Utmost Good faith and Warranties under Marine Insurance

Uberrimae Fidae

Contract of Good Faith

Uberrimae fidae

- Section 19: 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.

20. Disclosure by assured

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, **every material circumstance which, is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him**.

If the assured fails to make such disclosure, the **insurer may avoid** the contract.

Material circumstance

- (2) Every circumstance is material **which would influence the judgment of a prudent insurer in fixing the premium**, or determining whether he will take the risk.
- This duty is particularly critical in marine insurance contracts because more often than not the subject matter of insurance is on the high seas and as the insurer is almost entirely dependent on the insured for accurate information.

Associated Oil Carriers v, Union Ins. Society of Canton (1917) 2 KB 184

- In this case, the Court held that a 'prudent insurer' is one who possesses a degree of knowledge and foresight that is reasonably possessed by the more experienced and intelligent insurers carrying on business in the market.
- Every circumstance and every representation is material 'which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk [sections 20(4) and 22(2)].

NEED NOT BE DISCLOSED

- (3) In the absence of inquiry the following circumstances need not be disclosed, namely:-
- (a) any circumstance which **diminishes the risk;**
- (b) any circumstance **which is known or presumed to be known to the insurer**.
- The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know;

Need not be disclosed

- (c) any circumstance as to which information is waived by the insurer;
- (d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty.
- (4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, question of fact.
- (5) The term "circumstance" includes any communication made to, or information received by, the assured

Cases

- In *Glasgow Assurance Corporation v. William Sjmondson Co*. (1911) 104 LT.254, the **Court held that in marine insurance the fact that other insurers have refused to cover the risk is not material to disclose**.
- In *Mathie v. Argonaut Marine Ins*(1952) 21 LIL Rep.145 (HL), the **Court held that other insurances which simultaneously exist also need not be disclosed** unless it would change what was a perfectly usual and legitimate business transaction into a purely speculative one.

Section 21. Disclosure by Agent

- Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer-
- (a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

AGENTS' DUTY

- (b) every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent.

Warranties & Representations

Marine Insurance

22. Representations pending negotiation of contract

- (1) Every **material representation** made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. **If it be untrue** the insurer may avoid the contract.
- (2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

Representations

- (3) A representation may be either as to **a matter of fact, or as to a matter of expectation** or belief.

- (4) A representation as to a matter of fact is true, **if it be substantially correct**, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

REPRESENTATIONS

- (5) A representation as to a matter of expectation or belief is true if it be made in good faith.
- (6) A representation may be withdrawn or **corrected before the contract is concluded**.
- (7) Whether a particular representation be material or not, is, in each case, a **question of fact.**

What is Warranty?

- A warranty in contract of insurance is **substantially same as a condition in contract.**

- Breach of warranty gives other party right to avoid the contract. Discharge insurer from liability.

- Undertakes to fulfill a condition, confirms or negatives existence of certain facts.

- Should be **literally complied with**.

Condition & Warranty

- Breach of warranty makes **contract void, breach of condition gives the aggrieved party right to claim compensation.**

- Warranties must be complied with.

Warranty & Condition

Warranty is a

- -condition precedent for liability of insurer
- -limitation on general words used in policy

Warranty operates from outside of the contract also, while the 'condition' has to operate from within.

Warranty & Condition

- Warranty is **absolute** it cannot suspended even for a while.
- Operation of a **condition may be suspended**.
- Not to store naphtha near stocks is warranty of prohibition. If stored even once, it may discharge liability of insurer.
- If the **condition is that 'insured cannot recover if fire takes place** while prohibitive articles were kept, liability gets **re-attached** as soon as those articles are removed.

35. Nature of Warranties

- Section 35(1) A warranty, in the following sections relating to warranties, means a promissory warranty…
- that is to say a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.
- (2) A warranty may be express or implied.

WARRANTIES

- 35(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not.
- If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as form the date of the breach of warranty, but without prejudice to any liability incurred by him before that data.

36. When Breach of Warranty excused

- (1) Non- compliance with a warranty is excused when **by reason of a change of circumstances,** the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.
- (2) Where a warranty is broken, the assured not availed as the defence.
- (3) A breach of warranty may be waived by the insurer.

