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LAW RELATING TO WARRANTIES IN MARINE INSURANCE: UNITED KINGDOM AND INDIA IN A COMPARATIVE PERSPECTIVE

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Abstract

After almost a decade amendments have been made to the Marine Insurance Act 1906, UK in an attempt to balance the scales which was previously tipped towards the insurers. Since marine insurance warranties are governed by Marine Insurance Act 1963 in India, which is based on Marine Insurance Act 1906, UK, it become prudent to determine the issues identified by the English Law commission and amendments made by the Insurance Act 2015, UK to the warranties regime under Marine Insurance Act 1906, UK. It is the need of the hour to consider changes to law relating to marine insurance warranties in India as well, since the colonial law on which Marine Insurance Act 1963, India is based is heavily biased in favour of the insurer. Law makers of India have to choose the route they would like to follow. The right step will be to study the law in other commonwealth countries which were based on Marine Insurance Law 1906, UK, so that with time India will be ready to make changes most suited to Indian market conditions.

Introduction

Warranties in insurance law differ greatly from warranties in general contract law; the use of the word 'warranty' in insurance law is more restrictive.[1] Law relating to warranties have been critiqued over the years by judges, academicians, lawyers, and insurance market personnel, due to the fact that breach of warranty under insurance law has draconian effects as the insurer is automatically discharged from any further liability under the policy from the date of the breach.[2] But this is not the only issue warranties are criticised for, other issues include, use of basis of contract clauses, insurer can refuse a claim even for trivial reasons not connected to the breach and lack of possibility of remedying the breach. Warranties in marine insurance in United Kingdom were governed by Marine Insurance Act, 1906(herein after referred to as MIA, 1906) which also happens to be basis on which other commonwealth countries have enacted their respective marine insurance laws.

The Law Commission of India has observed that warranties in marine insurance correspond to "conditions" in the Sale of Goods Act. Under the Sales of Goods Act a breach of condition may give rise to a right to avoid the contract, similarly a breach of warranties discharges the insurer from liability from the date of the breach, as provided by English marine insurance law, therefore to that extent, it is more akin to a condition.[3]

Law develops and changes with time depending on economic and social circumstances; it had been long overdue to amend laws relating to marine insurance warranties. After numerous consultations and issue papers, the Law Commission of UK recommended changes to the law relating to warranties. These recommendations were put together in Insurance Bill 2014 which received the Royal Assent in 2015 and came into force on August 2016. Insurance Act 2015, UK applies to all insurance, thus it affects all consumer and non-consumer insurance policies. This act changes the law of warranties drastically. It is worth noting that the 2015 Act seeks to modify and improve upon those aspects of the previous law which have been widely criticised. For instance, abolishment of basis of contract clauses which bring the law relating to non-consumer insurance in line with consumer insurance, all the more significant given that the use of such clauses have been abolished in consumer insurance since the enactment of Consumer Insurance (Disclosure and representations) Act 2012 in the UK.[4] This act seeks to amend or rather change centuries old rule of automatic discharge and bring in a regime under which breach can be remedied. This paper looks at the Indian regime of marine insurance, followed by a study of the issues related to warranties in MIA 1906. Further, the amendments made by 2015 Act are considered, finally making recommendations in this regards.

Why was Indian Marine Insurance Act 1963 based on Marine Insurance Act 1906(UK)?

The Law Commission of India in its twenty-first report expressed its desirability to follow the English Act. As per the Law Commission, the English Act embodies law which crystallised and represented the experience of leading maritime nations, extending over three centuries. Further it believed that the marine insurance policy used in UK as embodied in the Lloyd's was settled in 1779 was also followed in India, although it has been criticised, but since it was based on usage and were in use for such a long span of time that it should not be lightly brushed away. Also, the law relating to interpretation of its provisions of the MIA 1906 were well settled by numerous decisions of courts, including the House of Lords,[5] which could be used in India as well. In this regard, the Law Commission opined that—

> As the topic is one which is international in character, both convenience and expediency require that our law should, as far as possible, be in conformity with it.[6]

Moreover, the Law Commission took note of the fact that since the business of marine insurance in India closely follows the English model, and many of the insurance policies in India were based on Lloyd's policy, it made following the English regime very appealing in Indian conditions.

