[178] and some courts have restricted its operation to a time policy on a vessel in port;,[179] however the rule is still applied.[180]

In time policies, the insured's obligation is more limited. Although there is an implied warranty of seaworthiness at the time of attachment of the insurance,[181] the courts decided that there is not the usual warranty of seaworthiness but rather the implied condition "that the vessel is in existence as such at the commencement of the risk, capable of navigation, and safe, whether at sea or in port, and seaworthy when she first sails, or, if at sea, had sailed seaworthy, and is safe".

In the U.S., a sort of negative, modified warranty was established in *Saskatchewan Gov't. Ins Office v. Spot Park, Inc. (The Spot Park)*[182] that,

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176) See, *Gregoire v. Underwriters at Lloyd's,* 559 F. Supp. 596, 598, 1982 A.M.C. 2045 (D. Alaska 1982) and *Employers Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F. 2d 1422, 1432-1433, 1933 A.M.C. 1460 (5th Cir. 1992).

177) *Employers Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F. 2d 1422, 1432-1433, 1933 A.M.C. 1460 (5th Cir. 1992) ; McAllister Lighterage Line, 244 F. 2d 867, 871 (2d Cir. 1957).

178) See, *Continental Ins. Co. v. Lone Eagel Shipping Ltd. (Liberia)*, 952 F. Supp. 1046, 1997 A.M.C. 1099 (S.D.N.Y. 1997) aff'd per curiam, 134 F.3d 103, 1998 A.M.C. 964 (2d Cir. 1998); *Employers Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F. 2d 1433.

179) *Continental Ins. Co. v. Lone Eagel Shipping Ltd. (Liberia)*, 952 F. Supp. 1066.

180) *Gulfstream Cargo Ltd. v. Reliance Ins. Co. (M/V Papoose)*, 409 F. 2d 974, 1969 A.M.C. 781 (5th Cir. 1969); *Saint Paul Fire & Marine Ins. Co. v. Belle of Hot Springs, Inc.*, 844 F. 2d 550, 1994 A.M.C. 302 (8th Cir. 1988); *D.J. McDuffie Inc. v. Old Reliable Fire Ins. Co.*, 608 F. 2d 145, 1980 A.M.C. 1886 (5th Cir. 1979).

181) *The Papoose*, 1966 A.M.C. 385 ; 1969 A.M.C. 781.

182) 1957 A.M.C. 655.

after the attachment of the attachment of the policy, the assured will not, through bad faith or neglect, knowingly permit the vessel to break ground in an unseaworthy condition. In that case the court went on to assert that the consequence of a violation of this "negative" burden is merely a denial of liability for proximate losses caused by such unseaworthiness. Under a time hull policy, the insurer escapes liability for a loss attributable to unseaworthiness only in cases in which the ship is sent to sea in an unseaworthy condition with the privity of the assured, in the sense of admiralty law. [183] Another court stated the following: "A shipowner's legal duty as to his vessel's seaworthiness vis-a vis cargo owner is completely different from his duty vis-a-vis his marine hull insurers. Thus it is not inconsistent to hold shipowner liable to shipper for failing in his non-delegable duty as carrier to provide a seaworthy vessel while at the same time holding that hull insurers did not sustain their burden of proving that shipowner acted out of bad faith or neglect in permitting his vessel to sail in an unseaworthy condition. In the latter case the knowledge of a master or crew member is not imputed to the shipowner."[184]

So, two warranties of seaworthiness apply in American law: (1) an "absolute" implied warranty at the moment of attachment of the policy and (2) a "negative, modified warranty... that the owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition."[185]

The first aspect of this warranty is a departure from English law: the s.39(5) of the MIA specifically excludes it. English law does not recognize an absolute implied warranty of seaworthiness in time policies because the insured vessel may be at sea at the time at which the policy attaches and her

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183) *Tropical Marine Products Inc. v. Birmingham Fire Ins. Co.* (The *Sea Pak*) 1957 A.M.C. 1946.

184) *Texaco v. Universal Marine et al*, 1976 A.M.C. 226.

