ILLEGAL PERFORMANCE OF MARINE INSURANCE CONTRACTS

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Why the issue of illegality matters

The issue of illegality is a subject which has recently attracted considerable attention. Since the judgment in The *Sea Glory* case, the legal positions of the guilty assured and the defence for the assured after the commission of illegality need clarification, especially under the circumstance of section 41 of the Marine Insurance Act 1906. This section is commonly considered a bad and ambiguous rule of marine insurance and violation of it may lead to some harsh consequences.

Introduction to the warranty of legality in marine insurance law

Warranty is unanimously recognised as a complex and difficult area in marine insurance law. There are basically two types of warranties under current marine insurance law, namely, express warranties and implied warranties. The implied warranty only exists in marine insurance[1]. Several species of implied warranty have been discussed and introduced into the market, such as warranty of seaworthiness, warranty of nationality and warranty of legality. The main purpose of this article is to introduce and discuss the development and the true scope of the warranty of legality.

The main origin of this warranty was based on early judgments during the 18th and 19th centuries. The main purpose of introducing this principle was to balance the conflict between public and private interests. Another purpose of this principle in common law, as cited by Lord Mansfield, was that no court will lend its hand to the illegal party and no one can benefit from his own illegality.

There are two sections in Marine Insurance Act 1906 which relate to legality issues, section 41 and section 3(1). Section 41 states that:

> There is an implied warranty that the adventure insured is a lawful one, and that so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

Section 3(1) states that: "every lawful marine adventure may be the subject of a contract of marine insurance". The words of those sections are straightforward and can be summarised into two points: firstly, the warranty of legality can be divided into two sections: the legality of the adventure itself and the legality of the performance of that adventure, these two distinct sections are closely connected; secondly, a lawful adventure is the foundation of a marine insurance contract, and therefore without the lawful adventure a marine insurance contract will not exist.

The importance of the warranty of legality is incontestable, there are four points to support this argument: firstly, as can be concluded from former cases the legality of the adventure and performance is the foundation of the insurance contract[2]; secondly, since the legality issue is regulated as a warranty in marine insurance law, the insurance policy can be terminated by the insurer from the time of that breach and such consequence is clearly severe; thirdly, by examining the judgments of cases prior to section 41, this section seems unable to cover former case law and several factors may influence the consequence of illegality which happens under marine insurance, such factors and the assured's connection with it shall be considered; fourthly, the implied warranty means that there is no need to express the requirement of legality of adventure in the marine insurance policy, by taking the severe consequence of the breach of warranty into account, it is important for the assured to be familiar with this warranty and strictly comply with it.

In this chapter, both legality of the adventure and the legality of the legal performance will be discussed, and since there are significant differences between these two kinds of warranties, this chapter will first introduce the origin and formation of these two sections separately, and then clarify the species and scope of this warranty; lastly, this chapter will discuss the insufficiency of s41 based on former case law and common law and attempt to solve the question of whether Section 41truly reflects the former common law or not and attempt to explore the true scope of section 41.

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[1] Thomas, ed, *The Modern Law of Marine Insurance* vol 2, p167

[2] *Redmond v Smith* (1844) 7 M.&Gr 474 "where is a voyage is illegal an insurance upon it is invalid"

Origin and Formation of the warranty of legal adventure in marine insurance law

The origin of the warranty of legal adventure is still open to debate, as hardly any books or articles have clarified this ambiguity. In *Arnould's Law of Marine Insurance and Average*, the case *Redmond v Smith* seems to be considered as one of the possible sources of the marine insurance and illegality issue[3], however earlier cases related to illegality can be traced back to the late 18th century.

The origin of the warranty of legal adventure

As stated before, most illegality cases were decided in the 18th and 19th centuries, during the Napoleonic Wars. Although there were several cases which related to the legality adventure issue, none of them can be regarded as the sole origin of this section. Therefore the cases prior to the 1906 Act should be considered carefully.

The first case which relates to legality in marine insurance can be traced back to 1797, namely *Farmer v Legg*[4]. This case related to the slave trade, losses happened in consequence of an insurrection, which was the result of improper command and navigation. The principle question of this case was whether the ship had been navigated according to the 31 Geo.3; c.54, a statute which regulated the qualification of the master who participated in the slave trade, according to this statute the adventure was lawful only if the master fulfilled the requisition of the statute. By failing to provide a certificate which complied with the statute, the plaintiff was nonsuited, because by failing to do so the whole adventure was unlawful and the policy upon it was rendered void.

The case *Farmer v Legg* was one of the earliest cases which related to the illegality of adventure. Another case which can be treated as a combined origin of this piece of legislation is *Law v Hollingswirth*[5], which was codified three months earlier than *Farmer v Legg*. In *Law v Hollingswirth*, the plaintiff failed to recover the loss of the vessel because there was no qualified pilot on board when the loss happened; this was prohibited by the statute of that time, even though there was no connection between the violation and the loss. Although, the judgment of this case mainly concentrated on whether there was a pilot on board, no words such as "warranty" or "legality" were mentioned, it can easily be concluded that, the absence of such pilot was violation of the law, and the legality of the adventure was essential to the validity of the insurance policy. One of the grounds for discharging the responsibility of the underwriter, raised at the trial was: "it being an implied condition in every policy that the ship shall be navigated according to the law."[6] This was the first time that the legality issue was clearly raised in marine insurance cases. Although, the judgment used the word "condition", the consequence of the breach of that "condition" was almost the same as a breach of warranty undercurrent marine insurance law.

Other cases mainly happened in early 19th century during the period of war with France. There were several restrictions on navigation during that period, therefore the policies relating to vessels which sailed in contravention of convoy acts were held void[7] as well as voyages which were against the provisions of the East India Company acts, or the South Sea Company acts[8], or the general navigation act; and in the judgments of these cases the word "illegal" was commonly used because of violation of these laws. The consequences and punishments on illegal voyages were severe; in most cases the assured could not recover the losses and in some particular cases they even could not recover the premium[9].

The phrase "implied warranty" was first raised in *Sadler v Dixon*, a case dealt with the loss of a vessel. In the judgment of that case, Tindal C.J. *cited*? *Law v Hollingswirth* and stated that the requirement of statute 5 Geo. 2 "was an implied contract on the part of the assured"[10] and "The decision of that case may be maintainable, on the ground of an implied warranty to observe the positive requisitions of an act of Parliament"[11]. Therefore, in this case, in the absence of the express requirement of legality, the legality issue was rendered as an implied one in contract. However, these cases only stated that an illegal adventure could taint the insurance policy, but the reason behind it was never clearly explained; furthermore, there were no clear general rules on illegality issues,

[3] *Arnould's Law of Marine Insurance and Average* 18thed, para 21.03.
[4] *Farmer v Legg* (1797) 7 TR 186.
[5] *Law v Hollingsworth* (1797) 7 TR 160.
[6] *Ibid*
[7] *Hinckley v Walton* (1810) 3 Taunt 131.
[8] *Wainhouse* v. *Cowie*, 4 Taunt 178.
[9] Such as in *Vandyck and others v Hewitt* (1800) 1 East 96.
[10] *Sadler v Dixon* (1841) 8 M & W 895.
[11] *Ibid*

until the judgment of *Redmond v Smith*. In this case, the defendant insurer issued a policy on a ship which covered any loss and misfortune which should be lawful to the assured. The ship foundered and sank on its voyage to London. By refusing to pay the losses, one of the defendant's pleas to the court was that the failure of the payment of seamen's wages on the said voyage was contrary to the 5 & 6 W. 4, c. 19 and rendered the voyage wholly illegal. By analysing former cases, Tindal C.J. considered the defendant's argument and stated in his judgment that "A policy on an illegal voyage cannot be enforced; for it would be singular, if, the original contract being invalid and therefore incapable to be enforced, a collateral contract founded upon it could be enforced. It may be laid down, therefore, as a general rule, that, where a voyage is illegal, insurance upon such voyage is invalid."[12] This statement not only explained the reason why the adventure must be lawful but also explained the consequence of an insurance which based upon an illegal adventure, i.e. no valid contract of insurance was ever created.