Further law commission of India also opined that following English law would facilitate business if the law pertaining to marine insurance was uniform, thus recommending to follow generally the pattern of MIA, 1906.[7]

Regime of Warranties under the Marine Insurance Act 1906, United Kingdom

(i) Identifying a Warranty:

It is important to identify a warranty in English marine insurance law because of its draconian effect. The marine insurance act 1906 defines promissory warranties[8] and also states that warranties can be either express or implied.[9] It is important to determine whether a term is a warranty or not, but identification of warranty is not an easy task especially since courts have held that the use of word 'warranted' is not conclusive.[10] The interpretative approach generally used by courts to classify a term as warranty is very fact specific and often motivates the courts to interpret it in such a way that the harsh consequences of breach could be avoided.[11] Thus, making it difficult to predict what the court will consider as warranty or otherwise.

(ii) Basis of Contract Clauses:

Warranties can be created in different ways one such way is the basis of contract clause, such clauses have been used in non-marine policies for a long time.[12]This clause converts the answers given by the assured while filling the proposal form into warranties.[13] Thus, assured warrants the truth of his answers; in case any if the answer is found to be false the insurer can repudiate the policy irrespective of the fact that statement was material or not to the loss.[14] This clause has been criticised over the years for being very harsh to the assured as any minor mistake in answering the proposal form may discharge the insurer from his obligations under the policy, in other words such mistake is considered as a breach of warranty.[15]

Both these provisions greatly benefit the insurer; the use of such terms in policy generally means the assured is sure to be on the losing side if there is any non-compliance, giving the insurers a very good defence.

(iii) Effect of Breach of Warranty:

(a) Automatic Discharge:

The Marine Insurance Act 1906, s 33 (3) provided that the effect of the breach of warranty is automatic discharge of insurer from liabilities under the policy from the date of the breach. The House of Lords has confirmed this view in the *Bank of Nova Scotia v Hellenic Mutual War Risks Association, The Good Luck*.[16] In this case the court observed that insurer is discharged from liability as from the date of the breach, for the simple reason that fulfilment of the warranty is a condition precedent to the liability of the insurer.

In another case *HIH Casualty v New Hampshire*,[17] Justice Rix stated that by breach of warranty the assured takes himself out of the cover because a warranty is very akin to a statement of the cover provided by the insurance. The insurance ceases to bind because the insurer had agreed to cover the risk provided the warranty was performed.[18]

(b) Breach and loss need not be connected:

Due to the words 'whether it be material to the risk or not 'used in MIA s 33(3), the insurer is discharged from his liability even though the loss may not be connected with the breach of warranty.[19] This means that no chain of causation[20] is required, the breach of warranty leads to automatic discharge irrespective of the materiality of the risk.[21]

(c). Remedying the breach:

Marine Insurance Act 1906, s 34(2) states:

> Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

This section codifies *De Hahn*.[22] In *De Hahn v Hartley*[23] the insurer was held not liable because the warranty of manning the vessel with required number of crew was breached. The vessel had commenced her voyage without the required number of crew contrary to the warranty in the policy. Although additional crew was picked up on the way but it was held this could not remedy breach of warranty. Once a warranty has been broken it cannot be remedied; the assured cannot take the defence that breach was remedied before the loss.[24]

The whole scheme of breach of warranty leading to automatic discharge has been criticised as harsh on the insured, keeping in mind that the breach cannot even be remedied. No matter how trivial the breach may be it will lead to discharge of the insurer from future liability under the policy. This does not bring the policy to an end but only discharges the insurer from further liability, this scheme can be criticised as being very insurer friendly.

