Warranties and doctrine of alteration of risk during the insurance period: A critical evaluation of the UK Law Commissions' proposals for reform of the law of warranties

*Dr Zhen Jing**

This paper critically discusses the proposals by the Law Commission of England and Wales and the Scottish Law Commission for reform of the law of warranties, examines the doctrine of alteration of risk as an alternative approach for risk management during the insurance period, and considers the possibility for the promissory warranty to be replaced by the doctrine of alteration of risk. It is argued that the Law Commissions' proposals for reform of the law are insufficient in terms of mitigating the harshness and unfairness of remedies for breach of warranty. The remedies in the doctrine of alteration of risk are much fairer than those for breach of a warranty. An appropriate model to deal with increase of risk during insurance period is proposed.

Introduction

Insurance warranty and alteration of risk are different doctrines in insurance law. They have a similar function for risk management during the insurance period but the effects for breach of a warranty and for an increase of risk are different.[1]

Insurance warranty is an ancient common law doctrine;[2] most common law countries once adopted the doctrine, but some of them have abandoned the doctrine in recent years.[3] The civil law countries have employed the doctrine of alteration of risk for dealing with risk changes during the insurance period.[4] In English law, the doctrine of warranty was established more than 200 years

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* BA (Beijing), MPhil (Wales), PhD (London), Lecturer in Law, School of Law, Bangor University, UK email: <z.jing@bangor.ac.uk>.

1 Remedies for breach of a warranty are much harsher than those for an increase of risk during the term of insurance.

2 In common law countries, generally the concept of warranty is used instead of the concept of alteration of risk. As Trine-lise Wilhelmsen comments in her paper of 'Duty of disclosure, duty of good faith, alteration of risk and warranties' (CMI Yearbook 2000, pp 332–411): 'Contrary to the civil law countries, the common law countries do not seem to share a general concept of alteration of risk . . .'.

3 For examples, Australian law abolished the doctrine of warranty through s 54 of Insurance Contracts Act 1984; New Zealand abolished the doctrine of warranty through s 11 of the Insurance Law Reform Act 1977.

4 Clarke said: 'Many other countries deal with significant changes in risk during the insurance period, not with promissory warranties or anything of the kind, but with more nuanced statutory rules about alteration of risk. See M Clarke, 'Aggravation of risk during the insurance period' [2003] *LMCLQ* 109 for detailed discussion. Germany, Norway, France, China and Japan etc. have adopted the doctrine of increase of risk.

ago.[5] This doctrine, however, has received heavy criticisms for its harshness and unfairness of remedies for breach of a warranty.[6] The English concept of insurance warranty was once described as 'prodigal aberration' from generally understood European principles of fairness.[7] The harshness of the doctrine of warranty is reflected from the following aspects: (a) a warranty must be exactly complied with;[8] (b) breach of a warranty automatically discharges the insurer from liabilities;[9] (c) later remedy for breach of a warranty is irrelevant;[10] (d) there is no need for any causal connection between the breach of warranty and the loss;[11] and (e) a statement may be converted into a warranty using obscure words that most insureds do not understand.[12]

The Law Commission of England and Wales and the Scottish Law Commission (LCs) have recognised the harshness and unfairness of the current law of warranty and aimed to solve the problems mentioned above. Over the years the LCs have published a series of issues papers and consultation papers for reform of the law. Proposals have been set out by the LCs,[13] especially on remedies for breach of warranties.[14] The main proposal of the LCs is 'to treat warranties as suspensive conditions' under which if the breach of a warranty is remedied the cover is restored. It is argued that this proposal can only solve one problem, this is, a breach of warranty can be remedied, but does not solve the problems of strict compliance, automatic and immediate suspension of the cover, and no need for causal connection between the breach and the loss. It is submitted that the LCs proposals for reform of the law are insufficient in terms of rebalancing the interest between the insurer and the insured and of removing the draconian effect for breach of warranties.

It is suggested that a radical reform on insurance warranty regime is necessary. As Professor Merkin and Professor Lowry put it: 'the LCs proposal

5 *Bean v Stupart* (1778) 1 Dong 11 at 14.

6 See R Merkin and J Lowry, 'Reconstructing Insurance Law: The Law Commissions' Consultation Paper' [2008] 71(1) *MLR* 95; M Clarke, 'Insurance Warranties: the absolute end?' [2007] *LMCLQ* 474; B Soyer, ' Reforming Insurance Warranties — Are we finally moving forward?' in B Soyer (Ed), *Reforming Marine and Commercial Insurance Law*, Informa, 2007, Ch 7, pp 127–54; Sir A Longmore, 'Good Faith and breach of warranty: Are we moving forwards or backwards?' [2004] *LMCLQ* 158; J Hare, 'The Omnipotent Warranty: England v The world', a paper presented to the International Insurance at the Turn of the Millennium, Vol 2, 2000, p 37.

7 Clarke, above n 6 .

8 Marine Insurance Act 1906 (MIA) s 33(3).

9 MIA 1906 s 33(2); *Bank of Nova v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1992] 1 AC 233; [1991] 3 All ER 1; [1991] 2 WLR 1279; [1991] 2 Lloyd's Rep 191; [1991] 3 All ER 1; [1991] 2 WLR 1279; [1991] 2 Lloyd's Rep 191.

10 MIA 1906 s 34(2).

11 MIA 1906 s 33(3).

12 The Law Commission and Scottish Law Commission, *Insurance Contract Law: the business insured's duty of disclosure and the law of warranties, A joint Consultation Paper*, 26 June 2012, para 12.17 (the Consultation Paper 2012).

13 The Law Commission and Scottish Law Commission, *Insurance Contract Law: Misrepresentation, Non-Disclosure and breach of Warranty by the Insured, A joint Consultation Paper*, 21 June 2007, Parts 7 & 8 (the Consultation Paper 2007). See Parts 15 & 16, the Consultation Paper 2012, ibid.

14 See Part 15 'Warranties: Proposal for Reform (1)' and Part 16 'Warranties: Proposal for Reform (2)', the Consultation Paper 2012, above n 12.

to retain continuing warranties in business insurance contracts will, if implemented, represent a missed opportunity to rid insurance contracts of terms long criticised as draconian and disproportionate in their effect.'[15]

Alteration of risk is another mechanism for risk management during the insurance period which has been commonly adopted by the European continental countries and other civil law countries.[16] This doctrine has a similar function as warranty for management of risk but the consequence for an increase of risk is much milder than that for breach of a warranty.

This article critically discusses LCs proposals for reform of the law of warranties, examines the doctrine of alteration of risk as an alternative approach for risk management during the insurance period, and considers the possibility for the promissory warranty to be replaced by the doctrine of alteration of risk. The paper includes five parts: part 1: the current English law relating to warranty and mitigation mechanisms; part 2: the LCs proposals for reform on warranties; part 3: the doctrine of alteration of risk and the rules of law relating to the doctrine in different jurisdictions; part 4: different effects between breach of warranty and breach of duties relating to alteration of risk; and part 5: conclusions and suggestions. This paper concludes that warranties should be replaced by the doctrine of alteration of risk. An appropriate model of alteration of risk is proposed to replace promissory warranty.

Part 1: The current English law on warranties

A fundamental term in an insurance contract

Unlike the general law of contract in which 'warranties' are considered to be relatively minor contractual terms: if breached, they only give rise to a right to damages and not a right to rescind, warranties in insurance contracts are fundamental terms that go to the heart of a contract.[17] More than 200 years ago, Lord Mansfield described a warranty as 'a condition on which the contract is founded',[18] to establish the existence of circumstances without which the insurer does not undertake to be bound.[19] The nature of a warranty as a foundation of an insurance contract has remained the same in modern law. Lord Goff in *The Good Luck* described a warranty as 'any term of the insurance contract which, properly construed, is a condition precedent to the inception or continuation of cover'.[20] Because a warranty is a fundamental

15 Merkin and Lowry, above n 6, at 95. Merkin and Lowry analysed many different policy terms which may achieve the same objective for the insurer to exclude or restrict their particular forms of loss and suggested that warranty (which is one of the terms) should be removed from English jurisprudence. See also Clarke, above n 6, at 482, '[a]t the very least, greater clarity is needed in this branch of the law, which, insofar as it impacts warranties, should not be left untouched by any reform.'

16 Such as Germany, Belgium, Italy, Norway, Spain, China and Japan and etc.

17 A warranty in an insurance contract has similar function with a condition in a general contract.

18 *Bean v Stupart* (1778) 1 Dong 11 at 14.

19 F Rose, *Marine Insurance Law and Practice*, Informa Law, London, 2004, at [9.20]; See also Clarke, above n 6.

20 See *The Good Luck* [1992] 1 AC 233 at 263 per Lord Goff (hull); [1991] 3 All ER 1; [1991] 2 WLR 1279; [1991] 2 Lloyd's Rep 191.

term in an insurance contract, breach of it, as breach of a condition in a general contract, is a fundamental breach and thus relieves the insurer from liability under the policy.[21]

Generally, there are two types of warranties, warranties of past or present fact, in which the policyholder 'affirms or negatives the existence of a particular state of facts'; and warranties of future conduct, in which the policyholder undertakes 'that some particular thing shall or shall not be done'. Warranties as to past and present facts, which are mainly created through 'basis of contract' clauses,[22] were abolished for consumer insurance by the Consumer Insurance (Disclosure and Representation) Act 2012.[23] In the third Consultation Paper 2012, the LCs proposed to abolish the basis of contract clauses for business insurance.[24] The proposal has received strong support; there is no dispute on the proposal for reform of warranties as to past and present facts. The LCs have not proposed to abolish the promissory warranty, the proposals for reform of promissory warranties are insufficient in terms of mitigating the harshness of the current law.

