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«The background and transition to the Insurance Act 2015»

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ABSTRACT

This diploma thesis aims to present and analyze the Insurance Act 1906 (MIA 1906) and Insurance Act 2015 (MIA 2015). The aim is to present the main changes that have occurred during the transition but also the possible impacts. In general, this change considered to be the most significant reform of English Insurance law since the Marine Insurance Act 1906. The main reason of this change was the in early 20th century, the 1906 Act's provision slowly but surely fell out of the line with the best practice in modern insurance market, failing to keep up with both legal and commercial developments in other jurisdictions. Indeed, considering some of the radical changes that the Insurance Act 2015 introduced (including for example the treatment of warranty breaches), would be reasonable to say that those changes would cause a huge upsurge in coverage disputes, as insureds and insurers and insureds grappled with the legislation. However, this belief is contrary to reality since this change in generally brought a balance between parties.

INTRODUCTION

As we all know Marine Insurance is an essential component of the shipping sector, which offers much-needed financial protection against loss or damages during maritime transportation. The Marine Insurance Act of 1906, a piece of law known for its profound impact on international marine insurance practice, historically laid down the rules and principles regulating marine insurance in the UK. The Insurance Act 2015, which superseded the 1906 Act after more than a century in existence, represents a significant advancement in UK maritime insurance legislation. It is important to quickly review the background of the Marine Insurance Act 2015 before examining its specifics. Since the Marine Insurance Act of 1906, which codified the common law that had evolved since the 18th century, was passed into law, the marine insurance laws in the UK have largely not altered. But with time, the laws had become stale and no longer accurately represented the reality of contemporary international trade and transportation. As a result, it was acknowledged that the UK Marine Insurance Act 2015 was a necessary change to bring the legislation into line with contemporary marine insurance practice. The revised regulation sought to strike a compromise between the demands of contemporary marine insurance practice and the reality of the maritime business environment of the present.

1. MARINE INSURANCE ACT 1906

1.1. GENERAL CHARACTERISTICS

The Marine Insurance Act 1906 (MIA) has been the United Kingdom's principal codifying statue of marine insurance for over one hundred years, keeping the legal basis and a framework for the laws governing marine insurance. The Act was drafted by Sir Mackenzie Dalzell Chalmers, who had earlier drafted the Sale of Goods Act 1893.The legals principles and rules laid down by the MIA have been largely emulated by many other jurisdictions, Australia, Canada, India, Malaysia, New Zealand, Singapore, the United States Federal Law before states laws were allowed to prevail, and the Japanese all incorporated provisions from the MIA into their marine insurance legislation. Consequently, the MIA is the legal basis for a substantial proportion of marine insurances and is widely recognized in all insurance markets.

The Act implies terms into a contract of marine insurance if there are no express terms to the contrary. Generally, though, the Act leaves the insurer and insured free to contract on whatever terms they wish. Therefore, the marine insurance contract itself (rather than the MIA) will contain the relevant insuring conditions and terms, either directly or by incorporation. This is usually achieved by incorporating a reference to standard from wording such as the "Institute Clauses".

The MIA states that, with relation to reinsurance, an insurer under an insurance contract has an insurable interest in his risk and may reinsure with respect to it, provided the policy specifies otherwise. The original insured has no right to or interest in such reinsurance.

The Act contains four key features, which are:

A. It was a codifying law that was expressing existing law in plain terms.

The 1906 Act's status as a codifying act is its primary distinguishing characteristic. The Bills of Exchange Act 1882[1] and the Sale of Goods Act 1979[2] were two of the major outcomes of the Victorian effort for the codification of English law, and the Act is the culmination of that trend. The same draftsman, Sir Mackenzie Chalmers, of course, created the three legislative bills that eventually became laws. It is common knowledge that Chalmers' goal in writing his Bills was to state established law as accurately as possible, deviating from this task of faithful record and systematic organization only to first fill in the odd gap by drawing on commercial experience, comparative law, or logical extensions of precedent, and second, to settle any discrepancy between decided cases. A codifying bill's purpose was to clearly explain the law as it stood at the time, not to reform it by suggesting changes or to make it longer by suggesting answers to issues that had not yet resulted in reported litigation. As the Bill moved through the two Houses of Parliament, these issues were left to be dealt with, if at all, by the two Houses of Parliament.

This idea of a draft Bill unavoidably impacted the selection of statutory focus area for the legislation. When the legal principles are well-established and when the cases that have been resolved which, the majority accumulate are merely examples of generally accepted principles, then codification of the law is appropriate. Thus, the impression could develop that Victorians had in mind for those regions codification as consisting of rules that have been judiciously and thoroughly constructed over the generations created by intellectual titans to generate, possibly under the very rare Homeric nod, a flawless and unbreakable mosaic. In other words, a body of legislation was ready for codification when, and only when, it had acquired a degree of perfect accomplishment.

However, if someone had this notion, they would be fundamentally misinterpreting the codification movement. That movement was motivated by a desire to help the marine and business community by, as much as possible, doing away with the requirement in litigation to establish the pertinent legal principles before applying those principles to the specifics of the dispute. Costs were consequently reduced. Even better, properly stated legal principles should, in some circumstances, eliminate the necessity for costly litigation. Politics at the time dictated that proposed legislation that went beyond the law already in place was unlikely to be approved by Parliament. Because they aimed to magnify and enhance the existing law, attempts to codify the criminal code and the law of partnerships had been problematic. Therefore, Sir Farrer (later Lord) Herschell[3] insisted that any bill be limited to codifying the existing law on the grounds that "[a] Bill which merely improves the form, without altering the substance, of the law creates no opposition, and gives very little room for controversy." He was in charge of guiding the Bills of Exchange and Sale of Goods Bills through the House of Commons and introducing the Marine Insurance Bill into the House of Lords. Chalmers claims that as a result, Lord Herschell ordered the following course of action:

> Let a codifying Bill in the first instance simply reproduce the existing law, however defective. If the defects are patent and glaring it will be easy to get them amended. If an amendment be opposed, it can be dropped without sacrificing the Bill. The form of the law at any rate is improved, and its substance can always be amended by subsequent legislation. If a Bill when introduced proposes to effect changes in the law, every clause is looked at askance, and it is sure to encounter opposition.

Therefore, the limitation of codification to the replication of existing law was the outcome of political reality rather than a notion of legal perfection. Leading proponents of the codes actively considered later altering legislation to enhance the enacting statutes.

B. It outlined the principles of maritime insurance.

The 1906 Act's codification of a wide range of rules is one of its additional features. Naturally, the Act's official focus is on the legal rules that govern contracts for maritime insurance. However, the Act is not intended to separate the law governing marine insurance contracts from the common law or general law of contracts, which is said to apply to marine insurance contracts subject only to incompatibility with the Act's provisions. Furthermore, a lot of the rules that apply to maritime insurance contracts don't just apply to them; they also apply to all other sorts of insurance contracts, whether they involve direct coverage or reinsurance, commercial or consumer insurance. It would be more accurate to argue that the Act codifies these principles of general insurance contract law for the purposes of marine insurance contracts. On such matters, non-marine action frequently cites the 1906 Act's phrasing as the law's final word. Therefore, in effect, the 1906 Act serves as a codification of general insurance contract law for many significant principles. In fact, a substantial portion of the post-1906 case law that shapes our understanding of the Act's provisions covers non-marine contracts.

The benefit of a unitary system of insurance contract law, or one that applies uniformly to all types of insurance contracts, is that the technically accurate classification of a contract is irrelevant and therefore unnecessary. While it is true that the system in English law is essentially unitary, it is not totally so.

C. Non - mandatory Law

The Act's mostly non-mandatory nature is its third general characteristic. Apart from a few clauses that represent public policy, the Act contains default rules that only apply when there is no other intention. Although a few of the Act's clauses specifically state as much, it is evident that the parties are allowed to deviate even from those that do not and even from notions that are so fundamental to insurance contractual law as the highest level of integrity.

The Act's mostly non-mandatory structure reflects its intention to support insured. Consequently, sections that deal with outmoded business practices may simply become obsolete, while those that prove to be inconvenient may be replaced by express conditions. The Act has not yet created any barriers to the innovation and evolution of the insurance markets, but that is not to imply that elements that represent outdated business practices cannot cause trouble today.

D. Commercial certainty

A last general aspect of the 1906 Act that deserves attention is the unambiguous endorsement of commercial certainty. The Act was trying to define explicit regulations and outline clear penalties for breaches. Therefore, liability is immediately discharged prospectively in the event of any change in risk, regardless of the merits of specific cases, and parties have the right to avoid the contract retroactively for failure to comply with the theory of utmost good faith.

When introduced the Marine Insurance Bill into the House of Lords, Lord Herschell cited Willes J. (as he was then) from Lockyer v. Offley in 1776, where the main goal was certainty. As such, it was needed to establish some rules, as it was more important the rules to be certain than be established in a one way or another. It was believed that entrepreneurs would prefer a clear rule that might apply brutally and against their interests in a specific situation to an ambiguous rule that would generate an equitable outcome in every case but might necessitate a time-consuming and expensive application process.

There is no denying the value of certainty in business and the extreme annoyance and difficulties that may result from legal uncertainty. But an unrestrained quest for certainty, regardless of the strength of the case, might backfire. A good example is the promissory warranty, for instance. It is obvious that the insurance contract law's promissory warranty is nothing more than the general contract law's condition precedent dressed up. As a result, once it is broken, there is no disputing the results. The insurer is immediately and prospectively released from liability. This is because, in exercising their freedom to conclude the contract they see fit, the parties have chosen to include that as a prerequisite to further coverage or, alternatively, because the promissory warranty serves to define the insured risk such that breach results in the risk no longer being that which it was agreed to cover.

As a result, issues like the causality between the breach and the casualty and the proportionality between the violation and the response simply do not come up. But in their place hangs the threat of grave injustice based on the particular facts of a particular case. An insurer will have an unbeatable defense in relation to a later casualty sustained by a different vessel that has complied flawlessly with all the terms and conditions of the policy, for instance, if one vessel insured under a fleet policy breaches a navigation warranty. This is true, barring contrary intention. Therefore, in order to ensure that terms only function as promissory warranties where it is obvious from their substance that they do in fact define the risk insured or where it is unmistakably clear from the wording that the parties have in fact exercised their contractual freedom to confer such status on the term, the courts have taken advantage of the logically prior question of whether a given term of the policy is properly characterized as a promissory warranty.

A comparable argument might be made regarding the maxim of utmost good faith. The insurer has the right to cancel the policy if the assured fails to disclose or makes a serious misrepresentation under the relevant provisions of the 1906 Act (and thereafter as the 2015 Act). The policy is voidable regardless of whether the omission to disclose or the misrepresentation was fraudulent, negligent, or innocent, which is made possible by the irrelevance of the assured's state of mind. The contract is also voidable for all omissions of material information or misrepresentations, regardless of their gravity or relevance. One might draw a comparison to the judicial power granted by legislation under English law to deny the right to rescission for non-fraudulent misrepresentation under general contract law. There is little doubt, however, that the all-or-nothing nature of the remedy of avoidance has compelled assureds to consider every option for restricting the applicability of the doctrine and the effectiveness of the remedy.

