Marine insurance warranties after the Insurance Act 2015

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Introduction

Non-consumer business insurance law has recently undergone an unprecedented level of reform, the product of which is the Insurance Act 2015 ('IA 2015') which came into force on the 12th August 2016. The focus of this paper is on the reforms in respect of marine insurance warranties. The pervasive criticism of the old law governing warranties was that it was "draconian"[1] because the assured's breach resulted in the automatic discharge of the insurer's liability[2] and a breach could not be remedied.[3] This paper explores two specific sections of the IA 2015 which reform the law of warranties and operate in tandem – sections 10 and 11. Section 10 abolishes the insurer's remedy of automatic discharge of liability and instead suspends the insurer's liability under the policy until the breach is remedied.[4] Section 11 picks up when section 10 leaves off[5] and prevents an insurers' liability from being discharged in cases where, although the assured is in breach, there is a disconnection between the breach and the loss. Section 11 supposedly finds application to warranties[6] but *not* to terms which "define the risk as a whole"; however, warranties, in their original conception, were used in marine insurance policies precisely to define the risk insured. It has been queried whether the distinction between a risk-defining term and a risk-mitigating term for the purposes of section 11 is inherent – ie is the distinction is intrinsic to a proper interpretation of section 11, or a matter of good drafting: this paper argues that the distinction is inherent.

This paper is divided into two parts. Part one outlines the former, draconian law on warranties and the reforms in-depth, identifying the questions raised by the reforms and makes an attempt to answer them. Part two analyses the operation of sections 10 and 11 with regards to specific marine warranties; more specifically, condition survey warranties, class and class maintained warranties and the implied warranty of seaworthiness.

1. Part one

1.1 Marine warranties prior to 12th August 2016

It has long been established that the effect of classifying a term as a "warranty" in insurance law confers a meaning and consequences quite distinct from its ordinary contract law definition. For the purpose of insurance contracts, warranties are defined by section 33 of the Marine Insurance Act 1906 (MIA 1906) which reads, in full:

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[1] Law Commission, Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties (Law Com CP No 204, 2012), paras [12.82] – [12.84]; [14.4].
[2] *"The Good Luck"* [1992] 1 AC 233, 263.
[3] Marine Insurance Act 1906, s.34(2); *Quebec Marine Insurance Co v Commercial Bank of Canada* (1869-71) LR 3 PC 234.
[4] IA 2015, ss. 10(1) and 10(7).
[5] Robert Merkin and Özlem Gürses, 'The Insurance Act 2015: Rebalancing the Interests of Insurer and Assured' [2015] 78 (6) *MLR* 1004, 1020.
[6] Explanatory Notes to the Insurance Act 2015, para [94].

> (1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
>
> (2) A warranty may be express or implied.
>
> (3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not.

Traditionally a breach of warranty results in the innocent party's – the insurer's, automatic discharge from liability.[7] Significantly, subsection 3 rendered all enquiries as to whether the warranty was material to the risk or not irrelevant. A particularly old and well-known case, *De Hahn v Hartley*,[8] is illustrative of the disconnection between the breach and the loss. A ship set sail with insufficient crew in breach of warranty; the breach was remedied and she was safely crewed when later captured. However, Lord Mansfield ruled that warranties must be strictly complied with: "[i]t is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with".[9] Several cases in marine insurance law illustrate the same point.[10]

The consequence was that by drafting a term as a warranty, insurers were automatically discharged from any liability on a seemingly 'technical' basis in instances where the breach was removed from the loss. Moreover, this was also the case in instances where the breach had been remedied prior to the loss.[11] English law influenced other common law legal systems to a huge extent; for example, in Hong Kong[12] and Canada[13] the law of warranties is based on the English MIA 1906 and in others like Singapore, the English MIA 1906 is directly applicable.[14] Nevertheless, Lord Hobhouse noted in 2001:

> "It is a striking feature of this branch of the law that other legal systems are increasingly discarding the more extreme features of the English law which allow an insurer to avoid liability on grounds which do not relate to the loss.[15]"

It is this "extreme" feature that the Law Commissions aimed to reform; indeed, they were damning in their critique of the consequences of breach of warranty, describing them as "draconian",[16] and – ominously, as bringing English law "into disrepute".[17]

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[7] (n 2) 263; MIA 1906, s.33(3).
[8] 99 ER 1130, (1786) l Term Rep 343.
[9] ibid, 346.
[10] For example, *Quebec Marine Insurance Co v The Commercial Bank of Canada* (1869-71) LR 3 PC 234 and *Hibbert v Pigou* (1783) 3 Doug KB 213.
[11] (n 3).
[12] Marine Insurance Ordinance (Ch 329).
[13] Marine Insurance Act 1993.
[14] Application of English Law Act 1993.
[15] *"The Star Sea"* [2001] UKHL 1; [2003] 1 AC 469, [79].
[16] (n 1) paras [12.82] – [12.84]; [14.4].
[17] Law Commission, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (Law Com No 353, 2014) para [12.15].

1.2 The reforms and the new problems stated

Sections 10 and 11 of the IA 2015 were introduced to remedy the two problems identified above.[18] Section 10 replaces section 33(3) of the MIA, including any common law rule: it applies exclusively to warranties and stipulates that during the period the assured is in breach, cover under the policy is suspended until the breach is remedied. The ramifications of suspensive cover are not limited to marine insurance and will be observed across all sectors of the insurance market. For example, in medical negligence cases, breaches are often waived to preserve the parties' commercial relationship;[19] one question following the reforms is whether the practice of waiving is now otiose? Section 10 presents conceptual challenges, particularly in marine insurance. More specifically, when can a breach and its subsequent remedy be said to occur? If a warranty cannot be remedied, is the insurer's liability indefinitely suspended per se, ie without proof of causation or insurer prejudice? If a policy contains more than one warranty, yet only one warranty is breached, is the insurer's liability indefinitely suspended?[20]

Section 11 is entitled "Terms not relevant to the actual loss" and applies to terms which are risk-mitigating, as opposed to risk-defining. It prevents insurers from avoiding claims in instances where, although the assured is in breach, there is a disconnection between the breach and the loss. In the case of warranties, it applies during the period of the assured's breach and suspension of cover. More generally, section 11 applies to any term, howsoever drafted, provided it is risk-mitigating. Merkin and Gürses have queried whether the distinction between risk-defining and risk-mitigating terms, for the purposes of section 11, is inherent or a matter of good drafting[21] which is particularly pertinent with regards to warranties because marine warranties, as traditionally defined, were terms which defined the risk.[22]

1.3 Old cases, new law: a snapshot

"The suspensory solution is a neat one":[23] mirroring the position in some American states[24] it prevents insurers from infamously relying upon a 'technicality' to avoid paying a claim and, in most instances, is straightforward to apply. For example, in *De Hahn* the breach would have been remedied once the vessel was fully crewed, and the risk had returned to that as agreed by the parties;[25] if the vessel had been captured during breach, or sunk (not her fault), the assured would have been able to recover if they could show that the crew number had no bearing on the ship's capture or sinking.[26]

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[18] ibid, para [18.8].
[19] 'Insurance Act 2015 Shaking up a century of insurance law' (2016) <https://www.clydeco.com/uploads/Files/Admin/CC010256_Insurance_Act_2015_26-07-16-web.pdf> accessed September 2017, 13.
[20] Özlem Gürses, 'Reform of construction of insurance contract terms' (2013) *JBL* 39, 40.
[21] Robert Merkin and Özlem Gürses, 'Insurance contracts after the Insurance Act 2015' (2016) *LQR* 445, 455.
[22] Özlem Gürses, Marine Insurance Law (2nd edn, Routledge 2017), 130.
[23] (n 5), 1008.
[24] Baris Soyer, 'Risk control clauses in insurance law: law reform and the future' (2016) *CLJ* 109,113.
[25] (n 17) [para] 17.45.
[26] IA 2015, s.11(3).