The effect of a promissory warranty

According to the Marine Insurance Act (MIA) 1906, 'A promissory warranty is 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.'[25] A warranty is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty.[26] The law of warranties is extremely harsh. The breach of a warranty automatically discharges the insurer from liability from the moment of the breach, even if the warranty has no bearing on the risk, materiality to the risk is irrelevant. Once a warranty has been breached, the insurer may reject all claims, even for losses which occur after the breach has

21 A warranty in the strict sense is only a clause which goes to the root of the transaction between the parties which ought to avoid or relieve the insurers from their liability under the policy. See J Birds, *Modern Insurance Law*, 8th ed, Sweet & Maxwell, 2010, p 180. See also Bankes LJ in *Roberts v Anglo-Saxon Insurance Co* [1927] KB 590 at 591, cited by Macpherson J in the *Cash & Carry* [1989] 1 Lloyd's Rep 299 at 302.

22 This is a legal device that converts the policyholder's answers and declarations into contractual warranties. Typically, the proposer is asked to sign a statement on a proposal form that their answers form the 'basis of the contract'. The effect of doing so can have severe consequences for the proposer who may have answered in good faith. See Consultation Paper 2012, above n 12, para 12.17.

23 Consumer Insurance (Disclosure and Representations) Act 2012 s 6 deals with representation made by consumers in connection with a proposed consumer insurance contract or variation. It provides that such representations cannot be converted into warranties of fact in a policy, dealing with similar issues to matters dealt with in the application form.

24 Consultation Paper 2012, above n 12, para 15.1(1): 'First, we propose to abolish basis of the contract clauses. Any clause which purports to give warranty status to answers on a proposal form should be of no effect. If an insurer wishes to use warranties of past or present fact, these should be included expressly in the contract.' See also para 15.12.

25 MIA 1906 s 33.

26 MIA 1906 s 33(3).

been remedied.[27] Breach of a single warranty discharges liability for all risks covered by the policy. Accordingly, breach of a warranty which is associated with one risk, such as fire, also discharges the insurer from liability for losses of some other kind, such as flood.[28]

The harshness of the rule of strict compliance was illustrated by the ancient leading case of *De Hahn v Hartley*.[29] A marine policy insured a ship and its cargo from Africa to its destination port in West Indies. The policy contained a warranty that the ship had a crew of at least 50. The ship left Liverpool with a crew of 46 at which point the warranty was breached. It however picked up an extra 6 hands in Anglesey, very shortly out of Liverpool, and it thus had and continued to have 52 hands. It was held that the insurer could avoid all liability for breach of warranty, even though it was obvious that the breach was remedied and had no connection with the loss that subsequently occurred. The rule of strict compliance is operating more severely against the insured than the rules of law in other European countries,[30] and much harsher than the rules of alteration of risk.

As the discharge of the insurer's liability is automatic, neither party to the insurance need take any step in relation to it. As Professor Clarke explains, 'the former policyholder is suddenly without cover and often quite unaware of it'.[31] The Association of British Insurers (ABI) has the view that this consequence can be 'highly problematic for an insured'. The policyholder does not realise that it must either negotiate with the insurer to restore cover or take steps to find alternative cover.[32]

Mitigation for the harshness of breach of warranties

Because of the draconian consequence for breach of warranties, for many years, the courts had attempted to moderate the harshness of the law through strict interpretation against the interest of the party who has put them forward. Terms which appear to be warranties may also be construed as 'suspensive conditions', which apply only for the duration of the breach.[33] For example, a car was promised to be used for carrying coal when the contract was concluded, and later it was used to carry other things. Is it a warranty or is it a term describing the risk? The House of Lords in *Provincial Insurance Company Ltd v Morgan & Foxton*,[34] held that 'the clause only meant that

27 MIA 1906 Act s 34(2) provides: '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.'
28 Consultation Paper 2012, above n 12, para 12.29.
29 (1786) 1 TR 343.
30 As Clarke, above n 4, comments: 'If the warranty broken, however, the contract and the cover come to an end automatically at the time the warranty is broken. As we shall see, that is a rule operating more severely against the insured than the rules of law in other European countries. This is sometimes called the rule of strict compliance and is not a feature of English law which many English commentators would recommend or defend.'
31 Clarke, above n 6.
32 Consultation Paper 2012, above n 12, para 12.27.
33 Ibid, para 12.44.
34 [1933] AC 240.

transporting coal was to be the normal use. Transporting other goods would not terminate the liability under the policy'.[35]

However, due to the fact that whether or not a term is a warranty is a question of construction, the courts have great discretion, leading to the consequence that the courts may give different interpretations for similar policy terms and this may result in different decisions in similar cases.[36] The problem is that where the outcome of a case is dependent on the courts' interpretation, the inconsistencies creep in.[37] The LCs expressed the view that: 'While this has advantages it also introduces uncertainty into the law.[38] In addition, the courts have struggled to decide what is or is not a warranty.'[39]

For consumer insurance, there are other statutory and regulatory safeguards, such as the Financial Services Authority (FSA) rules,[40] Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Insurance (Disclosure and Representations) Act 2012. Through these mechanisms, the harshness of the effects for breach of warranty is largely mitigated.[41] For instance, the FSA provides that rejection of a consumer policyholder's claim is unreasonable, except where there is evidence of fraud, if it is for breach of warranty or condition unless the circumstances of the claim are connected to the breach.[42] Here a causal connection between the breach and the loss is required by the FSA rules. Similarly, where an insurer turned down a claim where the breach of terms by the insured did not cause or contribute to the loss, the Financial Ombudsman Service (FOS) overturned the insurer's decision and ordered the insurer to pay the claim.[43]

35 See also *English v Western* [1940] 2 KB 156 and *Houghton v Trafalgar Insurance Co Ltd* [1954] 1 QB 247.

36 The facts of *Kler Knitwear v Lombard General Insurance Co Ltd* [2000] Lloyd's Rep IR 47 and *Sugar Hut v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 2636 are similar but the courts' decisions are different.

37 See Consultation Paper 2012, above n 12, para 12.55. See cases of *Kler Knitwear v Lombard General Insurance Co Ltd* [2000] Lloyd's Rep IR 47; *Sugar Hut v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 2636; *GE Frankona Reinsurance Ltd v CMM Trust No 1400 (Newfoundland Explorer)* [2006] EWHC 429; *Pratt v Aigion Insurance (The Resolute)* [2008] EWCA Civ 1314.

38 Consultation Paper 2012, above n 12, para 12.55.

39 Consultation Paper 2012, above n 12, para 15.1(1) states: 'First, we propose to abolish basis of the contract clauses. Any clause which purports to give warranty status to answers on a proposal form should be of no effect. If an insurer wishes to use warranties of past or present fact, these should be included expressly in the contract.'

40 The Financial Services Authority rules are now provided in the ICOBS. 8.12 provides '. . . rejection of a consumer policyholder's claim is unreasonable except where there is evidence of fraud, if it is for: . . . (3) breach of warranty or condition unless the circumstances of the claim are connected to the breach.'

41 These include Financial Services Authority rules, the Unfair Terms in Consumer Contracts Regulations 1999, and the Consumer Insurance (Disclosure and Representations) Act 2012.

42 ICOBS 8.1.2, the Handbook of the FSA 2007.

43 For example, an insured claimed for a stolen bicycle, but the insurer refused the claim because at the time of the theft it was not locked to a secure structure. The insured argued that this would not have made any difference: many bicycles were stolen at the same time, including locked bicycles.

Part 2: The Law Commissions' proposals for reform of warranties

The harshness and unfairness of the law of warranty and the disjuncture between the law and judicial as well as industry practice have led to reform of the law by the LCs. The Law Commission of England and Wales, in its 1980 report, described the law on breach of warranty as wrong and unjust.[44] The Law Commission had the view that the defects in the present law of warranties show a formidable case for reform.[45] Since 2006 the LCs have been conducting a joint review of insurance contract law and have published issues papers and consultation papers for reforming the law of warranties. In Issues Paper 2, the LCs provided that:

> The law on breach of warranty has the potential to cause considerable unfairness to policyholders by allowing insurers to avoid paying claims for technical reasons, which are unconnected with the loss that has occurred. Our proposals are designed to bring warranties to the insured's attention and to limit insurers' right to reject claims where the breach of warranty has no connection to the loss that has arisen.[46]

In the Consultation Paper 2007, the LCs expressed the view that the UK approach to warranties is out-of-line with the expectations of an international market.[47] The notion of a warranty is unknown to civil law systems, and increasingly is being abandoned by other common law jurisdictions. It no longer accords with international conceptions of fairness.[48] It is also recognised that the effect of a breach of warranty under UK warranty law is now out-of-step with the majority of other jurisdictions,[49] and is inconsistent with the mandatory, but milder, provisions concerning alteration of risk in several civil law countries.[50] The LCs concluded that the law on breach of warranty requires reform in both consumer and business insurance. The question is exactly what shape the reform should take.[51]

In the Consultation Paper 2012,[52] the LCs shaped the reform on warranties by setting out three proposals:

(1) *To abolish the basis of contract clauses*;[53]

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44 *Law Commission Report on Insurance Law*, Non-Disclosure and Breach of Warranty (1980) Law Com No 104, para 6.9:

> (a) It seems quite wrong that an insurer should be entitled to demand strict compliance with a warranty which is not material to the risk and to repudiate the policy for a breach of it; (b) Similarly, it seems unjust that an insurer should be entitled to reject a claim for any breach of even a material warranty, no matter how irrelevant the breach may be to the loss.