In the last 30 years of MIA 1906, several lawsuits have been filed looking into, among other things:

a. The scope of the objective concept of materiality
b. If the Act explicitly mentioned that subjective inducement of the specific insurer who took on the risk is necessary
c. Now that it has been decided that inducement is necessary, how is it proven?
d. Exactly what inducement entails
e. The scope of exemptions from the disclosure requirement, particularly any presumptions of knowledge made by the insurer.
f. Whether there are any inherent restrictions on the remedy of avoidance that are acknowledged by the law.
g. Under what specific conditions the insurer would be considered to have affirmed the contract by surrendering the right to avoidance.

The deception Act of 1967 established the judicial discretion to deny rescission for non-fraudulent deception in general contract law. That discretion is not relevant to nondisclosure16 and might not be applicable to the avoidance for misrepresentation remedies under insurance contract law. Consider, however, in 1967, when the Misrepresentation Act was written to address the pre-formation theory of utmost good faith, a certain level of apparent clarity in insurance contract law was forfeited. One has to wonder if a sizable portion of the ensuing case law and its associated expense could not have been avoided.

If it is true that certainty is desirable but should not be achieved at all costs, then a strategy that allows for a balance is needed. The law governing the sale of products serves as one such example. Several provisions are implied into contracts for the sale of products by Sections 12 to 15 of the Sale of products Act of 1979.18 Since the Act classifies the majority of these implicit terms as conditions, a seller's breach entitles the buyer to reject the products and choose to treat the contract as discharged. Such clarity regarding breach remedies may be seen as enhancing both consumer protection and certainty. Both parties are fully aware of their positions, and that they have rights that can be enforced. As a result, because rejection and termination rights are expressly granted by law, an insurer is less likely to try to prevent the assured from receiving the remedies that the law mandates. However, as some well-known case law indicates, this assurance may be purchased at the expense of a potential lack of proportionality between the breach and the remedies. The chance to change the remedies for breach was thus taken advantage of when reforms were presented, renaming and expanding the requirement that service sold during a business shall be of merchantable (now satisfactory) quality.

1.2 CONCERNS ABOUT THE RULES OF MARINE INSURANCE ACT 1906

After examining the fundamental elements of the law as it was codified in the 1906 Act, several individual rules may be discussed in the context of five issues that catch the attention of a law reformer, but they also played a key role in his subsequent change.

A. Differences between maritime insurance law and general insurance contract law

Different insurance coverage options could bring up various problems and worries. However, there is nothing about marine plans' maritime subject matter that mandates a different legal treatment from non-marine insurance. For instance, there is no discernible distinction between marine and non-marine liabilities or between ships and any other income-generating asset. In terms of how the insurance market functions, there are also no significant differences between the insurance of marine and non-marine risks. The regulations for marine insurance do, however, differ in several ways from those for non-marine insurance. Maybe just two examples will do.

Initially unless the policy specifies otherwise, the assured is responsible for paying premiums in the non-marine market. The opposite, however, is true with marine insurance. Unless the policy specifies otherwise, the broker, not the assured, is responsible for the premium when the risk is placed through a broker, which is almost often the case. Finding an explanation for this disparity is challenging. That does not imply that the marine rule cannot be defended. Insurers who operate in international markets where it may be difficult to acquire and execute judgments for premiums against assureds and their assets may justifiably want more easily enforceable rights against brokers. The non-marine market appears to run simply fine in the absence of any broker liability regulations, and insurers can get a good deal of protection by making premium payment by a specific date a requirement before liability under the policy. However, it seems indisputable that the existence of two different premium liability standards is archaic, regardless of the merits of either position.

Secondly, losses are categorized differently in marine and non-marine insurance. Total losses in marine insurance are split into "actual" and "constructive" total losses. The latter include situations like loss of possession where it is improbable that it can be recovered within a reasonable amount of time and damage that would be uneconomic to restore because the cost of repair would exceed the worth of the repaired property. The served notice of abandonment must be delivered to the insurer within a reasonable period after the property becomes a constructive total loss in order for the assured to be entitled to compensation on a total loss basis in cases of constructive total loss. Since non-marine insurance does not adhere to the idea of constructive total loss, serving a notice of abandonment is never necessary. Additionally, although the situation is not totally apparent, non-marine insurance does not seem to make the distinction between a total and partial loss in the same way that marine insurance does. Arguments may be made for either the marine or non-marine strategy when it comes to the substance of each issue, but it is difficult to find a solid case for a different course of action.

B. Ethical guidelines and doctrines

Although the 1906 Act were 100 years old, the regulations it had codified were, of course, much older and frequently even older. Many of them were no longer useful in any way. Two more instances may be given.

In the beginning there is no justification for keeping any formality requirements in the maritime insurance law. The continued requirement that a marine insurance contract had to be embodied in a marine policy in accordance with the Act and associated content requirements was against the trend of formalities disappearing from commercial contract law. More significantly, it was debatable whether the definition of a policy under the 1906 Act was limited to a paper document, in which case the requirement of a policy acts as a roadblock to the dematerialization of commercial documentation and, consequently, to the growth of electronic commerce.

The idea of insurable interest serves as a further illustration. The theory is intended to fulfill two purposes within the context of the Act. It is essential to upholding the public policy that forbids utilizing marine insurance contracts for gambling or wagering. It also strengthens the indemnity principle since the right of the assured to receive compensation for a loss resulting from a loss must have existed at the time of the loss if it did not. However, neither aspect of the doctrine's failure to provide a constructive contribution to insurance contract law.

Regarding the wager, it is obvious that there should be a rule prohibiting wagering on the results of maritime adventures. The law shouldn't allow a ship to be financially overloaded with insurance to the point where the risk of a casualty exceeds that which is already present in a nautical adventure. Besides, the rule increases the chance that insurers may fall victim to fraud, putting the lives of the crew, the owners' property, and the environment in jeopardy. The prohibition on wagering on marine adventures, however, does not necessitate hiding behind the insurable interest theory. Without mentioning the idea of insurable interest, the question of whether an insurance contract is a wager might be posed. It may be argued that the concept doesn't cause much harm because the existence of an insurable interest is only a legalese term reflecting the contract's non-wage nature. The doctrine is more harmful.

This is the issue. The notion of insurable interest therefore developed a life of its own independent of the policy it was intended to serve when the question of whether the insurance is a true indemnity policy was translated into whether there is an insurable interest. The idea of an insurable interest and how different insurance products recognize it have led to the creation of a body of legislation that is incredibly complex and has forgotten its original intent. Three distinct types of insurance contracts are currently recognized under English law. When the assured has an insurable interest, one would anticipate non-wager contracts, and when the assured has none, one would anticipate wager policies. The non-wager policy, however, is void due to a lack of insurable interest due to the technicality of the insurable interest statute. The highest authority declares that although this category shouldn't exist, it does. In other words, the notion of insurable interest not only serves no useful purpose in preventing unwanted bets on nautical adventures, but it also has the evil potential to invalidate the odd policy that is completely acceptable in principle. Furthermore, even in cases when an insurable interest defense is effective, it must still be refuted, adding expenditure and delay to the settlement process. At the moment of the loss, the assured must also have an insurable interest. But, as was just mentioned, public policy can function without the insurable interest concept if the issue is gambling. Again, a regulation to that effect does not necessitate a concept of insurable interest if the goal is that an assured should recoup exclusively in respect of the damage it has itself experienced. In the end, the notion of insurable interest does nothing more than give insurers a legal loophole to use when the agreement reached otherwise necessitates a loss to be paid. It ought to be eliminated.

C. Compliance with business standards

It has always been a goal of English commercial law to encourage marine commercial activity and promote new business ventures. The fact that several maritime insurance legislation provisions was not considering the contemporary business practice, however, is a third point of worry. There has already been mention of the contradiction between formalities and electronic trade. But in this context, it's important to make special note of cargo insurance, which doesn't adequately consider multi-modal transportation, an issue that is only made worse by containerization. The main issue is how the sea voyage is regarded by policy. The policy could be written to cover incidental interior travel before and after the primary insurance on a marine cruise. An interpretation of this policy could be that it assumes the goods will start on the main insured adventure to provide coverage for the incidental inland transportation. Like how a branch of a tree cannot exist without the tree trunk, risk with regard to the incidental land transit also cannot begin to exist in the absence of risk beginning with regard to the sea transit to which the land transit is incidental. The drafting of a contract may be the solution to this issue. The 1906 Act, which may in turn both reflect and affect the prevalent phrasing of cargo rules, may, however, exacerbate the problem of interpretation. A contract for indemnity of "losses incident to marine adventure" is what the Act defines as a marine insurance contract. Exposure to maritime dangers is another aspect of the "marine adventure" notion in the context of cargo. There is no contract if there isn't a maritime adventure. Even though an accidental inland transportation clause may be included to a maritime insurance contract, the contract is still considered marine insurance. Any such contractual extension "operates on the assumption that the insured adventure takes place and, on that basis, addresses the question of the commencement and termination of the risk," as is common in cargo policies. The risk never begins if the cargo is never exposed to the maritime risks that the policy considers, goes on the insured nautical adventure, or is otherwise subject to those perils. The issue is that, in contrast to a policy on goods in transit, the law views a cargo policy as one of marine insurance. Such a legal strategy runs counter to business reality. But Section 44 of the 1906 Act strengthens it much more. This states that the risk does not attach if the policy's specified destination is not reached by the ship when it sets sail for any other destination. In the context of a trip policy aboard a ship where risk is to attach "from" a specific port or location, the section makes perfect sense. When an insured ship sets out on a different journey than that which is insured, it is never actually participating in the adventure which is protected, and hence, the insurer is never in danger. However, the explicit text of the section does not limit it to these circumstances. Particularly when goods are insured for the entire multimodal transit, this ignores the trip's commercial indivisible nature and instead places an artificial focus on the sea route.

Consider, for instance, that an insurance that incorporates the Institute Cargo Clauses (A) insures cargo. Except for risks that are expressly excluded, these terms cover damage brought on by all hazards. Even if it involves an act of piracy, theft is not prohibited. Furthermore, according to the transit clause, risk begins to exist "at the moment the goods depart the warehouse or place of storage at the place herein designated for the commencement of transit." The insured is protected against all losses, including any thefts, which may occur during the transport, except caused by an excluded peril, after the items embark upon their transit, according to the commercial eye. But according to the law, s. 44 appears to have the following effects. The assured is covered if the cargo makes it to the port of loading and departs on the sea voyage but is then taken by piracy or another type of theft. The assured is not protected if it is stolen at the port of loading and loaded onto a fictitious ship managed by scam artists who then sail off with the cargo. Furthermore, the law's requirement that the marine adventure serve as the "trunk" of the covered risk appears to exclude coverage if the cargo is taken on the way to the port of loading but never sets sail. This undermines maritime insurance law and makes no sense commercially at all. It was necessary to amend the 1906 Act so that a policy's marine nature no longer has legal conceptual relevance.