This is the first authority which clearly expounded the legal basis of the legality issue, however, the judgment of this case was based on several former cases. Thus both the terms "implied warranty" and "lawful" can be supported by former cases.

Consequently, judgments of these series of cases were codified in 1906 Act, and the requisition of lawful adventure was regulated as one of the implied warranties.

Scope of the word "lawful"

According to the first part of section 41, the adventure insured must be a lawful one. However, there is no clear definition of the word "lawful". Besides the clarification of the word lawful, the definition of which kinds of conduct can be regarded as a breach of the lawful adventure warranty is also an ambiguous issue which needs to be resolved. In addition, the statute has omitted to mention the formation of such illegality and some special situations.

An adventure can be rendered illegal as a result of breach of statute, breach of the King's or Council's order or breach of public policy and common law. Some books calculate the EU legislation or international instruments as one of the species which can be covered by the word lawful, however this point is still uncertain under current circumstance: firstly, according to former judgments, the adventure must be illegal under English law and the mere illegality under foreign law is not necessary to render the whole adventure void; secondly, for EU legislation and international instruments to be effective in the UK, the legislation must be incorporated into domestic law. Therefore, in order to render an adventure illegal under EU law, the former two points must be fulfilled[13].

1 Illegal adventure by statute

A marine adventure can be rendered illegal by statute, and this is the most straightforward and common method to decide whether an adventure is legal or not.

In the early cases prior to the 1906 Act, numerous marine insurance policies were rendered illegal because of violation of statutes. In the case *Farmer v Legg*, the adventure was rendered illegal because the ship had not been navigated according to the 7th section of the 31 Geo.3, c.54. In the case *Law v Hollingsworth* the adventure was rendered unlawful because the pilot on board was not properly qualified according to the provisions of 5 Geo.2, c.20.

However, there are various circumstances which need to be emphasized: firstly, the words in statutes may not always be straightforward or without doubt, therefore the intention of the statutes needs to be examined in such cases. This principle was firstly cited in the case *Farmer v Legg*, and in that case the fundamental issue was to find out what exactly the Act required the assured to perform during the slave transport. Therefore in the judgment, Ashhurst J stated that "In a case where the words of an Act of Parliament are doubtful, we must see what were the mischiefs against which the Legislature meant to guard, and endeavour to find out the most probable means of effecting that purpose"[14]. Another approach to understanding the intention of the statute is to examine the aim of the policy of the statute, namely "whether the intention of parliament was to ban such

[12]*Redmond v Smith* (1844) 7 M & G 474.
[13] This argument has been supported by the most recent case, *Sea Glory Maritime Co, Swedish Management Co SA v AL Sagr National Insurance Co* [2013] EWHC 2116 (Comm) at para 291.
[14]*Farmer v Legg* (1797) 7 TR 186.

contracts or merely to impose fines upon those transgressing its terms[15]".

Secondly, not every violation of statute may render the policy void. This is the case when the requirements of statutes can never be complied with under some special circumstances. In the case *Suart and Another v Powell* the supply of seamen on a vessel was completely impossible so as to comply with the proportion of English seaman required by Navigation Act. The court rendered this voyage legal because of the unavoidable circumstance the vessel encountered. However, the courts still need plenty of evidence to prove such unavoidable circumstances, which will be discussed later.

2 Illegal adventures by King's or Council's order

A policy can be rendered illegal by King's or Council's order, this kind of illegality is unique in the late 18th century and 19th century during the Napoleonic wars. The most significant case was *Parkin v Dick*[16],this was a case which related to the prohibition of exportation. According to His Majesty by proclamation or order in Council which originated from the stat.33Geo.3, c.2, the exportation of naval stores was prohibited and therefore the whole contract was rendered illegal and void. Two points need to be noticed: firstly, this kind of illegality mainly happened in earlier cases and rarely happens under current circumstance. Secondly, the King's or Council's order also originates from statute. Therefore, this kind of violation can be seen as a derivate of the statutory illegality.

3 Illegal adventures because of violation of public policy and common law

An insurance policy can be rendered illegal because of violation of public policy. There are various kinds of public policy principles under common law, such as the assured cannot rely on his own illegality to get compensation and the assured cannot profit from his own illegality. However, in early marine insurance cases, adventure which was rendered illegal by public policy was rare. This section will only consider the public policies which relate to lawful adventure.

There is no clear definition of public policy, neither in marine insurance law nor in contract law. Cases which can be classified into this category are illegal activities not covered by clear statutory regulations, trading with the enemy was a case which fell into this scope. For instance, in the case *Vandyck and Others v Hewitt*[17], the insurance policy was rendered illegal based on the decisions of two former cases, therefore, even though there was no statute which forbad trading with the enemy at that time, the former judgments were viewed as public policy in this case and were therefore the foundation of the judgment. Furthermore, when there is an absence of statute, public policy was used as an ancillary instrument by courts. In the case *Kensington v Inglis and Another*[18] when the court decided whether the insurance was illegal or not, one of the elements which the court took into account was whether this insurance contravened the public policy of this country.

However public policy was not limited by former judgments, judges could create new public policy according to the facts of different cases, thus in the case *Pieschell v Allnutt Same v Lavie*[19] it was decided that not every communication with enemy could render the insurance void, which was a supplement to former judgments.

The positive effect of the application of public policy when deciding cases of illegality is obvious: statutes are unable to list every kind of illegality, therefore the applications of public policy increases flexibility. However, on the other side, public policy is a very unstable foundation of judgments, just like Burrough J. said "against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you".[20]

Formation of illegal adventure

The objective of this section is to explore the different stages of unlawful adventure under marine insurance law. Illegal conduct which happens in different stages may lead to different results, even though this rarely happened in early cases.

[15]Soyer, *Warranties in Marine Insurance*, 2nd ed.
[16]*Parkin v Dick* (1809) 2 Camp 221.
[17]*Vandyck and Others v Hewitt* (1800) 1 East 96.
[18]*Kensington v Inglis and Another* (1807) 8 East 273.
[19]*Pieschell v AllnuttSame v Lavie* (1813) 4 Taunton 792.
[20]*Richardson v. Mellish* (1824) 2 Bing 229, at 252.

