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ARTICLE

Comparative analysis of charter party clauses versus marine insurance contractual terms: present legal status and future trends

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Abstract

This paper aims to classify and assess the impact of charter party clauses against the contractual terms of marine insurance contracts. Initially, a contractual term may be classified as a condition, a warranty, or an innominate term when the nature of a clause is not yet classified. Based on this classification, the effectiveness of those terms and the available remedies vary significantly upon a contractual dispute or termination. Specifically, the classification of a term as a condition has similar effects in charter parties and insurance contracts, namely, the termination of the contract and/or claim for damages. Nevertheless, the marine insurance conditions also rely on the claim's seriousness to effectively provide the election of contractual termination, thus rendering them rather weakened compared to charter parties. At the same time, classifying a term as a warranty always had a different impact. The classification of a term as a warranty in a charter party may only offer as a remedy compensation for damages, but not the option to terminate the contract. In insurance contracts, the classification of a term as a warranty provides the same options to the affected party as a term classified as a condition, namely, the termination of the contract and/or claim for damages. With the introduction of MIA 2015, the affected party, when triggering a warranty, has a third option, namely, to be able to amend the contractual relationship in case reasons of termination emerge, protecting at the same time the other party, rendering it irresponsible of any damages or claims until the contractual relationship is reinstated.

Keywords Conditions · Warranties · Remedies · Charter parties · MIA 2015

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1 Introduction

In charter party contracts, conditions are essential contractual terms, and their fulfilment is vital for the continuation of a contract. If a party does not fulfil a condition, the other party can terminate the contract and/or claim damages. In the case of terms characterised as warranties or innominate terms, the affected party can only claim for damages but not repudiate the contract. However, should an innominate term be recognised as crucial due to the legislative framework or its importance to the contract, this term is regarded as a condition, giving the affected party the election to terminate the contract.

In insurance contracts, warranties used to have a *draconian* effect. For example, when a term was "triggered" by the assured, the insurer could terminate the contract and avoid the payment described in the insurance contract. However, this so-called "draconian effect" is believed to have been weakened with the introduction of the new MIA 2015 policy, giving the election to the insurer to either avoid the contract or provide time to the assured to amend issues to the contractual relationship (Merkin and Gürses 2015).

2 Materials and methods

The purpose of this paper is to examine and evaluate the present status and the relationship between the contractual terms of a charter party with those of a marine insurance contract in light of current changes in legislation (Smits 2017).

This paper is exploratory research, initially assessing the legal framework of the said issue (Budianto, 2020). Then, the analysis focuses on the most prominent cases and the most recent changes that affected the practical utilisation of the contractual terms (Otheitis and Kunc 2015).

The analysis of the relevant legislation is based on the doctrinal method, the dominant form in legal research, aiming to provide a systematic exposition of the legal and regulatory principles and to analyse the relationship between those principles to provide clarifications and detect the gaps in the existing legal framework (Tiller and Cross 2006; Boviatsis 2022(i)). This research method is qualitative and is very similar to critical analysis; the application of which is performed through (a) description of the existing and previous statutory and case law; (b) prescription, the essence of which is to search for practical solutions that may fit in the existing legal system (it overcomes problems arising from the existing law); and (c) justification, which is the case where after the analysis of legal principles a specific law can be categorised as "good law" (Liu and Cui 2020; Boviatsis and Daniil 2022(ii)).

The relevant legislation and case law are the primary sources of data. At the same time, evaluation of other similar research is often conducted to support the author's suggestions and demonstrate the extent of the issue in discussion (Zhao et al. 2019).

3 Classifying and assessing the terms in charter parties

3.1 Classification of terms in charter parties

Historically, contractual terms have either been characterised as "warranties" or "conditions". In charter parties, warranties have been developed as "safeguard" terms whose breach cannot impede the intended purpose of the contract (Wilson 2010). On the other hand, conditions are mutually dependent terms that are implicitly recognised as relevant in the contract context or expressly defined as they are by the parties (Goetz and Scott 1985). Any violation of a term, however insignificant it may seem, deprives the "part that is not in breach of the essential all benefit intended" (Gürses 2015). The breach relieves the innocent party, if it so chooses, of its other contractual obligations. Strict enforcement of conditions is considered acceptable compensation for the commercial certainty it provides to both parties (Bunge Corporation v Tradax Export 1981).