45 Ibid, para 6.10.
46 The LCs Issues Paper 2, 2006, Insurance Contract Law: Warranties, para 9.
47 Consultation Paper 2007, above n 13, para 7.51.
48 Ibid.
49 Ibid, para 7.52.
50 Ibid, para 7.66. The LCs cited Wilhelmsen's comments that if there are to be attempts towards harmonisation, it is unlikely that many other European States will move towards the British model.
51 Consultation Paper 2007, above n 13, para 7.67.
52 This is the final consultation paper of the LCs on warranties.
53 Consultation Paper 2012, above n 12, para 15.1(1).

(2) *To treat warranties as suspensive conditions*. A breach of warranty would suspend the insurer's liability, rather than discharge it. Where the breach is remedied before the loss, the insurer must pay the claim.[54]

(3) *To introduce special rules for terms designed to reduce the risk of a particular type of loss, or the risk of loss at a particular time or in a particular location*. For these terms, a breach would suspend liability in respect only of that type of loss (or a loss at that time or in that place). Thus for example, the breach of warranty to install a burglar alarm would suspend liability for loss caused by an intruder but not for flood loss.

In consumer insurance, the above proposals are mandatory and cannot be excluded by a contract term. In business insurance, they are default rules and can be contracted out by the parties through clear, unambiguous terms brought to the insured's attention.[55]

It is submitted that proposal (1) *to abolish the basis of contract clauses* is a good proposal by which warranties as to past and present facts would be abandoned for business insurance.[56] Proposal (3) is criticised to be fundamentally flawed.[57] First it is not easy to distinguish warranties designed to reduce the risk of a particular type of loss and those that are not. This proposal may be fertile for disputes.[58] Second, the suspension of cover for only those risks that the warranty is said to be designed to prevent is introducing causation by the back door. The LCs have accepted that introducing a causative link between the breach of warranty and the loss is flawed and yet it is being reintroduced in this manner.[59] This argument is reasonable. However, if proposal (3) is to be removed, all warranties will be treated as general warranties and breach of them will suspend all liabilities. It would still be problematic.

Proposal (2) *to treat warranties as suspensive conditions* is insufficient to solve the real problems of the harshness for breach of warranties. This is the 'focal point' of the LCs proposals for reform of warranties. '*To treat warranties as suspensive conditions*' means to treat what would otherwise be continuing warranty as merely suspending the risk so that once the breach has been remedied the risk reinstates.[60] The proposal recommends that where a

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54 Ibid, para 15.1(2).

55 Ibid, para 15.3. Some commentators critically analysed the defect of the LCs proposals to allow the parties to contract out the rules in business insurance. For example, Aon were concerned that opting out would quickly become standard practice 'driven by the market's wish to retain its historically powerful position': Consultation Paper 2012, above n 12, para 14.53.

56 The basis of contract clauses in consumer insurance was abolished by the Consumer Insurance (Disclosure and Representations) Act 2012.

57 P Jaffe, 'Reform of the Insurance Law of England and Wales — Separate Laws for the Different Needs of Businesses and Consumers' [2013] 126 *BILA Jnl* 18 at 38.

58 Jaffe, ibid, at 39 comments: 'Many insureds in dispute with their insurers will contend that the warranty is designed to reduce only a particular type of loss, and I dare say that many insurers will contend that the warranty is not so designed. This is therefore ground that is fertile for disputes.'

59 Ibid.

60 As exemplified by *Provincial Insurance v Morgan* [1933] AC 240 and *Kler Knitwear Ltd v*

warranty is not complied with, the insurer's liability should be suspended; and liability should be restored where the insured remedies the breach. This approach may still, in some situations, cause injustice and unfairness to the insured.

First, the effect of 'suspension' approach is that a warranty must still be exactly complied with. Any breach of a warranty automatically suspends the insurer's all liabilities. It is irrelevant whether the loss is caused by the breach of the particular warranty. If the loss is caused by risk other than the risk warranted, the insurer could equally be free from the liability to pay the loss. It can be argued that proposal (2) can only solve one problem, this is, a breach of warranty can be remedied. The problems of strict compliance, automatic and immediate suspension of the insurer's liability, and no need for causal connection remain almost the same as in the current law.

Second, that a breach of warranty can be remedied is only for temporary breach, not for permanent breach. If the breach of warranty is permanent, it would suspend the insurer's liabilities permanently. This would put the insured in the same position as he is under the current law for permanent breach. For instance, if the insured warranted that the lorry would be used to carry metal materials, but it was later permanently changed to be used for carrying gas cylinders, the warranty was then permanently breached. The 'suspension' approach would render the insurance cover terminated from the moment when the lorry was changed to be used for carrying gas cylinders. So there is no difference between the proposed solution and the current law for any permanent breach of warranties. Under the doctrine of alteration of risk, however, the consequence in this situation would be different.[61]

The LCs illustrated the effect of the proposals with the following example.[62] It could be helpful to use the same example to show the drawbacks of the proposals.

A couple insure a small yacht. The policy includes three warranties:

(1) A 'premium payment' warranty, requiring payment by 1 June;
(2) A 'lock warranty' requiring the hatch to be secured by a special type of padlock; and
(3) A 'pleasure use only' warranty, forbidding the yacht to be used for commercial gain.[63]

The insureds breach all three warranties. They fail to pay the premium until

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Lombard General Insurance Co Ltd [2000] Lloyd's Rep IR 47. For more see R Merkin, 'Reforming Insurance Law: is there a case for reverse transportation?', A Report for the English and the Scottish Law Commissions on the Australian Experience of Insurance Law Reform, 2007, p 60.

61 The doctrine of alteration of risk will be discussed shortly.

62 Consultation Paper 2012, above n 12, para 15.5.

63 The facts of *Yacht* case are very similar to the case of *Murray v Scottish Automobile* (1929) SLT 114. In *Murray* the car was insured for private use but it was later used as a taxi. The car was damaged by fire while parked overnight in a garage. The Court of Session held that the 'private use' term was descriptive of the risk. Nevertheless, the insurer was not liable to pay the claim. Lord Sands stated that the time the car was parked in the garage 'must be attributed to one use or the other'. It was best seen as ancillary to the use to which the car has been put during the day. On this logic, the car was still being used as a taxi when parked overnight, and the insurer was not liable to pay the claim. It is submitted that the same rule would apply to the yacht.

15 June; they install the wrong type of padlock; and they use the yacht for paid fishing trips. On 1 July the insureds are using the yacht to transport paying customers when it is hit by a sudden hurricane and sinks.

Under the current law, each single breach may discharge the insurer from liability automatically. Under the LCs proposals the cover would be suspended and be restored when the breach is remedied.

(1) The payment of premium on 15 June would remedy the breach and the insurer's liability would be restored. This proposal is, without doubt, a good proposal. However, the author is of the view that the payment of premium is not necessary to be dealt with by a warranty. Paying premium is the insured's consideration[64] in return for the insurer's promise to pay the loss suffered by the insured and it is also a condition precedent to the insurer's undertaking to bear the risk. Generally, the insurer starts to bear risks after the insured has paid the premium. When and how the premium should be paid is an agreement of the parties.[65]

(2) The lock warranty is aimed at a specific type of loss: loss by theft. Under the LCs proposal, it would not suspend the insurer's liability for other types of loss, such as loss in a storm. At first glance, it seems a very reasonable proposal. However, as discussed above, it has flaws because in some situations it is not easy to distinguish warranties designed to reduce the risk of a particular type of loss and those that are not. It is argued that this proposal may be fertile for disputes.[66]

(3) The 'pleasure use only' warranty relates to the contract generally, and suspends the insurer's liability for all losses until such time as it is remedied. Clearly in this case the breach had not been remedied, so the insurer rejected the claim on this basis. It is clear that in this situation the proposal would not improve the current law. First, the insured must still strictly comply with the 'pleasure use only' warranty. Second, the insurer's liability is automatically and immediately suspended from the moment that the paying passengers

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64 J Birds, *Birds' Modern Insurance Law*, 8th ed, Sweet & Maxwell, 2008, p 189 said 'The premium is the consideration given by the insured in return for the insurer's undertaking to cover the risks insured against in the policy of insurance.' See also *Lewis v Norwich Union Fire Insurance Co* [1916] AC 509 at 519. It is submitted that the premium warranty could be easily treated as an agreement on the payment of the premium. It is not necessary to be treated as a warranty. Because payment of the premium is the consideration of the insured in return for the insurer's promise to undertake his obligation to pay the insured amount on the occurrence of the insured event. The MIA states that the payment of the premium and the issue of the policy by the insurer are concurrent conditions, the insurer is not bound to issue the policy until payment or tender of the premium: s 52. It is a condition for the insurer to undertake liabilities for insured loss. Parties are free to reach an agreement on the date of payment of the premium, and the insured must pay the premium on that date, otherwise the insurer does not bear the risk. The premium warranty can be easily removed.