185) *Saskatchewan Gov't Insurance Office v. Spot Pack Inc.*, 242 F. 2d 385, 388(5th Cir. 1957).

condition uncertain. In practice, however, the British insurance market compensates for the absence of the absolute implied warranty by requiring the assured to pay for a survey prior to the issuance of coverage.[186]

Although the absolute implied warranty of seaworthiness remains part of American law, its importance is limited. This is due to the tendency of courts to restrict its application to cases in which the vessel is in port at the beginning of the policy period .[187] Nevertheless, if it applies, the insurer need not demonstrate that the assured had knowledge or was somehow at fault; the insurer is discharged if the vessel was not seaworthy at the inception of the policy.[188]

The second aspect of the seaworthiness warranty was formulated largely from dicta in previous cases, most importantly from the Supreme Court's pronouncement in *Union Insurance Co. Philadelphia v. Smith.*[189]

In an arbitration conducted in New York, the distinguished arbitrator, Russell T. Mount, ruled that if the insured vessel is in a port where there are repair facilities when the time insurance becomes effective, there is an implied warranty of seaworthiness relieves underwriters from liability; however, if the vessel is in a foreign port without repair facilities when the time policy attaches, the policy is not subject to the implied warranty of seaworthiness.[190] While the arbitrator may have correctly interpreted the law,[191] the decision appears somewhat harsh and impractical, -impractical for the reason that American underwriters are in direct competition with British underwriters; and

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186) *Continental Ins. Co. v. Lone Eagle Shipping Ltd. (Liberia)*, 952 F. Supp. 1046, 1997 A.M.C. 1099 (S.D.N.Y. 1997), aff'd per curiam, 134 F.3d 103, 1998 A.M.C. 964 (2d Cir. 1998).

187) Ibid.

188) *Employers Ins. of Wausau v. Occidental Petroleum Corp.*, 978 F. 2d 1422, 1436, 1993 A.M.C. 1460, 1470(5th Cir. 1992).

189) 124 U.S. 405, 8 S. Ct. 534, (1888). For greater detail on the history of the development of the American rule, see, R. W. Pritchett(1983), "The Implied Warranty of Seaworthiness in Time Policies: The American View," *LMCLQ*, Vol.2, p.195.

190) *The Natalie*, 1959 A.M.C. 2379.

191) *Henges v. Aetna Ins. Co.*, 132 Fed. Rep. 715.

as there is no warranty of seaworthiness in a time policy in English law (MIA, s.39(5)), it will be apparent that any general attempt by American underwriters to avail themselves of the basic defense of unseaworthiness in a time policy, thus voiding the policy, would render their policies inferior in that regard to those of their British competitors. The financing of large vessels in the 20th century required that, for the protection of both vessel owners and their mortgagees, a marine insurance policy provide the coverage for which the premium was paid without being subject to technical objections based on an absolute warranty of seaworthiness. This is not to say that the highest possible standard of maintenance should not be demanded by underwriters but rather that the American warranty of seaworthiness as interpreted by the courts be reduced to a requirement that the vessel not be sent to sea in an unseaworthy state with the privity of the assured. In practice, the implied warranty of seaworthiness in time policies is not usually insisted upon by American underwriters when due diligence has, in fact, been exercised to render the vessel seaworthy. Furthermore, whenever an assured can produce *prima facie* evidence of a loss by an insured peril, the onus of proving unseaworthiness is placed on the insurer.

Nor is unseaworthiness attributable to the fault or privy on the part of the vessel's master or crew sufficient to enable the underwriter to void the policy or to avoid a claim. The vessel owner himself or the person to whom full responsibility for the maintenance of the vessel has been delegated must have knowingly allowed the vessel to become unseaworthy and operated her in that condition. However, if in fact the assured is privy to unseaworthiness, one American court has suggested that the consequences under American law are more serious than in the U.K. The policy coverage is suspended whether or not there is a causal connection between the breach of the warranty of seaworthiness and injury or damage is sustained.[192]

In actual operation, the "American" rule for time policies is similar to that

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192) *The Miss Esmeralda*, 1971 A.M.C. 1134.

laid out in s.39(5) of the MIA. There are three elements of proof for the insurer who seeks to avoid the cover: (1) Unseaworthy condition, (2) knowledge or negligence on the part of the assured, and (3) a proximately causal relationship between the loss and the unseaworthy condition, The first element refers to an unseaworthy condition at the commencement of the voyage;[193] this warranty, as in the English rules, is not a continuous duty of seaworthiness. Second, the U.S. courts are split, doubtlessly owing to the ambiguity inherent to the original formulation of the rule by Judge Brown in *the Spot Pack*, as to whether the rule requires a showing of knowledge by the assured or mere negligence. Most courts seem to require knowledge,[194] which was the actual holding in *the Spot Pack*. To determine the third element, courts employ a proximate cause analysis.[195] For example, in *Insurance Co. of North America v. Board of Commissioners*,[196] the court denied recovery under the policy after finding that the shipowner breached the duty of seaworthiness by manning his tug with unlicensed captains, and that this caused the collision which gave rise to the loss.