D. Limited quality of shipping

Shipping that isn't up to grade puts people's lives, their cargo, and the environment in jeopardy. International maritime law, prior to the change of the Act, actively pursued its abolition through treaties like the 1974 Safety of Life at Sea Convention[4] and procedures like port state control. Underwriters was also understandably concerned about subpar shipping. The 1906 Act was addressing the problem in a way, but it did it so in a fundamentally inadequate way. The courts created a defense requiring both causation and privity, meaning knowledge, after concluding that the promissory warranty approach to unseaworthiness used in the context of journey policies could not be extended to time policies. Any loss resulting from unseaworthiness at the time the insured vessel was taken to sea to which the assured was aware would not subject an insurer under a time policy to liability. Furthermore, it is debatable whether or not that condition, which absolves irresponsible insurers, even exists. In The Star Sea, the assured shipowner failed to verify either the fire safety equipment on board its vessels or the competency of the master and crew to operate it in a manner that the trial judge called as "completely inadequate." A letter that the assured relied on for information about the two fires was called "absolutely pathetic" by critics. The insured vessel later experienced a fire in the engine room, and it was discovered that the fire dampers were faulty, and the master had ineffectively used the carbon dioxide extinguishing equipment aboard the ship. The vessel was officially declared a total loss. The evidence showed negligence but not privity, thus the assured was determined to be entitled to compensation for a loss brought on by the insured risk of fire.

This is quite unfortunate. Insurance is not intended to cover negligence in the outfitting, crewing, and upkeep of vessels. Hull and machinery policies are not intended to finance the operation of subpar shipping; rather, they are intended to disperse the risk of maritime and other risks. It is noteworthy that a cargo insurer that attempts to invoke the connected defense of inherent vice need prove simply the substandard character of the insured property and a direct link to the loss or damage. It's unclear why hull insurance is more lenient. It is important that under the Norwegian Marine Insurance Plan, negligence regarding unseaworthiness provides a defense, which is made even more difficult by the burden of proof placed on the guaranteed. It is stated that change toward the Norwegian approach is in principle desirable both by itself and in support of international maritime law, even though events like the introduction of the ISM code may help underwriters prove privity. The policy should at the very least include a negligence-based unseaworthiness defense as the default, leaving it up to prospective assureds and their brokers to justify to underwriters why they should be granted a license to be careless regarding the state of the vessel.

E. The principles of commercial contract law

The fact that some of the principles stated in the 1906 Act were no longer consistent with the principles of contemporary marine insurance contract law is a final cause for concern. In the context of marine insurance contracts, this compatibility concern may be expressed a fortiori. But there was already protection regarding the legislation that applies to the insurance industry. This part of diploma thesis concentrates on the provisions of the 1906 Act that was apply without any exception to marine insurance, without prejudice to the prospect of additional reform to then current consumer legislation. The Act was upholding the concepts of contract freedom and predictability, as already mentioned. Modern contract law recognizes that parties should have the flexibility to expressly incorporate any terms they like in their contracts, subject to a ridiculously small number of restrictions. Although any cost in terms of certainty is willingly paid, the default principles of contract law increasingly try to provide a conclusion that is reasonable given the facts of the instance. The introduction of innominate terms, the recognition of an account of profits as a remedy for breach of contract (albeit in rare circumstances), the expansion of the jurisdiction to award damages instead of an injunction, the relaxation of the rules on admissibility of outside evidence on contract interpretation, the introduction by statute of a judicial discretion to refuse rescission in cases of non-fraudulent misrepresentation, and Section 15A of the Sale of Goods Act are all examples of developments. The 1906 Act's clauses codified the pre-formation notion of uttermost good faith and the law of promissory guarantees come into focus at this point, and they can be viewed as being of the most consequence. These insurance contract law topics criticized for not being as responsive to the unique factual complexities of each case as we have come to anticipate from commercial contract law. The next concern is whether and how to implement such responsiveness.

It would of course be conceivable to restrict the application of the disclosure and misrepresentation doctrines regarding utmost good faith. For policies where the assured qualifies as a "retail customer," defined as "an individual who is acting for purposes which are outside his trade, profession, or business," the Insurance Conduct of Business Code, promulgated in the UK by the Financial Services Authority, takes this stance, for instance. This would cover a variety of yacht insurance policies. When it comes to non-fraudulent non-disclosure, the test for materiality changes to what the retail customer could reasonably be expected to divulge. The right to prevent innocent deception in relation to misrepresentation is eliminated.

These reforms, with all due respect, are confusing. Why does the materiality definition for non-disclosure vary, but not for misrepresentation? Why does the right to avoid not apply to innocent non-disclosure yet does for innocent misrepresentation? Why should the right to avoid innocent misrepresentation be eliminated in the context of consumer insurance when it is still in place for all other contracts, including consumer contracts? When discussing reform in the non-consumer setting, this topic becomes even more pertinent. But more generally, it might be questioned whether expanding the purview of the greatest good faith obligations is the right course of action. The assured would be required to reveal anything that the commercial assured may reasonably be expected to divulge under a corresponding modification to the definition of materiality in the commercial environment. Presumably, this is the commercial assured with the traits of the actual assured, generating a changeable and uncertain standard depending on the level of legal and commercial complexity of the actual assured. Furthermore, are qualified insurance brokers giving reasonable assured advice considering that they represent the assured as their agents? Would changing the concept of "materiality," aside from creating a great deal of uncertainty, make a difference given that it is limited to situations that the assured knows or ought to know and that are related to the risk to be insured? The actual issue with the theory of utmost good faith is not so much its application as it is the solution for failing to behave in utmost good faith, which is to avoid the policy. One expects the fire would dissipate from the argument over the extent of the duty if the remedy, outside of cases of fraud, were subject to the same judicial discretion as rescission for non-fraudulent misrepresentation in the general law of contract. The emphasis would shift to whether the remedy was appropriate given the circumstances. Uncertainty would undoubtedly result from this. However, the current legal framework already is the root of ongoing disputes. A modification in the remedy's availability would be in line with changes in commercial contract law more generally and could focus attention on the genuine problem.

The vocabulary with relation to promissory warranties it should have been altered and as was already mentioned, "promissory warranty" is simply insurance contract law jargon for the prerequisite of common law. What should have been done, then, to lessen the severity of the prospective antecedent conditions? The inapplicability of causation to present legislation is a frequent criticism of it. In general, when a condition prior to liability on the policy is breached, the insurer is released from any future obligations under the policy, including obligations to pay claims for losses that are not causally related to the violation. The insurer is released from liability for the relevant claim or claims when a condition precedent regarding notifying the insurer of an occurrence generating claims or regarding claims cooperation is violated, regardless of whether the violation causes the insurer serious prejudice or even any prejudice at all. Therefore, it is frequently advocated that the legislation governing conditions precedent be changed to limit the insurer's release to the amount of harm the insurer can demonstrate it has endured because of the breach. This reform should be happened for four reasons.

First, there should not be any justification for an insurance contract law to deviate from regular contract law. Any change to the condition precedent in insurance contract law will result in some divergence, but there are no indications that general contract law would like to do away with the non-causally relevant condition antecedent. The Sale of products Act of 1979's statutory implied criteria may not even go that far; yet the absence of a causal link may be important in assessing whether rejecting the products would be reasonable.

Second, it would be difficult to defend restricting the right to contract by demanding a causal link by mandatory law. There is no qualitative difference in the apparent unfairness, although it is possible that conditions precedent has a greater ability to act harshly in the context of insurance contracts. Going back to the Sale of Goods Act, Section 15A does not apply to express terms. The parties should have the freedom to negotiate any contractual terms they see fit, according to the unambiguous message of the Parliament.

The "basis clause" is one potential exemption. These provisions range in breadth, but their goal is to make it a prerequisite for coverage under the policy, such as that all information provided while applying for insurance is accurate. As a result, the insurer is entitled to reject liability for deception without proving materiality or inducement. Similar extensions to the assured's disclosure requirements may be made with appropriate wording. On the one hand, these clauses can once more be seen as straightforward examples of contract freedom. But in this situation, the law has previously thought through the proper duties to impose on an assured considering risk presentation. To create a balance between the interests of the insurer and the assured, the ideas of materiality and incentive are used. The ability of the insurer to develop the most thorough understanding of the risk is in their best interest. However, it is not acceptable to avoid the policy in situations where the misrepresentation or non-disclosure could not be justified and in fact had no bearing on the decision to give coverage. The equilibrium that the law has struck is destroyed by a foundation clause. As a result, there is a convincing argument against such clauses.

Thirdly, a crucial aspect of risk and risk transformation is the idea of a condition antecedent. A given risk is guaranteed by an underwriter, and the assured does not have the power to adjust that risk, according to Blackburn. It doesn't matter if he increases it or decreases it; if he changes it, the underwriter is fired. The Unfair Terms in Consumer Contracts Regulations of 1999[5] exempt from challenge any contract provisions that "relate... to the definition of the main subject matter of the contract," which is the insured risk, some notion of automatic discharge of liability divorced from causation, and any notion of prejudice to the insurer. Notably, the Unfair Terms in Consumer Contracts Regulations 1999 provides that clauses in contracts that "relate... to the definition of the main subject matter of the contract" are not subject to dispute. In any reform of the law governing insurance contracts, a distinction could be drawn between prerequisites for filing claims and those for the attachment and adjustment of risk. Any attempt to distinguish between "genuine" risk definition and any notion of "secondary" needs prior to cover, it is countered, would produce an unnecessary amount of uncertainty.

Fourth, the condition precedent was a highly effective tool for implementing policy. The fight against shoddy shipment has already been mentioned. To give one example, the ISM Code67 is a considerable effort to solve crewing standards' deficiencies. The Safety of Life at Sea Convention of 1974, under which the Code was issued, is a body of public law. However, the Code might be criticized for lacking teeth if failing to follow the Code in no way jeopardized, or was extremely unlikely to jeopardize, a shipowner's insurance coverage under private law. It is noteworthy that clause 13 of the International Hull Clauses[6] (01/11/03) specifies that failure to comply with this criterion would result in the automatic termination of coverage and that possession of the two essential documents that demonstrate compliance with the Code is required. In other words, even if the phrase "condition precedent" is explicitly defined rather than relying on the label, clause 13 imposes a condition precedent.

Therefore, it is recommended that the condition precedent be kept among the contractual conditions that are available to parties to insurance contracts. If the parties so want, they should be free to include clauses that trigger an automatic prospective discharge, regardless of the insurer's potential harm from non-compliance. However, it is apparent that such words have the potential to work harshly. As a result, judges are understandably reluctant to agree that a particular contract term operates harshly in a given situation. There is a case to be made for altering the default rule governing how such phrases function.

According to stated opposing provisions, the legislation on conditions precedent in insurance contract law could be changed so that a violation would only result in a denial of coverage if it directly contributed to the incident giving rise to the claim. The qualifier "subject to explicit contrary provision" is crucial. This complies with clauses from the International Hull Clauses, such as clause 13. The mere insertion of a name like "condition precedent" or "promissory warranty" may be deemed insufficient to oust the new default norm in the interests of contract language clarity. There is a case for a more radical reform that would eliminate conditions precedent to the making of claims in favor of making all such provisions ordinary promissory terms with damages quantified by reference to any loss the insurer can demonstrate was caused by the breach. Alternately, such a term could be characterized as innominate as a matter of law, in which case an insurer would only be liable for damages unless it could demonstrate that the breach of the condition caused it severe harm.