65 B Soyer, 'Beginning of a New Era for Insurance Warranties?' [2013] *LMCLQ* 384 comments that the LCs proposal will not affect terms which have no bearing on the risk of loss. The most obvious example is a premium warranty where the insured warrants making payment of the premium by a particular date. If the payment is not made by the agreed date, the cover will be suspended and remain so until the breach is rectified. If loss arises before the breach is rectified, the insured will not be able to seek indemnity.

66 Jaffe, above n 57, at 38.

> are taken on board. Even if the insured's taking the paying passengers is only a one-off event, the insurer has no liability for the loss.[67] Third, it is irrelevant that the loss has no connection with taking paying customers but is caused by a hurricane. The only improvement is that the insured is given an opportunity to remedy the breach in stopping taking paying passengers, by so doing the cover can be restored. However, it is sometimes difficult to determine whether and when the temporary breach of warranty has been remedied. For example, if the yacht is used habitually for taking passengers on every Monday and for pleasure use for the rest of every week, is the insured in breach of the 'pleasured use only' warranty only on Monday, and the breach remedied from Tuesday to Sunday? Or is the insured deemed to be in breach for the whole period from Monday to Sunday?

It is suggested that in order to solve the problems in the current law, the reform should be reshaped. A wholesale removal of warranties from English insurance law is necessary. Professor Merkin in his response to the Consultation Paper 2007 urged 'No warranties. Full stop!!!'[68]

Other common law jurisdictions have moved away from the English approach on warranty. Australia and New Zealand have effectively abolished the doctrine of warranty for general insurance contracts.[69] The Australian Law Reform Commission (ALRC) in its report No 20[70] recognised the harshness and unfairness of warranties and expressed the view that the parties' rights in the event of a breach of, or non-compliance with, a contractual term should depend on 'matters of substance', not on whether a term is characterised as a warranty or a condition, or on the difference in effect between a breach of warranty and an occurrence caught by a temporal exclusion.[71] General insurance law was reformed in the Insurance Contracts Act 1984 (ICA). The relevant provision is s 54 which applies to any term that excludes or restricts cover by reason of a post contractual act or omission of the insured or some other person, and it effectively remedies the unfairness of the doctrine of warranty. Section 54(1) precludes an insurer from refusing to pay a claim 'where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into . . .'. Section 54(2) provides that where the insured's act after the contract was entered into could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim. This however is subject to two rights for the insured: (1) where the insured proves that no part of the loss giving rise to the claim was caused by

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67 Under the doctrine of alteration of risk, a one-off event has no effect. See *Shaw v Robberds* (1837) 6 A & E 75.

68 Consultation Paper 2012, above n 12, para 14.4.

69 Insurance Contracts Act 1984 (Cth) s 54 and Insurance Law Reform Act 1977 of New Zealand s 11.

70 ALRC Report No 20, see <http://www.alrc.gov.au/report-20> (accessed March 2014).

71 See G Pynt, *Australian Insurance Law: A First Reference*, 2nd ed, LexisNexis Butterworths, 2011, para 20.1.

his act, the insurer may not refuse to pay the claim by reason only of the act.[72] And (2) where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.[73] Where the act or omission is not capable of causing or contributing to a loss, s 54(1) allows the insurer to reduce its liability 'by the amount that fairly represents the extent to which . . . its interests were prejudiced'. Section 54(6)(b) provides that an act or omission of the insured includes one that has the effect of altering the state or condition of the subject-matter of the contract or of allowing the state or condition of that subject-matter to alter. In essence, the operation of s 54 has effectively got rid of the unpleasant contractual terms, the 'warranty' and the 'condition precedent', which haunted insureds for hundreds of years.[74] However, in 2001 the ALRC noted that the 'question concerning categories of act or omission covered by section 54 has been a matter of some legal controversy'.[75] Concerns have been made about operation of s 54 in relation to 'claims made' and 'claims made and notified' policies. The Review Panel of the ICA has proposed amendment of s 54.[76] It is also worth mentioning that s 24 of the ICA has rendered 'basis of contract' clauses ineffective by converting warranties of existing fact into representations.[77]

Under New York law a breach of warranty will avoid an insurance policy only if it would materially increase the risk of loss.[78] So breach of warranty would be effective only if the materiality for increase of risk is satisfied.[79] It is obviously that the doctrine of alteration of risk has been introduced to the warranty regime in New York law.

The doctrine of alteration of risk is an alternative approach to deal with risk changes during the term of contract. As explained at the beginning, this article is to explore the possibility for the promissory warranty to be replaced by the doctrine of alteration of risk, it is therefore appropriate, at this stage, to examine the doctrine of alteration of risk.

Part 3: The doctrine of alteration of risk

Many civil law countries deal with significant changes in risk during the insurance period, not with promissory warranties or anything of the kind, but

72 ICA 1984 s 54(3).

73 ICA 1984 s 54(4). Section 54 of the ICA provides relief for non-compliance with contractual requirements of an insurance policy, where the non-compliance did not cause or contribute to the loss. If the non-compliance did contribute, however, the section gives insurers the ability to reduce the payout to the extent that their interests were adversely affected.

74 See Pynt, above n 71, para 20.50.

75 ALRC Report 91, 2001.

76 Report into the Operation of Section 54, October 2003, at <http://icareview.treasury.gov.au/content/_download/Review Insur Contracts Act2.pdf> (accessed March 2014).

77 ICA s 24 provides: 'A statement made in or in connection with a contract of insurance, being a statement made by or attributable to the insured, with respect to the existence of a state of affairs does not have effect as a warranty but has effect as though it were a statement made to the insurer by the insured during the negotiations for the contract but before it was entered into.'

78 New York Insurance Code Art 31 s 3106(b).

79 Materiality of increase of risk will be discussed shortly in Part 3.

with more nuanced statutory rules about alteration of risk.[80] Alteration of risk is also known as post-contractual change to the risk or post-contractual increase of risk. The function of the doctrine of alteration of risk is to confine the risk to the scope that the insurer promised to undertake at the time of contract. It means that during the currency of the policy, if the risk increases to the extent that renders the insured risk materially different from what the insurer agreed to cover, the insured must give notice to the insurer, and the insurer shall have remedies for the increase of risk.

The doctrine of alteration of risk is commonly adopted in the civil law jurisdictions, such as Germany, France, Norway, Belgium, China and Japan. The doctrine is not novel in English law under which the general rule is that an increase in the risk insured occurring after the insurance contract was concluded has no effect on the insurer's obligations in the absence of relevant warranties,[81] except (1) where there has been material changes in the circumstances which have increased the risk; and (2) where the claim falls outside the scope of the insurance agreed by the insurer. The two exceptions to the general rule are discussed below.[82]

Remedies for an increase of risk

The remedies for increase of risk vary in different jurisdictions. As mentioned above, in English law there is generally no effect of increase of risk, except that an alteration falls into the two exceptions:[83] The first is based upon an objective assessment of the subsequent events, the test being whether there has been material change in the circumstances which have increased the risk. The second is based on the construction of the insurance contract. If the claim falls outside the scope of the insurance agreed by the insurer, then the insurer is under no obligation to pay. Where the increase of risk falls into these exceptions, the insurer has remedies. The remedies are usually provided in a policy clause and vary in different policies. The policy may vest the insurer the

80 See Clarke, above n 4; see also Clarke, above n 6. See M Smith, 'The Effect of Subsequent Increase of Risk on Contracts of Insurance' [2009] *LMCLQ* 368. In his article, Smith gave a detailed discussion on the general rules of increase of risk in English law and the exceptions to the general rules.

81 The leading cases are *Show v Robberds* (1837) 6 A & E 75 and *Pim v Reid* (1843) 6 Man & G 1. As Clarke comments

> Once the insurance period is running, English law puts certainty ahead of active risk management or 'interference' by the insurer. If loss occurs within the scope of the cover, the insurer cannot say 'Oh dear! I did not think of that' and have the contract changed or terminated . . . Recoverable loss must, of course, be within the scope of the initial cover; and certain kinds of change of risk take the subject-matter outside the original cover.

See Clarke, above n 4, at 110.

82 Smith, above n 80, at 368, Smith critically examined the exceptions to the general rule of law that an increase of risk insured occurring after the insurance contract was concluded has no effect on the insurer's obligations.

83 In his paper, Smith, ibid, at 369–70 formulated two exceptions. The first is based upon an objective assessment of the subsequent events, the test being whether there has been material change in the circumstances which have increased the risk, if there has been, the insurer is discharged. The second is based on the construction of the insurance contract. If the claim falls outside the scope of the insurance agreed by the insurer, then the insurer is under no obligation to pay.

right to terminate the contract if the alteration is material,[84] or provide that the cover shall be suspended for any period in which the risk is increased in a particular manner.[85] The policy may also entitle the insurer to alter the terms of the insurance and to increase the premium in the event of increase of risk.[86]

Under the Principles of European Insurance Contract Law (PEICL),[87] the insurer is entitled to terminate the contract in the event of aggravation of risk. This right shall be exercised by a written notice to the policyholder within 1 month after he has become aware of the aggravation of risk. An insurer will remain liable for risks materialising within 1 month of the notice of termination being given.[88] German law has a similar provision: 'If an aggravation of the risk insured occurs, the insurer may terminate the contract subject to a notice period of one month.'[89] The right of termination shall lapse if it is not exercised within 1 month after the insurer learns of the aggravation of the risk insured.[90] The insurer may alternatively demand an insurance premium commensurate with the aggravation of the risk insured or may exclude insurance cover for the aggravated risk.[91] Norwegian law enables the insurer to terminate the insurance by giving 14 day notice if an alteration of the risk occurs.[92] In Italy, as a general rule, the insurer has two remedies in the event of an increase of risk: they are relieved from liability if they would not have covered the risk at all had they known of the alteration of the risk at the time of contract. If they would have covered the risk (albeit on different terms), their liability is limited according to the ratio that the actual premium bears to that which they would have charged.[93] The Chinese solution is that where there is a material increase of risk, the insurer is entitled to demand an increase of premium or terminate the contract in accordance with the contract.[94]

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84 In the recent case of *Ansari v New India Assurance Ltd* [2009] EWCA Civ 93, the policy clause stated: 'This insurance shall cease to be in force if there is any material alteration to the Premises or Business or any material change in the facts stated in the Proposal Form or other facts supplied to the Insurer unless the Insurer agrees in writing to continue the insurance.'

