Reassessing Warranty in the Marine Insurance Contract under Chinese Law

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The co-existence of warranty rules in marine insurance law and the "great increase of the degree of peril" provision in general insurance law has created many legal issues in marine insurance disputes in China. Much has been discussed as to whether it is necessary to reform warranty law, and if so, how. This paper identifies that there are two main differing opinions about the reform, but both opinions have their drawbacks. We suggest that, in order to better play its role in risk control, the warranty in Chinese marine insurance law should be reformed and improved through further learning from the English warranty law; and for defects that cannot be solved by the warranty in marine insurance law together with the associated rules in general insurance law, further consideration can be given to reforming the warranty by learning from the alteration of risk rules in other civil law countries.

1. Introduction

Under an insurance contract, it is customary for the insurer to employ risk control methods to prevent the insured from altering the risk, so as to maintain the risk at the same level agreed at the inception of the contract.[1] Among all the risk control methods, warranty, born from English law, is the most commonly applied one in common law countries.[2] The English warranty rule was first specifically provided in the Marine Insurance Act 1906 (MIA 1906),[3] and the MIA was widely accepted as a model law in other common law countries.

Under Chinese law, Chapter 12 of the Maritime Law of the People's Republic of China (CMC)[4] is dedicated to regulating the marine insurance contract. Article 235 in Chapter 12, which is largely modelled on the MIA 1906, is the only provision that touches upon warranty in Chinese law. It provides that "[t]he insured shall notify the insurer in writing immediately where the insured has not complied with the warranties under the contract. The insurer may, upon receipt of the notice, terminate the contract or demand an amendment to the terms and conditions of the insurance coverage or an increase in the premium."[5] It seems that there lacks a definition of warranty, and neither does the CMC further classify different types of warranty. In addition,

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[1] Baris Soyer, "Risk Control Clauses in Insurance Law: Law Reform and the Future" (2016) 75(1) *The Cambridge Law Journal* 109, 109.
[2] Ibid.
[3] Marine Insurance Act 1906 (MIA 1906), ss 33 to 41.
[4] Order No.64 of the President of the People's Republic of China, 01 July 1993.
[5] Article 235 of the CMC.

many other aspects, such as the components and legal consequences of the warranty, are very vague and confusing. These deficiencies often result in a limited and difficult application of warranty in Chinese law and practice.

When the CMC is silent over certain marine insurance rules, the relevant provisions of the Insurance Law of the People's Republic of China (Insurance Law),[6] as a general law compared to the marine insurance rules in the CMC, shall apply.[7] Accordingly, the parties under a marine insurance contract may try to rely on the "great increase of the degree of peril" provision in the Insurance Law to control the risk.[8] The parties may argue that the insured's certain behaviours have actually led to a "great increase of the peril".[9] Also, contractual parties may agree on a contractual clause that stipulates circumstances constituting "a great increase of the degree of peril". Article 52 of the Insurance Law provides that "where the degree of peril of the subject matter insured greatly increases during the term of validity of the contract, the insured shall notify the insurer in a timely manner as agreed upon in the contract, and the insurer may increase the insurance premium or rescind the contract as agreed upon in the contract,"[10] and "where the insured fails to perform the notification obligation prescribed in the preceding paragraph and an insured incident occurs because the degree of peril of the subject matter insured greatly increases, the insurer shall not be liable to pay indemnity."[11] Article 52 of the Insurance Law is recognized as an "alteration of risk" rule; similar provisions also exist in some other civil law countries.[12] Similar to the application of warranty, disputes arise from time to time regarding the application of alteration of risk rules.[13]

The warranty is mainly recognised in common law countries, and the alteration of risk rule is mainly applied in civil law countries. It is not difficult to find that the functions and legal consequences of the two rules are similar, and most countries have either the rule of warranty or alteration of risk in their national legislation. Interestingly, both the rule of warranty and alteration of risk are stipulated within Chinese law. Therefore, to minimise the possibility of legal disputes in this regard under the marine insurance contract, much has been discussed as to the warranty in Chinese law and its possible reform. Some researchers believe that to fulfil

[6] Order No. 26 of the President of the People's Republic of China, 24 April 2015.
[7] Article 182 of the Insurance Law, see also Article 1 of the Provisions of the Supreme People's Court on Several Issues about the Trial of Cases Concerning Marine Insurance Disputes (Provisions), No. 3 [2012] of the Supreme People's Court, 01 May 2012.
[8] Article 52 of the Insurance Law.
[9] For example, in such situations as deviation and changes of navigation area, instead of claiming the insured's breach of the warranty, the insurer may argue that the insured's behaviours lead to a "great increase of the peril", *see Shouguang Dongyu Hongxiang Wood Industry Co. Ltd v People's Insurance Company of China (Lianyungang Branch)*, Shanghai Maritime Court, (2014) Hu Hai Fa Chu Zi No. 620.
[10] Art 52(1) of the Insurance Law.
[11] Art 52(2) of the Insurance Law.
[12] Hereinafter, in this paper, a significant increase of risk equals alteration of risk.
[13] See Part 2.

the purpose of risk control, reforming the warranty rule alone in the CMC would be adequate;[14] whereas others hold that the warranty rules should be completely replaced by alteration of risk rules.[15] Both views have their own rationales, but they also both have drawbacks. Moreover, the CMC is currently undergoing revision, along with the warranty rule.