The categorisation of obligations into two separate categories proved simplistic and inconsistent with practical impediments. Moreover, individual contractual terms often serve multiple purposes, and the early categorisation of responsibilities as terms can produce unfair effects when the breach is not vital for the continuation of the contract and the intention of the two sides (Baatz 2020).

The categorisation of contractual terms was first implemented during the adjudication of the case of Hongkong Fir Shipping Ltd v Kisen Kaisha, in 1962. During the hearing it was found that the ship was unspoiled for the next 6 months. The engine room was in good condition, but due to the ship's age, it was necessary to be maintained by experienced engineers. In reality, however, the first engineer was an alcoholic, and the rest of the crew was incompetent. As a result, on the journey from Liverpool to Osaka, the engines suffered several breakdowns, for which the ship had to be left out of fare for repair for 3 months to be deemed seaworthy again. Whilst the ship was being repaired in Osaka, the charterers terminated the charter, citing the owner's violation of the airworthiness clause. The Court of Appeal held that the condition violated was an intermediate condition because the consequences of the breach of the airworthiness condition could vary from very serious to catastrophic, giving the charterer the right to terminate the contract or only claim damages.

In this prominent case, Judge Diplock L.J. established a third category of obligations, now known as "intermediate" terms, for which the consequences of not performing them cannot be determined in advance. Based on the above-mentioned case's ratio decidendi, an unforeseen breach should not lead to contractual termination, when especially the entire benefit that was intended to be received from the contract and the legal consequences of breaching such an undertaking was not intended by both parties, unless expressly provided for in the agreement, depending on the nature of the event in which the infringement occurs and do not automatically result from a previous classification of the commitment as a "condition" or "warranty" (Nolan 2008). But how is it possible to determine the parties' intentions and evaluate the severity of a contractual breach?

Using the obligation of airworthiness to underline his point, Diplock L.J. explained how violations of an obligation could be insignificant and quickly dealt with, such as a few loose screws or, more importantly, a threat to the physical integrity of the vessel. Classifying an obligation as an interim term allows courts to provide appeals depending on the consequences of the breach. Severe violations of the interim terms allow the innocent contracting party to terminate the contract, whilst minor violations only provide monetary compensation (Fisher 2015).

The House of Lords in the *Bunge v. Tradax* (1981) case confirmed the analysis of Hongkong Fir's interim terms and warned that the courts "should not rush to interpret contractual clauses as conditions". However, Judge Scarman clarified that the categorisation required a finding of the meaning attached to the term at the time of the conclusion of the contract through "explicit words or necessary consequences" (Chow 2020).

Suppose the parties intend to provide the innocent party with a right to establish a claim for any breach of a particular obligation. In that case, the court must maintain their wish and consider the term a condition. Otherwise, the court should classify the term as an intermediate term and only then proceed to an assessment of the nature and consequences of the breach to determine the appropriate remedy. "The appropriateness of allowing the need must compensate the contract cancellation for certainty". In other words, whilst the actual breach must not affect the characterisation of an obligation, the consequences of hypothetical violations studied by the parties after the contract are relative (Bennet 2006).

In another prominent case, the owners of the ship "Seaflower" Micado Shipping Ltd (*B.S. & N Ltd v Micado Shipping Ltd*, 2001) chartered their ship for a year for oil transportation. The Charter Agreement included a crucial clause that at the time the charter was signed, the vessel had received approval from MOBIL, CONOCO, B.P., and SHELL. Also, the owners guarantee that within 60 days, they will receive additional approval from EXXON. If during the charter, the ship loses even one of these approvals, they must immediately inform the charterers and restore it within 30 days; otherwise, the charterers have the right to cancel the charter agreement or reduce the fare until the owners prove that they have received the approvals from all five Major Oil Companies again.

The ship was delivered without the approval of EXXON to the charterers on 5/11/1997, and for 2 months, it was travelling without it. Finally, on 30/12/1997, the charterers requested the approval received by the ship from EXXON. The owners, however, had not acquired it and could not acquire it even after the end of the 60 days from the date of delivery of the ship as stipulated in the clause. As a result, the charterers expired the contract, demanded compensation for the damages, and returned the ship to the owners.