85 This type of provision is often referred to as either suspensory or a delimitation of the risk. See R Merkin, *Colinvaux's Law of Insurance*, 9th ed, Sweet & Maxwell, 2010, para 5-018.

86 For example, in the Premier Home Insurance (Lark Insurance Broking Group), a clause provides 'You must tell us about any change in circumstances which occurs before or during the period of insurance and which may affect this insurance. We may then amend the terms of this insurance.'

87 The PEICL was published in 2009. The PEICL presents the first fully developed model for an Optional Instrument in European insurance market. The PEICL provides the European legislator with a tool to overcome obstacles to the internal insurance market, which are formed by the often mandatory character of insurance contract law, at <http://www.europarl.europa.eu/document/activities/cont> (accessed March 2014).

88 PEICL Art 4:203(1).

89 German Insurance Contract Act 2008 s 24(2).

90 Ibid, s 24(3).

91 Ibid, s 25(1) and (2).

92 Norwegian Marine Insurance Plan 1996 s 3-10 (2010 version).

93 The Italian Civil Code, Art 1898 (the insurer's right to demand a higher premium or withdraw from the contract by serving notice).

94 See Chinese Insurance Law 2009 Art 52. In practice, the insurer rarely exercises his right of termination of the contract for an increase of risk. This is because the insurer does not want to lose customers. The insurer prefers to continue the contract by raising premium or change

To summarise, three types of remedies are generally available — the insurer could charge more premiums, change policy terms or terminate the policy.[95] These remedies are available where the increase of risk is a material increase. The next question to be considered is what is a material increase of risk?

What is a material increase of risk?

In English common law, this issue arises in the cases of *Hadenfayre v British National Insurance Society Ltd*[96] and *Ansari v India Assurance Ltd*.[97] Both cases discharged the insurer from liabilities on the grounds of material increase of risk during the insurance period, but different views were given on the issue of what is a material increase of risk in the two cases.

In *Hadenfayre*, Lloyd J held that:

> If it was a material fact to be disclosed *before* the contract of insurance, on the ground that it would have influenced the judgment of a prudent insurer in deciding whether to accept the risk and, if so, at what premium, then it seems to me to follow that it must have constituted a material variation *after* the contract of insurance was concluded.

'Material', in Lloyd J's mind, clearly meant 'material' in the insurance sense — that is, matters that would influence the judgment of a prudent insurer in fixing the premium or in determining whether to take the risk.[98] According to Lloyd J's statement, the test of material increase of risk should be a prudent insurer mere influence test. It is submitted that the prudent insurer mere influence test is not suitable to test the materiality for post-contract increase of risk: Because, first, the prudent insurer mere influence test was very harsh to the insured and was mitigated by the introduction of the doctrine of inducement for pre-contractual duty of disclosure;[99] second, this approach in effect reintroduces, through the back door, a continuing duty of disclosure of any information which would have influenced the judgment of a prudent insurer in deciding whether to accept the risk and, if so, at what premium,[100] and this would impose on the insured an onerous continuing duty of informing

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policy terms in the event of increase of risk rather than terminate the contract. In addition, nowadays, numerous types of coverage are offered by insurers, the insurance almost cover everything. On the other hand, from the insured's point of view, once the policy is terminated, the insured must take steps to find alternative cover, it is very difficult for him to effect a policy with other insurers in this situation in a short period of time. (Personal discussion with Mrs Xiaoling Zhang (the Deputy General Manager of Pingan Insurance Company of China, Qingdao Branch).

95 These remedies are much fairer that the automatic discharge of the insurer's liability upon breach of a warranty.

96 [1984] 2 Lloyd's Rep 393.

97 [2009] Lloyd's Rep IR 718.

98 Smith, above n 80, at 372.

99 MIA 1906 s 18(2) states: 'Every circumstance is material which would influence the judgement of a prudent insurer in fixing the premium or determining whether he will take the risk.' According to this provision, in *Container Transport International Inc (CTI) v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, the test of materiality of non-disclosure was determined as the 'prudent insurer mere influence test'. The test of materiality for pre-contractual duty of utmost good faith is too harsh to the insured, and later in *Pan Atlantic Co v Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427, the doctrine of inducement was introduced into the rules of utmost good faith.

100 Smith, above n 80, at 374.

the insurer of changing circumstances; and third, if a change of circumstance passed the prudent insurer mere influence test, then the insurer was discharged by the material change, this cannot square with the common law position that a subsequent increase of risk has no effect on the insurer's obligations unless the increase of risk amounts to a change of nature of the risk.

In *Ansari v New India Assurance Ltd*, which is now the leading authority in respect of increase of risk, the Court of Appeal expressed a different view on the meaning of material increase of risk. In this case, a policy term stated '[t]his insurance shall cease to be in force if there is any *material* alteration to the premises or business or any *material* change in the facts stated in the proposal form or other facts supplied to the insurer unless the insurer agrees in writing to continue the insurance'. The court construed 'material' as referring to changes of a kind that take the risk outside that which was in the reasonable contemplation of the parties when the policy was issued, namely, 'material alteration' means that the risk had actually altered in nature. Rejecting the argument for the insurer that 'material' was to be construed more widely in accordance with its meaning for pre-contract disclosure purposes, the court held that the term 'material' did not import the test for the pre-contract duty of utmost good faith, as materiality in that context meant no more than that a prudent underwriter would have been interested in the changed circumstances, a 'relatively undemanding' threshold. Instead, the court felt that the question should be whether the changed circumstances had a significant bearing on the risk; a test which the court felt was easily satisfied on the facts in this case.[101] Accordingly, the insurer could be discharged from liability only where the risk had actually altered in nature. It is submitted that this is a reasonable test for a material increase of risk.

In some civil law countries, the meaning of material increase of risk can be reflected from the wording of their insurance laws. Norwegian law provides:

> If, after the conclusion of the contract, the assured has intentionally caused or agreed to an alteration of the risk, the insurer is free from liability, provided that it may be assumed that he would not have accepted the insurance if, at the time the contract was concluded, he had known that the alteration would take place. If it may be assumed that the insurer would have accepted the insurance, but on other conditions, he is only liable to the extent that the loss is proved not to be attributable to the alteration of the risk.[102]

A similar definition is found in Greek law:

> throughout the insurance period, the policyholder shall be obliged to declare to the insurer, . . . any details or incident liable to entail an significant increase of the risk, such that had the insurer been aware of the fact or incident, it would not have concluded the insurance contract, or would not have concluded it under the same terms.[103]

Belgian law adopts the approach that the risk must be altered or increased in such a way that the insurer would not have accepted the insurance at all.[104]

According to these definitions for an increase of risk, the common approach

101 Merkin, above n 85, para 5-019.
102 Norwegian Marine Insurance Plan 1996 s 3-9 (2010 version).
103 Greek Insurance Contract Law No 2496/97 Art 4.1.
104 Belgian Insurance Law 1874 Art 31.

is that whether an increase of risk is a material increase depends on the insurer's hypothetical attitude which could be retrospective to the time of conclusion of the contract, that is if the insurer could prove that they would not have accepted the insurance or would have charged a higher premium if they had known that the alteration would take place. Based on this formulation, the test of material increase of risk during the insurance period should be established as 'the actual insurer decisive influence test'.[105] Accordingly, not all kinds of increase of risk are material but only those which would have caused the actual insurer to raise the premium, to change policy term, or to terminate the contract. The burden of proof is on the insurer.[106] To determine whether the insurer would charge a higher premium or terminate the contract for the increase of risk, reference should be taken retrospectively to the insurer's hypothetical attitude at the time of the contract. Namely, they can increase the premium, change policy term, or terminate the contract in the event of an increase of risk if they would have done so had they known of the increase of risk at the time of the contract.[107]

In China, the Insurance Law 2009 requires the insured to notify the insurer of any material increase of risk,[108] but the law does not give a definition on what is material increase of risk. As the author suggested in a previous paper,[109] a definition of the post-contract material increase of risk could be formulated by referring to the provision for pre-contract duty of disclosure.[110] The definition could be suggested as such: The insured must notify the insurer where the risk is increased to such an extent that the insurer would not have accepted the insurance, or would have accepted the insurance on a higher rate of premium if they had known about the increase of risk at the time the contract was entered into.[111] On the basis of this definition, the test of materiality of post-contract duty of increase of risk could be established as

105 It is suggested that for the test of post-contract 'material increase of risk', the insurer should refer to the actual insurer (not a prudent insurer), because the contract has already been entered into on the terms and conditions in that particular policy offered by that particular insurer. From this point of view the test should be 'the actual insurer decisive influence test'.