There are basically two forms of illegal adventure, firstly, the adventure or voyage insured is itself expressly prohibited by law; secondly, the voyage itself is lawful, however the adventure is tainted by performance before its commencement?

So far as the first type of illegal adventure is concerned, where the adventure itself is illegal, it is undoubtedly true that some kinds of voyages were expressly prohibited by law. Therefore a voyage to an enemy port during wartime was rendered illegal and the insurance upon it was void[21]; a voyage which transported English manufacture to any port to the Eastward of the Cape was rendered illegal by statute as well[22]. Furthermore a voyage without sufficient proportion of English seaman on board was rendered illegal as well, unless it was impossible for the assured to provide enough seamen[23].

So far as the second type of illegal adventure is considered, according to early cases, there were basically three kinds of performance which may render an adventure illegal before its initiation.

Firstly, sail without licence or convoy which needed to be acquired before the commencement of voyage. In the early 19th century, several statutes required ships to sail with convoy or licence and the absence of this would be rendered as illegal. There were various kinds of licences such as the licence to sail without convoy and the licence to trade with the South Sea Company or trade with an enemy. Both the licence or convoy need to be granted or arranged before the commencement of a voyage, as stated in the judgment of *Wainhouse v Cowie* "the first answer is, every person shipping goods must know and see that a sufficient licence is given"[24] this phrase clearly indicated that a licence needs to be granted before a voyage. In the case *Wainhouse v Cowie* a licence which was granted for a previous voyage would not render the next voyage legal, and licence for a specific voyage was unable to legalize a voyage to a different destination, as in this case, a licence to Gibraltar did not legalize a voyage to Malta[25]. This was the same in convoy cases, in the case *Cohen v Hinckley*[26] it was decided that "a ship cannot legally sail from port to port without convoy". Therefore the voyage in that case which was from Portsmouth to Falmouth without a convoy was rendered illegal as well.

Secondly, the loading operation before a voyage can render a lawful voyage illegal. In the case *Cunard and Others v Hyde*[27] the adventure was rendered illegal before its initiation because the master did not load the timber below the deck and sailed without certificate which was requested by statute. Therefore even though a voyage from North America to UK was not prohibited by law, the loading operation before the voyage tainted it. This case was frequently compared with the case *Wilson V. Rankin*, this was also a case which related to the illegal stowage of goods. The main difference between the two cases is that, in *Cunard* case the illegality happened before the commencement of the voyage, however in *Wilson* case the illegality happened during the voyage, and this minor distinction resulted in two different judgments. In the latter case, the illegal performance which was carried out by the master did not affect the assured's right to claim for compensation under insurance policy, however, in the *Cunard* case, the whole adventure was rendered illegal and the assured could not claim compensation under it. Thus, this is also one of the reasons why illegal performance before initiation of adventure and illegal performance during adventure should be considered separately.

Thirdly, if there is no sufficient or competent crew on board before the commerce of a voyage, the voyage can be rendered illegal as well. In the case *Clifford v Hunter*[28], the captain who was very ill before sailing rendered the whole voyage illegal, because he was incompetent to take charge of the vessel which resulted in the losses.

Besides the three scenarios which have been introduced, there are numerous kinds of performance before the commencement of an adventure; nevertheless, the former three cases can demonstrate the existence of the second kind of formation of illegal adventure.

There may be confusion between the second formation of illegal adventure and the illegal performance of 1906 Act. However, there are two differences between them.

[21] *Hagedorn v Bazett* (1813) 2 M & S 100.
[22] *Gray and Another v Lloyd* (1811) 4 Taunt 136.
[23] *Suart and Another v Powell* (1830) 1 B& A 266.
[24] *Wainhouse v Cowie* (1811) 4 Taunt 178.
[25] *Ibid*
[26] *Cohen v Hinckley* (1809) 2 Camp 51.
[27] *Cunard and Others v Hyde* (1858) EB & E 670.
[28] *Clifford v Hunter* (1827) M & M 103.

First of all, even though both kinds of illegality include the performance of the assured, the second form of illegal adventure mainly happens before the commencement of the adventure; however the second part of s41 regulates unlawful activities after the initiation of the adventure.

Secondly, the requirement on the performance of the assured is different, which leads to different results after violation. In the second part of s41, it requires that "so far as the assured can control the matter, the adventure shall be carried out in a lawful manner". However, there is no such defence for the assured before the commencement of the adventure. Thus, if the assured performs illegally before the commencement of an adventure, the whole policy upon it is rendered void, however, if the illegal performance happens during the adventure, there are various kinds of defences for the assured.

The proposal to divide the lawful adventure into two kinds of formation is to enable the courts and contractual parties to consider the legality of adventure in a more specific way, and may provide the possibility to provide more defences for the assured to avoid the automatic discharge rule in warranty. However, based on former authorities, the second formation of unlawful adventure means that, the adventure can only be performed in an illegal way, or the contractual parties intend to perform such adventure illegally, therefore, unless there are some particular circumstances, the second formation of unlawful adventure always renders the whole policy void.

Origin and scope of the warranty of legal performance in marine insurance law

This section will discuss the origin and scope of the second kind of illegality, the illegality of performance. The origin of such illegality is open to doubt as well. There are no clear authorities on this issue. However, the origin and scope of the illegal performance may share some identical characteristics with illegal adventure.

Origin of the warranty of legal performance in marine insurance law

The origin of the second part of s41 almost developed at the same time as the warranty of legal adventure. The origin of this piece of legislation can also be traced back to the late 18th century.

The case which may be seen as the origin of this legislation is *Planche and Another v Fletcher in* which the issue of the legality of the performance of the assured was first raised by the court. In this case, the defendant argued that by exporting enemy property during the time of war the whole adventure was rendered illegal because of the performance of the assured, and the insurance upon it was void. However, by considering the facts of the case, Lord Mansfield overruled the defendant's argument based on two points, the first was that: "What had been practised in this case was proved to be the constant course of the trade, and notoriously so to everybody[29]"; and the second one is that every man in England and France expected the commencement of a war and the underwriter was aware of that, therefore, the assured was not bound to give the insurer notice of this and since the insurer was aware of the risk and insured such risk, he was liable in case of capture. This can be seen as the first case in marine insurance law in which the legality of performance issue was first considered by a court. In this case, even though there was no fact proved the phrase "so far as the assured can control the matter" indicated that the adventure should be carried out in a lawful manner. In the case *Farmer v Legg* and *Law v Hollingswirth* it can also be seen that, the court required the adventure be carried out in a lawful manner as well, otherwise the adventure would be rendered illegal. Former cases mainly concentrated on or related to trade with enemy during war time. Therefore if an adventure was carried out to trade with an enemy or to profit the enemy , such conduct could render the voyage illegal, regardless of whether such adventure was carried out prior to the commencement of hostilities or not[30]. If the assured carried out the adventure not in strict compliance with the King's licence, the adventure was rendered illegal as well[31].