Against this background, this article aims to reassess the rules of warranty in China and discuss if there is any need for reform, and if so, in what way? Since the warranty rule in the CMC and the alteration of risk rule in the Chinese Insurance Law are both closely related, both rules will be discussed in tandem in this article. Accordingly, the structure of the article is as follows: After this Introduction, the drawbacks of the existing warranty law in China will be analysed in Part 2. It will be seen from Part 2 that the defects in these rules can generally be divided into five aspects, namely: lack of definitions, ambiguity of its components, lack of classifications, ambiguity of the duty of notification and ambiguity in the legal consequences. Part 3 is then dedicated to discussing these defects. Within the discussions, both the CMC and the revised CMC draft[16] will be referred to and compared, and the laws of certain other countries, including English law, Nordic law, German law and Japanese law will be referred to for discussion. After evaluating the existing Chinese law and the revised CMC draft, the paper concludes that: (1) Both the warranty provisions in marine insurance law and the alteration of risk rules in general insurance law in China shall continue to play their individual roles; (2) For the warranty in marine insurance law: a) the reform of the warranty may be further learned from English law; and b) for defects that cannot be solved solely by the warranty in marine insurance law and the alteration of risk in general insurance law, further consideration can be given to reforming the warranty rule by learning from the alteration of risk rules in other civil law countries.

2. Chinese Law on Warranty

In practice, some countries have their own specific marine insurance law, a very distinctive example of which is the MIA 1906; and some countries use standard contracts, such as the Nordic Marine Insurance Plan of 2013 (2019 version) (NMIP 2019)[17] and the DTV- German Standard Terms and Conditions of Insurance for Ocean-Going Vessels 2009 (DTV-ADS

[14] See Yuan Niu, "New Legislation of Insurance Warranty and Some Suggestions to Perfect the Chinese Regime of Marine Insurance Warranty" (2017) 28(4) *Chinese Journal of Maritime Law* 93 (in Chinese).
[15] See Ling Zhu, Xiuhua Pan and Zhen Jing, "Marine Insurance Warranty: Comparing Common and Civil Law Approaches and their Implications for the Reform of Chinese Law" (2017) 3 *Journal of Business Law* 218.
[16] Maritime Law of the People's Republic of China (Revised Draft for Review) (restricted distribution), hereinafter referred to as the revised CMC draft.
[17] Nordic Marine Insurance Plan of 2013 (2019 version), hereinafter referred to as NMIP 2019.

2009).[18] In contrast, due to the absence of a specific law or standard rule, the rules relating to marine insurance warranty are scattered around in different sectors of law and different levels of law in China. The rules can be found in the CMC, Insurance Law and the Civil Code of the People's Republic of China (CC).[19] In addition to legislation, judicial interpretations and adjudicatory guidelines also contain relevant rules about warranty, including the Provisions of the Supreme People's Court on Several Issues about the Trial of Cases Concerning Marine Insurance Disputes (Provisions), Interpretation (II) of the Supreme People's Court on Several Issues concerning the Application of the Insurance Law of the People's Republic of China (Interpretation II)[20] and Interpretation (IV) of the Supreme People's Court on Several Issues concerning the Application of the Insurance Law of the People's Republic of China (Interpretation IV).[21]

a. Warranty in the CMC and the Provisions

From Article 235 of the CMC, it seems that the insurer's right to remedy is only available after receiving the insured's notification. In addition, to avoid the possible late notification or non-notification by the insured, the Provisions have settled that the insurer is entitled to terminate the contract from the date of the breach if the notification is not sent in a timely manner.[22] In terms of the remedies, the CMC only states that the insurer can opt to terminate or modify the contract. However, Article 235 does not clearly provide for the consequences, particularly as to when the insurer decides to modify the contract but fails to reach a corresponding agreement with the insured. Fortunately, the Provisions provide that, in such a situation, the insurance contract is terminated, and the insured is discharged at the date of the breach.[23] However, if the insurer has paid for the loss after receiving notice of the breach, he is not entitled to terminate the contract again based on the breach.[24]

Nevertheless, the warranty in the CMC is still problematic in many other aspects. It is difficult to interpret the warranty and understand the different aspects of the warranty, including even basic elements of the warranty and classification of the warranty. In judicial practice, for example, it has been difficult for parties to reach an agreement as to whether the agreed

[18] DTV - German Standard Terms and Conditions of Insurance for Ocean-Going Vessels 2009, hereinafter referred to as DTV-ADS 2009.
[19] Order No. 45 of the President of the People's Republic of China, 01 Jan 2021.
[20] Interpretation No. 14 [2013] of the Supreme People's Court, 08 June 2013.
[21] Interpretation No. 13 [2018] of the Supreme People's Court, 01 September 2018.
[22] Article 6 of the Provisions.
[23] Article 8 of the Provisions.
[24] Article 7 of the Provisions.

departure date constituted a warranty in a case.[25] Also, in some cases, as well as the express warranty, the insurer referred to an implied warranty as being the commercial custom in their pleadings; however, due to the lack of an implied warranty rule in Chinese law, the judges eventually set the claims aside.[26] In addition, sometimes, even if the court confirmed the insured's breach of warranty, the decision to exempt the insurer from his liability is based on the insured's violation of both the warranty and the duty of disclosure.[27] Furthermore, although Article 235 of the CMC confirmed that the insurer's remedy is tightly related to the duty of notification, there lacks detailed rules about the duty of notification, such as the period for performing the duty, the subjects of performing the duty, and also the nature of the duty. In addition, the legal consequences of non-compliance are somehow unclear, and this has been criticised by legal practitioners. Even if the insured has duly exercised the duty of notification, there still lack rules to ascertain when the contract is deemed to be terminated. It is also unclear as to whether the insurer shall be liable for damages incurred during the period from the date of the breach to the time the insurer chooses to terminate the contract. Needless to say, it would be unreasonable to have the insured bear the adverse consequences when the damage is caused by reasons other than the breach.