106 For more detailed discussion on this point, see Z Jing, 'The Insured's Post-Contract Duty of Notification of Increase of Risk: A Comparative Perspective' [2013] *JBL* 842.

107 Ibid for more detailed discussion on the material increase of risk.

108 Insurance Law 2009 Art 52. The term 'notification of a material increase of risk' means notification of a material increase in the risk or notification of changes of facts or circumstances which have materially increased the risk. The latter includes changes either in the circumstances disclosed to the insurer by the insured at the time the contract was concluded or in the circumstances specified in the insurance policy which have materially increased the risk.

109 Jing, above n 106.

110 As to the pre-contractual duty of disclosure the Insurance Law provides that 'A material fact is a fact which shall *sufficiently* influence the insurer's decision on whether or not he will accept the insurance or raise the premium rate.' Based on this provision, the test of materiality of pre-contractual information was determined as the 'prudent insurer decisive influence test'. See Z Jing, 'The Insured's Duty of Disclosure and Test of Materiality in Marine and Non-Marine Insurance Laws in China' [2006] *JBL* 681. In this article the author established the test of insured's pre-contract duty of disclosure according to Insurance Law 1995 Art 16.

111 See B Wang, *Chinese Commercial Law*, People's Court Press, 1996, p 510. Wang has a similar view on this point, he says: 'after the conclusion of an insurance, the insured should notify the insurer of any increased risk if the increased risk would sufficiently influence an

'the actual insurer decisive influence test'.

The insured's duty of notification of increase of risk

Where there is an increase of risk, the insured is required to notify the insurer. However, imposing day-to-day obligations upon the insured to give notification to the insurer of the increase of risk is a heavy burden for the insured. The duty of notification is triggered only in the following situations.

The increase of risk must be a material increase

Some laws clearly stipulate that the insured must notify the insurer of a material increase of risk,[112] an immaterial increase of risk does not affect the insurer's liability and the insured is not required to notify the insurer of it.[113] This approach is fair to the insured.

Increase of risk is brought about by the insured

In most situations, the increase of risk is brought about by the insured himself. For instance, a 'pleasure use only' yacht was changed to be used for commercial gain; a 'private use only' car was changed to be used as a taxi by the insured. These changes were brought about by the insured which must be disclosed to the insurer. A Chinese case illustrates this.[114] The insured effected a fire policy on his house as a dwelling house. Later he let the house to a person for storing flammable chemicals. The insured risk was obviously materially increased and as the increase was brought about by the insured himself, he must notify the insurer of the increase. In Belgium and Norwegian laws the duty of notification applies only if the insured is responsible for the increase of risk.[115] Taiwan Insurance Law requires the insured to serve prior notice to the insurer if the material increase in risk is caused by the insured.[116] It is clear that where the increase of risk is brought about by the insured himself, the duty of notification is triggered.

Insured must have knowledge of the increase of risk

If the insured is not aware of the increase of risk, they are unable to notify the insurer of it and they are not in breach of the duty of notification. For example, the insured effected a fire policy for his terrace house. Unknown to him, his next door neighbour's dwelling house was changed to be used for storing fireworks. This undoubtedly increases the risk of fire on his house, but it would be unfair to expect the insured to notify the insurer of the increased risk

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insurer's decision on whether or not he would have supplied the insurance or what premium he would have charged at the time when the contract was concluded.'

112 The PEICL Art 4:201 provides: 'If the insurance contract contains a clause concerning aggravation of the risk insured, the clause shall be without effect unless the aggravation of risk in question is material and of a kind specified in the insurance contract.' See also Insurance Law 2009 Art 52.

113 See German Insurance Contract Act 2008 s 27, where it is provided that immaterial increase of risk does not affect the insurer's liability and the insured is not required to notify the insurer about it.

114 B Wang, *The Property Insurance Law — Legal interpretation and cases analysis*, Intellectual Property Press, 2009, p 78. The case was cited in the book.

115 Belgium Law 1874 Art 9; Norwegian Marine Insurance Plan 1996 s 3-9 (2010 version).

116 Taiwan Insurance Act Art 59.

because he himself did not know the fact. Norwegian law expressly provides that if the insured becomes *aware* that an alteration of the risk will take place or has taken place, he shall notify the insurer.[117] This implies that the insured has no duty to notify the insurer for an increase of risk that he is not aware of. The insured's knowledge refers to actual knowledge.[118] However, the PEICL requires the insured to notify the insurer if he has *actual* or *constructive* knowledge of an increase of risk. It is provided:

> If a clause concerning aggravation of the risk insured requires notification of an aggravation, notification shall be given by the policyholder, the insured or the beneficiary, as appropriate, provided that the person obliged to give notice *was or should have been aware* of the existence of the insurance cover and of the aggravation of the risk . . .[119]

It seems unfair to ask an insured to give notice if he does not actually know the increase of risk.

The duty of notification is a contractual duty

A clause which requires the insured to give notice in the event of increase of risk should be included in the policy.[120] For instance, in *Kausar v Eagle Star Insurance Co Ltd*,[121] a provision stated: 'You must tell us of any change of circumstances which increases the risk of injury or damage. You will not be insured under the policy until we have agreed in writing to accept the increased risk.' In the recent leading case of *Ansari v New India Assurance Ltd*[122] a policy term states: 'This insurance shall cease to be in force if there is any material alteration to the Premises or Business or any material change in the facts stated in the Proposal Form or other facts supplied to the insurer unless the insurer agrees in writing to continue the insurance.'[123] The insured has no duty to notify the insurer of an increase of risk if there is no policy term requesting him to do so. PEICL provides that: 'If a clause concerning aggravation of the risk insured requires notification of an aggravation, notification shall be given by the insured.'[124] In China, the insured is required to perform his duty of notification of the increase of risk according to the agreement of the parties stipulated in the contract.[125] It is suggested that to assist the insured to perform the duty of notification, the insurer should include a list of facts or circumstances in the policy which are likely to increase the risk of loss; the insured is only obliged to notify the insurer of changes of those in the list which have materially increased the risk.[126]

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117 See Norwegian Marine Insurance Plan 1996 s 3-11.
118 See also German Insurance Contract Act 2008 s 23.
119 PEICL Art 4:202.
120 PEICL Art 4:201; Chinese Insurance Law 2009 Art 52.
121 [1997] CLC 129.
122 [2009] Lloyd's Rep IR 562 CA (Civ Div).
123 The PEICL also require that a clause concerning of aggravations of risk should be included in the policy: Arts 4:201 and 4:202. See also Insurance Law 2009 Art 52.
124 PEICL Art 4:202.
125 Insurance Law 2009 Art 52.
126 For example, a notification clause in a private motor insurance policy would state: 'you must tell us if any of the following details change during the insurance period: (1) you modify your car; (2) you add another driver to your policy or amend the driving restriction; (3) you

Increase of risk is permanent and habitual

A one-off increase of risk is not a change in nature so it does not affect the insurer's liability to pay the claim. This is illustrated by the English case of *Shaw v Robberds*.[127] A fire policy was effected in respect of a kiln, the kiln was said to be used only for drying corn. On one occasion, the insured allowed a friend to dry bark in the kiln gratuitously and this occasioned a fire which brought about the dispute. It was held that the insurer were liable although drying bark was a more hazardous activity than drying corn. The use to dry bark was a one-off event and did not change the fact that the normal use was for drying corn. Lord Denman CL held that the case did not fall within the conditions excluding cover; and that the increase in risk caused by the insured's conduct did not preclude recovery under the insurance.[128]

The insurer's duty to give notice to the insured of his decision

As discussed above, where there is a material increase of risk, the insured must notify the insurer of the increase of risk. The insurer, upon receiving the insured's notification, must make the decision on whether they will terminate the contract or increase premium or change policy term, and then notify the insured of their decision within a reasonable time. Under the PEICL the insurer's right to terminate the contract shall be exercised by a written notice to the insured within 1 month after they have become aware of the aggravation of risk.[129] German law also requires the insurer to give 1 month notice to the insured before they terminate the contract.[130] Norwegian law requests the insurer to give such a notice in 14 days.[131] It is submitted that 1 month notice is reasonable in order for the insured to find an alternative cover in the case of termination of the contract.

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change the use of your car (eg, change from private to business use); (5) you change the address where you normally keep your car.' The insured should only be required to notify the insurer of changes of those in this list.

127 (1837) 6 A & E 75. See also *Pim v Reid* (1843) 6 Man & E 75.

128 In a Chinese case of *Mr Li Xian v PICC property Insurance Company, Dong Guan Branch*, Mr Li insured his car for private use. One day during the currency of the policy, Li took four men who hitchhiked and asked for 25 yuan from them. The car was hijacked by the men. Li claimed but was refused by the insurer who argued that as Li changed the use of the car from private to business purpose, the risk was obviously increased, but he did not notify the insurer of such change. In the policy, cl 15 stated: 'In the insurance period, if the insured vehicle is modified or the use of it is changed for business, which results in an increase of risk, the insured should notify the insurer in writing. Otherwise, insurer is not liable where the loss is caused by the increase of risk.' The court held that the use of the vehicle to take a few passengers was a one-off event, and did not change the fact that the normal use was for private purpose, as there was no evidence that the use of the car was changed permanently for business. See Dong Guan People's Court (trial court) civil cases report No 1874, 2006 <http://www.dgcourt.gov.cn> (accessed March 2014).