Criticism may be leveled at the statutory formulation of the notice of abandonment required in circumstances of constructive total loss in the context of maritime insurance.70 This procedural requirement is intended to give the insurer access to the remaining covered subject matter to which it is entitled under the substantive doctrine of abandonment upon payment for a total loss. It is a prerequisite to indemnity on a total loss basis. Commercial utility may exist for notice of a casualty giving rise to such possible rights on abandonment, but this utility does not support the retention of the procedural need prior to total loss indemnification. First, it is undeniable that insurers may have a legitimate interest in knowing about a casualty as soon as possible in case it leads to a claim. In the immediate aftermath of a casualty, when both physical evidence and witness memories are still recent, the true facts may be more easily ascertained. However, this desire for notification does not translate into a legal obligation of notification despite its business justification. If an insurer wants to be notified about a potential claim-triggering accident, they must agree to it. The prevailing opinion is that no legal notification need exists, with the exception of situations involving constructive total losses.

Second, whether the insurer suffers any financial harm as a result of the failure to deliver a notice of abandonment, the financial impact of restriction to indemnity on a partial loss basis still occurs. This is challenging to defend, particularly in the hull market where notices of abandonment are frequently turned down out of concern for potential liabilities to the insured vessel. Additionally, the requirement that a notice of abandonment be served within a reasonable period of a constructive total loss occurring and the difficulty in determining that moment in certain sets of circumstances result in the distasteful spectacle of serving multiple notices in the hopes that one will be delivered within the required window of time. If they fail to do so, the assured will be subject to a financial penalty despite having informed the insurer of the accident's occurrence, even if it wasn't immediately after it happened.

1.3 Conclusion

As an Act drafted with the intention of limiting opportunities for litigation on legal principle, it cannot be said that the Marine Insurance Act 1906 has been particularly successful. The last one hundred years have seen litigation on all the main principles codified in the 1906 Act. The Act has, nevertheless, been adopted with little or no amendment of substance by several other countries, most recently by Canada in 1993, while the law it codifies has been and remains influential in other jurisdictions, such as the US. Although, the Act continued to have an impact for the next years, and for this reason it has been reviewed. Concerns like the ones mentioned above pointed the need for significant reform. In addition, the Act intention was to codify the existing law and it did it up to a point but for that reason MIA 2015 came to clarify sections and add new ones in light of the last of jurisprudential progress. Although it is appropriate to celebrate the Marine Insurance Act of 1906's 100th anniversary, it is safe to assume that Chalmers would have supported study and change.

The Act had defined by opponents as mostly accommodated and strongly endorsed commercial certainty as a cornerstone of marine insurance legislation 1. The Act's focus has been questioned in terms of its regulatory purpose, and several of its clauses have raised concerns. For this reason, the appropriate reforms were made in order to reach the implementation of the Maritime Insurance Act 2015.

2. MARINE INSURANCE ACT 2015

2.1 INTRODUCTION

As it is already mentioned before, Insurance Act 2015 retains some of the law from the MIA 1906. It came into force in August 2016, and is concerned with both marine insurance and consumer insurance. It also adds some new legal ideas while codifying some changes that have taken place since its passage. The introduction of the new need to convey information fairly and the clauses relating to warranties and similar conditions are the subjects of most attention.

The provisions of the Insurance Act 2015 reflect the feeling that the law of marine insurance did not always mesh with the practice in other classes of business, and that modernization of the laws would bring UK practice into line with other jurisdictions. Significant changes have been made in the areas of disclosure, misrepresentation and warranties. The 2015 Act was introduced with the promise of effecting change for the benefit of assureds in order to level the perceived imbalance of insurance law, which had previously favored the insurer. The 2015 Act does not overhaul insurance law, rather it changes the law with respect to three distinct and discrete topics, namely the duty of fair presentation, the legal effect of breaches of warranties and other terms of the insurance contract, and the remedy for fraudulent claims. (This is to ignore a further reform introduced by way of amendment to the 2015 Act by sections 28-30 of the Enterprise Act 2016.) It achieves these aims by amending certain provisions of the MIA 1906, including the replacement of sections 18–20 of the 1906 Act. Whereas the 1906 Act was, largely, a codifying statute, the 2015 Act is a reforming statute.

As far as the duty of utmost good faith is concerned, the 2015 Act begins with two changes. First, it redefines the pre-contractual duty of utmost good faith as the "duty of fair presentation"[7]. Second, whilst it retains the name and concept of the duty of utmost good faith, the 2015 Act abolishes the remedy of avoidance for any breach of the duty of utmost good faith[8]. After the entry into force of the 2015 Act, section 17 of the 1906 Act provided that "A contract of marine insurance is a contract based upon the utmost good faith."[9] In its Explanatory Notes, Parliament has stated that "[t]he intention of section 14 is that good faith will remain an interpretative principle, with section 17 of the 1906 Act and the common law continuing to provide that insurance contracts are contracts of good faith".[10] It was unclear what role section 17, as modified, would play.

The 2015 Act replaces sections 18–20 of the MIA 1906,[11] by providing a fresh legislative regime for the assured's pre-contractual duty, now called the duty of fair presentation, with specified remedies for the breach of this duty of fair presentation, both in respect of contracts induced by the breach and in respect of contractual variations induced by the breach.[12] The 2015 Act does provide a remedy for the insurer in the event of the assured's presentation of a fraudulent claim,[7] which constituted a breach of the duty of utmost good faith.[13] However, a consequence of the abolition of the remedy of avoidance for any other breach of the duty of utmost good faith is that recognized categories of breach of the duty now have no remedy, unless another cause of action can be established. In particular, previously recognized breaches of the duty of utmost good faith now no longer attract a remedy, namely: (a) breach of the insurer's pre-contractual duty of full and accurate disclosure,[14] (b) breach of the assured's post-contractual duty to abstain from fraud other than in respect of claims, and (c) breach of the assured's duty of disclosure in respect of the operation of "held covered" clauses.

2.2 THE DUTY OF FAIR PRESATASION ON RISKS

In many ways, the assured's pre-contractual responsibility of greatest good faith as it applied according to sections 18–20 of the MIA 1906 is the same as the assured's duty of fair presentation under section 3 of the 2015 Act. This reflects the Law Commission's finding that the obligation of disclosure retained a significant role in the insurance transaction due to the underlying information gap between the parties, which was reached after a thorough investigation and consultation. However, the obligation has undergone changed and now referred to as a duty of fair presentation and includes two different components in terms of disclosure. In accordance with section 3(4) of the 2015 Act, the assured is required to disclose all material circumstances that they know or should know, or "failing that," to provide disclosure that provides the insurer with enough information to alert a prudent insurer that it needs to make additional inquiries in order to ascertain those material circumstances. By previous law, under section 18(1) of the 1906 Act, the duty of disclosure required the assured to disclose every material circumstance that is known to the assured; however, if the assured provides a risk summary to the insurer in order to warn the insurer that there may be additional material information that has not been disclosed and the insurer does not inquire about that additional information, the assured would have been deemed to have waived disclosure (which is a recognized exception). Therefore, the redefined responsibility combines the section 18(1) duty with section 18(3)(c)'s exemption to the waiver requirement.

The exceptions to the duty of disclosure under section 3(5) of the 2015 Act are broadly the same as the exceptions under section 18(3) of the 1906 Act, with two differences. Section 3(5) provides that, in the absence of enquiry, the duty of fair presentation does not require the assured to disclose a circumstance if (a) it diminishes the risk, (b) the insurer knows it, (c) the insurer ought to know it, (d) the insurer is presumed to know it, or (e) it is something as to which the insurer waives information. These exceptions correspond to section 18(3)(a)–(c) of the MIA 1906.

The main differences as mentioned above is first, the abolition of the exception in section 18(3)(d) by which the assured is excused from disclosing material circumstances where disclosure is superfluous by reason of the existence of a promissory warranty in the insurance contract. The reason for this change is that the effect of a breach of warranty has been altered by sections 10 and 11 of the 2015 Act. The second difference is that the scope of the exception based on the insurer's knowledge has been redefined under the 2015 Act, but the insured is still essentially subject to the same requirements regarding misrepresentations as they were under section 20 of the 1906 Act. Sections 3(3)(c) and 7(5) of the 2015 Act define a false representation of truth and a false representation of expectation or belief in a manner that is consistent with sections 20(4) and (5) of the 1906 Act.

The assured's obligations in respect of misrepresentations are largely the same as they were under section 20 of the 1906 Act. What constitutes a false representation of fact and a false representation of expectation or belief under sections 3(3) (c) and 7(5) of the 2015 Act are the same as that under section 20(4) and (5) of the 1906 Act.

Section 7(3) of the 2015 Act continues the definition of materiality as adopted by sections 18(2) and 20(2) of the 1906 Act, stating that "[a] circumstance or representation is material if it would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms." Following that, Section 7(4) lists examples of circumstances or representations "which may be material," including (a) unique or unusual facts relating to the risk, (b) any specific concerns that prompted the insured to seek insurance coverage for the risk, (c) and anything that people involved in the class of insurance and field of activity in question would typically understand as something that should be dealt with in a fair presentation of risks of the type. This is consistent with the existing case law.

Additionally, the 2015 Act keeps the provision that for the insurer to be entitled to use one of the Act's available remedies, the insurer must have been provoked by the assured's breach of fair presentation. This indicates that the insurer would not have entered the insurance arrangement at all or would have done so on alternative terms had there been a fair portrayal of the risk. The 2015 Act designates a breach as a "qualifying breach" if it involved a duty violation and the insurer was provoked by the violation, indicating that the breach qualifies for an Act remedy.

2.2.1 FUNDAMENTAL CHANGES

The 2015 Act is notable for its attempt to reform what is thought of as a burdensome obligation falling on the shoulders of the assured, yet much of that duty is left largely unchanged by the amendments. The 2015 Act has, however, made significant revisions to the assured's pre-contractual responsibility. These changes as previously mentioned are related to the manner of the assured's disclosure, the abolition of the broker's duty of disclosure, the knowledge of the assured for the purposes of the duty of disclosure, the knowledge of the insurer as an exception to the duty of disclosure and the remedies for breach of the duty of fair presentation. The most significant of these modifications deal with the parties' awareness and the breach's remedies. The question of whether Parliament was successful indeed in making the legislation less insurer-friendly when considering these specific modifications become more important.

At first, the 2015 Act made a minor but significant adjustment by stating that "disclosure in a manner which would be reasonably clear and accessible to a prudent insurer" is required for a fair presentation of the risk. This is significant because it makes it obvious that the assured will not fulfill the obligation of a fair presentation by disclosing a substantial number of documents that conceals relevant facts, like previous claims of the ship. So, for the purposes of the obligation, it may not always be right for the assured to give the insurer a 600-page report that contains valuable information in a remark on page 465 of the report.

Secondly, the responsibility of disclosure carried by the assured's agent to insure, its insurance broker, under section 19 of the MIA 1906 has been eliminated. In its place is the obligation that the assurance reveals not just information known to itself, but also information "known to one or more of the individuals who are responsible for the insured's insurance".

Then, the duty of fair presentation requires the assured to disclose information which the assured "knows or ought to know". This duty entails a considerable burden on the assured, greater than that under the MIA 1906, whether the assured is an individual or an incorporated entity or unincorporated association and whether the knowledge which defines the scope of the assured's duty of disclosure is based on actual knowledge ("knows"),[15] or constructive knowledge ("ought to know").