At the pre-trial stage, the judge held that the condition violated was not a condition but an intermediate condition and that the charterers did not have the right to terminate the charter agreement but only to claim compensation. When the case was brought to trial, the judge supported the owners and agreed with the above. But when the matter went to the court of appeal before Judges Waller, Rix, and Parker, whilst deciding that the wording of the clause did not clarify whether or not the receipt of approvals was of the utmost importance, they finally concluded that this clause was indeed a condition and the charterer was right to terminate the contract.

What is of great importance is that through this case, Judge Lord Waller has created a method for correctly judging when the breach of a contract term is considered a condition (O'Sullivan 2020).

3.2 The most prominent method of classifying a term: the Waller test

The test that L.J. Waller established in "The Seaflower" (2001) — also named as "Waller test" — states that a term of a contract will be considered as a condition (Lorenzon 2020):

(i) If expressly provided for in the statutes.
(ii) Whether it has been classified as the result of a previous court ruling (although it has been stated that many decisions on the matter are precise and open for review by the House of Lords and in many others, the facts that constitute the cases vary considerably, despite of the claim being on the same concept).
(iii) If the condition is expressly defined or the consequences of its breach, the innocent party's right to terminate the contract is explicitly provided for in the contract.
(iv) If the nature of the contractual agreement, the subject matter or the circumstances of the case lead to the conclusion that the parties must, with the necessary consequences, have as their object the purpose of constraining the innocent party from the further performance of its obligations if the condition has not been fully and accurately met.

Whilst the categorisation of specific contract terms depends on the particular nature and circumstances of each agreement, Waller L.J. identified different scenarios in The Seaflower where a specific term should be treated as a condition (B. S. & N. Ltd v Micado Shipping Ltd 2001): (1) when expressly provided for by English law, under which the contract was executed; (2) when it is recognised as such under English law by court order; (3) when defined as such in the contract or when the contract expressly provides that the breach allows the innocent party to treat itself as free; and (4) when the nature of the contract, object or circumstances of the case lead to the conclusion that the parties must, as necessary, provide that the innocent party will be released from further performance of its obligations in the event that the condition was not fully and accurately performed. Any term not meeting these criteria is considered an intermediate term (Rose 2013).

In the light of the new principles that the Waller test establishes, the position of the law enforcers is to evaluate and regard the terms included in the transport contracts as conditions, to such an extent, by applying the Waller test, as to assess their "vicinity" to one of the four established categories (also called limps) of the Waller test. When it is established that a term is a condition, by applying to one of the four categories, the innocent party may invoke the right to repudiate the contract unless — voluntarily — it wishes to waive its right for contractual termination or — unintentionally — affirms the contract by receiving a significant benefit comparing to the loss, or settled with a compensation. Alternatively, when the violated

terms are not classified as conditions, then the innocent party will only be entitled to damages without the right to terminate unless it can prove that the consequences of the breach actually "affect the root/intention of the contract" (Schoenbaum and McLellan 2011).

Nowadays, a more technical approach has been established in the sense of the intermediate term. Breach of such a term will not ipso facto provide the right to terminate the contract without evaluating the seriousness of the consequences of the infringement itself. It is, in other words, an ex-post evaluation of the impact of the violation so that it is possible, as compensation, to terminate the contract and to compensate or compensate only if the infringement is so severe that it reaches the root of the contract. The concept of "going to the root of the contract" was established by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* (1980) "the event that emerged… has the effect of depriving the other party of substantially the entire benefit that was the intention of the parties to obtain from the contract" (Gilman et al. 2013).

Therefore, nowadays, as to the position of the legal authorities, the terms must be categorised as intermediaries unless classified as a condition — by court order or explicit reference to the contract, or finally, due to the nature, object, or circumstances of the contract.

3.3 Contractual termination

According to a general rule of UK common law, the performance of a contract should be accurate; otherwise, the innocent party should have the right to terminate the contract if it so wishes effectively. Therefore, it can be concluded that even a small deviation from the contract terms will be treated as a breach. However, the distinction between deviation and infringement is not absolute. When the deviation is "microscopic" or "negligible", for the "de minimis non curat lex" rule, such a deviation will be ignored, and the contract will be considered to have been executed correctly. For example, in *Margaronis Navigation Agency Ltd v Henry W. Peabody* (1964), Diplock L.J. said "It seems to me that the law has always regarded a contract for the delivery or loading of a certain quantity of goods as fulfilled if that quantity has been delivered with the margin of error that is not commercially applicable to avoid…" (Soyer 2012).