In "*The Newfoundland Explorer"*,[27] Gross J held that the meaning of "fully crewed", "at all times", depended on what the vessel was doing, with "fully crewed" meaning at least one member of crew on board 24/7 regardless of the vessel's activity. Section 10 would have suspended cover for the period of time crew were not appointed; if loss was caused by bad weather, the assured could have relied on section 11. However, if the vessel went to sea and found itself (for whatever reason) without an engineer and one of the engines failed and consequently the ship caught fire, the assured could not have relied on section 11. By way of further example, in *"The Princess of the Stars"*, a typhoon warranty clause in the reinsurance policy was breached: the vessel set sail despite severe weather warnings and the vessel's route at the time of setting sail clearly was within the realms of the typhoon's path. The warranty's "commercial purpose was to ensure that no unnecessary risks were taken (…) [C]over depended on the scheduled vessels not sailing when there was *the possibility* (…) of encountering a typhoon or storm."[28] Thus, the clause aimed to reduce a particular kind of loss – typhoon/storm damage, and the loss which occurred was of this kind – the vessel consequently sank; however, because non-compliance with the term would have increased the risk of loss, a claim would be defeated by section 11(3).

1.4 Addressing the conceptual difficulties presented by section 10

If a risk-mitigating warranty is breached, it is likely that the insurer's liability is only suspended in respect of losses of that type because the policy "continue[s] to operate normally in all those ways".[29] Whether, and when, a breach can be said to have been remedied is important[30] and section 10 presents some interesting conceptual difficulties. It will not be possible to actually remedy all breaches, as s.10(4)(b) acknowledges and there is no reason to suggest, in this respect, that the applicable law on the doctrines of waiver is altered from the legal position prior to the IA 2015. This will be evident insofar as confidentiality warranties,[31] in reinsurance – warranties detailing the type of business which can be ceded to the reinsurer, and past or present fact warranties are concerned (eg the insured vessel must carry the flag of a particular state on the date the policy commences).

One underlying issue, when a breach cannot be remedied – and section 11 is precluded, is whether it is proper for the insurers' liability to be indefinitely suspended per se, ie without proof of causation or insurer prejudice. Gürses argues in the negative, because the effect of the old law is otherwise retained, and advocates a causal requirement, in tandem with the prejudice rule.[32] Thus, the onus should be on the assured to prove that the loss was not caused by, or did not contribute to, the breach – ie a complete chain of causation would not be necessary.[33] If, prima facie, the insurer is liable, their liability may be mitigated to the extent the insurer was prejudiced by the breach: "what would the insurer have done if the insurer had known that the assured was in breach?"[34] The answer in respect of a flag is that the insurer might not have insured the vessel at all, or it would have been on more stringent terms, or at a higher premium. What is clear is that this dual approach – a causal requirement, in tandem with the prejudice

[27] [2006] EWHC 429 (Admlty).
[28] [2014] EWCA Civ 1135, [2014] 2 CLC 436 [51] (emphasis added).
[29] (n 17) para [17.55].
[30] ibid, para [17.30].
[31] ibid, paras [17.49], [17.52].
[32] (n 20), 40-41.
[33] ibid, 57.
[34] ibid.

rule – is sound as a matter of legal analysis and, in this author's view, is more befitting of a commercial venture like (re)insurance which has evolved markedly from its early days in Lloyd's Coffee House when it was not always possible to determine precisely how and why a loss occurred.

Another example requires the assured to affirm or negative the existence of a particular set of facts prior to the policy's commencement; for example, that the insured vessel was surveyed in the last year and any ensuing recommendations were addressed. Interestingly, Soyer writes that cover will be suspended indefinitely as remedy is not possible but also notes the technical analysis, ie the warranty's breach means the insurer is never on-risk, as a condition contingent to attachment of the risk,[35] thereby defeating any concern that an irremediable breach discharges the insurer from liability per se.

The Law Commissions, addressing the conceptual difficulties, distinguished between "general" and "time-specific" warranties.[36] Regarding the former, the example of a warranty that a ship will not sail through a certain strait is provided: it is clear that when the ship safely leaves the strait, it is not possible to remedy the breach in the sense that it can be "undone", yet for the purposes of section 10(5) a breach is remedied when the assured "ceases to be in breach of warranty".[37] Regarding section 10(6) and the so-called "time-specific" warranties, a missed deadline cannot be remedied, yet it is "functionally" remedied when the risk reverts to that as agreed between the parties before breach.[38] This accords with the analysis that warranties function as risk control measures, helping the underwriter define the scope of cover[39] and protecting the insurer from alterations to the agreed risk. Furthermore, it reinforces the overriding objective of the reforms of the IA 2015 which is to promote a greater and more in-depth understanding of the risk(s) being insured – it therefore follows that insurers should be put back on-risk when it returns to that as originally represented.[40]

It is not at all surprising, in a market as sophisticated as the marine market, that guidance concerning promissory warranties has been issued for use with the Institute Time Clauses-Hulls (ITC-Hulls) which states it is agreed sections 10(5)(a)-(6) shall not apply.[41] (Notably, however, the guidance term for use with the ITC-Hulls, as drafted, is silent as to implied marine warranties; thus, the conceptual difficulties are not superfluous and are discussed below.[42]) This is all well and good because players in the marine market are commercially astute and "Held-covered" clauses assist greatly in practice. They entitle the assured to require, as soon as they discover that the warranty has been breached, that the underwriter is kept on-risk, thereby holding themselves covered.[43] Put differently, in circumstances in which the underwriter would ordinarily incur no liability, it is agreed that cover continues untainted by the breach. An early example is *Greenock Steamship Co Maritime Insurance Co Ltd*:[44] the policy was held-covered "in case of any breach of warranty, deviation and/or any unprovided incidental risk or

[35] Baris Soyer, 'Beginning of a new era for insurance warranties?' (2013) *LMCLQ* 384, 388.
[36] (n 17) para [17.31].
[37] ibid, paras [17.32], [17.34].
[38] ibid, paras [17.47] – [17.48].
[39] ibid, para [17.37].
[40] ibid, para [17.78].
[41] Joint Hull Clauses, 'JH2016005 Insurance Contract Law' (International Underwriting Association of London 8 July 2016) <www.iuaclauses.co.uk/site/cms/contentDocumentView.asp?chapter=8&category=54> accessed September 2017.
[42] See 'Implied warranties - Seaworthiness'.
[43] *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep. 560, 567.
[44] [1903] 1 KB 367.

change of voyage, at a premium to be hereafter arranged". Thus, the essence of 'held-covered' clauses is not to extend the underwriters agreement to provide cover on terms which differ from the original policy – the only extension is the matter of the extra premium, which must be reasonably proportionate to the extra risk assumed.[45]