(d) Excuse of non-compliance and waiver:

The Marine Insurance Act 1906, s 34 gives two ways of excusing the breach of warranty. Firstly, when there is a change of circumstances and the warranty ceases to apply to circumstances of the contract or when compliance with warranty becomes unlawful by a subsequent law.[25] Secondly, when a breach is waivered by the insurer[26], it is important to mention here that only waiver by estoppel applies to warranties.[27]

The problem is how insurer's liability that has ceased to exist can be revived by waiver.[28] Putting it differently how can an insurer who is automatically discharged from his liability under the contract without having an option of electing bring a contract back to life by use of waiver.

The Marine Insurance Act 1963, India

The Marine Insurance Act, 1963 is based on the MIA, 1906. There are very few differences and none with respect to provisions relating to warranties. Section 35 to 43 of the 1963 Act provide for the provisions applicable to warranties in marine insurance. It is also pertinent to mention here that these provisions are the same as MIA, 1906 Act of the UK. The issues highlighted above with regard to warranties under MIA, 1906 Act, also exist in India regime of marine insurance law. It is worth recalling that when the 1963 Act was being passed, these issues were considered as distinct feature of warranties

that were generally considered as law as it was part of the statute of the UK. It is interesting to mention here that the Law Commission of India in its twenty-first report opined with regards to MIA 1906 Act that—

> the statute has stood the test of time, having worked satisfactorily for more than half a century, ant that it has been adopted in the Commonwealth countries such as Australia and Canada, so much so it can well be said to have assumed the status of a law of nations.[29]

Although at that point of time it could not have been perceived that with passage of time the market conditions would change and the so called 'law of nations' would be amended.

The issues under MIA, 1906 Act were accepted as being nature of warranties in general while incorporating the provisions of MIA, 1906 Act in the 1963 Act. The section wise notes of Law Commission of India (twenty-first report) provide for these features of warranties as enlisted below:

(i) Identifying a warranty: Law Commission of India observed that 'no particular form of words is necessary. The word "warranty" is not necessary...',[30] also mere use of the expression "warranted" does not give rise to warranties.[31]

(ii) Basis of contact clause: Law Commission of India observed that a representation as to fact may or may not be incorporated as a warranty, further if it is incorporated, and turns out to be false, then "whether or not the fact is material to the risk", the insurer is discharged from any further liability under the policy.[32]

(iii) Effect of breach of warranty: As it has been already discussed above, the Law Commission of India had observed that the insurer is discharged from liability from the date of the breach. Further, with regards to the time of discharge it was observed that 'where assured fails to comply with the warranty, the insurer is discharged only from the date of the breach.'[33]

Similar to MIA, 1906 Act, the 1963 Act also does not provide for remedying the beach. From the above, it is clear that by adopting MIA, 1906 Act the issues connected to the features of warranties which are considered draconian in nature have also been adopted. These are the very features the UK wants to do away with, as they are very insurer friendly. The move to amend the law of maritime warranties is a move to balance out the scale in favour of the assured who have been suffering from the draconian effect of these provisions for more than a century.

The Insurance Act 2015, Part 3, UK

The insurance bill received the royal assent on 12th February 2015 and come into force on August 2016. The Insurance Act 2015, Part 3 changed the scheme of law relating to warranties and other terms. The changes made by the new act are as follows

(i) Basis of contract clause:

Section 9 of the Insurance Act 2015-

The basis of contact clause will cease to operate. As a consequence of this modification, all non-consumer insurance pre-contractual statements will be treated as representations, so the remedy available for false statement is that of misrepresentation.[34] The object of the clause is to prevent the insurers from using contract terms and other devise (on proposal form or other document) to convert those representations into warranties. The insurer can still include warranties with draconian effect in the policy using very clear words.[35]

(ii) Breach of warranty:
Section 10 of Insurance Act 2015

Sub-section (1) of this section does away with automatic discharge of the insurer's liability upon breach of a warranty. This is one of the major problems that was been identified in the preceding discussion. It should be noted that this sub-section uses the phrase, 'any rule of law that breach of a warranty (express or implied)', therefore the ambit of this sub-section is very broad as it includes both express and implied warranties. Automatic discharge is replaced by a provision that suspends the policy cover until remedied as spelled out by sub-section (2) and (4). As this section makes remedying a breach possible that is why by sub-section (7) (b) it omits s 34 of the MIA, 1906.[36]