b. Alteration of Risk in the Insurance Law

In terms of the alteration of risk, the Insurance Law does not provide a comprehensive definition or interpretation of "increase in the degree of peril". Among the five versions of the Insurance Law,[28] compared to the 2002 version, the Insurance Law 2009 only added a descriptive word "greatly" before the "increase in the degree of peril", and the description has stayed unchanged till now. In 2018, Article 4 of the Interpretation (IV) clearly states that seven factors should be considered when deciding whether the degree of danger has increased significantly, these including change of use of the subject-matter insured, change of the scope of use of the subject-matter insured, change of the environment of the subject-matter insured, change of the subject-matter insured due to refitting or any other reason, change of the user or manager of the subject-matter insured, the continuance of increase of degree of peril, and other

[25] *China Continent Property and Casualty Insurance Co. Ltd v Shanghai Port Machinery Heavy Industry Co. Ltd*, Shanghai High People's Court, (2010) Hu Gao Min Si (Hai) Final No. 41.
[26] *Jian Mao Shipping Co. Ltd v Du Bang Property and Casualty Insurance Co. Ltd (Fujian Branch)*, Fujian High People's Court, (2011) Min Min Final No.169.
[27] *Fuzhou Fengda Shipping Co. Ltd v China Pacific Insurance Company (Fujian Branch)*, Hainan High People's Court, (2018) Qiong Min Final No. 354.
[28] Insurance Law (1995), Insurance Law (2002 Amendment), Insurance Law (2002 Revision), Insurance Law (2014 Amendment), Insurance Law (2015 Amendment).

factors that may lead to a great increase in the degree of peril.[29] The first five factors are about specific matters related to statutory alteration of risk, the sixth factor confirms the criteria of "continuity", and the last factor tries to include all other factors that may lead to an increase. Besides this, Article 4 (2) of the Interpretation (IV) further confirms the criteria of "unpredictability".[30] Accordingly, three characteristics of the "increase in the degree of peril", namely significance, continuity and unpredictability,[31] have been established in Chinese law.

In addition to the lack of definition, rules about the conditions for applying alteration of risk also bring uncertainties. From Article 52 of the Insurance Law, one may understand that, to successfully apply this rule, the following conditions should be satisfied: a) there should be an agreement in the contract about the alteration of risk; b) the alteration of risk should be significant; and c) the insured shall notify the insurer of the alteration in a timely manner, without which notification the insurer is discharged from his liability when the insured accidents have a causal relationship with the alteration. To illustrate: Firstly, the circumstances relating to alteration of risk must be clearly stated in the contract, which implies that there are no statutory alterations stipulated in Chinese insurance law; and neither is the classification between statutory and contractual alterations stipulated in Chinese insurance law. In terms of the agreement, the scope of "contractual agreement" is not clearly stipulated, and the practices of the courts thus differ. Some courts believe that, in order to terminate a contract based on the alteration of risk, the contractual agreement should specify the situations of "a greatly increased risk", the duty of notification, and the consequences of the termination.[32] Moreover, in some cases, as long as the change of a specific item is agreed to be an alteration of risk, the insurer can invoke Article 52.[33] These different understandings of "contractual agreement" in judicial

[29]Article 4(1) of the Interpretation (IV), when the people's court determines whether the subject matter insured constitutes a "great increase of the degree of peril" as prescribed in Articles 49 and 52 of the Insurance Law, the people's court shall comprehensively consider the following factors:
(1) Change of the use of the subject matter insured.
(2) Change of the scope of use of the subject matter insured.
(3) Change of the environment of the subject matter insured.
(4) Change of the subject matter insured due to refitting or any other reason.
(5) Change of the user or manager of the subject matter insured.
(6) The continuance of increase of degree of peril.
(7) Other factors that may lead to the great increase of degree of peril.

[30] Article 4(2) of the Interpretation (IV), where the degree of peril of the subject matter insured increases, but the increased danger falls within the insurance coverage of the insurance contract foreseen or should be foreseen by the insurer when the insurance contract is concluded, it does not constitute a great increase of the degree of peril.

[31] See Liyi Zhang, "The Review on Judicial Application of the Insured's Duty of Disclosure of Increased Risk- Based on Analysis of 277 Judicial Cases" (2019) 6 *Political Science and Law* 105, 111 (in Chinese); and also Xiang Chen, "Issues Concerning the Judicial Application of Article 52 "Significant Increase in Risk" of the Insurance Law" (2021) 39(1) *Journal of Changzhou Institute of Technology (Social Science Edition)* 108, 109 (in Chinese).

[32] See *Chen Zhenrong v Beibuwan Property Insurance Limited Liability Company (Chongzuo Branch)*, Chongzuo Intermediate People's Court, (2018) Gui 14 Min Final No. 595.