Might this exclusion of sections 10(5)(a)-(6) indicate the potential return to a dual system of marine and non-marine insurance? Perhaps not – it is not only marine policies which might be unaffected by the reforms: energy policies in the London market are not, in the main, subject to English law by virtue of their international nature yet the changes the reform brings have been implemented as best practice for some time, requiring, for example, a link between the loss and the breach in Drilling Wells Reviews and Joint Rig Committee (JRC) Marine Warranty Survey.[46]

For the sake of completeness, it is worth briefly contemplating the impact the reforms will have on the doctrines of waiver.[47] An insurer is at liberty to waive an assured's breach of warranty either by express wording in the policy or by estoppel.[48] Waiver by election[49] was precluded under the old regime; the Court of Appeal confirmed that as the breach resulted in the insurer's automatic discharge of liability, there was nothing to elect or affirm.[50] The abolition of the automatic discharge of liability calls into question which type of waiver will apply under the new regime.[51] The focus is on the period of suspension of liability which occurs automatically: once the breach has been remedied, waiver becomes important because liability is automatically reinstated.

Gürses is of the view that waiver will be proved by estoppel only because no action by the insurer is required to give effect to the subsection to render them not liable for the losses it concerns.[52] However, this position is yet to be tested by the courts and there is disharmony in the academic community. Soyer submits that because cover is suspended, waiver by election is possible as cover will remain, meaning the insurer can choose "between two alternative and inconsistent causes of action open to him".[53] This will not alter the fact that waiver by estoppel is also available, where appropriate.[54] This author agrees with Gürses for the reason that waiver by estoppel enables the innocent party to either continue with the contract or accept the conduct of the other party and bring and action in damages. The latter position is seemingly not applicable in the instance of suspensive cover as no action by the insurer is required, their position is dependent on the assured clarifying their legal position – colloquially, the ball is in the assured's court.

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[45] ibid, 374.
[46] (n 19), 29.
[47] For an explanation of the difference between Waiver by Election and Waiver by Estoppel see *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd ("The Milasan")* [2000] 2 Lloyd's Rep 458, 467 and Arnould and others, *Arnould: Law of Marine Insurance and Average* (18th edn, Sweet & Maxwell 2016) paras [19]-[39].
[48] *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130 *per* Lord Denning MR; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India ("The Kanchenjunga")* [1990] 1 Lloyd's Rep. 391; *J Kirkaldy Sons v Walker* [1999] C.L.C. 722; cf *Argo Systems FZE v Liberty Insurance (Pte)* [[2011] EWCA Civ 1572 *per* Aikens LJ.
[49] *"The Kanchenjunga"* [1990] 1 Lloyd's Rep 391 *per* Lord Goff at 398.
[50] *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147; [2008] Lloyd's Rep IR 489, [38].
[51] (n 22), 126.
[52] ibid.
[53] Baris Soyer, 'Risk control clauses in insurance law: law reform and the future' (2016) *CLJ* 109, 117; Baris Soyer, 'Beginning of a new era for insurance warranties?' (2013) *LMCLQ* 384, 389.
[54] Soyer, B. 'Risk control clauses in insurance law: law reform and the future' (2016) *CLJ* 109, 117; Baris Soyer, 'Beginning of a new era for insurance warranties?' (2013) *LMCLQ* 384, 390.

However, what is one to make of the scenario in which an insurer provides an express waiver? This might be made in writing, explicitly recognising a breach of warranty and stating that the insurer considers their liability to be reinstated until a particular date; then, if the assured is still in breach, the insurer's liability will be suspended once again. The reasons above do not apply to this type of express waiver and there is, in principle, no reason why the reforms would preclude this; in practice, it may well be utilised by those insurers wishing to preserve their commercial relationship with their clients.

1.5 The nature of warranties pre- and post- the IA 2015 and defining the risk as a whole: does section 11 apply to warranties?

The question of whether section 11 does indeed apply to warranties is a necessary one because traditionally, in marine insurance law, the warranty enabled insurers to accurately define the risk. For example, in *Jeffries v Legandra* the underwriter's argument – that "depart with convoy" meant "sail with convoy for the whole voyage", and accordingly described the risk – persuaded the court.[55]

Past and present fact warranties, in their eighteenth century form, prevented the risk from attaching unless the warranty was complied with at the date of the policy.[56] In effect, they operated as conditions precedent to the attaching of the risk.[57] This evolved to the insurers' clear advantage in the latter half of the nineteenth century as 'basis of the contract' clauses operated to convert each statement in the application into a warranty, regardless of whether it was inducing, material, or otherwise.[58] "Basis" clauses[59] were patently "anachronistic and unjustified",[60] hence they did not survive the law reform[61] (although notably they supposedly present a "legacy issue" in D&O wordings[62]).

Continuing warranties – a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled[63] – originally developed in the eighteenth century. They responded to the realities of commerce during this period by providing insurers with a means of excluding liability for losses for which it could not be proven were caused by a specific, excluded event[64] – they made redundant any difficulties with regards to proof[65] because a particular thing either had or had not been done or a state of

[55] 91 ER 384, (1690) 2 Salk 443.
[56] *"The Milasan"* [2000] 2 Lloyd's Rep 458.
[57] *Thomson v Weems* (1884) 9 App Cas 671.
[58] *Dawsons v Bonnin* [1922] 2 AC 413.
59 For example, *Genesis Housing Association Ltd v Liberty Syndicate Management Ltd for and on behalf of Liberty Syndicate 4472 at Lloyd's* [2013] EWCA Civ 1173, [2013] 2 C.L.C. 444; *Dawsons Ltd v Bonnin* [1922] 2 A.C. 413.
[60] (n 5), 1017.
[61] IA 2015, s.9 (in respect of consumer policies the Consumer Insurance (Disclosure and Representations) Act 2012, s.6 is the relevant authority).
[62] (n 19), 31.
[63] Marine Insurance Act 1906, s.33(1).
[64] (n 5) 1017.
[65] William Vance, 'The history of the development of the warranty in insurance law' [1910-1911] 20 *YLJ* 523.

affairs either existed or did not exist; this was advantageous due to both inexpedient communications[66] and the rules of causation at the time.[67]

Codified by Sir Mackenzie Chalmers in sections 33 and 34 of the MIA 1906, the insurer's automatic discharge of liability from the date of the assured's breach of warranty served well when sea faring was primitive. Its justification was straightforward: "a warranty is very akin to a statement of the cover provided by the insurance, indeed it is part of that cover's definition";[68] by virtue of a breach of warranty, the assured removes himself from the cover which he had agreed with his insurers[69] and consequently, "the cover ceases to be applicable".[70] This is so despite "any subsequent [losses having] nothing to do with the breach of warranty (…) because *the insurer had only agreed to cover the risk provided the warranty was performed*.[71]

The Law Commissions decided against abolishing continuing warranties, opting instead to remove their most draconian feature – automatic discharge, and expressly indicated that section 11 applies to warranties.[72] This intent behind The Law Commissions reforms supports section 11's application to warranties. Moreover, as Merkin and Gürses note, the extension of the use of warranties in other classes of insurance has widened their scope and modified their function: they are now more closely related to exclusions rather than defining risk coverage[73] and consequently, the weight of Rix LJ's reasoning in justifying warranties as traditionally defined can be questioned and challenged.