However, not every illegal performance which happens during the course of the voyage can render the adventure illegal, which is the origin of the phrase "so far as the assured can control the matter". The first case which relates to this issue is *Moss and others v Byrom*[32].In this case, a loss happened because of the illegal capture of an American ship. The underwriter in this case argued that because an illegal letter of marque was taken on board and because of the illegal capture of a vessel, the policy was put to an end and the underwriter should not be liable for any losses. However by denying such argument, the court cited that the action of the

[29]*Planche and Another v Fletcher* (1779) 1 Doug 251.
[30]*Furtado v Rogers* (1802) 3 B & P 191.
[31]*Vandyck and Others v Whitmore* (1801) 1 East 475
[32]*Moss and others v Byrom* 101 E.R. 605.

master was a barratry and even though the capture was partly for the owner's benefit the underwriter was still liable for damage in consequence of that conduct, since the act was no longer under the control of the assured.

These early cases which relate to this piece of legislation only developed the basic rule of legal performance. Most of the cases in the early development of this section were similar. The fundamental principle which the courts follow was the same as the principle in legal adventure, which is that the insurance contract based upon an illegal adventure is void[33].

In the later development of legal performance in marine insurance law, several exceptions had been cited by common law and more factors had been taken into consideration when deciding such cases which will be discussed later.

It can be seen that the foundation of the origin of this piece of law is the same as the origin of lawful adventure, however, the main difference is that, in the warranty of lawful performance, the adventure which is insured is lawful and can be performed legally, however, the assured chose an illegal method to perform it.

Species and formation of illegal performance

The aim of this part is to examine the scope and species of illegal performance in marine insurance law which is based on cases to prior s41. It will first illustrate different kinds of illegal performance in former cases and then clarify and analyse several ambiguities and exceptions in case law, such as the phrase "so far as".
So far as the first issue is concerned, it is similar to illegal adventure, a lawful adventure can be performed illegally because of violation of statute, King's or Council's order, treaty between nations and public policy.

1 violation of statute

An adventure which is lawful in its inception can become illegal because the performance of the assured is a violation of statute. This is the most common kind of illegality; an adventure may be rendered illegal because of violation statute either by the assured himself or his agent.

An example of an adventure rendered illegal because of violation of statute is the case *Vandyck and Others v Whitmore*[34]. In this case a voyage was rendered illegal because of the lack of a valid licence, which was regulated by the stat 34 Geo 3, c, 9 as the legal method of performance. However, one difference between the violation of statute in illegal adventure and illegal performance is that, in the illegal adventure scenario, if the adventure is clearly prohibited by statute then the insurance is void, nevertheless in illegal performance scenarios, the factors which may influence the performance of assured will be considered, as will be introduced later.

2 Violation of King's or Council's order and licence

This kind of illegality is common in cases which relate to trade with an enemy or trade with the subjects of an enemy. Therefore any trade with an enemy is rendered illegal if such licence has not been obtained or no valid licence has been granted, in the case *Potts v Bell and others*, it was cited that according to the principle of common law trading with an enemy without king's licence was illegal in British subjects[35]. The trading with enemy case in this illegality category is similar to the illegality of unlawful adventure. In fact, this kind of illegality is a combination of illegal adventure and illegal performance because the statute which the assured violated was the legal method with which to perform such adventure. Thus, the adventure is only legal by trading with King's licence and without such licence or without a valid licence the whole adventure is rendered illegal. In the case *Vandyck and others v Whitmore*[36]the adventure was rendered illegal because the King's licence granted was for a limited time and any trade beyond this period was illegal. However, a valid King's licence or Council's Order is not enough to legalize such adventure; the assured also need to ensure the spirit of this document. Therefore, in the case *Atkinson v Abbott*[37], the adventure was not rendered illegal because the judge found that the assured was "without any purpose of defeating the Order of Council or trading with an enemy". Otherwise, even if such document has been granted, if the assured intended to violate the law the

[33]*Furtado v Rogers* (1802) 3 B & P 200.
[34]*Vandyck and Others v Whitmore* (1801) 1 East 475.
[35]*Potts v Bell and others* (1800) 8 TR 548.
[36]*Vandyck and Others v Whitmore* (1801) 1 East 475.
[37]*Atkinson v Abbott* (1809) 11 East 135.

adventure would be rendered illegal as well.

3 Violation of treaties between nations

This kind of violation was not very common in early judgements. The first reason was that commercial treaties between nations were not very common during that period and secondly, as cited in the case *Planche and Another v Fletcher "*one nation does not take notice of the revenue law of another"[38] therefore it appears that if the UK is not one party of a treaty and the content of the treaty has not been enacted into UK law, then a court will not follow such treaty and render an adventure illegal accordingly, as in the case *Pollard and Another v Bell*[39], where the legality of an insurance policy was not falsified by the judgment of a foreign court. However, there are some exceptions, in the case *Bell, and other v Carstairs*[40] an American assured could not recover their loss against the British underwriter because the ship was not properly documented according to the existing treaty between France and America and this was the efficient cause of the loss. Compared with the former two cases, the courts decided to follow the treaty and render the adventure illegal based on two points: firstly, the assured subject in this case was an American property, therefore, it should be regulated by the treaty of their state, whereas all the assureds in the two former cases were British; secondly, the document which was not on board was material to the adventure. Therefore, there was no reason why an English court could not use foreign treaties when dealing with a foreign assured's case. And this was also the case in *Baring and others v The Royal Exchange Assurance Company* where Le Blanc J cited that "And if they expressly condemn a prize for a breach of treaty, that is binding on our Courts where the same question arises upon the propriety of that condemnation"[41]. Thus violation of treaty was clearly one kind of illegal performance under English law.

4 Violation of common law and public policy

Violation of common law was very common in the early judgments of illegal cases. This was the case because firstly, in the early period the performance of illegality in most cases was the same, such as traded with enemy or sailed without documents; secondly, the statutes in early period were incapable of covering many kinds of illegality. Therefore, there were several early cases which followed the judgments cited before. Such as in the case *Potts v Bell and others* the judge rendered the adventure illegal because the authorities that cited by the insurer "were so many, so uniform, and so conclusive, to show that a British subject's trading with an enemy were illegal"[42]. This provided a reliable source for the English court to decide illegality cases.

So far as the violation of public policy is concerned, there is still no clear scope of how public policy relates to illegal performance. Just like the comment on violation of public policy in illegal adventure, public policy in illegal performance is a very unruly horse as well. As there is no clear definition of public policy in marine insurance law therefore which kinds of cases can be contained in this category is vague. According to early cases, new public policy can be created by the courts. In the case *Raphael Brandon v Nesbitt* after analysing former cases and statutes, the court rendered the adventure illegal on the ground that "an action will not lie either by or in favour of an alien enemy"[43], which originated from judgments of former cases and was cited as a new public policy by the court. Therefore a public policy may be a supplement to common law or a summary of common law.

Scope of "so far as the assured can control the matter"

The phrase "so far as the assured can control the matter" can be divided into two different parts: firstly, the difference of who commits the illegality can lead to different consequences and secondly, not every illegality which is committed by the assured can render the adventure illegal. Thus the scope of this phrase should be discussed from two aspects, firstly, illegality which involves the agent of the assured; secondly, illegality which is committed by the assured only. This section will consider the first scenario only, and the second scenario will be covered in the insufficiencies of section 41.

