

集美大学

LEGAL ANALYSIS OF WARRANTY IN MARINE INSURANCE CONTRACT – ENGLISH LAW AND CHINESE LAW PERSPECTIVES

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Agenda

I. Introduction

II. Warranties under English Law

III. Warranties in Chinese Law

**IV. Comment on the
development of warranties**



I. Introduction



• Introduction: English Law

- The difference between a warranty in marine insurance law and in contract law is quite pronounced.
- In contract law, terms of a contract are either conditions, warranties or intermediate terms.
- In marine insurance law, traditionally, a warranty is *a promissory 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 the assured affirms or negates the existence of a particular state of facts. Following it, *the warranty is a condition* that must be exactly complied with, whether it be material to the risk or not (Marine Insurance Act (MIA) 1906, Section 33)



• Introduction: English Law

- Many jurisdictions including common law and civil law have adopted or learned from the MIA 1906. Accordingly, The doctrine of warranties has been incorporated into their own legislation.
- However, severe criticisms on the warranty clause in marine insurance have experienced for many years, because the principal reason is the fact that under the current law, a breach of a warranty by the assured allows the insurer to terminate the insurance cover and withdraw from its contractual obligations. Therefore, the new warranty system in the Insurance Act 2015 (IA 2015) becomes one of achievements of a ten-year reform programme initiated by the English and Scottish Law Commissions in 2006.
- **Question: is this new warranty system perfect? why?**



• Introduction: Chinese Law

- Chinese law follows the civil law tradition which does not provide for a system of warranties either in contract law or in insurance law.
- However, in Chapter 12 of the Maritime Code of P.R.C.1992 (CMC 1992), the principles of MIA 1906 are followed. Accordingly, the concept of the warranty is provided through legislation. The thing is that the warranty system has not been established in the insurance law field.
- Questions: how are warranty clauses judicially interpreted and given effect in Chinese law?
- Along with the development of the warranty in English law, where is Chinese law going?
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Warranties Under English Law

- I) the warranty framework in MIA 1906**
- II) the deficiencies of the warranty system in MIA 1906**
- III) the new era: Insurance Act 2015 (IA 2015)**
- IV) the underlying legal issues**



• The Warranty Framework in MIA 1906

- A short history of MIA 1906:

MIA 1906 was drafted by Sir Mackenzie Dalzell Chalmers after he reviewed over 2,000 cases.

Warranties historically were construed strictly based on the early cases.

- the principles of warranty as established by early cases were
- (1) warranties were the terms on which the contract was founded;
- (2) they must be strictly complied with; and
- (3) it was immaterial whether or not the loss was caused by non-compliance with the warranty, as it was immaterial for what purpose the warranty was introduced.

All these principles have been codified into the MIA 1906.

cases—legislation— application of legislation handed down by courts



• The Warranty Framework in MIA 1906

- the warranty framework: s.33 to s.41, --
- -- s.33 nature of warranty;
- -- s. 34 when breach of warranty excused;
- -- s. 35 express warranties;
- -- s.36 warranty of neutrality;
- -- s.37 no implied warranty of nationality;
- -- s.38 warranty of good safety;
- -- s.39 warranty of seaworthiness of ship; s.40 no implied warranty that goods are seaworthy; s.41 warranty of legality.
- **These sections provided definition of promissory warranties, set out remedy for breach of a warranty, types of warranties and implied warranties In marine insurance policies.**
- **Note:** the warranty system provided by the MIA 1906 cannot only apply a marine insurance contract, but also an insurance contract. **but there is no implied warranty in non-marine insurance. therefore, ss.39 to 41 do not apply the non-marine insurance contract.**



• The Warranty Framework in MIA 1906

- s.33(1), MIA 1906, a definition of warranty :
- A warranty ... 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*.
- In accordance with the definition above, a warranty clause was particularized as a condition precedent by Lord Goff in *The Good Luck* where he held -
- *In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and prima facie, at least that the compliance with that warranty is a condition precedent to the attaching of the risk.---* *Bank of Nova Scotia v. Hellenic Mutual War Risk Association (Bermuda) (The Good Luck)*, [1989] 2 Lloyd 's Rep. 238 (C.A.)--- **it has been repealed after IA 2015 came into effect.**