2. Part two: Examples of specific warranties; sections 10 and 11 working together

2.1. Condition survey warranties

Condition survey warranties often feature in high risk, high value marine insurance policies at the request of the insurer. However, it is not uncommon for assureds to arrange for them to be conducted when not mandatory, for they evidence the vessel's safety and reliability in case of future claims – to this end, they reduce the risks posed by major maritime transportation. Condition survey warranties are to be fulfilled either – optimally, before the risk attaches, or after the commencement of the policy.

To assume an example, a warranty to have a condition survey within thirty days of the policy's inception will be breached if the survey is carried out on the sixtieth day of the policy. Subsequent to the reforms, the legal analysis under section 10 of the IA 2015 is as follows: the insurer will be on-risk for losses occurring between days one and thirty, and the insurer's liability will be suspended between days thirty-one and fifty-nine; the insurers will be back on risk on day sixty. It is in relation to losses occurring during the period of suspension of liability that

[66] (n 5) 1017.
[67] Formerly last in time: *Pink v Fleming* (1890) 25 QBD 396, 397; currently 'efficient' or 'predominant' cause: *Reischer v Borwick* (1894) 2 QB 548.
[68] *HIH Casualty and General Insurance Co v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] CLC 1480, [124].
[69] ibid.
[70] *State Trading Corporation of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 227, 287.
[71] (n 68) (emphasis added).
[72] (n 6) para [94].
[73] (n 21) 455.

the position is unclear and complex under section 11 of the IA 2015.

A condition survey warranty in a hull policy might be assumed to relate to the whole risk, because an aspect of the vessel's condition, prima facie, defines the whole risk, or a significant part of the risk – the latter being in accordance with the belief that a risk-defining clause is of general, rather than specific, importance.[74] As a warranty traditionally defined, this is not controversial. Indeed, in a market as sophisticated as the marine market, it is not uncommon, in ultra-high-value policies especially, to voluntarily incorporate standard terms: an example of such an express warranty drafted by the JHC was updated,[75] then renumbered, and now reads as a condition precedent to liability:[76] it is clearly stated that the parties agree that the term defines the risk as a whole.[77]

However, not all condition survey warranties are created equal because not all marine insurance policies incorporate standard terms and thus may not be drafted with the same wording. Indeed, it is the strength of section 11 that it applies to various types of policies and the type of policy can have a bearing on the interpretation of a warranty; in marine insurance, this might include, for example, cover for a privately chartered superyacht which, if classified as a consumer policy, prohibits the parties from contracting out of sections 10 and 11. Suppose hypothetically that on day thirty-two – while the vessel's cover is suspended, loss occurs in the form of negligent navigation or hijacking and ransom by pirates when the vessel is sailing in the Mediterranean. A benevolent interpretation of section 11 might aid the assured by preventing the insurer from citing breach of a condition survey warranty as a defence against indemnifying the assured. On the contrary, if loss occurred because one of the vessel's engines fails, section 11 would not benefit the assured.

It is important to bear in mind that the IA 2015 does not make any change to the definition of a "warranty"[78] and, to a great extent, the construction of warranties is heavily reliant on the judicial interpretation of contractual terms. Determining objectively what the parties intended occurs by reference to the factual matrix, taking into account the warranty's commercial function and objective[79] – although the contextual approach is tempered somewhat by the decision of *Wood v Capita Insurance Services Ltd*[80] which is discussed at length below – the plain and ordinary meaning of the words[81] and construing the policy in its entirety,[82] as illustrated by Rix LJ in *HIH Casualty and General Insurance Co v New Hampshire Insurance Co*.[83] Indeed, the intention of section 11 is stated to be

[74] (n 17) para [18.35].
[75] Joint Hull Committee 'New Survey Wordings' (JH2006/010B, International Underwriting Association of London 7 April 2006) <www.lmalloyds.com/CMDownload.aspx?ContentKey=35090016-1e06-4ceb-81ca-fb17b2b36863&ContentItemKey=e6853d60-834a-4d1d-a22f-fcaf8dbe3c01> accessed May 2017.
[76] Joint Hull Clauses, 'JH2013/007B Condition Survey' (International Underwriting Association of London 26 September 2013) <www.iuaclauses.co.uk/site/cms/contentDocumentView.asp?chapter=8&category=54>accessed September 2017.
[77] Joint Hull Clauses, 'JH2013/007B Condition Survey' (International Underwriting Association of London 26 September 2013) <www.iuaclauses.co.uk/site/cms/contentDocumentView.asp?chapter=8&category=54>accessed September 2017, (4)(k) (770)
[78] (n 6) para [86]; (n17) para [15.14].
[79] *Investors Compensation Scheme v West Bromwich Building Society (No 1)* [1998] 1 WLR 896.
[80] [2017] UKSC 24.
[81] *Thomson v Weems* (1884) 9 App Cas 671, 687.
[82] (n 79).
[83] [2001] EWCA Civ 735; [2001] CLC 1480, [101].

"to enable an *objective* assessment of the 'purpose' of the provision, by considering that sorts of loss might be less likely to occur as a consequence of the term being complied with",[84] meaning that the insurer is only off-risk for the types of losses the term is designed to reduce. The party seeking to demonstrate which risk(s) the warranty addresses bears the burden of proving this,[85] but it often results in both parties attempting to bring evidence to support their point, as noted by Longmore J:

> [B]oth sets of submissions fasten on the purpose of the condition survey in order to ascertain what is contractually required. In my judgment they are right to do so, because unless one can focus on its purpose it is not at all easy to judge what is required.[86]

This reality, together with the tangible increase in litigation which follows the enactment of any new legislation, contextualises Soyer's caution that the burden to prove that the warranty was designed to reduce the risk of loss caused by an alternative risk should be on the *assured* in order to discourage them from taking the point up too frequently.[87] In the context of marine policies, which are usually high-value, this will not generally be an unfair burden although in some minority cases, the burden to provide expert evidence may present difficulties.

A recent case, *Bluebon Limited (in liquidation) v (1) Ageas (UK) Limited (formerly Fortis Insurance Limited) (2) Aviva Insurance Limited (3) Towergate Underwriting Group Limited*,[88] which concerned the interpretation of a (non-marine) warranty demonstrates a somewhat unconventional application of these principles. While Bryan J interpreted the warranty in line with the interpretive principles and reasoned the Electrical Installation Inspection warranty was a 'true' warranty, he nevertheless held that it operated as a suspensory condition.[89] Significantly, in the context of this analysis, the assured argued that it was correct to construe the warranty narrowly: its purpose was to reduce fire as a direct result of faulty electrical installation, as opposed to the risk of fire per se. The judge however thought this was an "unbusinesslike construction"[90] and his comment that this "would (…) slice the insured risks which were covered too thinly",[91] may inform the reading of section 11. It accords with the view that risk-defining is of general, rather than specific, importance: if there is a connection between the warranty and the general risk insured under the policy, insurers may seemingly rely on the assured's non-compliance as a defence to their liability. Therefore, it must then follow that the warranty in question is classified as a risk-mitigating warranty for the purposes of section 11(1) because it aimed to reduce the risk of fire. Nevertheless, in light of the fact it was not necessary for the judge to determine precisely the manner of suspension in this case,[92] insurers may be keen to confine this reasoning – albeit obiter reasoning, to non-marine cases.