The consequence of the breach of this warranty of seaworthiness is only the denial of the particular claim involved; the policy remains in force but coverage is suspended until the unseaworthy condition is corrected.[197] A common issue in the American cases is the extent to which a so-called Inchmaree Clause[198] in a marine policy affects the implied warranty of

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193) *The Spot Pack*, 242 F. 2d 388 ; *The Sea Pak*, 247 F. 2d 119.

194) Courts which employ the knowledge rule include 5801 Assoc., 983 F. 2d 662 ; *The Sea Pak*, 247 F. 2d 116; *Insurance Co. of N. Am. v. Board of Comm'rs*, 733 F. 2d 1161, 1985 A.M.C. 1460 (5th Cir. 1984); *Gregoire v. Underwriters at Lloyd's*, 559 F. Supp 596; *Lemar Towing Co. Fireman's Fund Ins. Co.*, 352 F. Supp. 652.

195) See, *Thang Long Partnership v. Hihglnds Ins. Co.*, 32 F. 3d 189, 1995 A.M.C. 203 (5th Cir. 1994).

196) 733 F. 2d 1161, 1985 A.M.C 1460 (5th Cir 1984).

197) *Aguirre v. Citizens Cas. Co. of N.Y.*, 441 F. 2d 141, 145, 1971 A.M.C. 1134 (5th Cir. 1971).

198) In the United States, the sinking of a vessel in calm water gives rise to a presumption of unseaworthiness that denies recovery, unless either the assured can adduce rebuttal evidence of seaworthiness that will, in turn, arise a counterpresumption of loss by perils

seaworthiness. An Inchmaree Clause, named after the vessel in *Thames & Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.*,[199] provides cover against latent defects in a vessel's hull on machinery and negligence of the master or an engineer in the maintenance of a vessel. It is now contained in standard hull clauses in use in both England and America.[200]

In both *the Spot Pack*[201] and a second decision, *the Sea Pak*,[202] Brown J also clarified the degree to which the Inchmaree Clause affects the scope of the warranty of seaworthiness. Under these decisions. if unseaworthiness is caused or brought about by any of the various elements of the Inchmaree Clause, which includes the negligence of masters, engineers, or pilots and latent defects in the machiner or hull of the vessel, such unseaworthiness falls outside the scope of the warranty and recovery is allowed.[203] English law is generally in accord with this.[204]

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of the sea, or the unseaworthiness caused by a latent defect or act covered by the Inchmaree Clause. See, *Capital Coastal Shipping Corp. v. Hartford Fire Insurance Co. (The Cristie)* [1975] 2 Lloyd's Rep. 199 ; *The Ettore* [1933] A.M.C. 323 ; The Southern Sword [1956] A.M.C. ki1518. The situation is exactly the same in Norwegian law. The Norwegian Marine Insurance 1996, s.3-22 provides that, in cases where the ship springs a leak whilst afloat, the burden of proof of seaworthiness shifts to the assured. This formulation of American and Norwegian laws, however, goes beyond English law.

199) (1887) 12 App. Cas. 484 (H.L.).

200) T. J. Schoenbaum(1999), *Key Divergences between English and American Law of Marine Insurance : A Comparative Study*, op.cit., pp.169-170.

201) 242 F. 2d. 391-92.

202) 247 F. 2d. 123.

203) It is important to note, however, that if the assured is on notice of the negligence of the master or a latent defect, there is no cover even if the loss comes within the Inchmaree Clause. *Windsor Mount Joy Mut. Ins. Co. v. Giragosian*, 57 F. 3d 50, 1995 A.M.C. 2542 (1st Cir. 1995); accord: *Continental Ins. Co. v. Lone Eagle Shipping Co. (Liberia)*(952 F. Supp. 1046, 1997 A.M.C. 1099 (S.D.N.Y. 1997), aff'd per curiam, 134 F. 3d 103, 1998 A.M.C. 964 (2d Cir. 1998).