Under UK civil law, the way enforcement is carried out appears less severe. Article 1455 of the Italian Civil Code states that from the point of view of the termination of the contract: "the infringement must be of no lesser importance". Thus, words with little meaning suggest that the violation, to lead to termination, has something to do with the nature of the contract. That provision, therefore, appears to go further into the de minimis non-curat legis rule of customary law, in that the concept of "'microscopic' should be regarded as narrower than that of 'not being of minor' importance" (Chuah 2009).

Violation of the contract gives the right, depending on the condition violated, to the affected party to consider the contractual agreement as rejected or repudiated

or to treat the contract as still in effect and binding to allow a claim for damages. In contractual repudiation, the violated contractual term is classified as a condition: an essential term of the contract, also described as the essence of the contract, which — as Devlin J. points out — "governs the entire contract so that, if it is not complied with, performance has been carried out completely different from that provided for in the contract". On the other hand, a condition will be classified as a warranty whenever it is not fundamental, but only secondary or as a warranty so that the affected party elects to avoid the repudiation (Wilson 2010).

The *Bunge Corporation v Tradax Export S.A.* (1981) case is an example of a breach of condition. In this case, clause 7 of the chartering agreed required the ship to be ready for loading on 15 June 1975, but the ship was delayed by 4 days. As a result, the charterer expired the contract and sought compensation for the lost days between the fare price agreed with that of the purchase. As a result, Bunge sued Tradax for illegally terminating the contract. The court held that the condition violated was a condition and that the charterer correctly terminated the contract as there was an explicit term on the charter agreement that stipulated the agreed date of the ship's readiness for loading. "This categorisation is carried out by interpreting a specific term of the contract in which it appears, instead of taking into account the magnitude of the breach of this term that has occurred in the present case" (Cogge and Jac 1981).

In *Cosmos Bulk Transport Inc v China National Foreign Trade Transportation Corporation (*1978*)* "The Apollonius" case, the charter agreement included a clause that stipulated that the speed of the loaded ship would be 12–14 knots. However, the vessel at the time of delivery and during the charter could travel at a speed of up to 10.6 knots. The owners did not dispute that the ship at the time of delivery could not travel at the speed agreed but argued that this obligation relates to when the charter contract was signed and not to the delivery date. The court of appeal confirmed that the ship was obliged to have the agreed speed at the time of signing the contract or earlier. Therefore, this term is considered a warranty condition, and its violation does not give the right to charterers to terminate the charter but only to claim compensation (Todd 2015).

4 Contractual terms in marine insurance contracts

4.1 Before MIA 2015

Whilst in charter parties, a term should be classified as a condition for a contract to be repudiated, the equilibrium is opposed in marine insurance contracts. Conditions in marine insurance contracts may be trivial or fundamental, leading from contractual repudiation to only claim for losses and damages (*Arcos Ltd v EA Ronaasen* 1933). Specifically, in insurance law, the following categories of conditions are recognised: (i) conditions precedent to the validity of a marine insurance contract; (ii) conditions precedent to the evaluation and attachment of the risk; (iii) conditions precedent to the contractual liability, arising from a claim and as with the other conditions precedent, give right to refuse the emerging claim; and (iv) ordinary conditions, similar to the above but not rendered

precedent, and their breach can only lead to claims for damages or contractual termination, depending of the seriousness of the claim (Gürses 2015).

On the other hand, marine insurance warranties are divided into (i) present warranties, consisting of statements of fact made by the assured at the outset which, if untrue, prevent the risk from attaching and (ii) continuing warranties, consisting of promises by the assured that something will or will not occur during the contractual relationship, any breach giving rise to an irremediable termination of the risk (Merkin and Gürses 2015).

Warranties were defined by MIA 1906 S.33(1) undertaking by the assured (a promissory warranty) promises by the assured that some particular things will or would not be done. In MIA 1906 S.33 (2), there are express and implied warranties; in non-marine insurance, they are only express.

One of the ways to create an express warranty is the basis of the contract clauses (to make all the statements as a warranty) — mostly non-marine. For example, all the statements made by the assured in the proposal form are warranties. Another way is by simply using the word warranty to say it is warranted; the *Milasan* (2000) and the *Game Boy* (2004) are recent examples of express warranties. The express and implied warranties may be present or continuing. Present means that it applies at some certain and determined moment it says at that moment. In contrast, continuing implies an obligation to comply with it continuously.