Notably, the role of the marine warranty surveyor has been increasing in the marine market, moving away from a 'box-ticking' exercise to a more comprehensive survey of more value in identifying problems with a view to

[84] (n 6) para [94] (emphasis added).
[85] *Fraser v Furman* (Productions) Ltd [1967] 1 WLR 898, 905.
[86] *Kirkaldy & Sons Ltd v Walker* [1999] Lloyd's Rep. I.R. 410, 418.
[87] (n 35) 394.
[88] [2017] EWHC 3301 (Comm).
[89] ibid, para [157].
[90] ibid, para [165].
[91] ibid, para [165] (emphasis added).
[92] ibid, paras [19], [64], [162].

reducing risks.[93] The greater reliance on risk surveys is reinforced by the reforms, which aligns with promoting a greater understanding of risk between the parties. The result is that the court is potentially at liberty to conclude – objectively, that there are risks the condition survey warranty might not reduce. Examples could include collision liability due to negligent navigation**,**[94] and failure to comply with a bunker fuel management recommendation. Consequently, certain risks may still be covered during the period of suspension of cover. This is to the clear advantage of assureds, and significant in terms of rebalancing the interests of the insurer and assured – it continues to afford a sensible, commercial approach reliant on judicial common sense and fact-finding.

The pertinent question is whether, and if so how, this analysis changes if the parties have incorporated standard terms or have positioned a term at the beginning of a policy under a heading labelled 'risk-defining terms', thereby explicitly agreeing particular terms are risk-defining. Put another way, can the distinction between risk-defining and risk-mitigating terms ever be purely a matter of good drafting?

As discussed above, when considering the Law Commissions' guidance, and interpreting what the parties objectively intended by reference to the factual matrix construction principles, the aim of the court's enquiry is ascertaining the warranty's objective purpose. The courts, as always, look beyond any 'label' ascribed to a provision in a policy – any form of words from which the intention to warrant can be inferred is a 'warranty',[95] the corollary being that the inclusion of the word 'warranty' in a policy is neither strictly necessary nor definitive[96] – although it assists in determining the parties' intentions. Lord Hodge SCJ, delivering the leading judgment[97] in a recent non-marine Supreme Court decision, *Wood*,[98] re-emphasised the importance of considering the policy as a whole in contractual interpretation: in ascertaining the objective meaning of the contractual language, the court considers the contract as a whole – including its nature, formality and the quality of the drafting – attributing a greater or lesser weight to these aspects, in an assessment of its wider context, as relevant on the facts of each particular case.[99] Significantly, in the context of this analysis, in the case of competing meanings it is the construction which is more consistent with business common sense which is to be favoured; this is determined by balancing (1) the suggestions of the language used ("textualism") and (2) the factual background and the practical implications of competing constructions ("contextualism").[100]

In *Wood*, the disputed term was an indemnity clause in a share purchase agreement but in this hypothetical instance involving section 11, the prima facie contractual language will be considered against the assured's argument that the warranty in question is risk-mitigating. In light of *Wood*, if a risk-defining warranty is drafted in a complex commercial agreement which has been negotiated and drafted by professionals, greater emphasis must be attributed to a textual analysis because the policy represents the result of a negotiated compromise;[101] indeed, such

[93] Nigel Chapman and Simon Jackson, 'Are marine warranty surveys meeting expectations?' (2012) <https://www.clydeco.com/uploads/Files/Publications/2012/1207_Legal_analysis_(2).pdf> accessed 13 June 2017.
[94] Jonathan Evans, 'Insurance Act 2015 – Implications for Marine Insurance' (Kennedys Law LLP lecture handout, 2017).
[95] MIA 1906, s. 35(2).
[96] *"The Pride of Donegal"* [2002] EWHC 24 (Comm).
[97] SCJJ Neuberger, Mance, Clarke and Sumption concurred.
[98] [2017] UKSC 24.
[99] (n 98) para [10].
[100] (n 98) para [12].
[101] (n 98) para [11].

a contract will contain a multitude of risk-managing terms such as indemnities, warranties, exclusions and limitation clauses. Consequently, the incorporation of standard terms, or the inclusion of a warranty under a heading entitled 'risk-defining terms' in a policy, will generally mean that any assured's 'last hope' argument that the disputed warranty is, in fact, risk-mitigating based on a purposive interpretation may not find "a receptive ear"[102] – unless it produces a commercial absurdity, the courts do not seek to rewrite the bargain.

In the minority of marine policies which lack clarity in their drafting, or are otherwise less formal or sophisticated policies, it is possible that a disputed warranty may be considered in isolation – an interpretation which would have favoured Capita, in *Wood*, as indemnitee. The foregoing analysis indicates that the distinction between risk-defining and risk-mitigating terms for the purposes of section 11 is, on the face of it, one of good drafting: the court *must* consider the quality of the drafting of the terms in question. Nevertheless, the language used – the precise drafting – is only *one* of the elements which weighs in the balance with the factual background and the practical implications of competing constructions. Even if the contract is a commercial one, the enquiry the courts must undertake is more onerous than reading the words "risk-defining" in isolation and drawing a conclusion there – it *must* consider the contract as a whole and make an assessment as to whether to attribute more or less weight to elements of its wider context, in determining its objective meaning. For this reason, it is submitted that the distinction between risk-defining and risk-mitigating terms for the purpose of section 11 is an inherent one.

2.2 Class and class maintained warranties

The Law Commissions indicated that class and class maintained warranties are risk-defining: they effect either the whole risk, or a significant part of the risk. Nevertheless, it is mooted here whether this is the correct approach due to inconsistency among leading marine insurance practitioners as to their classification.

While one considers them to be "obvious" risk-defining terms "one regularly sees"[103] in hull policies, another is of the opinion that such terms are intended by the parties to reduce the risk of certain types of loss.[104] As commercial law should endeavour to place the parties' intentions at the forefront of interpretation, if the term was intended to reduce the risk of a particular type of loss it should follow that section 11 applies. This would arguably mean, for example, that insurers could not cite breach of a class warranty as a defence to machinery breakdown because the crew negligently failed to clean the lubricating oil filters.[105]

However, it would be a bold decision by the courts to disregard the Law Commissions' interpretive guidance, particularly as the market will be anticipating, and indeed reliant, on such warranties being categorised as risk-defining. Indeed, the International Underwriting Association (IUA) has published guidance for use with ITC-Hulls which mimics the pre-reform law.[106] It is submitted that this is the correct approach: as warranties traditionally defined,[107] they are imperative to insurers in determining the exact risk(s) they are agreeing to

[102] cf (n 24) 122.
[103] Ik Wei Chong, 'New act overhauls UK insurance law' (Tanker Shipping & Trade 15 August 2016) <www.tankershipping.com/news/view,new-act-overhauls-uk-insurance-law_44152.htm > accessed 13 June 2017.
[104] (n 94).
[105] ibid.
[106] JHC, 'JH2016005 Insurance Contract Law' (International Underwriting Association of London 8 July 2016) <www.iuaclauses.co.uk/site/cms/contentDocumentView.asp?chapter=8&category=54> accessed September 2017.
[107] (n 17) para [18.24].

underwrite; consequently, it is right not to diminish their protection. Moreover, it is submitted that this supports the argument that the distinction between risk-defining and risk-mitigating terms is inherent: once again, the Law Commissions' guidance and determination of what the parties objectively intended, by reference to the factual matrix construction principles, points towards the warranty's objective purpose as defining the risk as a whole and there will be no scope, in the context of agreed standard terms, for an alternative argument or conclusion in light of *Wood*.