204) *Martin Maritime Ltd. v. Provident Capital Indemnity Fund (The Lydia Flag)*[1998]2 Lloyd's Rep. 652. For a recent U.S. case, see *International Ship & Marine Serus., Inc. v. Saint Paul Fire & Marine Ins. Co.*, 944 F. Supp. 886, 1997 A.M.C. 1419 (M.D. Fla. 1996).

6. Application of Marine Insurance Warranty under Korean Law

More than 85% of marine insurance contract to be used in international trade are generally concluded on the basis of various English Institute Clause s[205]. In these clauses governing clauseS[206] are provided in cases of disputes in liability problems regarding the contract between the parties, the resolution relies on the English law, or MIA, as well as case law and commercial practice.

Legal provision regarding to the warranty does not currently exist in Korean commercial law, and in the case of concluding insurance contracts with Institute Clauses, Korean precedents have come to be valid for the application of English law, precedent and practice regarding dispute whether insurer is to compensate. Therefore, the cultivation of certain knowledge related to law and marine insurance practice in the UK is an essential prerequisite for performing studies of marine insurance act and practice operations of marine insurance in Korea.

If such marine insurance clauses are typically used, at the time of the breach of warranty, the warranty clause to recognize immunity has been printed or incorporate within the policy the contents of the warranty according to the agreement of the parties. However, the insurance division of Korean commercial law providing general terms on the insurance contract does not include provisions of the warranty:, relevant domestic cases[207] were not found until 1990, and thus, domestic interests regarding warranty clause were lacking. However, recent continuing decisions of the Supreme Court for the

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205) For examples, ICC(W.A, F.P.A, All Risks) 1965, Institute Time Clauses, ICC(A, B, C) 1982, ITCH 1983, ITCH 1995, IHC 2003, ICC(A, B, C) 2009, etc.

206) In case of marine cargo insurance provides as follows: "All questions of liability arising under this polish are to be gives by the laws and customs of England" or "Notwithstanding anything contained herein or attached hereto the contrary, this insurance is understood and agreed to be subject to English law and practice only as to liability for and settlement of any and all claims."

207) See, Supreme Court of Korea, Sep.29,1995, 93da53078 ; Supreme Court of Korea, Mar.8,1996, 95da28779 ; Supreme Court of Korea, Oct.11, 1996, 94da60332 ; Supreme Court of Korea, May 15, 1998, 96da27773.

doctrine of warranty were too unfavorable to the insured, and the interpretation related to the validity of the court decision has been the subject of a great deal of interest on the academic side.[208]

The Korean courts have already recognized the validity of the governing clause of the English law;, in the case of expressing a warranty in concluding insurance contract, its validity has been sufficiently recognized.[209] Therefore, if the insured brokes a warranty, the insurer is discharged from liability as from the date of the breach of warranty. In the absence of any causation between the breach of warranty and loss, the insurer's exemption is recognized, criticisms have been leveled on the grounds that this is unilaterally unfavorable for the insured.[210]

Cases relating to breach of warranty in Korea are as follows:

1) Causation between breach and loss

In the absence of any causation between breach of warranty and loss, in a recent case[211] it was held that the insurer was discharged from liability as from the date of the breach of warranty. The insurance period spanned from 12:00 on October 15, 1999 to 12:00 on October 15, 2000, and the governing clause of English Law included the insurance policy as well as insurance clauses that the insurance was subject to English law and practice. Additionally, within 60 days from the commencement of insurance, the insured must receive the condition survey from the Korea Register of Shipping or London Salvage Association, and perform the implementation details from the condition survey, and submitted a survey report stating that the warranty

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208) See. Y. S. Jeong(2003), "Effect of Warranted Class Maintained Clause and Explanation Duty of Claus-Supreme Court of Korea, Jul.27, 2001, 99 da 55533-," *The Korea Institute of Maritime Law*, Vol.15, No.1, pp.359-376.

209) Supreme Court of Korea, Jan.11, 1977, 7da2116 : High Court of Seoul, Aug.19, 1980, 77na340.

210) J. S. Koo(2005), "A Study on the Disclosure and Warranty in Marine Insurance," *Journal of Shipping and Logistics*, Vol.47, pp.103-105.

211) District Court of Busan, May 31, 2001, 2001gahap6292.

of the contents of the insurance contract was concluded.