[33] See *Hu Xuehua, Lei Xingqiong v People's Insurance Company of China (Taizhou Luqiao Branch) and Taizhou Luqiao Yunxing Transportation Co. Ltd*, Wenzhou Intermediate People's Court, (2012) Zhe Wen Min Final No. 100 and *Hu Tiechun v China Life Property & Casualty Insurance Company Limited (Chengde Branch)*, Longhua People's Court, (2017) Ji 0825 Min Chu No. 89.

practice actually raise the issue as to whether the duty of notification should be considered as a statutory obligation or a contractual obligation.[34] As to there being a significant increase of certain risks, the seven factors in the Interpretation (IV), as discussed above, provide useful references for the trials, but do not entirely solve the problems in determining the "significantly increased degree of peril". When it comes to the duty of notification, in addition to questions about its nature, there also lacks rules dealing with the insurer's duty of notification, as well as both the time and method of performing such a duty. In addition, if an incident occurs during the notice period, it is not known as to whether the insurer should bear the loss.

3. Problems of Chinese Law about Warranty

The above analysis shows that both laws of warranty and alteration of risk in Chinese law have flaws, including in the following four aspects: Firstly, there lacks specific definitions, and the elements for constituting the warranty and alteration of risk are missing; secondly, there is no classification of either warranty or alteration of risk in Chinese law; thirdly, the conditions for application of the warranty or alteration of risk rules are unclear; and finally, although both rules entitle the insurer to terminate or modify the contract, the legal consequences of breach of warranty or alteration of risk are not very clear and fair. The following analysis will focus on discussing the aforesaid flaws. During the discussion, reference will be made to the relevant provisions in the revised CMC draft and the laws of certain other countries.

a. Definition and Identification of Warranty

i. Definition and Identification of Warranty in the CMC

It is claimed that adding a definition of warranty is one of the main tasks of the revised CMC draft. Learning from the English law,[35] Article 293 of the revised CMC draft states that warranty in this article refers to a written clause in a marine insurance contract that the insured has the obligations of an act or omission, or that the insured affirms or negatives the existence of a state of fact, but excludes agreements that have no effect on the risk covered.[36] In other

[34] Both viewpoints are supported by academic circles and adopted by different courts.
See Lanlan Deng, "A Preliminary Study on the Duty of Notification of Increased Risk - Discussions of the Improvement of Article 52 of the Insurance Law" (2013) 2 *Law and Society* 65, 66 (in Chinese). See also *Zhuang Enmin v Ping An Insurance (Cangnan Brach)*, Wenzhou Intermediate People's Court, (2020) Zhe 03 Min Final No. 895, in which case the duty of notification is a statutory duty. By contrast, in *Pan Jingzhi, Yu Peng, Li Hui and Chen Fujun v Anbang Insurance Co Ltd (Jinlin Branch)*, Changchun Intermediate People's Court, (2017) Ji 01 Min Final No. 1825, the duty of notification is a contractual duty.
[35] MIA 1906, s 33.
[36] Article 293 of the revised CMC draft.

words, if a breach of the agreement does not have any material effect on the risk covered, then this agreement should not be deemed as a warranty clause under Article 293.

Over the years, the current warranty law has been criticised for being too general and incomplete. A definition alone, together with the above-mentioned "exclusion" in the revised CMC draft, is however still not adequate, and will possibly cause more problems. In contrast, under English law, in the *HIH Casualty*,[37] a term is a warranty if: a) it goes to the root of the contract; b) it is descriptive of the risk or bears materially on the risk of loss; and c) damages would be an inadequate or unsatisfactory remedy for its breach. These three aspects as a whole set a yardstick for determining the definition of a warranty.[38] Therefore, the legislators in China may further consider including relevant elements for defining a warranty. The "significance of the breach" and "adequacy of the remedy" in English law should be referred to.

ii. Definition and Identification of Alteration of Risk in the Insurance Law

Under the Insurance Law, there also lacks a defining scope of 'alteration of risk'. Rather, as to identifying the alteration of risk, Article 52 of the Insurance Law, together with the provisions in the Interpretation (IV), show that the "increase in the degree of peril" should be significant, continuous, and unpredictable. According to judicial practice, an increase in risk is "significant" if the original risk that constitutes the basis of the contract is greatly increased. For example, to be significant or material, the alteration should be sufficient to affect the insurer's decision as to whether or not he would increase premiums or conclude the contract.[39] As to unpredictability, this means that the risk exceeds the insurer's foreseeable range at the time of conclusion of the contract. Therefore, if the insurer had assessed a known risk prior to the contract and decided to enter into the contract, he could no longer claim an increase of the peril based on the same risk.[40] Continuity means that the increase in risk is sustainable and that such an increase causes corresponding damages.

Based on the summary given by Wilhelmsen in the CMI Yearbook 2000, the existing definitions of the alteration of risk in different jurisdictions can be classified into four different

[37] *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co and Others* [2001] EWCA Civ 735.
[38] Baris Soyer, *Warranties in Marine Insurance* (3rd edn, Routledge 2017), p 12 Para 2.3.
[39] See *Xu Chuanren v Peopl's Insurance Company of China (Dalian Branch)*, Liaoning High People's Court, (2017) Liao Min Final No.1272 and *Zhang Fengyun v Ping An Property and Casualty Insurance Company of China (Mudanjiang Centre Branch)*, Mudanjiang Intermediate People's Court, (2017) Hei 10 Min Final No. 261.
[40] See *Xu Chuanren* (n 39 above).