For the sake of completeness, it is worth highlighting Clauses 13.1.4 and 13.1.5 of the ITC-Hulls which detail the International Safety Management Code (ISM), adopted in 2002. Compliance requires acquiring the 'Document of Compliance and Safety Management Certificate' – it therefore arguably relates to the risk of loss and promotes the safety of crew at sea and the IUA's guidance it is expressly stated that such terms are risk-defining.[108] It is possible for a technical, de minimis, non-compliance to breach a requirement and result in the insurers' automatic discharge from liability, despite it having no impact on the risk insured or the loss occurring. While this appears unduly balanced in favour of the insurer, Soyer supports the position[109] and it is difficult to construct a convincing argument to the contrary: insurers are not enabled to ensure that documentary compliance is reflected in reality; moreover, as the clause applies to vessels of more than 500 tonnes, this would be too onerous a task for insurers which would not favour the expedient nature of commerce.

2.3. Implied warranties – Seaworthiness

2.3.1. *An overview and the problems stated*

Four warranties are implied into marine insurance contracts by the MIA 1906[110] and, according to the Lloyd's Market Association (LMA), they "remain important".[111] Seaworthiness[112] provides the focus because, despite its diminished use,[113] it aptly highlights section 10's conceptual difficulties. There is a minority case to say that a more straightforward option would have been to have repealed the seaworthiness warranty.[114] The fact of its diminished use in practice perhaps renders the conceptual difficulties with regard to remedy somewhat academic; indeed, the essence of the warranty is maintained, to an extent, by virtue of the condition survey and class and class maintained warranties. However, more than two centuries after its conception – and during a period of unprecedented legislative modernisation, it was not resigned from the statute book which somewhat underlines its significance.

It is implied, in voyage policies only,[115] that the vessel is seaworthy and reasonably fit to carry the goods to their intended destination at the start of the voyage.[116] The precise conceptual difficulty with remedy per se is because

[108] (n 106).
[109] Baris Soyer, 'Potential Legal Implications of ISM Code for Marine Insurance' (1998) *International Journal of Insurance Law* 279.
[110] ss.36-41.
[111] (n 17), para [17.79].
[112] MIA 1906, s.39.
[113] (n 5), 1019.
[114] (n 17) para [17.79].
[115] *Gibson v Small* (1853) 4 HL Cas 353 cf *Fawcus v Sarsfield* (1856) 6 E&B 192.
[116] If the policy attaches while the vessel is in port, s.39(2) implies a warranty that the vessel is reasonably fit to withstand the ordinary perils of the port.

the duty only applies at the commencement of the voyage: "the insured makes no warranty (…) that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage".[117] Section 39(4) of the MIA 1906 offers some guidance on what the warranty precisely encompasses: the vessel must be "reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured". For example, the engine must function properly,[118] there must be a sufficient number of competent crew on board to deal with the ordinary perils of the voyage[119] and the vessel must be satisfactorily fueled.[120] Therefore, it is a relative concept, depending on the particular voyage in question, which makes for a flexibly applied doctrine.[121] The questions raised are (1) whether it is possible to remedy a breach of the implied warranty of seaworthiness and (2) is it risk-defining for the purposes of section 11?

2.3.2. *Remedying a breach*

a. Breaches which cannot be remedied

The '"attributable to something happening" wording in section 10 is intended to cater for the situation in which loss arises as a result of an event which occurred during the period of suspension, but is not actually suffered until after the breach has been "remedied"'.[122] Crucially, this acknowledges that there will be instances in which remedying the breach will *not* result in the risk returning to that as agreed by the insurer[123] and "attributable to" will more than likely require an analysis of what caused the loss between the event during the period of suspension and the loss arising post remedy which it is not a "straightforward exercise".[124] An example in the context of seaworthiness is found in *"The Princess of the Stars"*, referred to above: a typhoon warranty provision was breached when the vessel set sail en route within the realms of a typhoon's path and the vessel consequently sank. A similar example – albeit unrelated to seaworthiness – is if an insured vessel sinks due to a structural defect sustained during salvage operations in breach of warranty, after completion of said operations.[125]

b. Breaches which can be remedied

The Law Commissions provided an example: if a ship sets sail with insufficient medicines, the warranty is breached; yet, if and when the medicine supply is replenished, the insurer will be back on risk.[126] This is logical and in keeping with the objective of an increased understanding of risk between the parties: upon replenishment the risk is returned to that which the insurer agreed to insure.

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[117] *Dixon v Sadler* (1839) 5 M&W 405, 414.
[118] *Gibson v Small* (1853) 4 HL Cas 353.
[119] ibid.
[120] *"The Pride of Donegal"* [2002] EWHC 24 (Comm).
[121] ibid.
[122] (n 6) para [89].
[123] (n 24) 114.
[124] ibid.
[125] ibid.
[126] Law Commission, *Insurance Contract Law: Misrepresentation, Non-disclosure and Breach of Warranty by the Insured* (Law Com CP No 184/Scottish Law Com DP 134, 2007), para [8.118].

On this basis, the legal analysis of *De Hahn* post reform would be as follows: a vessel which departs without sufficient crew to make it seaworthy, but which later acquires enough additional crew, prior to any loss – or any cause of loss[127] – occurring, has remedied the breach of warranty.[128] An analysis with regards to sufficient fuel needs a more detailed explanation.

c Sufficient fuel

If a voyage is particularly lengthy it is often divided into discrete stages to allow for refueling etc. The vessel must be seaworthy at the commencement of each stage.[129] Lord Porter stipulated in *Northumbrian Shipping Co Ltd v E Timm & Sons Ltd* [130] that sufficient fuel should be loaded to ensure the vessel can reach the next stage of its voyage, with an appropriate contingency; importantly, this is not to be reduced in the knowledge that there are bunkering facilities en route to the next port.

Following the introduction of section 10, it is tentatively submitted that this requirement be relaxed.[131] Lord Porter expressed concern that "failure of the master to make good the deficiency would not make the ship unseaworthy but would only be an instance of negligence on the part of her officers"; this would decrease the liabilities of the ship-owner and allow him to excuse his failure for performing his obligations on the ground that he had entrusted them to his servants, who in turn, were negligent.[132] To maintain the position to the contrary – that the ship was (un)seaworthy depending on whether the master bunkered or not en route, "would involve the possibility of her becoming unseaworthy at some place on the voyage, which would be difficult to define".[133] This view, which dates from 1939, is arguably not good law nowadays and can be distinguished: what matters is the mere fact of the vessel's having become unseaworthy and the consequential remedy on the part of the assured – which would be achieved, having acquired additional fuel. Nevertheless, this is admittedly an argument of limited significance given that cargo ships can now carry a considerable amount of fuel on-board.