Sub-section (2) refers to two situations where the insurer has no liability under the contract—

1) Loss occurring after a breach of warranty, but before it has been remedied,

2) Loss that is attributable to something happening during that period of breach.[37]

The first situation is easy to understand, the insurer is not liable under the policy if the warranty is breached but not remedied. But the second situation applies to a case where the loss causing event has already taken place but the loss is not suffered until the beach has been remedied. In such cases the insurer will not be liable because the event occurred when the warranty was breached and the policy cover was suspended. [38]

Thus from the above discussion it can be said that the determination of the point when the breach is remedied is of great significance. Sub-section (5) explains when the breach will be remedied in general warranties and time-specific warranties. Sub-section (5) (b) very clearly states that breach is remedied if the insured ceases to be in breach of warranty. The reason for this as explained by the Law Commissions is that where the risk is not altered following a remedy of a breach, there is no reason why the insurer should not be back on risk once the breach has been remedied.[39]

Where as in time-specific warranties sub-section (5) (a) states that if the risk is restored to a state as it was before the breach or in other word, as it was contemplated by the parties. Time-specific warranty is explained by sub-section (6) as warranties that require something to be done or not, or condition to be fulfilled, or something is or is not to be the

case, within a specific time period. For example, if a warranty requires a vessel to be classed with a classification society within 15 days of signing of the policy, but the vessel is not classed until the 30th day then for the period from 15th till 30th day the policy will not cover the risk. It is only after the breach has been remedied that is on the 30th day that the policy will cover the risk.

Law commission has spelt out the effect of this provision, explaining that under the new law *De Hahn*[40] would have been decided differently. The insurer was held to be not liable in this case because the vessel was not adequately manned as required by the warranty. But, the vessel had picked up additional hands 6 hours into the voyage. As per the present law the cover would have been suspended for 6 hours until the additional hand came onboard.[41]

The Law Commission has further observed that the test to determine if the breach of a time-specific warranty has been remedied is to look at the purpose for which the clause was inserted in the contract and ask whether that purpose has been frustrated or by remedying of breach that purpose is still in substance fulfilled and the risk restored to that which the parties contemplated.[42]

Sub-section (4) provides that the insurer will be liable if the loss that takes place before the breach of warranty or in case the breach was remedied after the remedy.

The liability to pay the premium has not changed under the new law. Under the old law the assured had to pay the premium even when the policy cover had ceased, because the policy continued. It was up to the parties to contractually decide on the issue, for example by including cancellation clause in the policy. Such a provision will continue to operate even under the new regime.[43] Thus, the premium would continue to be payable during the period of suspension as the cover is not terminated only suspended.

(iii) Terms not related to the actual loss:
Section 11 of Insurance Act 2015-

The main issue this clause seeks to address as per the Law Commission is the breach of warranty being used as an excuse by insurer to escape liability for an unconnected loss.[44] Sub-section (1) uses the words, 'tend to reduce the risk', this clause is aimed at applying to clauses that reduce the risk, and the courts will look at this aspect only.

How will this clause operate? When an insurer would resist liability on the basis of breach of a policy term, then the insured has to show that non-compliance could not have increased the risk of loss which had already occurred (s 11(3)).

As explained by the Law Commission, the remedy offered by this clause would be broader than earlier causation test because the courts would not consider what had actually happened. It is sufficient that the term was relevant to the particular kind, time or place of

loss. Thus, the insurer will not be liable for the actual act.[45] A direct causal link between the breach and ultimate loss in not required.

This section is best explained by an example; consider a policy containing a warranty that the insured's office premises should have 15 CCTV cameras for surveillance and prevention of theft. If the premise is installed with only 12 cameras, then the warranty is breached. Now let us imagine the premise is badly damaged by fire, then as per the new regime insurer cannot take the defence of this breach, namely not installing adequate cameras as the insurance policy required, provided the assured shows that non-compliance with the term did not increase the risk of loss due to fire.