According to early judgments, when the courts dealt with the first scenario, several factors were taken into consideration, such as the connection between the losses and the assured, the relationship between the assured

[38]*Planche and Another v Fletcher* (1779) 1 Doug 251.
[39]*Pollard and Another v Bell* (1800) 8 TR 434.
[40]*Bell, and other v Carstairs* (1811) 14 East 374.
[41]*Baring and others v The Royal Exchange Assurance Company* (1804) 5 East 99.
[42]*Potts v Bell and others* (1800) 8 TR 561.
[43]*Raphael Brandon v Nesbitt* (1794)6 TR 23.

and his agent, and the intention and the knowledge of the assured and his agent.

The law clearly indicates that, if there is no connection between the conduct of the assured's agent which lead to the loss and the assured, then such cases will not be regarded as violation of this warranty. In the case *Moss and others v Byrom*[44] the captain illegally took a prize during a voyage and violated the instructions of the assured, then even though the vessel was lost because of such illegality, the assured was entitled to recover against the insurer. This is also the case in *Metcalfe v Parry,* in this case it was decided that "to invalidate a policy on ship on the ground that she sailed without convoy, it is necessary to prove that this happened with the privity of the owner"[45]. But this is not always the case according to former cases, in the case *Pipon v Cope*[46] even though the smuggling committed by the crew had no connection with the assured and the losses were not caused purely because of such illegality (the loss happened because of a collision in harbour), the assured was not entitled to compensation. This was because the assured failed to prevent the repeated acts of smuggling by the crew which increased the risk to the insurer and discharged the insurer's responsibility accordingly. Therefore, so far as the assured can control the matter, the assured has a duty to pay due diligence on the performance of the crew, otherwise even if there is no connection between the assured and the loss, the assured may not be entitled to claim for insurance.

The relationship between the assured and his agent is another factor which is significant when deciding with the breach of this warranty. The agents of the assured may include the crew on the ship or the broker of the assured. In former cases if losses happen because of the barratry of the crew then in most circumstances the assured is entitled to claim such losses. In the case *Heyman and others v Parish* Lord Ellenborough decided that if barratry was proved and no surprise upon the defendant then the assured could recover such loss[47]. The assured is also not liable for the negligence of his agent, for instance, in *Busk v The Royal Exchange Assurance Company*[48] once the assured had provided a sufficient crew on board, the negligence of the crew which caused the loss did not vitiate the assured's right to claim for loss. However, the mere act of barratry will not result in such consequence; only the barratry which commits an illegality will not prejudice assured's right[49]. In contrast, if the illegality committed by the crew is in obedience to the orders of the assured, then such act may contribute to the violation of such warranty. In the case *Hobbs v Hannam*[50] which dealt with smuggled goods on board, the court found that the smuggled goods were brought on board because of the orders of the agent of the assured and the master implicitly obeyed, in this case the order from the agent was considered as the order from the assured. Therefore, in this case even though the assured himself did not participate in the illegal performance, the illegality which was committed by his agent rendered the loss irrecoverable. Thus, so far as the assured can control the matter, the insurer is liable for the losses which are caused by barratry and not liable for the illegality which is caused because of the orders of the assured or his agent. However, it is clear that the Hobbs case was wrongfully decided, since it is unfair for the assured, if orders from any of his agents are considered as his orders, thus, in the case *Carstairs and others, executors of Lyon v Allnutt* it was decided that "it is not enough to shew that the ship sailed without convoy by the instrumentality of an agent of the assured, unless it appear that the agent had authority from his principal for this purpose"[51].

Furthermore, if it turns out that the assured has no knowledge of the illegality then the assured should not be liable for the loss, this is another factor which is beyond the assured's control. Thus in the case *Wilson v Rankin*[52] without the knowledge that the master carried the timber on deck, the assured still had the right to claim for loss. In the case *Oom and others v Bruce*[53] which dealt with insurance on enemy subjects, the agent of the assured still carried out the insurance even after the commencement of hostilities between Britain and Russia. Lord Ellenborough however, decided that the insurance was not rendered illegal, because the assured carried out the insurance without any knowledge of the illegality and the hostilities between the nations and the agent of assured was entitled the return of premium. Another case which was based on the judgment of *Oom* and goes much further is *Henting and Another v Staniforth*. In this case, a voyage was illegal from its inception because the ship sailed before the licence was granted which was unknown to the assured who resided abroad, when

[44]*Moss and others v Byrom* 101 E.R. 605.
[45]*Metcalfe v Parry* (1814) 4 Camp 123.
[46]*Pipon v Cope* (1780) 1 Camp 434.
[47]*Heyman and others v Parish* (1809) 2 Cowp 149.
[48]*Busk v The Royal Exchange Assurance Company* (1818) 2 B &Ald 73.
[49]Compare *Cory and Sons v Burr* (1881-82) LR 8 QBD 313.
[50](1811) 3 Camp 93.
[51]*Carstairs and Others, Executors of Lyon v Allnutt* (1813) 3 Camp 497.
[52]*Wilson v Rankin (1865-66)* LR 1 QB 162.
[53]*Oom and others v Bruce* (1810) 12 East 225.

deciding whether the voyage was illegal and whether the assured was entitled to recover back his premium Lord Ellenborough decided that "The illegality depended upon a fact, viz. the posteriority of the licence to the ship's departure, which was not known to the parties, and was contrary to the opinion and expectation that the plaintiff might reasonably entertain"[54]. Therefore, the assured had a right to suppose that the voyage would be legal. And therefore, "he (the assured) is not a party to a violation of the law and is entitled to recover back his premium"[55]. From this point of view, the knowledge of the illegality of the adventure is not within the scope of the matter which the assured can control. However, one factor which is crucial when deciding such cases is that, the assured's intention has to be proved, which will be discussed later.

Based on the introduction of the origin of this piece of law and the former judgments which formulate the phrase "so far as the assured can control the matter", it is clear that the intention of this phrase is to provide a defence for the assured during the voyage, because the assured is not able to control everything during the course of a transaction. However, according to former analysis there are still two obligations for the assured to comply with: firstly, the assured should have no connection with the losses, either by physical performance or indirect performance, such as orders on agent; secondly, during a voyage, the assured should observe due diligence on the adventure and his agent.

The insufficiencies of section 41 in 1906 Marine Insurance Act

After the analysis of the origin and the phrases of warranty of legality in marine insurance law, the objective of this section is to resolve the questions raised in the introduction: whether s41 of 1906 Act truly reflects the judgments of former cases, and what is the true scope of s41? To answer these questions, two issues need to be expounded, firstly, the insufficiencies of section 41 and secondly, whether this section should be regulated as a warranty.