2.3.3. *The status of the common law and the conceptual difficulty with remedy*

The proposition that a breach can be remedied is seemingly in contradiction with existing common law. Ordinarily, statute overrides the common law but, in this instance, there is ambiguity; Merkin and Gürses argue regard the implied warranties to have been implicitly repealed and that a "bolder legislative approach would have been to make [this] explicit" and for the common law to cease to have effect.[134]

The common law position is outlined in *Quebec Marine Insurance Co v Commercial Bank of Canada*.[135] There was a defect in the ship's boiler before it set sail and she became disabled during the voyage. She was put into

[127] IA 2015, s. 10(2)
[128] (n 17) para [17.45].
[129] MIA 1906, section 39(3); *Thin v Richards & Co* [1892] 2 QB 151, 143.
[130] [1939] AC 397 (HL), 413-414.
[131] Setting aside the issue of potential criminal liability under The Merchant Shipping Act 1995.
[132] (n 130).
[133] ibid.
[134] (n 21) 459.
[135] (1869-71) LR 3 PC 234.

port for repair and afterwards, continued at sea, where she perished due to bad weather. Counsel argued that when the breach was remedied before the loss, the insurer should be liable.[136] However, Lord Penzance was unequivocally against what he viewed to be a "position of perilous latitude".[137]

Nonetheless, it is interesting to note that a ship is not deemed to be unseaworthy by virtue of some trivial defect which can later be remedied by competent crew. Lord Esher M.R. noted an example includes a port-hole which is left open but can easily be shut at any moment;[138] however, this remains the position even where the defect is not in fact remedied because seaworthiness is assessed at voyage commencement. Indeed, this is why it is conceptually difficult to think of any breach of this warranty having been remedied because the warranty's effectiveness is only imperative at the commencement of the voyage. Therefore, it could be easily presumed that, in practice, a breach might suspend the assured's cover indefinitely, replicating the pre-reform scenario as the warranty was frequently 'Held-covered', making it a suspensory condition.[139]

2.3.4. *The case for a continuing duty*

In 1816, Lord Redesdale proffered as a justification for the warranty that:

> 'Unless the assured were bound to take care that the vessel was in every respect seaworthy, the consequence would be most mischievous: for the effect of insurance would be to render those chiefly interested much more careless about the condition of the ship, and the lives of those engaged in navigating her.[140]'

It is a justification which places, for public policy reasons, primacy on the safety of crew at sea. Yet, this judgment, and indeed this class of warranty, emanate from an era of rudimentary sea faring.[141] It is therefore questionable whether a warranty of continued seaworthiness would be an appropriate development which adequately reflects technological advances. It is now possible for an assessment to be made, prior to departure, that although a vessel's engine(s) is in need of a minor repair, for example, it can nevertheless safely arrive at a port, say two miles into its voyage, for repair prior to continuing – with especial emphasis on "minor" and "safely".[142]

One potential difficulty is that the requisite test when determining seaworthiness is concerned with the actual state of the vessel and not whether the owners acted with due diligence.[143] However, Clarke LJ held that the reasonably prudent owner test is relevant to the extent that, had they known about it, the prudent owner would have taken steps to rectify the problem and not have risked adverse consequences.[144] In making an assessment that a vessel

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[136] Attempting to mistakenly rely on Lord Tenterden's judgment in *Weir v Aberdeen* 2 B&Ald 320.
[137] (n 135) 244.
[138] *Hedley v The Pinkney and Sons Steamship Co Ltd* [1892] 1 QB 58, 65; *Steel v State Line Steamship Co* 3 AC 72, (1877) 4 R (HL) 103.
[139] (n 21) 458.
[140] *Wilkie v Geddes* (1816) 3 Dow 57, 60.
[141] Michael Mustill, 'Fault and Marine Loss' (1988) *LMCLQ* 310, 347-349.
[142] Although *MacDonald v Mark Tod and Leigh Tod* [2006] CIV 2005-404-4451 highlights that differences in professional opinion between marine surveyors has the potential to be ripe for litigation, it should be remembered that a cause of action both in breach of contract, and in negligence, would be viable fallback avenues to pursue; *Regulus Ship Services PTE Ltd v Lundin Services BV* [2016] EWHC 2674 (Comm), [70].
[143] *"The Fjord Wind"* [2004] EWCA Civ 602, [2000] 2 Lloyd's Rep 191, 199.
[144] ibid.

can *safely* arrive at a port, say two miles away for repair, the ship-owner or charterer is not risking particularly adverse consequences in setting sail on time. In fact, since its efficacy would be upheld throughout the duration of the voyage, the standard imposed would arguably be raise; given that it is now possible to remedy breaches, assureds should be incentivised to do so to the extent that this is possible as *Redman v Wilson*[145] highlights, despite being an old case – a ship was abandoned, rather than repaired, after it began to leak and was unfit to continue sea voyage.

It is submitted that, based on the above reasoning, remedying a breach of the seaworthiness warranty is possible. In reality, it will depend upon the specific facts, but as a matter of legal analysis, it would complement the language of section 10 and be doctrinally sound. It would also strike a fair balance between the interests of the parties because if remedy is not possible, the effect of the old law is replicated and this is correct: there is no term more imperative to the risk in marine policies. Alternatively, in the event that it is deemed disproportionately harsh, the parties could justly exclude its application.

2.3.5. *Risk-defining or risk-mitigating?*

A difficult point arises when a warranty seemingly both (i) defines the risk as a whole and (ii) tends to reduce the risk of loss: are they mutually exclusive categories? As discussed above, the implied warranty of seaworthiness is comprehensive – fundamentally, the vessel must be reasonably fit to encounter the perils of the voyage upon which she embarks.[146] To this end, the warranty aims to reduce the risks posed by major maritime transportation which includes the risk of losses of a particular kind. For example, if a vessel requires a particular number of crew to sail, it must sail with the requisite number to reduce the risk of collision, navigational difficulties and catastrophes which occur on board;[147] indeed, the crew must be sufficiently trained – the warranty reduces the risk of loss by fire in requiring that the crew must be able to operate the fire-fighting equipment aboard the vessel.[148] Additionally, the vessel must be sufficiently fueled to ensure it is not stranded and it should not have any structural defects, latent or otherwise, such as a defective hull which reduces the risk of loss by 'foundering', ie sinking or submerging.

In a similar vein, if a cargo container ship is to embark on a journey, say transporting parts from the Philippines to be assembled in China, the vessel "should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, must be fairly expected to encounter"[149] – this means that a cargo container ship should not list when fully loaded to reduce the loss of the cargo containers over-board. If a crude oil tanker is to embark on a journey through the Strait of Malacca and/or the South China Sea it must have sufficient crew and sophisticated and operative navigation and communication equipment to attempt to reduce the risk of losses from piracy, ie kidnap and ransom and theft of fuel which is so frequently siphoned off and sold on the black market.

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[145] 153 ER 562, (1845) 14 M&W 476.
[146] *Martin Maritime Ltd v Provident Capital Indemnity Fund Ltd ("The Lydia Flag")* [1998] 2 Lloyd's Rep 652, 656.
[147] (n 8).
[148] (n 15).
[149] *Steel v Slate Line Steamship Co* (1877) 3 App. Cas. 72, 77.