It is a matter of interpretation of the contract to find if a warranty is continuous. In case law, there are some principles for interpreting contractual terms. First, there is the principle of objectivity: it does not matter what the assured argues; the court should see what two reasonable and hypothetical people will say for the contract, for the insurer and the assured, concluding that we disregard what the parties subjectively say (Soyer 2012).

Whilst the utilisation of the word warranty is not essential by any means for the creation of a warranty, the questions that arise are (i) whether the term goes to the root of the transaction; (ii) whether the term bears materially on the risk; (iii) whether damages would be an adequate remedy for breach (Clarke 2017). Subject to MIA 1906 S.34(2), the remedy for breach of warranty is that the insurer is automatically discharged from liability, being even more advantageous than avoiding the contract (The Good Luck 1991).

The contractual relationship between insurer and assured is much stricter. Thus, if the assured party mainly responsible for complying with warranties fails his obligation, the insurer, if he exercises his right of repudiation, the contract is effectively terminated, giving the marine insurance warranties the so-called draconian effect (Gürses 2015).

4.2 The nature and purpose of the MIA 2015 Act

MIA 2015 came into force in mid-August 2016, yet its precise impact on the field is not yet completely known. Nevertheless, several predictions can be made about

its likely impact on key issues. There are five general critical points of interest to bear in mind (Jeon and Shin 2016):

i) The Insurance Act 2015 is the product of a lengthy investigation by the Law Commission, in charge of amending insurance contract law in the UK. However, it was not designed to deal specifically with the concept in marine insurance law, and there was an underlying assumption that the marine market would "contract out" of any rules that were not suitable.
ii) The 2015 Act applies to all non-consumer insurance contracts made after 12 August 2015. There is no differentiation in the statute between marine and non-marine insurance (or large and small commercial risks). Some marine insurance contracts could be classified as consumer contracts (e.g. some forms of yacht insurance). A consumer for these purposes is an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business, or profession.
iii) The statute does not prevent (in most cases) the use of existing contracts or arrangements. It will often change the duties the parties owe each other under those contracts and the legal remedies that can be sought in case of a breach.
iv) It established a specific framework for parties to contract out of the Act, and it is not necessarily enough simply to have a different rule expressed in the contract.
v) The initial market reaction has been mixed, with some marine providers seeking to revert to the "traditional" rules as set in the Marine Insurance Act 1906 (and associated case law) and others generally following the new provisions. Therefore, it is essential to understand what principles are being agreed upon and not simply look at the terms of the contract (which may not reference the statutes directly) (Clarke and Soyer 2016).

The new legislation does not affect the marine insurance condition, only insofar as they relate to the risk. Nevertheless, changes are evident to the issue of insurance warranties, focusing mainly on the formality of the classification instead on the actual effects of a contractual breach. Many have characterised this change as timid and lacking actual influence on the contractual relationship (Costabel 2015).

4.2.1 Present warranties

The form of a present warranty has already been defined to be on the insurers and for its effect to be draconian. Specifically, as draconian, we refer to a term distinguished for its finality and its irreversibility; thus, the outcome of triggering a warranty with such effect used to lead to automatic contractual termination along with claiming for damages. In practice, the insurer should provide an accurate description of the facts; else, the risk would not attach. In case of a false statement or misrepresentation of the facts, the insurer does not require any evaluation of materiality; he can easily avoid the contract. In the case of *Dawsons v Bonnin*

(1922), the House of Lords concluded that "when answers are declared to be the basis of the contract, this can only mean that their truth is made a condition, exact fulfilment of which is rendered by stipulation as essential to its enforceability", practically linking a false statement or a violation of a term with a forcible contractual termination (Soyer 2012).

Upon the issue of pre-contractual misrepresentation, Sects. 9 (1) and (2) of the MIA 2015 assess the issue of representation executed by the assured to the content of the contract and is stated that a representation cannot be regarded as warranty pre-contractually. However, this does not limit the insurer to require the execution of a fact as crucial to initiating a contractual relationship (Bertolini 2021).