However, in this case, the insured requested a condition survey for the ship from the Korea Register of Shipping on December 17, 1999, which elapsed on December 14, 1999 at the limit of condition survey, and the condition survey was done on December 23. As a result of the condition survey, the ship received a confirmation that there was no problem with the seaworthiness, -on January 3, 2000, the ship sailed from Busan for Mozambique in East Africa with 8 crew members aboard. However, on January 13, 2000, after distress signal was captured, and in this case was missed, it was concluded that the ship had sunk. In this case, according to the condition survey, the ship had set out with no seaworthiness problems, and there was no causal link between the sinking of the ship and the breach of warranty. However, the insurer declined the insurance payment for reasons of breach of warranty owing to the failure to receive a condition survey within 9 days.

The court held that a warranty is a condition that must be complied with precisely, whether or not it be material to the risk, and if it not complied with precisely, then, subject to any express provision in policy, the insurer is discharged from liability as from the date of the breach of warranty.

However, the insured claimed that no breach of warranty had occurred because the ship had no seaworthiness problems, and that there was no causal link between the sinking of the ship and any breach of the warranty;, the court held that this up. Thus, in Korea, as in the MIA, causation does not require a disclaimer, the insurer must prove that the warranty was broken, and causation between the breach of warranty and the loss is not necessary to prove.[212)]

2) Effect of breach of warranty and its waiver

A waiver of the insurer for warranty as is the case in the UK, is rather

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212) J. S. Koo(2004), "A Study on the Marine Insurance Warranty," *Journal of Shipping and Logistics*, Vol.42, pp.132-136 ; E. G. Park(2003), "A Study on the Domestic Precedents of the Breach of Warranty," op.cit., pp.167-173.

strictly applied. According to the reference case[213], the insured agrees to the insurance period from June 19, 1990 to June 19, 1991, and after conclusion of the hull insurance contract the contract was renewed for a 1-year extension period. In this insurance policy a governing clause of English law was included, stating that this insurance was subject to English law and practice. It also included warranty of contents issuing a promise of certificate of seaworthiness from the Lloyd's agent or from the Korea Register of Shipping.

This case is that of -the insured who encounters a sailing accidents and has not been issued a certificate of seaworthiness. In this case, the insurer insists on being discharged from liability because the lack of seaworthiness certification constitutes a breach of warranty. However, the insurer had collected quarterly premiums from the insured without terminating the insurance contract, despite foreknowledge of this. The insured claimed insurance premiums, upon insisting that the breach of warranty could be waived by the insurer. In the first instance, the plaintiffs's claim was accepted, but, the second instance, the insurer was discharged from liability due to contrary decision.

The main point of this case is as follows. If a breach of warranty occurs under the MIA regime, the insurer is clear that a discharge from liability takes place automatically from the time of a breach of warranty, except with the express provision, and that no positive action, whether described as the avoidance or the acceptance of repudiation, is required in order to effect such a discharge.

Additionally, in this case, the fact itself that the insurer collected quarterly premiums knowing of the breach of warranty, the insurer could not be considered to have waived the right of immunity in accordance with the breach of warranty, and the insurer collected quarterly premiums from the insured without terminating the insurance contract, despite being aware of this breach of warranty. A breach of warranty has the effect merely of discharging the insurer from further liability automatically, and does not entitle the insurer

213) Supreme Court of Korea, Oct.11, 1996, 94da60332.

to repudiate the contract retroactive to the date at which the breach first occurred.[214] Therefore, if the insurer is entitled to receive the premium prior to the date of the breach of warranty, he can receive premiums even with current knowledge of the breach of warranty.

V. Conclusions

Over the years, warranties have gained a prominent place in insurance practice as a result of insurers making increasing use of them in policies to reduce the burden or extent of their promise of cover.[215] This has brought the warranty regime under close scrutiny, and several of its features have been the target of criticism in both judical[216] and academic circles.[217]

A serious divergence exists not only between English and American law, but also within American law itself. These differences concern, in particular, the degree to which the formalistic, strict rules of law applied through the MIA should be adhered to in the United States. Many courts continue to follow the

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

215) B. Soyer(2008), "Reforming Insurance Warranties-Are We finally moving forward?," in B. Soyer(ed)., *Reforming Marine and Commercial Insurance Law*, informa. p.128.