Under Insurance Act 2015, the assured who is an individual is obliged to disclose to the insurer what he or she knows and what is known to the "one or more of the individuals who are responsible for the insured's insurance". Also, the assured who is not an individual (namely, a company or an incorporated or unincorporated association) must disclose to the insurer information which is known to one or more individuals who are either: (i) part of the assured's "senior management" or (ii) responsible for the assured's insurance. This has the potential effect of substantially increasing the actual knowledge of the assured which informs the duty of disclosure. Under the MIA 1906, a corporate assured will be taken to know that which is known to the individual or individuals, who is or are the directing mind and will of the company, which may include an internal insurance manager or may refer to a chief executive or managing director and the board of directors. However, under the 2015 Act, the actual knowledge of the corporate assured will extend not only to those responsible for the insurance within the assured's organization, namely the internal insurance and risk managers, but also to the appointed brokers, including potentially the producing broker. Further, the knowledge of any one of these individuals will have to be disclosed.

Additionally, under Marine Insurance Act 2015 the insured is not required to disclose significant circumstances to the insurer if the insurer is aware of, should be aware of, or is expected to be aware of the relevant circumstance. Section 5 of the 2015 Act defines the scope of the insurer's knowledge further, as analyzed previously. More specifically, the insurer knows about a situation "only if it is known to one or more of the individuals who participate on behalf of the insurer (broker or consultant) in the decision whether to take the risk, and if so on what terms". This basically means that the insurer is aware of what the individual underwriter who opted to ensure the relevant vessel, cargo etc. is aware of. This is identical to the status under the 1906 Act.

Regarding what insurer and insured ought to know under the 1906 Act, the assured under section 18(1) and the insurer under section 18(3)(b) was defined in the same terms: what the assured or insurer ought to have known "in the ordinary course of the subject insured". Under the 2015 Act, the knowledge of the assured is broader and therefore increases the burden of disclosure upon the assured and the knowledge of the insurer – setting the scope of the exception to the assured's duty of disclosure – is defined more narrowly under the 2015 Act.

The difference in the definition of how the assured's constructive knowledge and the insurer's constructive knowledge are defined by the 2015 Act may have unintended or unexpected consequences, for example, where the insurer seeks to reinsure the risk which it has insured: as far as the direct insurance is concerned, what the insurer ought to know is more limited than what the insurer ought to know as a reinsured.

2.2.2 REMEDY MEASURES

The 2015 Act incorporates the Law Commission's suggestion that the duty of disclosure continue in the insurance transaction. Nonetheless, the Law Commission, with Parliament's support, determined that the responsibility required change, which is explained above. The main problem with the MIA 1906's duty of utmost good faith is the inflexibility and severity of the remedies for the assured's breach of that obligation. As a result, it is not random that the 2015 Act revised the insurer's remedies in the case of the assured's infringement of the obligation of fair presentation. The even more interesting element of the remedies available to insurers under the 2015 Act is that the improvements to the remedies are more substantial. Although they are more favorable to the assured than the MIA 1906, they are nevertheless potentially severe. There is no space for the court to exercise discretion.

The broad remedy of avoidance for breach of the obligation of greatest good faith is abolished by Section 14 of the 2015 Act. In its stead, the 2015 Act enacts a slew of remedies for failure to meet the obligation of fair portrayal.[16] Under the 2015 Act, the proper remedy is determined by (i) whether the breach was "deliberate" or "reckless,"[17] and (ii) the degree of the insurer's incentive due to the assured's breach of obligation[18]. If a breach was intentional, the insurer has the right to cancel the insurance contract and keep the premium paid by the insured, regardless of the level of motivation, provided that the insurer was influenced. However, if the violation was neither purposeful nor reckless, the insurer's remedies are limited to the degree to which the breach prompted the insurer to engage into the insurance contract. If the insurer would not have entered the insurance contract at all, he or she may cancel it but must refund the money to the insured.

Generally, the remedies for breaches of the duty of fair presentation that encourage the insurer to agree to alterations to an insurance contract are equally based on whether the breaches were intentional or unintentional, as well as the level of the insurer's enticement. If there was a willful or reckless violation, the insurer may cancel the insurance contract from the date of the modification and keep all premium. If the violation was not intentional or reckless, and if the insurer would not have agreed to the alteration at all, the contract may be handled as if it had not been created, and the insurer must restore any excess premium paid. If the insurer would have given permission to the change on conditions other than the premium, the insurer may regard the contract as if it had been altered on those grounds. If the insurer would have charged a greater premium for the change, the insurer may decrease any claim payable under the original or amended contract correspondingly.

Except from all the above the parties have the option of changing the obligation of fair presentation and the remedies available for a breach of the duty by contract. However, basis clauses are no longer authorized under Section 9 of the 2015 Act, however special pre-contractual assurances may be necessary. Furthermore, no contract may shield a contractual party from his or her own dishonesty. The 2015 Act includes a transparency requirement that must be followed if the parties agree in their contract to change the default position under the 2015 Act. Sections 16 and 17 of the 2015 Act provide that where a relevant contractual term puts the assured in a worse position in terms of the duty of fair presentation, that contractual term will be of no effect unless, having regard to the characteristics of the assured and the circumstances of the transaction, first the term is clear and unambiguous as to its effect, and second either the insurer takes sufficient steps to draw the term to the assured's attention before the contravention occurs, or the assured had actual knowledge of the term.

2.2.3 CONCLUSION

In conclusion, τhe Insurance Act 2015 was passed as a move to make English insurance law more proportional and consistent with contemporary insurance practice as it related to the requirement of complete and accurate disclosure, which is now known as the responsibility of fair presentation. The 2015 Act was designed to give the insurer access to meritorious remedies in the event of a duty breach, which are those that are commensurate with the type and gravity of the violation.

The 2015 Act made several adjustments while maintaining the existing condition of the law. The breadth of the assured's responsibility of disclosure and the applicable remedies for breach are reflected in the two biggest revisions. The remedies have been characterized as being more reasonable. It is true that the remedies outlined in the 2015 Act are tiered, considering both the effect on the insurer and the assured's blameworthiness when determining whether to engage into an insurance contract and under what conditions. However, these remedies are rigid and still threaten harsh repercussions for an individual who violates the obligation of fair portrayal, particularly if the violation was unintentional and slight. However, this range of therapies is preferable to the rigid, severe therapy allowed by the MIA 1906.

The knowledge that is treated as belonging to the assured for the purposes of the duty of fair presentation and the knowledge that is treated as belonging to the insurer, which operates as an exception to the assured's duty of disclosure, are the other significant changes that affect the burden of disclosure placed on the assured. The scope of the assured's obligation of disclosure is now far more onerous than it was under the 1906 Act, or at the very least, it has the potential to be more stringent than it was before this alteration in the law. It seems unlikely that the 2015 Act will succeed in its goal of making the obligation of fair presentation less insurer-friendly, at least in this one area.

2.3 INSURER’S DUTY OF GOOD FAITH

It has long been recognized that the obligation of good faith in marine insurance law is reciprocal[19], meaning that the insurer must treat the insured with good faith in all their interactions, just as the assured must treat the insurer with good faith. The Marine Insurance Act (MIA) 1906's[20] section 17 has historically been cited as the source of the insurer's duty of good faith. It states generally that "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

There are a lot of issues that arise since this item merely provides "avoidance" of the contract as a remedy. Most of the time, "avoidance" would be an unrealistic remedy for the assurance in the pre-contractual stage, particularly if a breach is discovered after the insured property has suffered a loss. The obligation in the post-contractual phase is not without debate, however. The "avoidance" remedy in this situation is frequently viewed as being overly harsh[21], and courts have been obliged to use creative construction methods to limit the application of the post-contractual obligation of good faith. During the case Star Sea, held that only fraudulent failure to act in good faith, post-contract, gives rise to the right to avoid on the presumption that there is no justification for requiring the same high degree of openness post-contractually as is expected of parties at the pre-contractual stage. Based on this idea, Longmore LJ held in K/S Merc-Skandia XXXII v. Certain Lloyd's Underwriters (The Mercandian Continent) that it would be appropriate to use the avoidance remedy in a post-contractual context if the innocent party would otherwise be justified in accepting the behavior of the party in breach as a repudiatory breach of the policy. The goal of this strategy is to align "avoidance" with contractual remedies that would be applicable when the in-question clause is breached in a fraudulent manner. It assumes that the requirement to observe good faith in the post-contractual context would typically be associated with a contractual obligation. Naturally, these powers, which were initially intended to lessen the severity of the avoidance remedy, severely restrict, the extent of the insurer's post-contractual obligation of good faith.

At the end Insurance Act 2015 (referred to as "the 2015 Act") managed to make those significant amendments, as promised, one of which is the exclusion of the remedy of "avoidance" from the purview of section 17 as mentioned before.[22] This provision still states that "a contract of marine insurance is a contract based upon the utmost good faith" in its revised version. This was a necessary step to make sure that other reforms made by the 2015 Act, particularly the new proportionate remedies offered to an insurer in the event of a breach of the assured's duty of fair presentation of the risk[23] and remedies provided to the insurer in the event of the submission of a fraudulent claim[24], are not jeopardized by the continued mention of the remedy of "avoidance" in section 17.

Obviously, the intention to streamline insurer's remedies in situations of pre- or post-contractual breach of the good faith duty on the side of the insured was what motivated the change to section 17 of the MIA 1906. Given that the unpopular remedy linked with this section is no longer an issue, it is probable that the change in the pertinent legislative provision will also influence the insurer's position, hastening the natural evolution of the theory by the courts. Therefore, the purpose of this section of the dissertation is to assess and provide recommendations for the future growth of the insurer's obligation of good faith while taking into consideration pertinent authorities agreed upon before the 2015 Act's entry into effect as well as basic legal principles. Although the modified version of s. 17 is not meant to create a cause of action for an insurer, it is argued that by reminding courts of the common law position that existed prior to the passage of the MIA 1906, the underlying nature of insurance contracts as requiring the highest good faith can still play a significant role in the development of the insurer's duty of good faith.

2.3.1 COMMITMENT FOR GOOD FAITH ON PRE&PRO CONTRACTUAL STAGE

At the outset, it should be noted right away that the insured has always been in a strong position when he is persuaded to sign an insurance contract because of a significant deception made by the insurer during the contract formation stage, even prior to the adoption of the 2015 Act. The assured may choose to rely on alternate strategies in such a situation. For instance, the elements of the tort of deception are likely to be met if the insurer made a dishonest misrepresentation to persuade the latter to sign into the contract. The insured will be entitled to an award which would put him in the same situation as he would have been if the fraud had not been committed as regards the number of damages for the tort of fraud. This would allow the assured to recover the cost of repairs or cost of reinstatement of the vessel in cases where the ship suffers a loss on the theory that he has been deprive of the anticipated benefits from pursuing an alternative cause of action (e.g., buying another insurance policy). The assured enters an insurance contract as a result of the insurer's fraudulent misrepresentation and discovers later that the policy has no practical use for him. The deception Act (MA) 1967 also gives the assured the chance to prove their case for damages even where the deception was just negligent. The MA 1967 permits the assured to recover damages in the same amount as if he were suing for the tort of deceit11, therefore from the assured's standpoint, the number of damages will be evaluated favorably. Therefore, it is reasonable to assume that updating Section 17 is unlikely to change the current situation in a scenario where the insurer carelessly or fraudulently misrepresents the type of coverage; although, admittedly, situations of this nature are quite unusual in practice.