(iv) How would section 10 and 11 apply together?

Section 11(4) clearly states that section 10 will apply in addition to section 10. All warranty clauses would be covered by section 10, and section 11 would apply to other terms which reduce the insurer's liability, and it may also apply to warranty. Therefore, all warranty clauses will be hit by section 10 and 11. For example—

A takes insurance policy for his house, policy contains two warranties that house should be fitted with burglar alarm system within 30 days of conclusion of policy, and another warranty requiring the house to be fitted with sprinkler system approved by local fire department. The insured fails to comply with both warranties, but after 40 days he gets the burglar alarm installed. On the 50th day, the house is hit by a hurricane and is badly damaged. Since the policy covers hurricane damage he claims under the policy, insurer refuses the claim on the basis of breach of warranty.

Under MIA 1906 Regime - Since the sprinkler system warranty was not complied with at the inception of the policy, insurer would not be liable under the policy since he is automatically discharged from liability to indemnify under the policy upon breach of warranty.[46] Even if assured fits the sprinkler system, he will still be in breach of burglar alarm warranty as he failed to install it as per the warranty within 30 days.

Under Insurance Act 2015 - The policy cover would be suspended for the duration the burglar alarm is not installed. Upon installation of the burglar system, the house would be covered under the policy (as per s 10). Section 11 would apply to sprinkler system warranty because if complied with, it would have reduced the risk of loss by fires. Although the assured was in breach of sprinkler system warranty, the insurer cannot refuse a claim with respect to loss caused by hurricane. Because even if insurer shows that assured didn't comply with sprinkle system warranty he won't succeed as assured would prove that non-compliance with warranty could not have increased the risk of loss which actually occurred in the circumstances in which it occurred(s 11(3)).The loss was caused by hurricane and not fire, therefore non-compliance with sprinkler system warranty would have contributed to the loss due to hurricane.

Conclusion

The new (English) Insurance Act, 2015 seeks to address and resolve the problems faced by the MIA1906, as observed above; the previous regime of warranties under MIA 1906 was very insurer-friendly. The effect of breach was very harsh as the insurer was automatically discharged, although the English courts have over the years tried to lessen the draconian effect but this has only generated more uncertainty than resolve it.

In India as well, the draconian effect of breach of warranty has been noticed and steps have been taken to counter it. National Consumer Dispute Redressal in *S.Kamala vs New India Assurance Co. Ltd* [47] held that-

> We also have no difficulty in accepting the contents of Section 35(iii) of the Marine Insurance Act, 1963, but in our view, the Insurer would have got away with the taking advantage of this provision but for the fact that the Insurance Companies themselves have, for good reasons, decided to settle the claim for breach of 'warranty' treating them as non-standard claims, hence Section 35(iii) of the Marine Insurance Act would stand compromised to that extent as we are reasonably sure that at the time of drawing these 'Guidelines' to be followed by the Insurance Companies, the provisions of Marine Insurance Act, would have been within their knowledge and yet they have agreed to settle the cases on non-standard basis in terms of breach of warranty.

From the above para it is very clear that in India as well, the issue of automatic discharge of the insurer has been recognised, the use of words, “for good reasons” may have been used with regard to the inconvenience caused to the assured due to the debilitating effect of the breach.

It is time that the Indian law makers decided which route the Indian marine insurance law warranties regime should take. The question arises: Should we follow the UK model as we have done before. But the new UK law has not been tried and tested yet; it is surrounded with uncertainty, which will continue until courts start giving interpretations of its provisions to clarify the law. The other route is that we conduct our own study into the marine insurance law prevalent in other commonwealth countries, as MIA 1906 Act is the basis of the marine insurance law regime in most of the commonwealth countries, it will be interesting to study the divergence of those countries from MIA, 1906 Act. Such a study would help us understand the fact that insurance market changes with time and as per market requirements.