129 PEICL Art 4:203(1).

130 German Insurance Contract Act 2008 s 24(2).

131 Norwegian Marine Insurance Plan 1996 s 3-10 (2010 version) provides: 'If the insurer becomes aware that an alteration of the risk has taken place, he shall, without undue delay and in writing, notify the assured of the extent to which he intends to invoke § 3-9 and § 3-10. If he fails to do so, he forfeits his right to invoke those provisions.'

Consequence for the breach of the duty of notification

The consequences for the insured's failure to perform the duty of notification of an increase of risk vary from one jurisdiction to the next.

Causal connection approach

Some countries have adopted the causal connection approach that means in the event of breach of the duty of notification by the insured, the insurer is entitled to be discharged from liability if the loss is caused by the material increase of risk. For instance, under Art 4:202(3) of the PEICL, '[i]n the event of breach of the duty of notification, the insurer shall not on that ground be entitled to refuse to pay any subsequent loss resulting from an event within the scope of the cover unless the loss was caused by the aggravation of risk'. Similar provisions can be found in German law, under which the insurer shall be obligated to effect payment if the aggravation of the risk insured was not the cause of the occurrence of the insured event.[132] The requirement of causal connection test can also be found in NZ and Australian laws.[133] It is also the Chinese approach that 'where the insured fails to perform the duty of notification . . . the insurer shall not be liable for indemnity if the loss is caused by the material increase in risk'.[134]

As the author argued previously[135] the causal connection approach seems reasonable at first glance but it has problems. Sometimes it is difficult to establish a causal connection between the increase of risk and the loss. In some situations, it is clear that the risk has been materially increased but the loss has nothing to do with the increase of risk, the insurer still must pay. So it is unfair to the insurer who receives low premium but bears a high risk which was not contemplated at the time of the contract.[136]

In the Consultation Paper 2007, the LCs suggested introducing the causal connection approach into the warranty regime. They were of the view that the insured should be entitled to be paid a claim if it can prove that the event or circumstances constituting the breach of warranty did not contribute to the loss.[137] However, this proposal provoked a strong reaction. Some respondents supported,[138] while some others criticised the proposal. The main criticisms

132 See German Insurance Contract Act 2008 ss 23 and 26.
133 Insurance Law Reform Act 1977 s 11; Insurance Contracts Act 1984 s 54(2).
134 See Insurance Law 2009 Art 52.
135 Jing, above n 106.
136 For example, in a hypothetical case, the insured paid £200 premium for the insured amount of £4000 on his car for private use. Later he changed the use of his car for business purposes, but did not notify the insurer. The insurer would have increased the premium an extra £20 had they been notified by the insured. The car was then damaged in a road accident while the insured took passengers for commercial gain. The insurer can then refuse the insured's claim for the loss because there is a causal connection between the loss and the increase of risk. However, if the car was stolen at night while it was parked in front of the insured's garage, the insurer should be liable for the loss as no causal connection can be established between the loss and the increase of risk. In this situation, the insurer received £200 premium and paid £4000 for the loss. Had the insured performed his duty of notification, the insurer would have received £220 premium and paid £4000 for the loss.
137 Consultation Paper 2007, above n 13, paras 12.55 & 12.56.
138 For example, the Risk Managers' Association believed that the introduction of a causal

were that the causal connection test would be difficult to apply in practice;[139] it was not appropriate for all warranties;[140] and it might increase moral hazard.[141] Thus no introduction of causal connection test between breach of a warranty and the loss was proposed in the Consultation Paper 2012.

The degree of insured's fault

In addition to the causal connection approach, German law also takes into account the degree of the insured's fault in dealing with the consequence of an increase of risk.[142] The insurer's remedy for a breach of the duty not to aggravate the risk depends on the degree of the insured's fault. Where the insured intentionally or through gross negligence breached the duty the insurer may terminate the contract without notice.[143] Where the breach was negligent or unintentional the insurer has the right to terminate the contract on 1 month's notice.[144] The insurer is not liable for losses occurring after the intentional breach of the duty by the insured. Where the insured has been grossly negligent the insurer may reduce the amount to be paid on a claim commensurate to the insured's fault. However, in either case there must be a causal connection between the aggravation of risk and the loss.[145] It is submitted that this approach is reasonable and fair because intentional and innocent non-performance of a duty should not be treated in the same way. This approach may reduce the chance for the insured to gain advantage by trickery by seeking to obtain better coverage by paying a lower premium.[146]

Part 4: The doctrine of alteration of risk versus doctrine of warranty

Differences between the two doctrines

As mentioned above, the function of the doctrine of alteration of risk is to confine the risk to the scope that the insurer promises to undertake at the time of the contract. If the risk is materially increased during the term of the policy, the insurer is entitled, upon the insured's notification, to charge more

connection test was an 'essential change to insurance contract law'. The British Insurance Law Association thought it would 'accord with most people's sense of justice'. See Consultation Paper 2007, para 14.37.

139 For example, Clarke warned that 'the history of English law on question of causation is not encouraging'. That view was shared by other respondents who were concerned that introducing the test would necessitate a closer assessment of the exact chain of causation and the significance of potentially intervening events and that this could lead to increased litigation. See Consultation paper 2012, paras 14.39 & 14.40.

140 Consultation Paper 2012, above n 12, paras 14.41–14.43.

141 Consultation Paper 2012, above n 12, para 14.36.

142 German Insurance Contract Act 2008 ss 24 & 26.

143 Ibid, s 24(1).

144 Ibid, s 23.

145 Ibid, s 26.

146 For example, it may be the case that when the car insurance is effected, the insured tells the insurer that the car is for social and domestic use, but the insured has already plans to change it to business use some months after the inception of the policy. If there is no requirement of notification of increase of risk, insureds may take advantage by effecting a policy by paying a lower premium for a lower risk and then changing the use to one with a higher risk without the need of paying an extra premium.

premiums, change policy terms or terminate the policy, depending on the nature of the increase. Thus: (i) if the insurer has decided to charge higher premiums or change policy terms, the insured is still covered under the policy; and (ii) if the insurer has decided to terminate the contract they will serve a 1 month (or so) notice to the insured so that the insured may have time to find an alternative policy.

By contrast, under the doctrine of warranty, the insurer is automatically discharged from liability from the moment when the warranty is breached,[147] so the insured is immediately without cover and often quite unaware of it,[148] and he or she has no time to find an alternative cover. Professor Clarke criticised this approach and said that, even in the case of substantial breach of warranty, policyholders in breach should be given time to negotiate or seek alternative cover.[149]

The rules of alteration of risk are clearly fairer than those of warranties. As discussed above, the current law on warranties would not be improved significantly by the LCs proposals. Let us still take the yacht case as an example. Where the 'pleasure use only' warranty was breached, the insurer's liability was suspended automatically and immediately. If the rules of alteration of risk were applied, the consequence would be different. When the yacht was used for the purpose of commercial gain the risk was materially increased. The insured, under the concept of alteration of risk, would be required to notify the insurer of the material change of the risk. The insurer would then probably charge a higher premium for commercial use of the yacht and the insured would be continuously covered by the policy. If the insurer terminates the cover, the insured, after receiving the termination notice from the insurer, could take steps to find an alternative cover for the yacht.

In addition, under the doctrine of alteration of risk, generally an increase of risk does not affect the insurance cover unless the risk is materially increased. Even if the increase is material, in practice the insurer usually chooses the remedy of charging extra premium or changing policy terms rather than terminating the policy.[150] If the risk is increased to such an extent that the

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147 It is even worse under English law. Where there is a breach of warranty, the insurance cover comes to an end but the insured is asked to continue to pay the premium until the policy expires if the premium is payable in instalments. The insurer is entitled to retain the full amount of the premium if the insured has paid the whole premium in a lump-sum; see Merkin, above n 85, para 7-040. Under the doctrine of alteration of risk, in some jurisdictions the insurer is required to refund to the policyholder the premiums received after deducting the premiums in accordance with the contract for the period from the date of commencement of the insurance liability to the date of rescission of the contract. For example, Art 52 of the Insurance Law 2009 provides:

> Where the insured risk of the subject matter of insurance increases materially during the period of the contract, the insured shall, in accordance with the contract, notify the insurer in a timely manner and the insurer shall have the right to increase the premiums or rescind the contract. Where the insurer rescinds the contract, it shall refund to the insured the premiums received after deducting the premiums in accordance with the contract for the period from the date of commencement of the insurance liability to the date of rescission.

148 See Clarke, above n 6, at 481.

149 Ibid.

150 That is because the insurer does not want to lose business; they prefer to continue the contract by raising the premium rather than terminating the contract. Moreover, nowadays,

insurer decides to terminate the contract, they must give a notice to the insured, so that the insured may effect an alternative policy. By contrast, a warranty must be exactly complied with, whether it be material to the risk or not; and if a warranty is not complied with, the cover is ended (or suspended) automatically, and no notice is required to be given to the insured.

Again, under the doctrine of alteration of risk, the insurance cover is not affected by a one-off or temporary increase of risk as illustrated by *Shaw v Robberds*. However, if the term 'the kiln was to be used only for drying corn' adopted in the case was interpreted as a warranty, it would be a breach of warranty when it was used to dry bark, then the insurer was discharged from liability and the cover ended automatically.