So, if the insurer has a duty to speak out during the formation process, may his silence on some instances be construed as a breach of that duty to act in good faith? Would the insurer be in breach of the pre-contractual duty of good faith by choosing to remain silent if the insurer is in possession of information relating to the assured's entitlement under the policy or sells an insurance product that he knows is unlikely to cover the vessel or the cargo as it should? What remedy would be accessible to an assured in such a situation, which is more important?

2.3.2 CASE

A case that largely represents the breach of good faith and also mentioned before, is the House of Lords decision in The Star Sea[25].

The Star Sea, Centaurus, and Kastora were three vessels that the Kollakis family legally owned. The Star Sea's one-ship firm, Manifest Shipping Ltd., was the one that registered each of the vessels. A group insurance plan for the 40 vessels in the fleet has been extended for another year. Kappa Maritime Ltd., whose directors included Mr. Nicholaidis and members of the Kollakis family, successfully managed all three ships. The company's directors, Captain Kollakis and Mr. Faraklas, were the registered managers. The latter served as Manifest Shipping's sole director. The Centaurus' engine room caught fire a year before this insurance coverage was renewed. The Korean crew failed to use the CO2 system to put out the fire because the engine room could not be effectively sealed. As a constructive total loss (CTL), the ship was withdrawn. Within two months of the initial event, the Kastora ship also became a CTL because of an engine room fire that her Korean crew failed to extinguish. The crew attempted to use the CO2 system this time, but it was unsuccessful since the funnel dampers were open. The vessel's Kappa Maritime managers hired a surveyor, who discovered the dampers were in bad shape.

These facts were known to the directors of the claimants and both managing corporations. They switched to having completely Greek officered warships because they were unhappy with the Korean crews in the fleet. The Star Sea's new captain was an accomplished and capable leader. The appropriate directors did not, however, take any action to verify his understanding of how to properly operate the CO2 system. Additionally, no additional measures were made to guarantee the upkeep of the engine room's machinery and to direct the superintendents to examine the condition of the dampers.

When the Star Sea was inspected in January 1990 by a surveyor from the Belgian port authorities after she had been taken into custody by cargo claimants, flaws in the emergency fire pump were discovered. The chief engineer severed a suction pipe going through the forepeak ballast tank to a non-return valve in the ship's side during the fire pump repairs, which were eventually finished. It turned out that this pipe was never fixed, which had an impact on the ship's seaworthiness. The Star Sea left Nicaragua on May 27th, 1990, for Zeebrugge with a full cargo of bananas, mangoes, and coffee. A fire broke out in the engine room two days later while she was approaching the Panama Canal. The fire spread and took several days to be extinguished.

The assured shipowners, Manifest Shipping Ltd., claimed under the insurance policy against the underwriters and their first defense for was that the vessel was unseaworthy. It was failed because it was found that the master was clearly incompetent because he had not been trained to operate the firefighting equipment. However, section 39 (5) of the Marine Insurance Act 1906, says: “In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness”. There is no implied warranty, hence the insurers cannot be held responsible for the loss owing to the unseaworthiness unless and until the assured has actual knowledge of the unseaworthiness or at least constructive knowledge, i.e., they must have had a reasonable suspicion. However, the insurers were unable to establish this. The breach of the highest good faith was the underwriters' second line of defense. But it was unsuccessful. They asserted that the owners breached this obligation at the claim stage because, in their letter to the underwriters attempting to settle the claim, they failed to disclose two expert reports pertaining to the loss of those two additional vessels that had previously occurred. Both had perished in the fire as well. The underwriters claimed that because the expert reports were pertinent, there had been a violation of the highest duty of good faith.

In the House of Lords, it was held: The court's procedural procedures take precedence over the requirement of absolute good faith after court proceedings have begun, or even if it does continue at all. According to the House of Lords, a court would dismiss a claim for failing to produce relevant documents if there were papers prior to the loss that were important but were suppressed or purposefully destroyed. The highest good faith obligation remains in place, but the court's procedural norms take precedence. The only behavior that could violate the need of absolute good faith during the claims process is fraud. Therefore, The Star Sea overruled what Mr. J. Herst in The Litsion Pride referred to as culpable behavior. There must be fraud for there to be a claim of a breach of the highest duty of faith in connection to claims. In The Star Sea, the defense of a breach of the highest good faith was unsuccessful because the underwriters were unable to establish fraud.

It could be contended that if anyone treat it as a pre-contractual responsibility, then it should be considered as general law, allowing for avoidance of innocent non-disclosure. The standard pre-contractual responsibility must exist if the cover is indeed new. The House of Lords stated that it is only restricted to fraud at the claims stage.

In The Star Sea, the underwriters were held accountable because there was no evidence of fraud on the part of the relevant party. The House of Lords wanted to restrict the ongoing obligation of absolute good faith. They acknowledged the ongoing obligation but asserted that once that happens, the court's procedural rules should take effect. It was said that:

"… The law upon such a case is in accordance with justice and with sound policy. The law said that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained. It is the customary practice to insert in fire policies conditions that they shall be void in the event of a fraudulent claim; and there was such a condition in the present case. Such a condition is only in accord with legal principle and sound policy. It would be most dangerous to permit parties to practice such frauds, and then, notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is willful falsehood and fraud in the claim, the insured forfeits all claim whatever upon the policy. This, therefore, was an independent defense; quite distinct from that of arson … Sir Roger Parker said, at p. 452[26]: The appellant submits that the law, in the absence of a specific clause, is that an insured may present a claim which is to his knowledge fraudulent to a very substantial extent but may yet recover in respect of the part of the claim which cannot be so categorized. To accept this proposition involves holding that, although an insurance contract is one of utmost good faith, an assured may present a positively and substantially fraudulent claim without penalty, save that his claim will to that extent be defeated on the facts. . .. I can see. . .every reason why he should not recover at all. In my judgment this is not so. It appears to me that it is contrary to reason to allow an insurer to avoid a policy for material non-disclosure or misrepresentation on inception, but to say that, if there is subsequently a deliberate attempt by fraud to extract money from the insurer for alleged losses which had never been incurred, it is only the claim which is forfeit."

In general, however, examining this and other examples in similar cases where the insured is in the position of the insurer, an important question arises. The trickier question is what would happen if the insurer for example breached his duty of good faith. Unlike sections 18 and 20 of the MIA 1906, the 2015 Act adds corresponding remedies where the insured is in breach of his duty to make a fair presentation. As we can also conclude through common sense, if for example the negligent insured fails to disclose an important circumstance and it can be proved that the insurer would have entered the contract but charged a higher premium, the insurer can reduce the amount payable proportionately paid for claim. However, recovering premiums is not always an adequate remedy for insurers who non-disclosure leads to fraudulent or negligent policies. Claiming damages is a practical solution. If the duty of good faith stems from common law, courts can award damages in appropriate cases. In other common law jurisdictions, courts can make damages available as a direct remedy for breach of good faith principles.

As an alternative, s. 17 might be used to support the creation of a new tort that would allow the assured to receive compensation when an insurer breaches its pre-contractual duty of good faith. But the elimination of "avoidance" as a remedy from the scope of s. 17 may have changed the equation. In contrast to the precontractual responsibility of the assured, which has a remedy provided in the applicable legislation in the event of a breach, the existence of a duty on the side of the insurer to observe good faith has now been recognized by a legislative provision. The courts frequently create new torts when necessary, and since the courts will be able to define the boundaries of this tort, there is no risk that this new tort will be used against the assured (for example, by enabling insurers to sue assureds for damages even in situations of innocent non-disclosure). When the insurer breaches his duty to act in good faith at the pre-contractual stage, a policy decision must be made as to whether it is desirable to create a new tort that permits damages; however, it is submitted that the circumstances are somewhat different than they were 25 years ago, when changes to the MIA 1906 could pave the way for a different result.

However, it is widely acknowledged that once an insurance contract is signed, the parties' good faith obligations continue. The courts have stated on numerous occasions that in situations when an insurer is given a discretionary authority under the contract, he is by virtue of the duty of good faith obliged to utilize his discretion in a reasonable manner without being capricious, arbitrary, or perverse. There is no question that a liable insurer has an implied duty to consider the interests of the assured in managing a claim and its defense, as in the case of Groom v. Crocker[27]. Sir Wilfrid Greene MR[28] emphatically stated the legal position by saying that insurers have the right to control proceedings in which they and the assured have a common interest, ensuring small judgments and a burden on the assured if insurers are insolvent. They can decide on tactics based on common interest, but their decisions should not be influenced by gaining an advantage outside the litigation with which the assured has no concern.

In a similar vein, Fargnoli v. GA Bonus plc., a case from Scotland[29], According to Lord Penrose[30], mutuality of the obligation of good faith would require an insurer at the claims stage to refrain from delaying in bad faith an admission of liability for the settlement of claims that he would be required to admit before a court to be valid, or that might prevent the insurer from putting the assured to the test of what he already knows to be true or advancing knowingly flimsy defenses to a claim. Again, referencing the possibility of the insurer's obligation, Lord Penrose was adamant that a breach of this duty would result in an insurer being put in repudiatory breach of the contract. Most people believe that this requirement is imposed on the insurer by law, maybe in this case as a direct outcome of the insurers' shared duty of good faith. However, it is important to note that the competent authorities make no reference to Section 17 of the MIA 1906. This may be the result of the fact that, since such a duty is generally included into contracts whenever one party is granted discretion, it is not specific to insurance law.

Even though the two examples concern the insurer's rights against the assured, it is undeniable that in appropriate insurances—particularly liability policies where the insurer takes over the management of the litigation—the ongoing duty of good faith could serve as one of the justifications for implying a term into the contract outlining the obligations of the insurer. Prior to the alteration in s. 17 of the MIA 1906, the doctrine of uttermost good faith served this purpose, and there is no reason to believe that this would change because of the statutory amendment. An important consideration in deciding whether to imply a specific term into an insurance contract is the fact that the obligation of good faith exists during the whole policy duration.

However, by observing the issue of good faith we can say that using it can be limited to insurers' rights. In several cases, it has been stated that if the insurer did not act in good faith while using the remedy, the insurer may be prevented from exercising an apparent right (such as the right to avoid the policy). This debate was first made public by Colman J in Strive Shipping Corporation v. Hellenic Mutual War Risks Association (Bermuda) Ltd (The Grecia Express)[31], who opined that the continuing duty of good faith might limit the insurer's ability to reject an insurance policy because of the assured's pre-contractual breaches of the highest good faith. In this case, the insurers attempted to escape a marine policy on the grounds that the assured neglected to report that there were suspicious circumstances linking the assured to prior marine casualties at the time of renewal. According to Colman J., the prior losses weren't suspicious and weren't significant. His extra thoughts on the subject, nevertheless, were intriguing. He continued by saying that "It would be unconscionable and contrary to the insurer's continuing duty of good faith if the insurer were allowed to avoid the policy based on those facts which had not been disclosed and which had been proved at the date of the purported avoidance not to have been true.", even though the suspicious circumstances may have been material facts at the inception of the policy requiring their disclosure. The upshot of such a development is that the courts may be allowed to reverse a stated avoidance at a trial stage if it turns out to be viable to make an inroad into the equitable concept of "unconscionability."