The insufficiencies of section 41 can be summarised as: the language of this piece of law is abstract. There is no clear description of defences for the assured in both of the two pieces of legislation and the elements which may influence the consequence of the case have been ignored by the legislation as well. Furthermore, some specific circumstances which may not render the adventure illegal have not been covered by the law. Therefore, from this point of view, the legislation has not inflected the former cases properly and can be proved as follows:

Firstly, not every illegality can render the whole policy void. This is a very important defence for the assured which has been ignored by the 1906 Act. This exception exists in several circumstances: (1) Statute itself may clearly provide such exception: for instance, it has been demonstrated that sailing without convoy contributes to an illegal voyage, however, according to the stat.43 Geo.3, c. 57, unless the party interested in the insurance was privy to or instrumental in the sailing without convoy, the statute may not avoid such policies[56]. (2) If the circumstances which prevent the assured fulfilling the lawful requirement are permanent and unchangeable, then such illegal act will not render the insurance policy void. For instance, the case *Suart v Powell*[57] the assured is not guilty if a due proportion of such seamen cannot be procured in any foreign port. (3) If the entire cargo belongs to different parties which have no partnership between them, and covered by distinct policies then the illegality of part of the cargo may not taint the others. In the case *Hagedorn v Bazett*[58], the illegality of the cargo which was exported to Russia did not render the cargo which was exported to Hamburg illegal, even though the cargo was carried in the same vessel. And this is also the case when the illegality happens during the performance of an adventure, for example, in the case *Keir v Andrade* the assured was allowed to export 150 barrels of gunpowder, however the assured exported 300 barrels instead. The vessel was captured and caused the loss, the insurer alleged that the exportation of the extra 150 barrels was a violation of statute and consequently illegal and contaminated the whole adventure. However, the court divided the cargo into two parts and "the adding 150 barrels afterwards did not vitiate the application of the licence to the first"[59]. Therefore the whole adventure was not illegal and the insurance on the first 150 barrels was valid. (4)The voyage may not be rendered illegal as well if the intention of the parties and law has been taken into consideration, which will be discussed later.

The exceptions which may not render the whole policy void vary from case to case, it is impossible to

[54]*Hentig and Another v Staniforth* (1816) 5 M & S 124
[55]*Ibid*at p 125.
[56]*Cohen v Hinckley* (1808) 1 Taunt 249.
[57]Suart v Powell 109 E.R. 785.
[58]*Hagedorn v Bazett* (1813) 2 M & S 100.
[59]*Keir v Andrade* (1816) 6 Taunt 504.

enumerate them and there are no general rules related to this defence. This exception depends upon how the courts construe the law and what facts the courts take into consideration. Consequently, this kind of defence is not stable, however when the courts decide similar cases they may take the decisions of former cases into account.

Secondly, the intention of the parties which had been taken into account by several former cases has been ignored by s41 as well. The intention of parties has provided a defence for the assured in illegality issues. The intention of parties was considered by Lord Ellenborough C.J in two cases: in the case *Ingham and others v Agnew*, the voyage was rendered illegal not because there was no licence on board as required by the law, but because the parties had no intention to obey it "it appears that at the very time the parties obtaining that licence meditated a voyage up the Mediterranean. The voyage was therefore illegal and the insurance void"[60]. In another case *Wilson v Foderingham*, the defendant refused to pay the freight because he argued that the voyage had been taint by illegality, namely sailing without convoy. Even though this was not a marine insurance case, determination of the legality of the voyage is the foundation of carriage contracts as well. In this case the voyage was rendered legal because as cited by Lord Ellenborough C.J "If this contract had been made upon an understanding that it was intended to contravene the provisions of the Act of Parliament, perhaps the voyage might have been illegal, as being an act contemplated to be done in violation of a law of the State; but this contract was entered into, as we must presume until the contrary be shown, in perfect innocence, and with the purpose of effectually complying with the Act of Parliament[61]".

Therefore two kinds of intention of parties have been considered by Lord Ellenborough C.J namely the intention of the parties when entering the contract and the intention of the parties when executing the contract, if the assured enters into the insurance policy without the intention to commit the adventure illegally, then the illegal performance may not render the policy void. However, if both of the parties enter into the contract with intention to commit it illegality, then even though it can be performed legally, the contract is void.

However, this may only provide limited protection to the assured, because on the one side, it is inconvenient to estimate the moral intention of the assured as admitted by Lord Ellenborough C.J himself "it would lead to this inconvenience, that in every case we should have to estimate the moral rectitude of the captain[62]"; and on the other hand, it is hard to prove this either by the assured or insurer. Besides these two reasons, the courts tend to adopt a severe attitude towards illegality issues and frequently ignore this factor. However, such intention issue should raise the attention of the courts when dealing with illegality in marine insurance cases, and this has been considered by the judges in the most recent case *Sea Glory*.

The intention factor had also been considered in illegal performance circumstances, in the case *Atkinson v Abbott* which dealt with shipping goods to enemy territory, the intention of the assured and his agent had been considered by the Lord when deciding this case. In this case, an insurance policy was issued on a voyage to a neutral port in Sweden which the assured had no intention of visiting; the object of the voyage was to supply the British fleet in Denmark which was a hostile country then. The ship was captured by a Danish vessel and the assured claimed for damage. When deciding whether the intention of the assured and the voyage was fraud or illegal the Lord analysed that because "the object of it was to supply the British fleet and forces engaged in the expedition to Copenhagen with provisions[63]" and the voyage was "without any purpose of defeating the Order of Council or trading with an enemy[64]", the object of the voyage was not illegal, therefore the voyage was not illegal either in intention or act. It is clear that the intention of the assured in this case was considered a very important element. However, this is not always the case when the assured has no intention to violate the law. In the case *Denison v Modigliani* which has been analysed before, even though it was alleged by the assured that the letter of marque which had been taken on board was "not being intended to be made use of and not having been acted upon in the voyage out[65]" the court decided that the conduct of the assured has raised the risk insured and the whole adventure was illegal.

Thirdly, the intention of the law has been ignored by s41 as well. Under some circumstances, the courts need to clarify the ambiguities of legislations. For example, in the case *Farmer v Legg* it was cited that "In a case where the words of an Act of Parliament are doubtful, we must see what were the mischiefs against which the

[60] *Ingham and others v Agnew* (1812) 15 East 522.
[61] *Wilson v Foderingham* (1813) 1 M & S 471.
[62] Ibid at p 472.
[63] *Atkinson v Abbott* (1809) 11 East 140
[64] *Ibid* at p 140.
[65] *Denison v Modigliani* (1794) 5 TR 582.

Legislature meant to guard, and endeavour to find out the most probable means of effecting that purpose".[66] And "we (the court) must decide according to the intention of the Legislature which is to be collected from the general object of the Act and from the particular words used in it"[67]. Therefore, the objection of the court is to protect the intention of the legislation rather than simply follow the requirements of the legislation.

Another circumstance in which the intention of the law may provide a defence for the assured is that the court is obliged to find out which punishment the law intends to impose upon the guilty assured, namely whether the consequence of illegality is the void of contract or simply a penalty. In the case *Redmond v Smith and Another,* after analysis of the facts of the case, even though the illegality of the assured was confirmed, the court rejected the plea of the insurer which requested the invalidity of the policy. As cited by the court "the object of the legislature was to protect seaman from imposition[68]". And even though the illegality sustained according to the law "he (the master) shall be liable to a penalty; but there is nowhere said that such non-compliance shall make the voyage illegal[69]". Thus, despite the illegality that existed in the voyage, it was not severe enough to make the voyage illegal and vitiated the insurance upon it.