approaches.[41] In particular, instead of defining alteration of risk, some of the existing definitions tend to use a descriptive approach to describe the general conditions that an alteration of the risk shall satisfy, and describe different situations that may fall within the alteration of the risk. For example, under the NMIP 2019, an alteration of risk occurs when a) the changes alter the basis of the insurance contract; and b) the risk altered is contrary to the conditions of the contract.[42] Moreover, two general conditions about the alteration of risk are summarised in the Commentary on clause 3-8: Firstly, the change must be of a fortuitous nature, meaning that it is unpredictable; and secondly, the change must amount to a frustration of the fundamental terms that the insurance contract is based on, meaning that it is significant.[43] In addition to the general rule, the NMIP 2019 also lists several specific items as being an alteration of risk.[44] Furthermore, the laws in some other countries do not provide a general definition and characteristics of alteration of risk, but merely list certain specific circumstances as being an alteration of risk in order to avoid any disputes in determining the alteration of risk. For example, under German law, Article 24.1 of the DTV-ADS2009 provides that the insured may alter or allow the third party to alter the risk.[45] In addition, Article 24.5 directly lists seven items that can constitute an alteration of risk.[46] From the above discussion, it is not difficult to see that the laws in those countries aim to ensure that some particular alterations of risk are protected by law, whilst putting less emphasis on whether the contractual parties can agree on issues that may constitute an alteration of risk or to what extent such agreements (if effective) are protected by law.

b. Classification of Warranty

i. Classification of Warranty in the CMC

A warranty clause must be expressly stated in a written format under the CMC. This rule indicates that an implied warranty is not recognised in Chinese law. Interestingly, implied warranties are, however, considered from time to time by the courts; for example, when the subject-matter insured was an inland watercraft, it was considered that there was an implied

[41] The first approach is that the risk must be increased compared to the written or implied conditions of the insurance contract. The second approach is that the risk must be altered or increased in such a way that the insurer would not have accepted the insurance at all, or would not have accepted the insurance on the same conditions, if he had known about the increase. A third method is to say that the risk is substantially altered. The final approach is to connect the sanction to circumstances affecting or altering the risk after the contract is concluded without any further definition.
[42] Clause 3-8(1) of the NMIP 2019.
[43] Commentary for Clause 3-8 of the NMIP 2019.
[44] Clause 3-8(2) of the NMIP 2019.
[45] Article 24.1 of the DTV-ADS 2009.
[46] Article 24.5 of the DTV-ADS 2009.

warranty to limit the navigation area to within the inland water.[47] In another case, the respondent alleged that Chinese marine insurance practice actually recognises three kinds of implied warranties, these being seaworthiness, non-deviation and legality. Among these, seaworthiness confirmed from another aspect the rationality and legality of the contractual warranty about a valid certificate of fitness for towage.[48] Thus, one may conclude that despite the absence of written legislation, an implied warranty is actually used in Chinese law. In contrast, English law expressly distinguishes between the express warranty and the implied warranty. An express warranty can be established if the parties have the intention to obey the warranty and include it in the policy in writing;[49] whereas implied warranties are implied and provided by the statutory law.[50] Several implied warranties are provided and defined in the MIA 1906, such as the warranty of seaworthiness and legality.[51] Accordingly, Chinese law may consider specifically providing for the implied warranty in its statutes.

ii. Classification of Alteration of Risk in the Insurance Law

An alteration of risk clause must be clearly agreed upon by the contractual parties and contained in the contract under Chinese law, which means that only the contractual alteration of risk is valid. In contrast, in the NMIP 2019, in addition to the contractual alteration of risk, Clause 3-8 (2) lists three specific situations that constitute an alteration of risk, namely, any change to the state of registration, of the manager of the vessel, or of the company that is responsible for the technical/maritime operation of the vessel.[52] The NMIP 2019 also contains some statutory rules for the alteration of risk in Clauses 3-14 to 3-21. Besides this, in Article 24.5 of the DTV-ADS2009, seven items that can constitute an alteration of risk are listed as statutory alterations, such as docking or entering slipways with cargo, breach of the agreed trading warranties, and change of flag.[53] Accordingly, containing specific circumstances as statutory alterations in Chinese law may reduce disputes in identifying the alteration of risk.

iii. Summary

[47] See *Fuzhou Fengda Shipping Co. Ltd v China Pacific Property Insurance Co. Ltd (Fujian Branch)*, Hainan High People's Court, (2018) Qiong Min Final No.35 and *Hainan Antong Industrial Co. Ltd v People's Insurance Company of China (Hainan Branch)*, Haikou Maritime Court, (2018) Qiong 72 Min Chu No. 23.
[48] See *Jian Mao Shipping Co. Ltd* (n 26 above).
[49] MIA 1906, s 35.
[50] Soyer (n 38 above), p 10 Para 1.21.
[51] MIA 1906, ss 39 and 41.
[52] Clause 3-8(2) of the NMIP 2019.
[53] Article 24.5 of the DTV-ADS 2009.

From the above discussion, it is seen that neither the implied warranty nor the statutory alteration of risk is stipulated in Chinese law. However, being a type of very specialised contract, it is necessary to have well-designed implied or statutory rules in marine insurance law. Compared to adding such implied warranty rules into the CMC, it is less feasible to adopt statutory rules concerning alteration of risk in marine insurance into general insurance law. Thus, Chinese law may consider including some implied warranties within its legislation, so as to reduce the possibility of disputes in this regard. With regard to such implied warranties, it is possible to consider including warranties for legality, seaworthiness and non-deviation, as the English law does, as well as statutory rules covering changes to the state of registration, and changes to the manager of the vessel etc., as the NMIP 2019 does.