• The Warranty Framework in MIA 1906

- s.33(2), MIA 1906, the type of warranties: A warranty may be express or implied.
- s.33(3) Legal effect for breach of a warranty
- A warranty is a condition which must be exactly complied with, whether it be material to the risk or not. *If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.* (the second sentence is omitted by IA 2015 which came into effect on 12 August 2016.)
- It follows that the breach of a warranty was considered to produce the same results as a breach of condition as per the law of contract in general. Consequently, **the breach of a warranty automatically discharged the insurer from liability.** (*The Good Luck*), [1991] 2 Lloyd's Rep. 191 (H.L.)
- The automatic discharge from liability was justified by the rationale of warranties in insurance law that the insurer only accepted the risk provided that the warranty was fulfilled.



• **The deficiencies of the warranty system in MIA 1906**

- **(I) Basis of the contract:** The presentation made by the assured in the slip could be converted into the warranty clause by virtue of the basis of the contractual clause.
- **(II) strict compliance:** there are only two exceptional circumstances to excuse the assured' s liability for breach of a warranty.
 - (1) by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract; or
 - (2) compliance with the warranty is rendered unlawful by any subsequent law. (s.34 (1), MIA 1906, omitted after IA 2015 came into effect.)
- **(II) Breach cannot be remedied.**
- **(III) the absence of a causal link: it is not necessary to examine** a causal link between the breach of warranty and the occurrence of the assured' s alleged incident.
- **Consequence:** The prominent role of London market has been challenged by other insurance market esp. Scandinavia insurance market.



• **The New Era: Insurance Act 2015 (IA 2015)**

- **Prior to IA 2015**, in order to avoid the deficiency of MIA 1906, in some cases warranties could be regarded as suspensive or descriptive. It follows that in the event of a breach of warranties, the marine insurance policy will be suspended until the breach is remedied.

(De Maurier (Jewels) Ltd v. Bastion Insurance Co Ltd [1967] 2 Lloyd' s Rep 550, 558-559; Svenska Handelsbanken v. Sun Alliance and London Insurance plc [1996] 1 Lloyd' s Rep 519, 551-553; Kler Knitwear Limited v. Lombard General Insurance Co. Ltd [2000] Lloyd's Rep IR 47.)

- Since 2006, the English and Scottish Law Commissions started to work together for a joint consultant paper in the joint insurance law project. After experiencing a ten-year reform project, **IA 2015 was enacted which came into effect on 12 August 2016.**



• **The New Era: Insurance Act 2015 (IA 2015)**

- **Basis of the contract:**
- **S.9 Warranties and representations**
- (1) This section applies to representations made by the insured in connection with—
 - (a) a proposed non-consumer insurance contract, or
 - (b) a proposed variation to a non-consumer insurance contract.
- (2) Such a representation is not capable of being converted into a warranty by means of any provision of the non-consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).
- **it follows that it is not possible to create a warranty by a basis of the contract clause.**



• **The New Era: Insurance Act 2015 (IA 2015)**

- **Breach can be remedied.**
- **s.10 (1)** “any rule of law that breach of a warranty (express or implied) in a contract of insurance results in the discharge of the insurer’s liability under the contract is abolished” .
- **s.10(2)** “an insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached **but before the breach has been remedied.**”
- It follows that an insurer has no right to discharge the liability due to the breach of a warranty even if the insurer has no liability before the breach has been remedied.



• **The New Era: Insurance Act 2015 (IA 2015)**

- **s.11 entitled “Terms not relevant to the actual loss”**
- (1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following: (a) loss of a particular kind, (b) loss at a particular location, (c) loss at a particular time.
- (2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured satisfies subsection (3).
- **it stresses the interlink between the loss arising from a particular type and the associated liability.**
- **ss.10 and 11 are not compulsory provisions.** It follows that the insurer can exclude them from being incorporated into the insurance contract so long as it can satisfy the transparency requirement of s.17 of IA 2015.



- **The Underlying Legal Issues**

- S.11 stresses the interlink between the loss arising from a particular type and the associated liability, but the Law Commission stresses that a direct causal link between the breach and ultimate loss is not required.
- How to understand it?