According to these two cases, it seems that the court has developed a reliable defence for the assured in illegality cases, which has not been covered by s41. However, in order to achieve the correct application of this defence the function and character of the law shall be considered. Namely, whether the character of the law is suitable for the court to rely upon in order to forbid an insurance contract and vitiate the policy. Not every violation of any legislation can render an insurance contract illegal. This is because, firstly, the assured is not obliged to be familiar with every piece of UK law, for some law is of little use or clearly unfair; secondly, even though the legality is not necessarily closely connected with the loss, the law which the courts use to determine the illegality needs to demonstrate an illegal act, otherwise this may provide an improper defence for the insurer. For instance, in the case *Toulmin v Anderson* which was wrongfully decided, the loss of the vessel and goods on board was because of the barratry of three Spaniards on board. Neither the goods on board nor the voyage was illegal according to the law of that time. Even though the first objection of the insurer was that the voyage was illegal according to statute 15 Car.2, c.7, s.6, the court did not deliver a legal opinion upon that subject[70]. The second objection raised by the insurer which the judgment relied upon was that the vessel did not obtain a licence from the south-sea company before the initiation of the voyage and the policy was subsequently rendered void by the court because of this objection. Nevertheless, this judgment was clearly inequitable because of two points. Firstly, as stated by the judge, the statute relied upon was "the almost forgotten charter of the South Sea Company"[71] therefore, whether the legislation is still valid and suitable to be applied on such a specific case was a question need to be clarified by the court. According to the argument of the plaintiff, two recent acts of parliament tended to legalize such voyage, however this had been ignored by the court[72]. Thus, not only might the assured not be familiar with the statute but also such statute might not be appropriate to be applied on such voyage. Secondly, the judgment was not fair to the assured because of the legislation the court relied upon had no connection with the illegality. The function of the statute as stated by court is "gives to the South Sea Company in the strongest terms possible an exclusive right to trade in the South Seas". According to the facts of the case, it was clear that the assured did not intend to violate this exclusive right of trade, therefore the legislation the court relied upon cannot properly demonstrate such illegality which existed in this case. Consequently, even though the objective of the law had been considered by the court, the legislation the court applied was incorrect which led to an incorrect judgment.

Fourthly, another insufficiency which has not been mentioned before is that in some cases the breach of warranty of legality has no connection with the losses. It is well known that under current marine insurance law, to establish a breach of warranty there is no need for a connection between the breach and the loss, which has been demonstrated by numerous cases. However, in illegality cases it may not be appropriate to adopt the same rule. Since firstly, it was cited that the object of legislation shall be taken into consideration, therefore if the illegality does not contravene what the law intends to protect and does not result in loss, it is clear that such illegality will not be supported by the court[73]. Secondly, based upon the analysis of exceptions in s41, the objective of this section is to protect the insurer from losses caused by illegality on the part of the assured rather

[66] *Farmer v Legg* (1797) 7 TR 191.
[67] *Ibid* at p 192.
[68] *Redmond v Smith and Another* (1844) 7 M & G 457 at p 475.
[69] *Ibid* at p 474.
[70] *Toulmin v Anderson* (1808) 1 Taunt 232.
[71] *Ibid* at p 232.
[72] *Ibid* at p 233.
[73] *Redmond v Smith and Another* (1844) 7 M& G 457.

than to preclude any illegality in an adventure, otherwise there will be no exceptions. Therefore, if the illegality of an adventure has no connection with the losses or the illegality which causes the losses is not committed by the assured, then there is no need to trigger this piece of law. Furthermore, under common law illegality rules, there is a causation requirement between the losses and the illegality which has been proved by several cases and the Law Commission report[74].

Therefore it can be summarized from this part that, firstly, the s41 of 1906 Act does not reflect the judgments of former cases well; secondly, the 1906 Act and common law impose a severe consequence on the assured when in breach of such warranty and only provide limited defences for the assured, this is clearly unconscionable and is the reason to discuss whether section 41 should be regulated as a warranty issue.

Should the warranty of legality be regulated as an implied warranty in section 41?

According to the authorities and cases which have been listed before, it can be established that marine insurance contracts which involve illegality will be regarded as void. Based on the analysis before, it can be concluded that s41 of 1906 Act does not reflect the former case law properly. Therefore a question may arise, why is the legality rule of marine insurance regulated as an implied warranty in MIA 1906 rather than condition, innominate terms or express warranty in marine insurance? The phrase "implied warranty" used in the judgment of some cases is not enough to answer this question. This is a question which the drafter of the Act, Sir Mckenzie Chalmers, himself did not answer. And another question is whether this classification is reasonable. To answer these two questions is another way to resolve the question, whether s41 has reflected former case law properly. To answer these two questions, the different kinds of terms in ordinary contract law and insurance law shall be introduced first.

In general contract law, contract terms can be divided into three classes: condition, breach of which entitles the innocent party to repudiate the contract; warranty, breach of which enables the innocent party to claim for damage only; innominate terms, the breach of innominate terms may entitle the innocent party to repudiate the contract or claim for damages, which mainly depends on the seriousness of that breach.

However, the concepts of condition and warranty in insurance contracts have different meanings. According to the Clinvaux's Law of Insurance, an insurance condition is "either an obligation on the assured to act in a particular way, or a contingency –which may be outside the control of the assured-upon which the validity of the policy or of any claim may depend."[75] And the insurance warranty is "a pre-contractual promise by the assured that a given fact is true, or that a given fact will remain true, or that he will behave or refrain from behaving in a particular way."[76]

The consequences of breach of condition and warranty terms in insurance law are different from the consequences in ordinary contract law as well. The consequence of breach of condition in insurance law is more like the breach of innominate terms in ordinary contract law although some special circumstances may exist; and the consequence of breach of warranty in insurance contract is basically automatic termination of the insurance contract[77].

One of the minor differences between the non-marine insurance contracts and marine insurance contracts is that the implied warranty is unique to marine insurance and all the warranties in non-marine insurance must be expressed[78]. Therefore as one of the two implied warranties which has been regulated by MIA 1906[79], it is necessary to answer the question why the warranty of legality is an implied warranty.

According to former judgments, the reasons why warranty of legality is regulated as an implied one in s41 can be concluded into the following two points.

Firstly, this is the foundation of marine insurance contract. Other kinds of warranties may not be required in every marine insurance contract; however the warranty of legality must be fulfilled before the inception of the adventure and maintained during the adventure in order to make the legislation effective. This requirement

[74]For example, the *Gray v Thames* and Law Commission paper No. 189.
[75]Colinvaux's Law Of Insurance, 9th ed (2010), p 331.
[76]*Ibid*, p 331.
[77] The specific consequences of breach of warranty will be discussed below.
[78]*Euro-Diam Ltd v Bathurst* [1988] 2 All ER 23.
[79] The other is the implied warranty of seaworthiness.

originates from a fundamental principle which has been long decided in English law: "the courts will not permit a person to enforce his rights under a contract of any kind if it is tainted by illegality"[80], which is a general principle first cited in the case *Holman v Johnson* by Lord Mansfield. This is a case related to smuggling of tea into England, in the judgment Lord Mansfield cited that "The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."[81] Later it was also decided in the marine insurance case *Morck and Another v Abel* that "no man can come into a British court of justice to seek the assistance of the law who founds his claim upon a contravention of the British laws"[82] and no man shall benefit from his own criminal conduct. In the absence of Marine Insurance Act in the 19th century this is the public policy which many cases were based on and it is common sense in the insurance market. Therefore there is no need to express the legality of adventure and performance in marine insurance contract, since all the prohibitions have been clearly cited by statutes and public policy.