216) Lord Griffiths in *Forsikringsaktielselskapet Vesta v. Butcher* [1989] A.C 852, 893-894, said: "It is one of the less attractive features of English insurance law that breach of a warranty in an insurance policy can be relied upon to defeat a claim under the policy even if there is no causal connection between the breach and the loss." In a similar fashion, writing extra-judicially, A. Longmore(2004) forcefully criticised the current warranty regime in "Good Faith and Breach of Warranty: Are We Moving Forwards or Backwards?, *LMCLQ*, p.158.

217) T. J. Schoenbaum(1999), "Warranties in the Law of Marine Insurance : Some Suggestions for Reform of English and American Law," *Tulane Maritime Law Journal*, p.267 ; J. Hare(2000), "The Omnipotent Warranty: England v. The World," in M. Huybrechts, E. V. Hooydonk & C. Dieryck(eds), *Marine Insurance at the Turn of the Millenium*, Vol.2, Intersentia, p.37 ; B. Soyer(2002), "Marine Warranties: Old Rules for the Millenium?", in D. R. Thomas(ed.), *Modern Law of Marine Insurance*, Vol.2, Lloyd's of London Press Ltd. p.161.

strict English approach. However, many doctrines of flexibility have been invented by American courts to mitigate what many court consider the harsh doctrines of English law. In this debate, America is a house divided.

In many key areas of warranty law, including the implied warranty of seaworthiness, there remains a marked concordance of English and American law. Despite more than 200 years of formal separation, the American courts administer a system of seaworthiness warranties that corresponds largely to English practice. The implied warranty of seaworthiness remains federal law, and the so-called "American" rules of law really are quite similar to English law.

The most efficient and direct way to achieve a greater uniformity of the English and American laws of marine insurance would be for the United States to pass a new federal marine insurance law.[218] This law should not only reverse the *Wilburn Boat* case, but should also elaborate some substantive principles of law based upon, but updating and reforming, the MIA. This American initiative should be accompanied by a parallel reform effort in the United Kingdom to reexamine certain of the rigidities of the MIA, particularly in the area of utmost good faith and warranties, and to amend the MIA, accordingly. A formal mode of cooperation should be established to guide both reform efforts, such as a Joint Marine Insurance Committee of Experts composed of persons from both countries. In this way, the essential uniformity of the law of marine insurance can be regained and preserved.[219]

Wide-ranging proposals for reforms to the law regarding misrepresentation, non-disclosure and breach of warranty have been put forward by the Law Commission and the Scottish Law Commission[220] in a joint consultation

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218) A second-best solution would be to adopt a Restatement of the American Law of Marine Insurance. See, M. F. Sturley(1998), "Restating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem," *J. Mar. L. & Com*, Vol.29, p.41.

219) T. J. Schoenbaum(1999), *Key Divergences between English and American Law of Marine Insurance : A Comparative Study*, op.cit., pp.170-171.

220) Law Commission and Scottish Law Commission(2007), *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured*, LCCP No.182, SLCDP No.134.

paper published in June 2007.[221] These proposals, if implemented, would involve the repeal or amendment of the sections in the MIA that address warranties, and their replacement by a mostly new legal framework based on principles that differ from those of the existing law regarding the warranties discussed herein. The Law Commissions have come to the view that the law in this area "is neither simple nor modern and is in urgent need of reform". The English Law Commission had expressed similar views when considering the same areas of insurance law in 1980, but did not at that time make any recommendations regarding a reformation of marine insurance law. It must, necessarily, deal with the law as it now stands, but it should be noted that far less use is now made of express warranties in marine insurance practice than was formerly the case. They have, for example, largely been modified from the most recent set of standard Hull Clauses and Cargo Clauses, the IHC(2003) and ICC(2009). The Law Commissions noted in their consultation Paper of June 2007 that "express warranties are now very rare in marine policies" and that "there does not appear to be my great demand for them in the market". Whatever commercial justification may have existed for the development of the strict rules applying to warranties in the eighteenth century, it is questionable at best whether insurers currently require the same protecting, under modern commerce condition.