Warranties Under Chinese Law

- I) the warranty framework in Chinese law
- II) understanding and application of a warranty clause: case study
- III) where will the warranty go?



• The Warranty Framework In Chinese Law

• I) Source of Law:

- **legislation:** general law: Civil Code 2020 and Insurance Law

special law: CMC 1992 (priority);

• **Judicial Interpretation:**

- --- Provisions of the Supreme People's Court on Several Issues on the Trial of Cases Concerning Marine Insurance Disputes (Provisions of Marine Insurance Disputes 2006) ;
- --- Interpretations I, II, III and IV of the SPC on Several Issues concerning the Application of the Insurance Law of the People's Republic of China
- **guiding cases and typical cases:** no reported insurance cases regarding the warranty clause



• The Warranty Framework In Chinese Law

- II) the current system

- 1) definition?

- **clarification:** “warranty” translated into Chinese has the same meaning as “guarantee” . Thus, it is assumed that the concept of “warranty” is connected to the Guarantee Law of P.R.C.1995 which provides that-
 - Guarantee referred to in this law means the acts of a guarantor to pay the debts or assume the responsibility under an agreement between the guarantor and the creditor, in case the debtor fails to pay the debts
- **No definition:** there is no definition of “warranty” although the consequence of a breach of a warranty is addressed in Article 235 of the CMC 1992 which stipulates that-
 - The assured shall notify the insurer in writing immediately where the assured has not complied with the warranty in the contract. The insurer may, upon receipt of the notice, terminate the contract or demand an amendment to the terms and conditions of the insurance coverage or an increase in the premium.



• The Warranty Framework In Chinese Law

- 2) No principles or doctrines of marine insurance
- 3) No implied warranty:
- 4) **freedom of contract**: the agreed warranty clause; apply the English law (*Taiwan Baili Shipping Co., San Lian Shipping Co. Ltd. v. Shenzhen Branch of People Insurance Company of China* – English law, Guangdong High Court)



• The Warranty Framework In Chinese Law

• III) the underlying reform

- the Notes and Proposal on the Revision of the CMC 1992 have suggested that the marine warranty provisions in Chapter 12 of the CMC 1992 be revised by reference to the English insurance law.
- 1) the concept of “warranty” under the MIA 1906 into Chinese law;
- 2) *The insurer must perform the obligation of the written notice in order to terminate the contract;*
- 3) there must be a causal link between the breach of warranty and the occurrence of the assured’ s alleged incident if the insurer attempts to escape from his liability.
- **It is difficult to judge whether or when the above provisions might apply officially.**



• Understanding And Application Of A Warranty Clause

- **types of warranties: implied and express**
- **1) The implied warranty:**
 - 1) it usually cannot be recognized by the courts, but not all.
 - 2) In accordance with Article 120 of Summary of Second Working Conference on Foreign-related Commercial and Maritime Trials, it is provided that “[I]n a ship voyage policy, the insured ship shall be seaworthy upon the commencement of voyage; where the insured violates this provision, the insurer shall not be liable for indemnification from the day of violation.” --- it follows that this might be treated as an implied warranty by legislation.
 - However, such implied warranty does not extend to cargoworthiness whether by legislation or judicial interpretation.
 - 3) some scholars purport to express their opinions on implied warranties to Chinese courts. They make a reference to the type of implied warranty in the MIA 1906 as representing the international customary law. But such opinions remain simply in theory rather than in practice.



• Understanding And Application Of A Warranty Clause

- II) The express warranty:
 - 1) an implied warranty is incorporated into the contract to be an express warranty;
 - 2) **the *contra preferentem* (interpretation against the draftsman) rule**: courts are accustomed to following the general principles in contract law to interpret them. The typical example is that once there is a dispute involving an express warranty, the interpretation will be beneficial to the assured in accordance with Article 498 of the Civil Code 2020
 - 3) **“the protection of the assured” principle**
 - in Chinese Insurance Law, it does not matter whether the contract is in standard form or not, it must, in any event, be beneficial to the assured.

Article 30: if there is any dispute over the interpretation of clauses in an insurance contract between the insurer and the assured or his beneficiary, and then the courts or arbitrators shall interpret the disputed clauses in favour of the assured and the beneficiary.