Steps have to be taken to protect Indian assured and insurers from losing out due to the vagaries of the older regime followed by marine insurance laws in India; a good start would be to conduct research in this field and then apply it to law and policymaking. Only such a locally grounded and context specific application that takes the Indian situation into full consideration can do justice to the full range of issues raised in this paper.

Endnotes

[1] Soyer B., *Warranties in marine Insurance*, 2nd edn (Cavendish, London, 2006) at para 1.5.

[2] Section 33(3) of Marine Insurance Act, 1906.

[3] Law Commission of India, 21st Report on Marine Insurance, (1 September 1961) page 73 <http://lawcommissionofindia.nic.in/1-50/Report21.pdf>.

[4] Section 6(2) of Consumer Insurance (Disclosure and representations) Act, 2012 (United Kingdom).

[5] Law Commission of India, *Supra* note 3, at page 3.

[6] *Ibid.*

[7] *Ibid*

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[8] Section 33(1), *Supra note* 2.

[9] *Ibid*, Section 33(2).

[10] Gurses O., *Marine insurance law*,1st edn (Routledge,2015) at page 101.

[11] Law commission, *Insurance contract law: Business disclosure warranties, insurer's remedies for fraudulent claims, and late payment* (Law com no.353, 2014) at para 13.5.

[12] Gilman J., Merkin R., Blanchard C., Templeman M., *Arnould: Law of Marine Insurance and Average*, 18th edn (Sweet and Maxwell, 2008) at para 19-2.

[13] Gurses,*Supra note* 10 at page 121.

[14] Merkin &Colinvaux, Insurance contract law (Sweet & Maxwell,2014) at para B-0142.

[15] *Gensis Housing Association Ltd v Liberty Syndicate Management* [2013] EWCA Civ 1173,*Dowsons Ltd v Bonnin* [1922]2 AC 413.

[16] [1991] 3 All E.R. 1.

[17] [2001] 2 Lloyd's rep 161 at page 122-125.

[18] Gilman, *Supra note* 12 at para 19-10.

[19] *Ibid* para 19-11.

[20] Bennett H. N., '*Good luck with warranties*' (1991) JBL 592 at page 596.

[21] See *Yorkshire Insurance co v Campbell* [1917] A.C. 218,*Forsikringsaktieselskapet Vesta v Butcher* [1989]1 All E.R. 402.

[22] Gurses, *Supra note* 10 at page 114.

[23] (1786) 1 Temp rep 343.

[24] *Quebec Marine Insurance Company v Commercial bank of Canada* [1869-71] L.R 3 PC 234.

[25] Section 34(1), *Supra note* 2.

[26] Section 34(3), *Supra note* 2.

[27] *Agro Systems FZE v Liberty Insurance Pte and others* [2011] EWHC 301(comm.), at para 25.

[28] Law Commission, *Supra note* 11 at para13.21.

[29] Law Commission of India, *supra* note 3 at page 3.

[30] *Ibid*.

[31] *Ibid* page 74.

[32] *Ibid* page 73.

[33] *Ibid*

[34] Merkin & Colinvaux, *Supra note* 14 at para B-0213.

[35] Law Commission, *Supra* note 11 at para 16.10-16.11.

[36] Section 34(2), *Supra note* 2, states that when a warranty is broken the assured can not avail himself of the defense that the breach has been remedied; warranty complied with before the loss.

[37] Law Commission, *supra note* 11 at para 17.23.

[38] *Ibid* para 17.26-17.29.

[39] *Ibid* para 17.37.

[40] De Hahn, *supra* note 23.

[41] Law Commission, *supra* note 11 at para 17.45.

[42] *Ibid* para 17.48.

[43] *Ibid* para 17.58.

[44] *Ibid* para 18.20.

[45] *Ibid* para 18.39.

[46] Section 33(3), *supra* note 2.

[47] *S.Kamala v New India Assurance Co. Ltd*, 3(2006) CPJ 284 NC, at para 12.