4.2.2 Continuing warranties

The importance of continuing warranties is paramount, especially in the shipping industry; when the liability from an event needs to be excluded, the continuing warranties may be triggered even if the affected party was unable to prove the actual cause of the loss. This is very important, especially in the absence of effective communications when the vessel is in other jurisdictions. Additionally, the utilisation of the continuous warranties enabled the insurer to avoid the contract without even proving the causation of the loss (*Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd,* 1918). Specifically, before the concept of causa proxima emerged, establishing the concept of liability connected to the root cause of the contract, the continuous warranties ensured the insurer's automatic discharge from liability. Pursuant to Sects. 33 and 34 of the MIA 1906: *a warranty has to be exactly complied with; in the event of non-compliance, the insurer is automatically discharged from liability as of the date of the breach of warranty; (*confirmed in *The Good Luck,* 1991*) the automatic discharge principle means that there cannot be a waiver by affirmation, but only waiver by estoppel,* (*Argo Systems FZE v Liberty Insurance Pte Ltd,* 2012), a concept which is ultimately unavoidable but also in contrast with the express wording of Sect. 33(3) (Clarke 2017); thus, the loss from an event needs no connection with the actual breach, and most importantly the breach may not be remedied, automatically discharging the liability from the insurer, effectively terminating the contractual relationship (*The "Newfoundland Explorer",* 2006). Insurers and judges often criticised the forcefulness and terminality of those sections. Specifically, by applying those sections, insurers often found themselves automatically discharged from marine insurance contracts whilst they intended to amend the emerging causes of termination. Insurers were faced with a dilemma, should they trigger the warranty and automatically terminate the contract, leading to the loss of a client, or should they waive the emerged cause of termination and thus lose the option of termination in the future? On the other hand, judges were forced to automatically terminate the contract, with little they could do to preserve the contractual relationship effectively. Thus, in many cases, the wording of warranties was narrowed, and even then, contracts were forcefully terminated from events irrelevant to the risk, with no intention from the contractual parties (Gurses and Merkin 2016).

It became evident that continuing warranties could not be abolished from marine insurance legislation, but at the same time, it was also apparent that they effectively damaged the contractual relationship of both parties; thus, it was decided that in the MIA 2015, the automatic termination principle will be removed. Specifically, Sect. 10(1) of the new Act: *abolishes any rule of that breach of a warranty in a contract of insurance results in the discharge of the insurer's liability under the contract and replaces it under Sect. 10(2) with a suspensory principle*. Nevertheless, the insurer has the option, subject to Sect. 11, to avoid any liability from an event after the breach of the warranty. Still, before any remedy of this breach, as Sect. 10(2) states, the risk will be reattached. This suspensory solution appealed to the courts, which were left free to consider the contractual parties' intentions and to evaluate if the cause of termination was effectively attached to the root of the contract. At the same time, the courts could easily deny a contractual termination, in contrast to the insurer's intention (*The Resolute,* 2009). This solution of abolishing the automatic discharge from a contract practically weakened the effects of standard warranties. The interpretation of this amendment is effectively subject to the parties' intentions; if the parties intend to safeguard their contractual relationship, this amendment can be characterised as revolutionary and beneficial to both parties. In the case of an insurer's intention to avoid a contract, a contradictory court ruling may even be characterised as an action violating the fundamental principle *of freedom of contracts* (Soyer 2015).

4.3 Breach of warranty in MIA 2015

The "insurance warranty" enshrined for many years in S.33 MIA 1906 has been long criticised for its strictness. Under the interpretation adopted in *The Good Luck* (1991) 2 Lloyd's Rep 191 breach of an insurance warranty automatically discharged the underwriter from liability, irrespective of the (possibly) temporary nature of the violation or lack of relevance to the claim submitted. This led, over time, to the reclassification of many former warranties in marine insurance policies into some other form of risk management clause, with a more limited remedy. Nonetheless, insurance warranties exist in many marine policies and the MIA 1906. An obvious problem with the law before the MIA 2015 was the difficulty of classifying a term within English law as a warranty or something else. Indeed, even the word "warranty" indicates very little (Soyer and Tettenborn 2016).

Two major statutory provisions in the 2015 Act alter this position. These are subject to "contracting out", and some market participants have already indicated their willingness to restore the old S.33 rule to life. Section 10 abolishes the strict compliance/permanent discharge rule and replaces it with a new standard default rule, "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" (S.10(2)) (Soyer 2012).

Ultimately, two points can be excluded. First, it not only removes underwriters' liability for the period of non-compliance (from "breach" to "cure") but also extends that to losses attributable to something happening during that period. Second, it creates potential conflict about when the breach was cured. The statute provides for two types of cure: (1) no longer being in breach of warranty and (2) where something had to be done by a particular date by bringing the level of risk down to the level anticipated by the contract. One minor point to note is that the statute does not determine which parties have to prove breach or cure. Instead, it is assumed that the underwriter has to prove breach (as under the S.33 model) but that (probably) the insured has to establish that it has been cured (Lin 2017).