- **Understanding And Application Of A Warranty Clause:**

- **Case Study**

- **I) overview:**

- ---few cases regarding the understanding and application of a warranty clause;
- --- normally, a court does not simply apply the warranty clause to exclude the insurer' s ability. In legal practice, the court often claims that the insured breaches both the warranty clause and the duty of disclosure; alternatively, the court held that the insured breached the contractual obligation. Therefore, the insurer was entitled to refuse to indemnify.

- **II) case analysis: conflicting cases regarding the warranty clause**



• Case Study (I)

- 1) ***China Continent Property & Casualty Insurance Co. Ltd. v. Shanghai Port Machinery and Industries Co. Ltd***, [2010] H.G.M.S<H>Z.Z.D.41
- **Facts:** In the insurance policy, the date of departure was on 27 September 2007. But *Shanghai Port Machinery and Industries Co. Ltd.* did not actuate departure in accordance with that date. After the insured incident occurred, the insurance company claimed that the insured did not proceed on the date of departure of the ship which constituted a breach of a warranty clause. Therefore, they was not liable for the loss.
- **Legal issue:** The main dispute related to whether the clause regarding the agreed date was a warranty clause.



• Case Study (I)

- **The Shanghai Maritime Court** at the first trial held that the form of warranty must be written in the marine insurance contract in accordance with Article 235 of the CMC 1992. In addition, “**the protection of the assured**” principle was applied.
- **The Shanghai High People’ s Court** upheld the first decision and held further that the reason:
- the formation of the warranty clause included two aspects: one was that the formality of the contract was to be compatible with the requirement of the statute law; namely, the warranty must be a statement or a promise and the content was to be written in the contract; Another was that the substantive condition was to be consistent with the statute law; namely, that the content of a warranty clause expressed must be genuine; also the parties must be aware that the consequence of the statement or promise and the validity of the insurance contract were connected.



- **Case Study (I)**

- **overview:**

- first, the formality of the warranty must be satisfied, namely, it must be written definitively;
- secondly, the content of the warranty clauses and the validity of the contract must be relevant;
- finally, the application and interpretation of the contract must be beneficial to the assured rather than the insurer.



• Case Study (II)

- 2) *Chenco International Inc. v. Shanghai Branch, China Pacific Insurance Co. Ltd* [1997] H.H.F.S.Z.D.486 (Shanghai Maritime Court)
- **Fact:** The departure of a ship clause within a certain reasonable time did not expressly provide to be a warranty clause.
- **legal issue:** whether the departure of a ship within a certain reasonable time was a warranty clause in the insurance contract.
- **Held:** According to the customary law of marine insurance, if the departure of the ship goes beyond a reasonable time, the risk would be increased. Therefore, this clause constituted the warranty.



Where Will The Warranty Go?

guiding case?

Judicial Interpretation?

revision of legislation!

Notes 2020 and Proposal 2020
a skeletal warranty regime to
mirror the English law



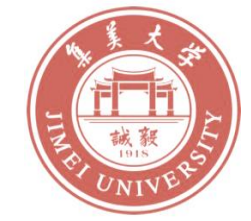
Comment On The Development Of Warranties

- **Question: is this new warranty system perfect? why?**
- **English law:** The main deficiencies have been addressed.
- However, two main issues may challenge to legal certainty regarding the application of the warranty due to ambiguities in certain provisions and the Explanatory Notes.
- First, given that the insurer may exclude the application of the IA 2015, how and to what extent this new warranty regime may be applied and interpreted are important issues.
- Secondly, **the Law Commission stresses that a direct causal link between the breach and ultimate loss is not required.**



Comment On The Development Of Warranties

- **Questions: how are warranty clauses judicially interpreted and given effect in Chinese law?**
- **Along with the development of the warranty in English law, where is Chinese law going?**
- **Chinese law:** objectively, there is no any improvement in the warranty system even if the Notes 2020 and Proposal 2020 have provided a skeletal warranty regime to mirror the English law, because no one can confirm whether and to what extent they can be incorporated in the revision of CMC 1992.
- the positive aspect is that the Notes and Proposal have avoided the deficiency raised by IA 2015 regarding the causal link between the breach and ultimate loss. In addition, the legal effect of the revised provision should be certainty not be chosen by the insurer.



谢谢!