The possibility for the promissory warranty to be replaced by alteration of risk

Having discussed the two doctrines, it is suggested that the doctrine of warranty could be replaced by the doctrine of alteration of the risk for the following reasons.

First, the doctrine of alteration of risk is much fairer than the doctrine of warranty. The LCs have recognised that the rules of alteration of risk in some civil law countries are milder than the UK warranty law.[151]

Second, the doctrine of alteration of risk is not a novel concept in English law. A body of common law rules in relation to increase of risk has been established in English law. So to adopt the doctrine of alteration of risk to replace doctrine of warranty would not cause much uncertainty.[152] Actually, the doctrine of warranty and doctrine of alteration of risk operate simultaneously in English insurance law in managing risks during the term of insurance. Although the promissory warranty is the main mechanism, the doctrine of alteration of risk operates in some situations.[153]

Third, the test of materiality of an increase of risk was already established in English common law in the leading case of *Ansari v New Assurance Ltd*,[154] which could be used to test what is a material increase of risk.

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numerous types of coverage are provided by insurers. On the other hand, from the insured's point of view, once the policy is terminated, the insured must take steps to find alternative cover. It is very difficult for the insured to effect a policy with other insurers in this situation where his or her original policy was cancelled by the former insurer.

151 Consultation Paper 2007, above n 13, para 7.66.

152 Some commentators worried that to introduce a new doctrine of alteration of risk would cause uncertainty. See Soyer, above n 6, p 135.

153 The doctrine of alteration of risk applies in the following situations: (1) alteration in the subject matter of insurance; (2) change of locality; (3) change of circumstances. See H Ivamy (Ed), *Moazley and Whiteley's Law Dictionary*, 11th ed, Butherworths, London, 1993.

154 In *Ansari v New Assurance Ltd* [2009] Lloyd's Rep. IR 718, the Court of Appeal construed 'material' increase of risk as referring to changes of a kind that take the risk outside that which was in the reasonable contemplation of the parties when the policy was issued, namely, 'material alteration' means that the risk had actually altered in nature. Therefore, where there is an increase of risk, the insurer could be discharged from liability only where the risk had actually altered in nature. The test of materiality for a post-contract increase of risk could be established as 'actual insurer decisive influence test' which is different from the 'prudent insurer mere influence test' for pre-contract duty of disclosure.

In addition, New York Insurance Law provides a good example for introducing the doctrine of alteration of risk into the warranty regime. Under s 3106(b) of the New York Insurance Law: 'A breach of warranty shall not avoid an insurance contract or defeat recovery thereunder unless such breach materially increases the risk of loss, damage or injury within the coverage of the contract . . ..' This provision indicates that a revolutionary change has been made in New York law as to the effect of a breach of warranty. This provision introduces the doctrine of alteration of risk into warranty regime. Since early common law, a warranty breach, regardless of its materiality, ipso facto avoided a policy.[155] Now a breach of warranty will avoid a policy or defeat recovery thereunder only if the said breach materially increased the risk of loss within the coverage of the contract.[156] Thus three questions must be answered by the trier of the fact: (1) Was there a warranty? (2) Was it breached? (3) Did the breach materially increase the risk? Previously an affirmative answer to the first two questions ended the matter; now, however, an additional finding of fact must be made. The introduction of the doctrine of increase of risk into warranty regime significantly improves the previous law relating to warranties.[157]

Part 5: Conclusions and suggestions

The Law Commissions' reviews on warranties is almost finished. The LCs final report and draft Bill are expected to come out by summer 2014.[158] It would miss the opportunity to remove the warranty regime from English law if warranty is still retained in the Bill.[159] Although the LCs proposals for reform of warranties indicate that 'we are finally moving forward',[160] the move is inadequate in terms of mitigating the harshness and unfairness of the current law.

It is suggested that the best way to fix the age-old doctrine may be simply to eliminate it. The promissory warranty could be replaced by the doctrine of alteration of risk which has an equivalent function of management of risk during the insurance period, but offers fairer solutions for breach. To introduce the doctrine of alteration of risk would not cause much uncertainty because the doctrine is not novel in the English legal system.

The major difference between warranty and alteration of risk is that the

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155 See *Gaines v Fidelity & Casualty Co* 188 NY 411; 81 NE 169 (1907); *Foot v Aetna Life Ins. Co* 61 NY 571 (1875); *Metropolitan Life Ins Co v Rutherford* 98 Va 195; 35 SE 361 (1900); *Donley v Glens Falls Ins Co* 184 NY 107 at 113; 76 NE 914 at 917 (1906).

156 New York Insurance Law 2010 s 3106(b).

157 See FLASII, 'The "Insurance Contract" Warranties and Representations' [1941] 10 *Fordham L Rev* 276 at <http://ir.lawnet.fordham.edu/flr/Vol10/iss2/8> (accessed February 2014).

158 The LCs are currently in the process of drafting a Bill to cover disclosure in business insurance, warranties, damages for late payment and the insurer's remedies for fraudulent claims. It is expected that the LCs final report and draft Bill will be published later in 2014, <http://lawcommission.justice.gov.uk/areas/insurance-contract-law.htm> (accessed 18 November 2013). See also D Hertzell and L Burgoyne, 'The Law Commissions and Insurance Contract Law Reform: An Update' [2013] 19 *JIML* 105.

159 Merkin and Lowry, above n 6, at 110 comment: 'The decision to retain continuing warranties in English jurisprudence by allowing the insurers of commercial risks to include them in policies is a curious one.'

160 See Soyer, above n 6.

insurance cover could not survive the breach of warranty, the LCs proposal could not improve the position if the breach is irremediable; while under the doctrine of alteration of risk, in the event of increase of risk the insured would continue to be covered under the policy if the insurer chooses to charge more premiums or change the policy terms for the material increase of risk. Even if the insurer terminates the policy by giving notice within a reasonable time, the insured could have time to find an alternative cover.

Given that there are different rules of alteration of risk in different jurisdictions, an appropriate model could be established by adopting good solutions from a number of jurisdictions as follows:[161]

1. Where there is a material increase of risk, the insured must notify the insurer of the increase. The insurer can charge extra premium, change policy term, or terminate the policy. Where the insurer is to terminate the policy they must give 1 month's notice to the insured.[162]

2. Where the insured fails to notify the insurer of the increase of risk, the remedies available to the insurer should depend on the degree of the insured's fault as well as the causal connection between the loss and the breach of the duty of notification:

(1) For an intentional[163] breach of the duty by the insured, the insurer should not be liable for any loss occurring after the increase of risk.

(2) For a gross negligent[164] breach of the duty by the insured:

(a) the insurer should not be liable for any loss occurring after the increase of risk, where the insurer can show a causal connection between the increase of risk and the loss;

(b) where the insurer cannot show a causal connection between the increase of risk and the loss,

(I) where the insurer would have increased premium had they been notified by the insured of the material increase of risk, the insurer should be allowed to reduce its liability by the amount that fairly represents the extent to which their interests were prejudiced by the insured's non-notification. In other words, the insurer may reduce the amount to be paid proportionately to the ratio of premium they received and the premium they should have received;[165]

161 See Jing, above n 106 for more detailed discussion on the doctrine of alteration of risk.

162 See PEICL Art 4.203.

163 The non-notification is intentional if the insured knew that the risk insured against has been materially increased or the change of facts or circumstances has materially increased the risk, but he did not notify the insurer.

164 The non-notification is grossly negligent if the insured did not care whether or not the change of facts or circumstances has materially increased the risk.

165 For example, in the hypothetical case mentioned above n 137, if the car was stolen at night while it was parked in front of the insured's garage, the current Chinese law does not allow the insurer to be released from liability for the loss as no causal connection can be established between the increase of risk and the loss. The insurer has to pay the insured £4000 for the loss. The insurer would have increased the premium an extra £20 had the insured notified them of the increase of risk (changing the use of his car from private to business use). By the rule recommended, the insurer should be allowed to reduce its liability by the amount that fairly represents the extent to which their interests were prejudiced.

(II) where the insurer would have terminated the contract had they been notified by the insured of the material increase of risk, the insurer should not be liable for any loss occurring after the increase of risk.

(3) For an innocent[166] or mere negligent[167] breach of the duty of notification by the insured, the insurer should be liable for any loss, no matter whether or not the loss is caused by the increase of risk.

This model is built on the basis of a combination of the concept of degree of the insured's fault,[168] the concept of materiality of an increase of risk and the doctrine of causation. It is submitted that the model is much fairer to both the insured and the insurer. The three elements in the model exist in the English law so the introduction of the module into English law could not result in much uncertainty.

Instead of paying the insured £4000 for the loss, the insurer should be liable to pay £3636 (£4000 × £200 ÷ £220 = £3636) for the loss which is proportionate to the ratio of the premium they received (£200) and that they should have received (£220).

166 The non-notification is innocent if the insured did not honestly know that the risk insured against has been materially increased or the change of facts or circumstances has materially increased the risk.

167 The non-notification is merely negligent if it is not intentional, grossly negligent or innocent.

168 The introduction of the concept of the degree of insured's fault to the post-contract duty of notification in English insurance law is consistent with the effect for non-performance of pre-contract duty of representation adopted in Consumer Insurance through the Consumer Insurance (Disclosure and Representations) Act 2012 s 5. Some other countries' have also applied the concept of the degree of the insured's fault in their insurance laws, such as German Insurance Law s 26; PEICL Art 4.203(b) and Insurance Law 2009 Art 16.