37. Express Warranties

- (1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.
- (2) An express warranty must be included in, or written upon the policy, or must be contained in some document incorporated by reference into the policy.
- (3) An express warranty does not exclude implied warranty, unless it be inconsistent therewith.

Examples

- Ship will sail on a specific day
- Ships is safe on a particular day
- Ship will proceed to the destination without any deviation.

IMPLIED

- Implied warranties do no appear in the policy at all but tacitly understood by the parties to be present and are as fully binding as express warranties. Assumed to have been included in policy by law, custom, usage or general agreement.
- Seaworthiness, Legality of venture, and non-deviation are implied warranties.

AUTOMATIC DISCHARGE WHEN WARRANTY IS ADHERED TO

- In The Good Luck, 27 a vessel was mortgaged to a bank who also became the beneficiary of the insurance.
- The vessel was insured by a Protection & Indemnity ("P&I") club who by a letter of undertaking promised to promptly advise the bank if they should no longer insure the ship. **Under an express warranty the vessel was prohibited from sailing in certain areas of extreme danger.**
- Nevertheless, the actual owners of the ship continuously sent her into such prohibited waters without informing the bank or the P&I club.

Cont.

- The club later discovered what was going on but, despite the letter of undertaking, never gave the actual owners any advise to stop the breach, nor did they give the bank any prompt notice.
- The Good Luck, despite her name, was then hit by Iraqi missiles when sailing in the Arabian Gulf (part of the prohibited areas) and she eventually became a total loss. The bank brought an action against the P&I club for failure in giving prompt notice.
- The parties agreed that the club was in fact in breach of the letter of undertaking.
- Question is whether the ship's insurance had come to an end automatically or not due to the breach bythe shipowners

CONT.

- The House of Lords finally held that a breach of a warranty of this nature will automatically discharge the insurer from liability as from the date of breach, thus **assimilating it with a condition precedent.**

- The effect was that since the P&I club decided to rely upon a breach of warranty defence, they came in breach of their own letter of undertaking as they **were held to be automatically discharged from any further liability from the very moment the ship had entered the prohibited area.**

40. Warranty of good safety

- Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

41. Warranty of seaworthiness of ship

- (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
- (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

Seaworthiness of ship

- S.41(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

Seaworthy

- S. 41. (4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.
- S.41 (5) 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 in not liable for any loss attributable to unseaworthiness.

What is seaworthiness

- Reasonably fit to undertake voyage and to withstand the ordinary perils of the sea.
- To be seaworthy a ship should be suitably constructed, properly equipped, officered and manned with trained persons, amply supplied with fuel and provision.
- It is a relative term.
- A ship fit for coastal voyage may not be seaworthy for trans-oceanic voyage.

Seaworthiness

- Ship suitable for summer voyage may not be fit for winter voyage.
- Purely passenger ship may not be seaworthy as a cargo ship.
- Standard of seaworthiness may vary with any particular vessel at different periods of same voyage.
- Warranty of seaworthiness of ship applies to hull but not to cargo insurance.

Compliance

- Ignorance or innocence is **no excuse** to breach of warranty.

- Implied warranty has to be fully complied with.

- If ship owner fails to discover the latent defect, it would defeat his object of insurance, deprive him of right to recover.

42. No implied warranty that goods are seaworthy

- S.42 (1) In a policy on goods or other movables there is no implied warranty that the goods or movables are seaworthy.