Restricting the law reform to insurance warranties only has been perceived as a major weakness of the Law Commissions' recommendations.[222] It has been argued that the impact of the law reform might be diminished if insurers were allowed to replicate the effects of a warranty by making use of similar

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221) For a general evaluation of the proposals of the Law Commissions, See, M. R. Merkin & J. Lowry(2008), "Reconstructing Insurance Law: The Law Commission' Consultation Paper," *M.L.R.* Vol.71, p.95. The work of the Law Commissions is ongoing, and another Issues Paper on insurable interest was released in January 2008. It is intention of the Law Commission to publish a second consultation paper focusing on the issues of insurable interest and post-contractual good faith(including fraud and damages for late payment of claims) at a later stage.

222) M. R. Merkin & J. Lowry(2008), "Reconstructing Insurance Law: The Law Commission' Consultation Paper," *M.L.R.* Vol.71, p.110.

terms, such as exclusion clauses or clauses that described the risk. This argument certainly has force, and it should be noted that New Zealand and Australian legislation[223] that has been designed with the object of curbing the harshness of the warranty regime applies not only to terms written as warranties but also to other terms that have a similar effect.

Korea is subject to the MIA of U.K. in case, -in which Korean Commercial law provides for a duty of disclosure, but does not provide for a warranty. The warranty system is quite strange, and is not a system usually thought of as activity susceptible to reform, as the warranty system is a unique legal doctrine of Anglo-American Law. However, Korea uses the MIA as its basic marine insurance contract law regime;, marine insurance in Korea essentially operates in accordance with the marine insurance clauses of the U.K., although there is a lack of detailed understanding about the MIA. This can create an unfavorable situation for contracting parties -especially Korean fishery and shipping companies -because they lack understanding of the legal nature and characteristics of warranties as explained.[224] Therefore, might expect that risk issues would arise countries such as Korea, who seek to adopt the Institute Clauses of U.K. as their fundamental marine insurance regimes. additionally, in the Korean insurance practice, a great deal of opposition has been raised by Korean insureds, who feel the strictness of the warranty regime to be unfavorable to insureds.

For this reason, the United Kingdom and the United States, as well as other relevant nations, are currently considering various measures by which the strictness of the doctrine of warrant might be mitigated. The doctrine of warranty in marine insurance, however, still tends to be strictly interpreted, including the unfavorability of the regime for insured shipowners. Korea's ship reserves have increased steadily, and by taking into consideration the realities

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223) See, s.54 of the Australian Insurance Contracts Act 1984 and s.11 of the New Zealand Insurance Law Reform Act 1977.

224) See, Supreme Court of Korea, Feb.10, 1998, 96da45054 ; Supreme Court of Korea, Oct. 11, 1996, 94da60332, http://www.netlaw.co.kr/netlaw.exe.

of the current situation, the strictness of the warranty regime operating in the marine insurance industry urgently require revision.

Thus, acknowledging the differences in the warranty structures of marine insurance contracts in the U.S. and the U.K., can be considered a first step toward finalizing a more universal and uniform marine insurance contracts regime.

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ABSTRACT

Main Differences of Warranties under Marine Insurance Contract

- with Comparisons between U.K., U.S. and Korea -

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According to English law, 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 to be insured. However, Unites States law affords the implied warranty of seaworthiness a great deal of latitude. In the case of voyage policies, it has been traditionally held that the assured is bound not only to have his vessel seaworthy at the commencement of the voyage but also to keep her so, insofar as this can be achieved by himself and his agents, throughout the voyage. Additionally, a defect in seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss consequent to such bad faith, or want of prudence or diligence; but does not affect the insurance contract in reference to any other risk or loss covered by the policy, and which is not caused or exacerbated by the aforementioned defect.

One of the most important areas of difference in the marine insurance contract between the U.K. and U..S. is the breach of warranty. Prior to the *Wilburn Boat* case, the MIA was thought to hold that the effect of a breach of warranty was similar under American law -in that under the general maritime law literal compliance with all promissory warranties is required. In this case, the Court concluded that state law should apply to a marine insurance policy, and found that there was no federal rule addressing the consequences of a breach of warranty in marine polices. However, it is of the utmost importance that this case brought to a close the imperative concordance between English and American law. Meanwhile, in relation to

marine insurance contracts in Korea, this insurance is subject to English law and practice;, additionally, the international trade volume between Korea and the United States has assumed a vast scale. Therefore, we believe it is important to understand the differences in marine insurance law between the two countries in terms of marine insurance contracts, and most specifically warranties.

Key Words: marine insurance contract, breach of warranty, seaworthiness, the *Wilburn Boat* case, MIA