Furthermore, it would be reasonable for the warranty to be divided into express warranty and implied warranty within Chinese law. For the express warranty, dividing it into a specific express warranty and other express warranty could be considered. The specific express warranty would be where both parties agree on the circumstances that constitute a warranty, as well as the legal consequences of termination if there is any breach. This clause would be valid once the rules about unfair contractual terms in insurance law[54] and contract law are satisfied,[55] since the contract law respects party autonomy. For the other express warranty, the validity of the warranty may be ascertained by referring to the conditions for identifying a warranty in the former section.[56] Such a classification is also consistent with the provisions in the CC. Firstly, there exists a juridical act that is subject to a condition for rescission. Accordingly, under a special express warranty, the contract can clearly provide that, when the specific conditions agreed in the contract are fulfilled, then the contract can be terminated directly.[57] Secondly, the other express warranty corresponds to Article 562 of the CC, where the parties may rescind a contract if they reach a consensus through consultation.[58] Apart from the express warranty, to gain certainty and avoid unnecessary disputes, certain matters should be regulated by statutory law as an implied warranty. The design of the list of matters or circumstances that constitute an implied warranty can be learned from the foreign marine insurance rules. Therefore, based on this method, clauses about the warranty may be divided into implied warranty and express warranty, the latter including both special and general express warranty. Similarly, it is also feasible to classify the alteration of risk in the Insurance Law as statutory alteration of risk and

[54] Article 11 of the Insurance Law.
[55] Article 151 of the CC.
[56] See Para 3.1.2.
[57] Article 158 of the CC.
[58] Article 562 of the CC.

contractual alteration of risk, the latter including both special and general contractual alteration of risk.

c. Conditions for Applying Warranty

Once a clause is admitted as a warranty or an alteration of risk, the next step is to decide whether the existing legal rules, that is, Article 235 of the CMC and Article 52 of the Insurance Law, can be invoked. The discussions in this section exclude the implied warranty unless otherwise specified.

i. Conditions for Applying Warranty in the CMC

In both the CMC and the revised CMC draft, application of the warranty is closely related to the agreement of the parties and the insured's duty of notification. In addition, the insurer's duty of notification has also been confirmed in the revised CMC draft. Thus, to invoke the warranty rules, the insurer must prove that the contractual agreement is valid, and that both the insured and the insurer have fulfilled their duties of notification.

Accordingly, in some cases it is first necessary to analyse the validity of a contractual warranty. A valid warranty clause shall satisfy both formal and substantive requirements. For the formal requirements, the clause is a statement or promise, which is embodied and clearly expressed in the form of a contractual clause. The substantive requirements refer to the following: a) the warranty is based on the clear agreement of the parties to the insurance contract; b) the agreement must clearly reflect that the parties have the intention to use a statement or promise as a warranty; and c) the parties hope to associate the fulfilment of this warranty with the effectiveness of the insurance contract.[59]

In terms of the duty of notification, under the revised CMC draft, although the insurer's notice period is not specified, the contract is not terminated until the insurer's notice of termination reaches the insured. Thus, during the period from the insured's breach to the insurer's notification, the insurer still bears the risk of assuming insurance liability under the insurance agreement. In addition, as compared to the CMC, the exercise of the insurer's rights to terminate or modify the contract no longer needs to be conditional on the receipt of the insured's notice. Therefore, under the design of the revised CMC draft, both the insurer and

[59] *China Continent Property and Casualty Insurance Co. Ltd* (n 25 above).

the insured will actively fulfil their duty to give prompt notice. Under English law, the insurer should also perform his obligation to notify his termination of the contract; otherwise, there is a risk of committing to a waiver of the breach.[60]

ii. Conditions for Applying Alteration of Risk in the Insurance Law

As provided in Article 52 of the Insurance Law, the application of alteration of risk is closely related to the significance of the alteration, the duty of notification and the contractual agreement about the alteration.

As for the significance of alteration of risk, this has already been discussed elsewhere in the paper.[61] About the duty of notification, only the insured's duty is regulated by Chinese law. In contrast, in the NMIP 2019, Clause 3-13 also provides the insurer's duty of notification. If the insurer fails to fulfil his duty of timely notification in writing, he may lose his rights to invoke Clauses 3-9 and 3-10.[62] As to the time of notification, despite some differences,[63] most countries require a timely notification so that, following the alteration, both the insurer and the insured can make decisions and take necessary measures. When it comes to the nature of the duty of notification, on the one hand, some scholars believe that it is a contractual duty, because from the semantic interpretation of the provision, parties shall have the right to agree on their own notification rules based on the principle of party autonomy.[64] On the other hand, the duty of notification can be regarded as a statutory duty. To be consistent with the principle of utmost good faith, the insured must promptly notify the insurer about any significant change of risk. Moreover, because of the asymmetry of information, it is difficult for the insurer to obtain a clear understanding of the situation of the subject-matter insured without the insured's voluntary notification. In addition, as well as in Article 52, the term "greatly raises the degree of peril" appears in Article 49 of the Insurance Law,[65] the provision of which expressly states that the insured's obligation to notify is a statutory obligation. Actually, in other civil law countries, the insured's duty of notification is also regulated by the statutory rules,[66] it actually

[60] Soyer (n 38 above), p 174 Para 5.40.
[61] See Section 3.1.2.
[62] Clause 3-13 of the NMIP 2019.
[63] Some countries require that the duty should be performed without delay, such as Austria and Germany; some require exercise as soon as possible, such as Spain; and some specify a specific time, such as Greece and France.
[64] Deng (n 34 above).
[65] Article 49(3) of the Insurance Law.
If the assignment of the subject matter insured greatly raises the degree of peril, the insurer may, within 30 days of receipt of the notice as mentioned in the preceding paragraph, increase the insurance premium or rescind the contract as agreed upon in the contract. If the insurer rescinds the contract, it shall refund the collected insurance premium to the insurance applicant after deducting the receivable part from the day of commencement of insurance liability to the day of contract rescission.
[66] Clause 3-11 of the NMIP 2019.

being more appropriate to treat the duty of notification as a statutory obligation. Finally, regarding the contents of a contractual agreement, if the duty of notification is determined to be a statutory obligation, there is no need to agree on the notification obligation in the contract. Moreover, suppose that the specific contractual alteration was to be introduced into Chinese law. In that case, the agreement over this specific alteration must contain the circumstances where the alteration of risk is constituted and the consequences of the termination of the contract if any alteration occurs. For the other contractual alteration of risk, the agreement should contain the circumstances of the alteration and the remedies for the insurer.