Merkin and Gürses query whether the distinction between risk-defining and risk-mitigating terms is inherent or a matter of good drafting[150] and on this analysis, it is unclear: they are ostensibly mutually exclusive categories. The implied warranty does aim to reduce the risk of losses of a particular kind, an analysis supported by The Law Commissions' guidance which suggested section 11 shall apply in all cases where the loss which occurred was not related to the breach of the implied warranty.[151] Whether this is actually reflected in section 11 itself is another matter; but the real question is, if it is, does this mean that the warranty cannot simultaneously be one which defines the risk as a whole?

The editors of Arnould postulate that the warranty cannot sensibly be regarded as a risk-mitigating term because it aims to reduce a particular kind of loss: since perils of the sea are "perils of indefinite extent", as partially outlined above, it therefore follows that its impact is far too broad for section 11(1)(a).[152] If the distinction between risk-defining and risk-mitigating provisions for the purposes of section 11 is a binary, mutually exclusive one, it would follow, on this argument, that the warranty is risk-defining.

Kendall and Wright, however, argue that terms which are risk-defining can in fact simultaneously function as risk-mitigating terms: in the event of an interpretive conflict, the exception in section 11(1) prevails.[153] This is apparently supported by section 11(2) which states that if a term falls within section 11(1) then a breach of that term will not cause the insurer's liability to be excluded, limited or discharged in respect of other types of loss[154] – although the caveat is that satisfying section 11(3) may prove to be problematic. This author acknowledges the strength in this argument not in the least because it is an interpretation which utilises section 11 to maximum effect for assureds.

Perhaps the real question is whether, once the matter has been determined for the first time, there will be any scope to subsequently challenge its application? While the warranty is a flexibly applied one, in accordance with the facts of each case, the fact of its diminished use suggests this will not be a frequently litigated point.

Conclusion: does the Insurance Act 2015 represent a significant change to the law of marine warranties?

Song and Hjalmarsson predicted that section 10 would find limited application in practice for two reasons.[155] The first is because terms will be drafted as conditions precedent rather than warranties to avoid the ambit of section 10. In insurance law, conditions are analysed in the same way innominate terms are analysed in contract law: a breach confers upon the innocent party either the right to repudiate the contract as a whole, or a right to damages, depending on the seriousness of the breach. The question to ask is: does the breach go to the "root" of the contract?[156] In other words, is the innocent party deprived of the benefit they were expecting to gain as a party to

[150] (n 21) 455.
[151] (n 17) paras [17.82] – [17.84].
[152] Robert Merkin and others, Arnould: Law of Marine Insurance and Average (1st supplement, 18th edn, Sweet & Maxwell 2016), para [1.3].
[153] David Kendall and Harry Wright, 'A practical guide to the Insurance Act 2015' (Taylor & Francis Ltd (2017), Chapter 7.
[154] (n 17) para [18.37].
[155] Mexian Song and Johanna Hjalmarsson, 'The Insurance Act 2015 and marine insurance' (2016) *Shipping and Trade Law* 1, 3.
[156] *Hong Kong Fir Shipping Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26; *Friends Provident Life & Pensions Ltd v Sirius International Insurance Corp* [2005] EWCA Civ 601; [2005] 2 All E.R. (Comm) 145.

the contract? If answered in the affirmative, the innocent party can repudiate the contract as a whole. This author questions whether section 10 should have applied to conditions precedent? Otherwise, insurers might demand conditions precedent "of all manners" to replicate the former, draconian law.[157] Nevertheless, its practical effect would likely have been limited, since insurers could opt to contract out of section 10 altogether, although in respect of Small and Medium-sized Enterprises (SMEs) in particular, satisfying the transparency requirements might well be onerous.[158] Additionally, so far as section 11 is concerned, it is immaterial whether a clause is drafted as a warranty or condition precedent providing it is risk-defining.

The second reason cited is that the 2016-17 Rules for eight P&I Clubs have contracted out of sections 10 *and* 11.[159] Sections 15-17 of the IA 2015 govern contracting the Act out and section 16 concerns non-consumer insurance contracts: it is possible providing that the "transparency requirements" stipulated in section 17 are adhered to.[160] This means that the insurer must take sufficient steps to draw the "disadvantageous term" to the assured's attention before the contract is entered into or the variation agreed[161] and it must be clear and unambiguous as to its effect.[162] Contracting out might prove to be routine in all classes of insurance, but is predicted to be widespread in the marine market.[163]

Indeed, it was noted as far back as 2008 that the London market did not appear to be detrimentally impacted by "draconian" warranties, accounting for 23.7% of the worlds' marine insurance market in terms of premium income.[164] This may, in part, be due to the numerous ways both the market[165] and the judiciary[166] found to circumvent its harshness. That said, Soyer noted that this figure was down from 31.2% in 1991 and highlighted anecdotal evidence indicating a preference for German and Norwegian markets.[167] Nevertheless, figures indicate that the global marine insurance industry grew by 3% between 2010 and 2013, and London kept up – as of 2013, it continued to be a market leader with a market share of 33.3% and a gross written premium total of £5.9 billion. Yet local marine capacity in Asia – in Singapore in particular, which has established itself as a regional hub for Asian marine insurance business, represents a serious threat to the weight and longevity of the London Market:[168] while the reasons for this are multidimensional, it certainly aligns with an appetite for change.

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[157] Richard Aikens, 'Reforming Insurance Warranties - Are We Finally Moving Forward?' Chapter 7 in Baris Soyer (ed), Reforming Marine and Commercial Insurance Law (Informa 2008), 128.
[158] IA 2015, s.17.
[159] (n 128); The UK P&I, Rule 5L, NORTH Rule 6(1), (2) (b), (c), West of England Rule 21(1)(b) (c), Brittania Class 3 Rule 3 3(5), Steamship Class 1 Rule 7 IV, London Class 5 Rule 43 43.1.1, Shipowners Rule 1, II A, B, Standard Section A 1.5.1. and 1.5.2.
[160] IA 2015, s.16(2).
[161] IA 2015, s.17(2).
[162] IA 2015, s.17(3).
[163] (n 19), 9.
[164] (n 131).
[165] In the form of 'Held Covered' clauses, eg cl.3 ITC-Hulls (01.10.83); *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep. 560, 567.
[166] For example, *"The Milasan"* [2000] 2 Lloyd's Rep 458; *"The Newfoundland Explorer"* [2006] EWHC 429 (Admlty); *"The Resolute"* [2008] EWCA Civ 1314.
[167] (n 31) 385.
[168] London Market Group, 'London Matters – The competitive position of the London Insurance Market' (London Market Group and The Boston Consulting Group 2014) <www.lmalloyds.com/CMDownload.aspx?ContentKey=1310e396-0521-490c-8009-b476fc8bee56&ContentItemKey=124ac2aa-c5f6-4cdf-af08-123e2ecb5482> accessed September 2017, Figures 9 and 10.

Sections 10 and 11 appear to strike the right balance of interests between the parties: insurers have the option to contract out of the suspensive effect if and when it deems it necessary, whereas for assureds, warranties are relieved of their most draconian features. It is section 10's interrelation with section 11 which is curious; regarding the distinction between risk-defining and risk-mitigating terms, it has been the aim of this paper to suggest that the distinction, in the language of Merkin and Gürses, is an "inherent" one – ie is the distinction is intrinsic to a proper interpretation of section 11, rather than a matter of good drafting.[169] More generally, whether other insurance markets follow the lead of the marine market in contracting out the long-awaited reforms remains to be seen.

[169] (n 7) 455.