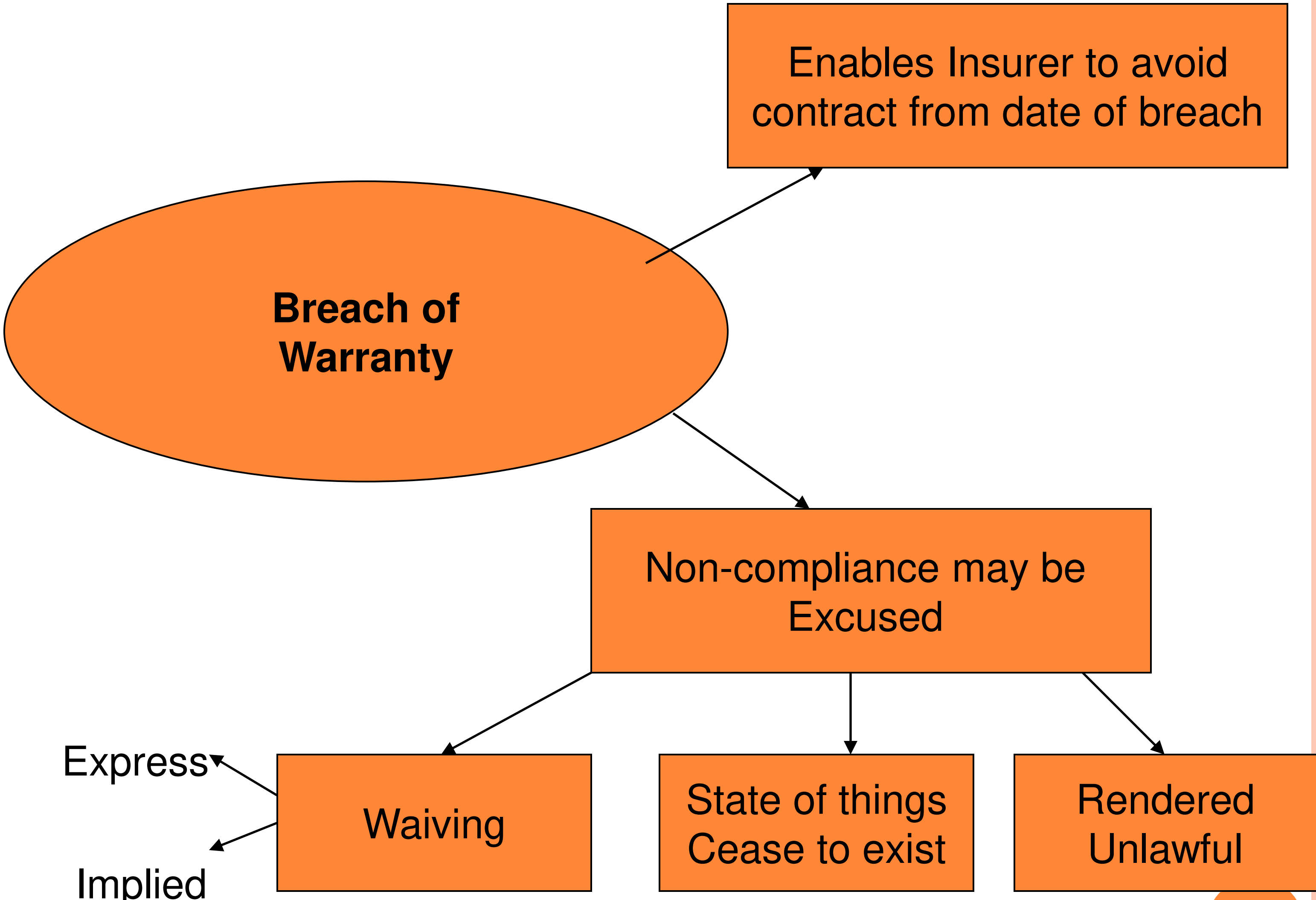
- S.42 (2) In a voyage policy on goods or other movables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other movables to the destination contemplated by the policy.

Seaworthy condition

- Test: whether the leak was attributable to injury and violence without or to weakness from within?
- Unfit or unseaworthy condition was introduced in Merchants Trading Co v The Universal Marine Insurance Co case (1935)53 Ll.L.Rep 156. Appellate court also approved this test. Ship was unable to keep herself afloat in still water. It could not withstand expected, ordinary and foreseeable casualty.

43. Warranty of legality

- S. 43: There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.
- No marine insurance for illegal voyages, eg smuggling, violating neutrality laws etc.


Enables Insurer to avoid contract from date of breach
Breach of Warranty
Non-compliance may be Excused
Express
Implied
Waiving
State of things Cease to exist
Rendered Unlawful