Furthermore, warranty or alteration of risk is most likely included in standard forms. In that case, it should be regulated by the rules covering standard forms in the Insurance Law. Under Article 17(2) of the Insurance Law, the insurer shall remind and explain to the insured the clauses that may exempt or limit his liability to the insured in a reasonable manner.[67] Besides, Article 9(2) of the Interpretation (II) provides that a clause providing that an insurer enjoys the right to rescind the contract due to the breach of statutory or contractual obligations by the insured shall not be one of the "clauses exempting the insurer from liability" mentioned in Article 17(2) of the Insurance Law. Article 10 of the Interpretation (II) clearly stipulates that if the insurer takes the prohibited circumstances as prescribed in laws and administrative regulations as the exemption clause of the insurance contract, there is no need for the insurer to explain such an exemption expressly. Instead, a reasonable reminder is enough. Accordingly, the difficulty here is about whether the warranty clause or the alteration of risk clause is an exemption clause in Article 17(2) of the Insurance Law. From the above discussion, it is clear that the insurer's right to terminate the contract and exempt himself from liability under the warranty or alteration of risk is based on the statutory or contractual obligations of the insured, the right of which does not belong to Article 17(2) of the Insurance Law. Thus, according to Interpretation (II), the insurer only needs to remind the insured of the clauses.

iii. Summary

This part analyses the conditions under which the warranty and alteration of risk rules can be applied under Chinese law. For an insurer who claims for breach of a contractual warranty or the occurrence of a contractual alteration of risk, he should prove that the insurance contract clearly indicates the circumstances that may constitute the breach or alteration, he has provided

[67] Article 17(2) of the Insurance Law and Article 496 of the CC.

notice to the insured about the warranty or alteration of risk rules in the contract to attract the insured's attention, the insured's breach is significant, or that the alteration affects the basis of the contract. In addition, fulfilment of the duty of notification by both parties must occur.

d. Legal Consequences of the Breach of a Warranty

The legal consequences of a breach of the warranty and the occurrence of alteration of risk are almost the same, including termination and modification. However, these legal consequences are not entirely at discretion. Except for the situation where a specific contractual clause stipulates termination as the consequence, the legal consequences of non-compliance with the warranty or alteration of risk clause are related to the facts of the breach or alteration, the duty of notification, and the causal relationship between the risk and the loss.

i. Brief Discussion about the Legal Consequences

The legal consequences of breaching a warranty remain unchanged in the revised CMC draft. Under both versions, the insurer can choose to modify or terminate the contract. If the insurer opts to terminate the contract, the contract is rescinded from the time when the insurer's notice reaches the insured.[68] As to a loss that occurs during the notice period, compared to the current rules, the revised CMC draft has learned from the IA 2015 and stipulates that the insurer shall not bear insurance liability for the loss unless the insured's breach of the warranty has no effect on the insurance incidents, or the incidents occur after the insured's correction of the breach.[69] However, in cases where the insured fails to notify the insurer about the breach, as summarised from the Provisions, the contract terminates from the date of the breach if such is being claimed by the insurer.[70] Accordingly, the CMC and the revised CMC draft provide the options to the insurer, aiming to soften the strict consequences of a breach under English law. Failure to stipulate the conditions under which the insurer can terminate the contract immediately and when the insurer can only modify the contract, however, will inevitably lead to the insurer terminating the contract directly in most cases. In this situation, the design of the provisions of the legal consequences under the CMC and the revised CMC draft has no practical meaning.

The English law itself also attempts to soften the strict legal consequences of breaching the warranty through section 10 of the IA 2015. Nevertheless, the suspension of the liability rule

[68] Article 293 of the revised CMC draft.
[69] Article 293 of the revised CMC draft.
[70] Article 6 of the Provisions.

in the IA 2015 is not sufficient to ease the harsh consequences. For example, legal consequences for a permanent breach never change since it cannot be remedied.[71] Even for a temporary breach that can be remedied, the risk after the breach sometimes cannot definitely return to the same degree as was anticipated by the insurer at the inception of the contract. In this situation, it would be more reasonable for the parties to have an opportunity to modify the contract. Therefore, at least from the current regulations in the IA 2015, it is difficult to conclude that they completely achieve the aim of loosening the severe consequences of the breach of warranty. Based on the above analysis, rather than copying the rules from English law, it would be more appropriate for Chinese law to specify the conditions that should be fulfilled when opting for different legal consequences. In terms of loss during the notice period, these two exceptions will be further discussed in Section 3.4.3.