Despite uncertainties surrounding the concept, it is argued that removing "avoidance" as a remedy from the scope of section 17 of the MIA 1906 would probably have a beneficial effect. This might allow courts to expand the idea with the help of the mutual obligation of good faith by adopting completely new remedies in response to various situations. It is true that the circumstances in which the insurer will be permitted to "void" the contract will be limited with the introduction by the 2015 Act of proportionate remedies for breach of the assured's pre-contractual breach of good faith. However, one might envisage situations in which court intervention might be required. For example, if an insurer later seeks to deny responsibility by claiming an inaccurate description of the condition of the vessel after realizing that the assured had incorrectly described the insurance's identity. In that case, it's possible that the insurer could be prohibited from bringing up this defense on the grounds that doing so would violate their duty to act in good faith.

In conclusion, authorities have been open to the idea of utilizing the theory of the greatest good faith to prevent an insurer from acting unreasonable after the contract has been signed, without attempting to specify its parameters. Undoubtedly, however, the scope of this concept is far from being clear, but it is obvious that an insurer who attempts to depend on a remedy while aware that he lacks one under the circumstances will be prohibited from doing so.

3. FUTURE OF WARRANTIES AND CONDITION IN MARINE INSURANCE CONTRACTS

On August 12, 2016, the Insurance Act 2015 went into effect, making some significant modifications to the legislation pertaining to warranties and other clauses in marine insurance contracts. No matter where the policy is placed or the policyholder is located, the changes apply to all insurance and reinsurance contracts that begin or are renewed on or after August 12, 2016, as well as to modifications of existing policies on or after that date, if the contract is subject to the laws of England and Wales, Scotland, or Northern Ireland. The first significant change is that insurers can no longer deny a claim based on a warranty breach or other similar "risk mitigation term" if the violation is unrelated to the actual loss that has occurred. The second is that cover is now stopped concurrently with the insured's warranty violation rather than being automatically and permanently terminated as the insurer's only remedy for such a breach. The last one is that "basis of contract" provisions are no longer in existence in any form, and insurers cannot enter into contracts to avoid them.

3.1 CHARACTERISTICS OF WARRANTIES AND CONDITIONS

Terms in insurance contracts can be split into three categories: warranties, conditions precedent, and bare conditions.

A warranty is a clause in a policy that must be strictly followed; any deviation from this rule is a breach. Warranties may be created in several ways, including express term (a warranty that is created by specifically naming it as such) or construction (a warranty that is implied into a policy where, for example, compliance with the term is fundamental to the insurance contract and where the term is important to the risk) or as a basis of contract clauses[32]. According to the previous law, if a policyholder breaches a warranty, the insurer is immediately and permanently released from liability beginning on the day of the breach, regardless of whether that breach had any bearing on the loss that had already happened or whether it has since been corrected. This is obviously a rather severe remedy, and as was mentioned above, it is one of the main issues that the Act 2015 changed.

From the other hand we have conditions that can be divided into the following categories: Conditions precedent to the insurer coming on risk, Conditions precedent to the insurer's liability to pay a claim and Bare conditions.

The first type of condition precedent was imposed at the pre-contractual stage and provided that the insurer will not come on risk until certain conditions have been satisfied. For example, a payment of premium condition or a requirement that the insured provides a survey of the insured subject matter. The claims procedure is frequently related to the second kind of condition precedent. While the consequences of a breach vary depending on the precise terms used, a breach often allowed the insurer to deny a specific claim but had no bearing on the coverage moving ahead. For instance, if a policy's condition precedent required that a claim be reported within a certain amount of time after the insured became aware of it, failing to comply would mean that the claim would not be covered even if the insurer had not suffered any harm from the late notification. For upcoming claims, the policy is still in effect. Regarding bare condition, is a clause in the policy that relates to the actions of the policyholder while it is still in effect (for instance, that the policyholder cooperates and provides the insurer with all reasonably possible help in the case of a claim). If the insurer is able to show that the breach caused it to incur harm, it may be entitled to damages.

3.2 SIGNIFICANT CHANGES

Changes to the law on warranties and other terms are contained in Sections 9 to 11 of the Act 2015 and are set out in reverse below. These changes are positive steps forward for policyholders as they have weathered some of its harshness prior law, regarding insurers' remedies for breach of warranty and the prior ability of insurers to rely on unrelated breaches of policy terms to avoid paying claims.

The purpose of Section 11 of the Act 2015 is to prohibit insurers from rejecting or limiting their responsibility for paying claims based on breaches of policy conditions that have no bearing on the actual damage the policyholder has experienced. It is crucial to understand that Section 11 applies to any clauses in the policy (including warranties and preceding conditions) that have the potential to lower the risk of (a) a specific type of loss, (b) loss at a certain time, or (c) loss at a specific location.

This new law prohibits insurers from using a policyholder's breach of a risk mitigation term as reasons to refuse to pay a claim if the policyholder is able to show that the breach "could not have increased the risk of the loss which actually occurred in the context in which it occurred" (s.11(3) Insurance Act 2015). For instance, it is unclear that the insurer would be able to rely on a breach of a policy condition requiring sprinklers to be in operation if an insured vessel was destroyed by floods. On the other hand, if the property suffered fire damage and the sprinklers had not been maintained in working order, the insurer would likely still be able to rely on this breach. Note that it will be the policyholder's responsibility to demonstrate that the breach did not enhance the likelihood of the actual loss.

The fact that this new protection is not applicable to policy clauses that "define the risk as a whole" is a significant restriction that policyholders should be aware of. Even after the Act came into effect, insurers may still be able to rely on the breach of a clause that "defines the risk as a whole" as reason for rejecting or limiting liability for the claim, depending on how precisely the phrase was written. Even though policyholders would benefit from the reforms brought about by section 11 of the Act, there are still certain areas where confusion exists.

It won't always be clear to distinguish between policy terms that "define the risk as a whole" and those that "risk mitigation terms" (and are, thus, covered by Section 11). The Law Commission provided the following examples of expressions that might be seen as defining the risk as a whole: Specify the geographical area in which a loss may occur, specify whether the insurer is responsible for compensating the insured, or specify that a cargo or a vessel not be utilized for commercial purposes. Although the Law Commission has provided these examples, whether a term is or is not one that “defines the risk as a whole” will ultimately be left to the courts to determine.

Furthermore, it is unclear whether courts must or can interpret an exclusion clause as being a term with which the policyholder must "comply" for the purposes of Section 11(1), despite the Law Commission's Explanatory Notes suggesting that Section 11 could apply to exclusions. As it establishes limits on the extent of coverage offered by a policy, one may also argue that an exclusion is a phrase that describes the risk as a whole (thereby falling beyond the purview of Section 11).

3.2.1 CHANGES TO THE LAW ON INSURER'S REMEDIES FOR BREACH OF WARRANTY

The Act of 2015 (under section 10) made a number of significant changes, and as was mentioned above one of which is the elimination of automatic and permanent termination of coverage as the insurer's sole remedy in the event of a warranty breach. Instead, if a warranty has been breached, coverage will be terminated from the moment of the breach until the problem has been resolved (if the issue can be solved). After the insured rectified the breach, the insurer will be responsible for any additional losses, unless the loss can be linked to an event that occurred while the insurance was stopped.

Generally, warranties can be distinguished between time-specific warranties and other warranties. Time-specific warranties demand for something to be done (or not done) by a specified date, and a breach is cured when the risk to which the warranty refers essentially becomes the same as what the parties to the insurance contract originally anticipated. For instance, if a property insurance has a warranty stating that a burglar alarm must be installed by 1 April, but the policyholder waits until 15 April to do so, the warranty is breached on that day and the risk returns to what the parties had originally anticipated. Coverage would have been halted between April 1 and April 15 in this case. Accordingly, the insurer will be responsible for losses that happen between the time of inception and 1 April, won't be responsible for losses that happen between that date and 15 April (unless the insured is able to show that the breach could not have increased the risk of the loss that actually occurred in the circumstances in which it did occur and will be responsible for losses that happen after that date, provided they aren't the result of something else).

In any other case (other warranties), the breach of warranty is remedied when the insured ceases to be in breach of warranty. For instance, if a warranty stipulates that a ship must sail with a crew of 20, but the policyholder sends out the boat with just 18, the breach is fixed as soon as the insured hires two more crew members. The insured is no longer in warranty breach at that moment. It's crucial to keep in mind that some warranties will never be able to be satisfied; for instance, a warranty pertaining to a duty of secrecy cannot be fulfilled once that obligation has been breached. The insurer's obligation would thereafter be suspended for the balance of the policy period, depriving the policyholder of coverage beginning on the date of breach. It is therefore prudent for policyholders to avoid including warranties that cannot be remedied in their policies wherever possible. For instance, policyholders should avoid any clause that states that a specific situation is "warranted at

inception" since, in such cases, if there is noncompliance with the clause at inception, there is only one policy inception date, and this makes it impossible to remedy the situation.
Finally, it's critical to comprehend how sections 10 and 11 of the Act relate to one another. When a warranty is broken, the insurer's responsibility is suspended starting from that point forward. However, during the suspension of coverage, a loss that is unrelated to the warranty breach may happen. Starting from this moment, no loss that happens during the time of suspension of insurance is covered (Section 10), regardless of whether the breach has any causal relationship to the loss. This is since the insurer's obligation is ceased after the warranty has been breached. However, due to Section 11 of the Act, the insurer will not be able to use the breach of warranty as a defense to avoid liability if the warranty is a risk mitigation term (rather than a term that defines the risk as a whole) and the policyholder has proof that the breach could not have increased the risk of the loss that occurred in the circumstances in which it occurred.

3.3 CHANGES ON "BASIS OF CONTRACT" TERMS

A major improvement for policyholders is the total removal of "basis of contract" clauses under Section 9 of the Act. As a result, once the Act came in force, insurers were not anymore able to use a clause in the policy or in the proposal form to turn promises made by the insured in pre-contractual documents into warranties. It is crucial to remember that this legal change only applies to new and renewed policies which began on or after August 12, 2016, as well as to changes to existing policies beginning on or after that date. In other words, the Act cannot automatically invalidate a "basis of contract" language that was included in a policy that was purchased before August 12, 2016.

In addition to the basis of contract terms being eliminated, policyholders and insurers are now free to contract out of the Act. Insurers may attempt to exclude the favorable improvements brought about by the Act, and policyholders may endeavor to position themselves better than they would be under the Act. However, for such a "disadvantageous term" to be effective (i.e., one that would leave the policyholder in a worse situation than they would be under the Act), the insurer must adhere to the following "transparency requirements" as outlined at section 17 of the Act. Initially the insurer must take sufficient steps to draw the disadvantageous term to the insured’s (or its broker’s) attention before the policy is entered. Then, the term must be clear and unambiguous as to its effect.

As a result, it would not be sufficient for a term just to specify that, for instance, "Section 10 of the Insurance Act 2015 is excluded in its entirety." The detrimental term would have to specify what would happen if Section 10 were removed in order to conform to the Act's disclosure requirements. Therefore, the following might be a compatible clause: "Section 10 of the Insurance Act 2015 is excluded in its entirety. As a result, the insurer is released from duty permanently as of the date of the warranty breach if the insured fails to precisely comply with any warranty in the policy. Because of this, the insured cannot use the defense that the warranty breach was fixed before any losses occurred.

From the time that the Act came in force, it is possible for insurers to include conditions precedent and warranties in policies, and insurers still can have to label them as such. Policyholders must continue complying to all the policy conditions and warranties as of the Act's effective date. Only the insurer's remedies for breaches of risk mitigation conditions and warranties have changed as was previously noted. For example, a condition precedent in a policy, such as one requiring timely notification of claims or losses, must nonetheless be properly followed since failing to do so might impair the policyholder's capacity to receive compensation under the policy.