Secondly, the main function for the warranty to be expressed in insurance policy is to make clear the intention of the parties to the court, which enables the court to decide the consequences of the breach of that specific term easily. However, in practice the court can hardly ignore the illegality issues. In the case *Gedge and others v Royal Exchange Assurance corporation*[83]the judgment of that case stated that "the court cannot properly ignore the illegality or give effect to the claim even if the illegality be not pleaded or relied on by the defendants". In this case the court did not ignore the illegal transaction even if there is no express prohibition in the insurance contract. Therefore there is no necessity for the legality requirement to be expressed.

The legality requirement can be regulated as an implied one because of the two points mentioned; however whether the legality requirement should be regulated as a warranty is another question, since there are five differences between the warranty of legality and other ordinary warranties.

(1) Compared with other kinds of warranties, warranty of legality cannot be waived either by agreement or by estoppel, for such waiver will negate the effect of legislation and such act will be contrary to public policy as stated in the first point. And it is also because the court will not ignore the illegality which exists in a contract.

(2) The most important principle in warranty is the strict compliance principle as stated in s.33 of the 1906 Act: once a warranty is breached, the insurance contract is automatically terminated regardless of whether the assured can control or is aware of the matter or not. However as clearly stated in s.41 "so far as the assured can control the matter", it indicates that if the adventure which is performed illegally is out of the control of the assured, such circumstance will not be considered as a breach of this implied warranty. In the warranty of legal adventure cases, as has been stated before there are several circumstances where illegal adventure may not be rendered as a breach of warranty as well. Thus, these regulations clearly contradict the well-known principle in warranty.

(3) The difference also exists in the doctrine of divisibility of warranty. It is clear that in most cases if a warranty has been breached then the loss of the whole cargo under the same policy cannot be covered. However, in some special occasions of the legality cases, the cargo under the same policy can be divided. In the case *Hagedorn v Bazett*, a license on a voyage to the Baltic had been granted, however part of the cargo on the ship belonged to Russia which was regarded as an enemy by England at that time, therefore a question arose on the trial, whether this license could be extended to protect the whole property or only a part of it, because at that time trade with enemy was regarded as illegal by English court. By deciding the insurance policy only did not cover the goods of Russia (which was illegal), Lord Ellenborough C.J. stated that "the mere accidental circumstance of several persons having employed one common agent, does not communicate to the others the vice belonging to the property of one of the assured; but that the contract may be distributed"[84]. Therefore, in this case, even though part of the goods was illegal such illegality did not taint the whole insurance policy. However, this was a very special case, if it can be established that the subject matter insured is covered by the same policy, belongs to the same assured, the partial illegality may taint the whole policy[85]. However, the former case law on this issue contradicted with each other, in the case *Keir v Andrade*[86], even though all of the gunpowder was covered under the same policy and belonged to the same assured, the illegality of half of the goods did not render the lawful

[80]*MacGillivray on Insurance Law*, 11th ed, 356
[81]*Holman v Johnson* (1775) 1 Cowp 341.
[82]*Morck and Another v Abel* (1802) 3 B & P 35
[83]*Gedge and others v Royal Exchange Assurance Corporation* [1900] 2 QB 214
[84]*Hagedorn v Bazett* (1813) 2 M & S 100.
[85]*Cunard and Others v Hyde* (1859) 2 E& E 1.
[86]*Keir v Andrade* (1816) 6 Taunt 498.

part of the goods illegal.

(4) The issue on return of premium is different as well between the warranty of legality and other kinds of warranties. Under insurance law, premiums paid by the assured are recoverable either on the present warranty or continuing warranty, because the insurer will not face any liabilities for losses since the insurance contract has come to an end after the breach. There are no clear words related to the return of premium in s.41 of 1906 Act; however in the early judgments which relate to illegality prior to the 1906 Act, the premium paid on an illegal insurance cannot be recovered. In the case *Vandyck and Others v Hewitt,* the insurance policy which was to cover trading with the enemy was considered as illegal and the premium paid on it could not be recovered, the judge stated that "where it was considered that money deposited upon an illegal wager, and paid over to the winner, could not be recovered back from him[87]". Furthermore, it was later decided in the case *Morck and Another v Abel* that "a foreigner cannot recover back the premium paid by him upon a policy of insurance, if the voyage be in contravention of the British laws.[88]" This judgment has been supported by a number of cases such as *Chalmers and Another v Bell*[89] and *Lubbock and Another v Potts*[90]. This is also the reason why the section 84 (3) of Marine Insurance Act indicates that there is no return of premium if there has been illegality on the part of the assured, which is clearly not a happy one.

(5) The last point is the difference which exists in the consequence of breach between the warranty of legality and other ordinary warranties. It can be established by numerous cases prior to the 1906 Act that, the consequence of an insurance which is tainted by illegality is that the insurance contract is void rather than merely unenforceable after the breach, therefore not only the losses which happen after that breach are unrecoverable but also the losses which happen before that breach. However, this is clearly not the case in breach of ordinary warranties. Under ordinary warranty regulations the breach of a continuing warranty will not influence the insurer's liabilities which occur prior to the date of breach. Therefore the consequence of breach of warranty of legality is clearly not the same as other kinds of breach of warranties.

Above are the five differences which exist between the warranty of legality and other kinds of warranties. Therefore, based on the analysis above, it is clear that s41 in 1906 Act does not reflect the special character which exists in the judgment of former cases, and consequently it is not appropriate to regulate the requisition of lawful adventure and performance as a warranty in marine insurance law.

Conclusion on section 41

Based on the analysis of former case law before, it can easily be concluded that section 41 in 1906 Marine Insurance Act does not reflect former case law properly. And the true scope of legality issue in marine insurance law has more abundant meanings. The true scope of legality in marine insurance law is to protect the legitimate interests of the insurer and prevent the assured from profiting from his own fault. However, section 41 only cited the basic two principles in practice and the possible defences for the assured have been ignored. Furthermore, based on the severe consequence of breaching legality rules, it is inappropriate to regulate these rules as warranty as well. Therefore, based on the most recent case *The Nancy*, it seems that the application of common law illegality rules is a more proper method when dealing with marine insurance illegality issues.

[87] *Vandyck and Others v Hewitt* (1800) 1 East 96.
[88] *Morck and Another v Abel* (1802) 3 B & P 35.
[89] *Chalmers and Another v Bell* (1804) 3 B & P 604.
[90] *Lubbock and Another v Potts* (1806) 7 East 449.