This new remedy applies whether the warranty is express or implied. So the "marine statutory warranties" are amended in kind, although they are of diminishing practical significance in most markets. (For the sake of clarity, S.39(5) on unseaworthiness for H&M cover is not affected as it is not a "warranty"). Section 11 applies instead to all risk management clauses, not only warranties. This provision went through many iterations, and the final version raises many questions. "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" (Adamos 2020).

There is no agreed understanding of the limits of a term which defines the risk as a whole. It cannot be clauses that do the kinds of things described in (a), (b), and (c), but it is not certain that these two lists are comprehensive. This is problematic because that type of clause escapes the regulatory effect of S.11 entirely, which is therefore of paramount importance. The controls on the use as defences of "risk management obligations" are found in SS.11(2), (3): "(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)".

This then deprives the underwriter of the ability to limit its exposure for insured perils because the defence is not unjustified in terms of the Act. The underwriter can only limit or exclude liability where the insured is not able to satisfy S.11(3): "(3) The insured satisfies this subsection if it shows that the non-compliance with the term could not have increased the risk". The combined effect is that any clause related to risk management, except those defining the risk as a whole, are subject to S.11(2), where S.11(3) is satisfied. This does not provide any protection against non-risk management clauses that limit liability, such as claim notification clauses (Edwards 2015).

It is not enough to show that the breach of the term did not contribute to the actual loss that occurred (a causation-type enquiry). It must be shown that the breach could not have affected the type of loss that occurred — this is a functional enquiry: "was this clause incorporated to control this kind of loss?" The precise application of this rule is likely to be difficult, but it may cause both claimant and underwriter difficulties as uncertainties arise on both sides of the issue. Section 11 is the most challenging provision to give precise advice, which may lead to it being "contracted out of" in many commercial contracts, at least in time (Soyer 2015).

5 Conclusion

In conclusion, whilst in charter parties, the classification of a term as a condition was vital to repudiate a contract, in insurance contracts, the violation of a warranty led to the automatic discharge of any liability. The significant difference was that the avoidance of a condition could lead only to compensation and prospectively to the continuity of the contractual relationship. In contrast, when the insurer triggered a warranty the insurance contract was automatically terminated.

Recently, the shipping market led to the evolution of the contractual terms. In charter parties, the unidentified by the rule of law judicial decisions are initially considered as innominate terms, "hybrid" terms that can lead either only to compensation, safeguarding the contractual relationship or to be regarded as conditions, effectively terminating the contract. In any case, it is up to the affected party to elect to trigger the charter party clauses in case of an emerged breach or to waive this option with no future costs.

At the same time, in marine insurance contracts, the so-called draconian effect is believed to have been weakened with the introduction of the new MIA 2015 policy, giving the election to the insurer to either avoid the contract or provide time to the assured to amend the triggered warranty to the contractual relationship. To this end, it was concluded that the interpretation of this amendment is effectively subject to the parties' intentions; if the parties intend to safeguard their contractual relationship, this amendment can be characterised as revolutionary and beneficial to both parties; in the case of an insurer's intention to avoid a contract, a contradictory court ruling may even be characterised as an action violating the fundamental principle of freedom of contracts.

Thus, the classification of many terms as innominate terms along with the so-called weakened status of warranties, passing the election of contractual termination to the insurer, creates an option for the insurer equal to the option of the innocent party in charter parties to maintain the contractual relationship by providing opportunities to the opposite side to amend or compensate the contractual gaps. At the same time, (i) the insurance policy is temporarily suspended, and the insurer is not liable by the insurance policy until the assured amends the contractual relationship and (ii) the charter party continues to be executed, preserving the innocent party's right of compensation and future profit by the continuation of the charter party.

We can safely conclude that the severity of conditions and the draconian effect of insurance warranties have not been abolished. It is only the automatic termination principle that has been removed providing to the affected parties the right of compensation or exclusion of any liability whilst the contractual relationship is preserved. It is also evident that the creation and the remedies of a condition and a warranty have become similar, creating contractual terms in both charter parties and marine insurance policies with similar effects, impact, and elections for the affected parties.

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