Policyholders should, therefore, had to use the time before 12 August 2016 to improve their notification provisions to ensure that the notification provision is only triggered by the knowledge of certain class(es) of individual within the insured (for example, the knowledge of the risk manager) and not the insured generally and that there is a reasonable period in which to notify (as opposed to a short specified time limit). There is a clear threshold for a notification clause to be triggered, such as claims likely to be for more than a certain monetary amount. Finally, it is still possible to include condition precedent “sweep-up” clauses in policies. For the reasons discussed above, such clauses should be avoided.

CONCLUSION

As a conclusion it has to be noted once again that the Insurance Act 2015, together with its earlier sibling, the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA)[33], is the most significant reform of the nation's insurance law since MIA 1906. The Marine Insurance Act 1906 (the "1906 Act"), designed for marine insurance but with enormous impact on our insurance law generally, was not itself a reform but in essence a codification of the then existing common law. The 1906 Act's ossification of the law resulted in a number of restrictions on court jurisprudence that have been felt in subsequent years. Particularly, the one and only remedy of avoidance for breach of the duty of good faith was criticized as being draconian and insufficient, as was the automatic termination of an insurance contract brought about by a breach of warranty, regardless of how far removed it was from the cause of the loss, how minor the breach, and even if the breach. However, the 1906 Act required both of these remedies. Section 17 stated that "if the utmost good faith be not observed by either party, the contract may be avoided by the other party"; Section 18(1) stated that "[i]f the assured fails to make such disclosure, the insurer may avoid the contract"; Section 20(1) stated that "the insurer may avoid the contract" if any material pre-contractual representation was untrue; And Section 33(3) stated that "the insure" may avoid the contract if a warranty was not complied with, subject to All of those supplies are now gone.

However, in more recent times, there has been a propensity to define a warranty and set it apart from other provisions of an insurance contract by examining whether it characterized the risk. This contract interpretation exercise could be challenging enough. Of course, it was just a prerequisite if the contract was broken. Nevertheless, it makes sense from a doctrinal standpoint that an insurer should not be held responsible if the risk actually taken differs from the risk contracted for, regardless of any connection to the loss and regardless of whether the breach was corrected before the loss.

As regard the duty of good faith, it is already noted that because of section 14 of the Act by section 17 of the 1906 Act which states that: "A contract of marine insurance is a contract based upon the utmost good faith", with the reference to the remedy of avoidance deleted. Additionally, section 14 of the Act changes any legal principle based on that surviving doctrine, which obviously applies to insurance contracts in general, save to the extent that it survives both the Act's and CIDRA's provisions. According to the Law Commission, it serves three purposes: it is clarifying the meaning of the need of fair presentation, it is explaining the necessity of implication of words, and it provides opportunity for judicial discretion. Even in a post-contractual setting, it is not anticipated that it would result in a claim for damages. And it has previously been established by authority that the obligation of good faith ends when litigation starts.

However, the doctrine's continued existence is compatible with the Act's goal of achieving better balance in the pre-contractual disclosure role by requiring insurers to be aware of the function of questioning. It is also feasible that it might impact an insurer's ability to cancel under the terms of the policy, a subject that was briefly covered in past jurisprudence even if it was done so under the shadow of an outdated legislation. In light of this, the civil law notion of rights abuse may evolve. The common law and civil law also worry about the abuse of cancellation rights, but only under certain situations that likely depend on the meaning of words. It's likely that the idea of good faith will now be applied in a more sophisticated manner to bring about just outcomes or prevent unjust ones.

It's also interesting to observe where the good faith theory goes without its one and only remedy, avoidance. Although mutual, the idea has historically been of little or no advantage to insureds because they almost never find themselves in a position where they would like to avoid their insurance. The obligation of disclosure was really established by the notion of good faith. However, because, unlike most insurers, it is his insured who makes the proposal, the reciprocal responsibility of the insurer, who is equally under a mutual obligation to preserve the utmost good faith, was typically lost to sight. However, now that the duty of good faith is not only a means of avoiding responsibility and the duty of fair presentation has grown more nuanced, but there may also be circumstances in which the doctrines of fairness and good faith combine to provide a different result than in the past.

This leads into the duty of fair presentation generally. It is to be observed that the duty covers both non-disclosure and misrepresentation on an equal footing (section 3(3)). Two possibly controversial aspects of this duty are the alternative ways of fulfilling that duty set out in section 3(4)(b), and the reference to a "reasonable search" in section 3(6). The Act's section 3(4)(b) formulation emphasize that the aim is to achieve the greater disclosure, and that evidence that the proposer has not in good faith attempted to meet that primary duty will be likely to result in a finding that a fair presentation has not been made. Also, section 4 discusses limitations on the knowledge of an insured, aiming to bring accountability to individuals but limiting it to agents, brokers, and intermediaries. It also applies to business organizations, where accountability is limited to senior management or those responsible for their insurance.

Before leaving the subject of the duty of fair presentation for that of warranties, it is important to address the Schedule 1 remedies for breach of duty. This is the Act's fundamental principle, in a significant sense. The previous law regarding the duty to disclose has been reformulated as a duty of fair presentation, balancing the roles of insured and insurer. Warranties and fraudulent claims remain. However, remedies have become more flexible in cases of wrongdoing, non-disclosure, breach of warranty, or fraudulent claims. The evolution of common law towards remedies remains uncertain due to statutory code and precedent doctrine.

As regards terms and warranties, Part 3 of the Act deals with warranties "and other terms" that are "not relevant to the actual loss." It is important to note that the elimination of basis of contract clauses and similar provisions (section 9) has the effect of ensuring that any promissory warranty of the insurance contract must stand on its own and cannot result from a simple pre-contractual declaration. As a result, it is hoped that the obligation of fair presentation and the operation of the insurance contract will be kept separate. Regarding warranties themselves, the Act makes no attempt to alter how they are recognized. The 1906 Act's definition of a warranty, which is as 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 negates the existence of a particular state of facts," and which "is a condition which must be exactly complied with," remains in effect despite the second sentence of section 33(3) and the entirety of section 34 of the 1906 Act being abolished. But it's still difficult to tell a warranty apart from other clauses in an insurance policy. It is a question of interpretation, and legal precedent oscillates between establishing a warranty as a condition to the insurer's liability, which acknowledges it by its impact and might be considered the initial problem, and a particular word that contains a crucial characterization of the risk.

As a conclusion the Act is not revolutionary since it permits extensive, nearly entire contracting out and leaves the obligation of fair presentation largely as it was in its pre-Act form. But the remedies offered in the event of a duty breach or a failure to abide by warranties and other conditions excluding or limiting risk are novel. The new remedies are significantly more adaptable, reasonable, fine-tuned, and equitable than the previous statute for these reasons. Its effects are it's the greater transparency, greater proportionality, the growth of agreed guidelines which will themselves promote greater transparency and proportionality, and the product of all this will be greater fairness and the promotion of insurance as better answering to the needs of industry and commerce. Insurance cover is no longer be so much in the discretion of the insurer but is available on a principled but also flexible and fair basis. The minority of fraudsters and deceitful seekers of insurance are not any better off, but the substantial majority of lawful and honest users of insurance is better served by a great and important industry. Perhaps, in the short run, there will be litigation about some of the new language in the Act. In the short run, the lawyers will benefit, and the judges will have to elucidate the principles of the Act. In the long run, however, these new remedies will work their own solutions; and one of their benefits will be that judges and arbitrators will be able, for the first time in a long while, to stop looking for ways in which they can protect insureds against the over-rigid provisions of an out-of-date law. Everyone will benefit from that.

NOTES

1. Bills of Exchange Act 1882 (legislation.gov.uk)
2. Sale of Goods Act 1979 (legislation.gov.uk)
3. Farrer Herschell, 1st Baron Herschell - Wikiwand
4. International Convention for the Safety of Life at Sea (SOLAS), 1974 (imo.org)
5. Unfair Terms in Consumer Contracts Regulations 1999 - Wikipedia
6. The International Hull Clauses 2003 | 7 | Marine Insurance: The Law in (taylorfrancis.com)
7. Section 3(1) and (2) of the Insurance Act 2015
8. Section 14(1) of the Insurance Act 2015.
9. Section 14(3)(a) of the Insurance Act 2015
10. At para. 116 of Act 2015
11. Sections 18–20 of the 1906 Act are “omitted” by section 21(2) of the 2015 Act.
12. Sections 2(2) and 3, respectively, and Schedule 1, Part 1 and Part 2, respectively. There is no provision in the 2015 Act dealing with “held covered” clauses.
13. Section 12 of the Insurance Act 2015.
14. Galloway v Guardian Royal Exchange (UK) Ltd [1999] Lloyd’s Rep IR 209. It has been questioned whether or not the presentation of a fraudulent claim is embraced by the duty of utmost good faith or whether it is subject only to an independent common law rule (Agapitos v Agnew (The Aegeon) [2002] EWCA Civ 247; [2002] 2 Lloyd’s Rep 42). See the discussion in Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea) [2001] UKHL 1; [2003] 1 AC 469
15. Actual knowledge includes blind-eye knowledge.
16. Section 8 and Schedule 1 of the Insurance Act 2015
17. These terms are defined in s. 8(5) of the Insurance Act 2015. A deliberate breach means one where the assured knows that it acted or failed to act in breach of the duty of fair presentation. A reckless breach is one where the assured did not care whether or not it acted or failed to act in breach of duty.
18. Schedule 1, Part 1 of the Insurance Act 2015.
19. In Carter v. Boehm (1766), 3 Burr 1905, Lord Mansfield is credited as saying: "The policy would equally be void, against the underwriter if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived, and an action would lie to recover the premium."
20. Especially given that ss. 18–20 of the MIA 1906 devotes their attention to specific pre-contractual duties of the assured and his intermediaries, the only provision in the Act that the insurer’s duty could derive from is s. 17 of the MIA 1906.
21. This led Lord Clyde in Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea) [2001] UKHL 1; [2003] 1 AC 469, at [6], to comment that limiting the scope of s. 17 to pre-contractual negotiations “appears to be past praying for”.
22. See s. 8 and Schedule 1 of the Insurance Act 2015.
23. See s. 12 of the Insurance Act 2015.
24. See “Insurance Contract Law: Business Insured’s Duty of Disclosure and the Law of Warranties”, Joint Consultation Paper, (2012), LCCP 204/SLCDP 155 at p. 127.
25. The Star Sea [2001] UKHL 1, [2003] 1 AC 469, [1997] 1 Lloyd’s Rep 360, [1995] 1 Lloyd’s Rep 651
26. Roger Parker (judge) - Wikipedia
27. [1939] 1 KB 194
28. Wilfrid Greene, 1st Baron Greene

29. [1997] CLC 653, at 670–671.
30. George William Penrose, Lord Penrose
31. [2002] EWHC 203 (Comm); [2002] 2 Lloyd's Rep 88.
32. A "basis of contract clause" is often found in proposal forms stating that the facts set out in the proposal form are the "basis of the policy" and are to be construed as being incorporated into it. This type of clause has the effect of conferring the status of a warranty on all of the pre-contractual representations made by the prospective policyholder.
33. Consumer-insurance-act-recommendations.pdf (abi.org.uk)

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