When it comes to the legal consequences of alteration of risk, Article 52 of the Insurance Law only states that after giving notification to the insured, the insurer has the right to choose between modification and termination. As to the loss, without the insured's notification, the insurer is not liable for any loss that occurs due to the greatly increased risk.[72] Within this Article, the causal relationship between the loss and the alteration of risk, the duty of notification, and the legal consequences are mentioned. However, neither are the causal relationship and the duty of notification provided in detail, nor are there detailed rules about what consequences should be chosen under what circumstances as specified in the Article. As far as the causal relationship is concerned, there are three different opinions found in the academic circle and in trial practice.[73] The most popular and appropriate theory in practice is the proximate cause theory.[74] The concept of proximate cause usually refers to the most direct and effective cause in causing an insurance incident in marine insurance law.[75] The application of proximate cause is beneficial to the insured to indemnify the loss, and also to the insurer to control the risk. As to the duty of notification, in some civil law countries, legal consequences about the alteration of risk largely depend on the duty of notification, and more about the duty of notification will be discussed in the next section. In regard to the legal consequences, some European countries in their insurance laws tend to protect the interests of the insured by

[71] Zhen Jing, "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" (2014) 25 *Insurance Law Journal* 183, 191.
[72] Art 52(2) of the Insurance Law.
[73] See Haibao Xing, "Discussions of Causality in Insurance Law", (2012) 1 *Insurance Studies* 109. They are conditional theory, correspondent theory and proximate theory.
[74] See *Pan Jingzhi* (n 34 above), *Ma Xiaoyou and Chi Guangqiu v China Continent Property & Casualty Insurance Co.Ltd* (Changchun Centre Branch), Changchun Intermediate People's Court, (2015) Chang Min Er Final No. 872 and *Zhang Shugen v China Ping An Property Insurance Co. Ltd (Zhuhai branch)*, Zhuhai Intermediate People's Court, (2015) Zhu Zhong Fa Min Si Final No. 161.
[75] Özlem Gürses, *Marine Insurance Law* (2nd edn, Routledge 2017), p 160.

stipulating that the insurer should firstly consider modifying rather than terminating the contract when the risk increases.[76] In Japanese Law, when a risk increases, a non-life insurance policy should continue on the assumption that the insurance premium will be changed to an amount corresponding to such increased risk; and the termination of the contract is only available when certain conditions are fulfilled.[77] Therefore, it would be preferable for both the warranty and alteration of risk in Chinese law to have the conditions specified that should be fulfilled when opting for different legal consequences.

ii. Subjective Intent of the Insured in Breaching the Duty

Although both the CMC and the Insurance Law provide the connections between the legal consequences of the breach or alteration and the duty of notification, neither of the rules, however, tries to differentiate the insured's subjective intent in his breach.

In European law, despite the aim of protecting the insured, once the insured is at fault for the increased risk, the law will favour the insurer. The tendency to favour the insurer is more obvious when the insured at fault breaches the duty of notification, because for that the cover will be automatically terminated in some countries.[78] In Japanese law, when the contract clearly agrees that the insured shall notify the insurer of the increase and the insured fails to notify the insurer either intentionally or through gross negligence, the insurer can then cancel the policy.[79] The connections between the legal consequences and the insured's subjective states in breach or performance of the notification obligation are also confirmed by the NMIP 2019. In Nordic law, for an alteration that is intentionally caused or agreed to by the insured, the insurer is free from liability unless the insurer would undertake the insurance even if he had known of the alteration at the time the contract was concluded.[80] Besides this, regardless of the reason for the alteration, the insurer can cancel the insurance by giving fourteen days' notice.[81] Moreover, the consequences of not fulfilling the notification obligation are more severe. If the insured knew or should have known that the alteration occurred, but failed to notify the insurer either intentionally or through gross negligence, then regardless of whether the alteration was caused by or consented to by the insured, the insurer would be free from liability and he could

[76] Malcolm Clarke, "Aggravation of Risk during the Insurance Period" (2003) *Lloyd's Maritime and Commercial Law Quarterly* 109, 120.
[77] Article 29 Cancellation by Reason of Increased Risk of Insurance Act (Japan).
[78] Clarke (n 76 above), see also Article 24.3 of the DTV-ADS 2009.
[79] Article 29 (n 77 above).
[80] Clause 3-9 of the NMIP 2019.
[81] Clause 3-10 of the NMIP 2019.

choose to cancel the contract by giving fourteen days' notice.[82] In contrast, if the insured takes reasonable steps to notify the insurer, the insurer should be liable for the damages occurred within the notice period, but he can cancel the contract by giving fourteen days' notice.

Obviously, it is a common practice for civil law countries to consider the subjective intent of the insured in deciding the legal consequences of the alteration of risk. Indeed, by considering this factor, the legal consequences will become more certain and reasonable. If the insured, either intentionally or with gross negligence, causes a significant increase in risk, and deliberately fails to notify the insurer in time, he violates the statutory or contractual obligation and thus shall bear the adverse legal consequences. On the other hand, if the alteration of risk is not caused by the insured, and he fulfils the notification obligation in a timely manner, the insured should get a chance to re-negotiate with the insurer. Consideration of the fault or gross negligence of the insured can better balance the rights and obligations between the contractual parties. Thus, to facilitate certainty and gain fairness in Chinese law, the subjective intent of the insured can be introduced as a factor in determining the legal consequences of a change of risk. Similarly, since the warranty rules share almost the same legal consequences and functions as the alteration of risk, by learning from the alteration of risk rules in other civil law countries, it can be considered for both rules to take into account the subjective intent of the insured for ascertaining the legal consequences.

iii. Exceptions to the General Rules

The revised CMC draft proposes two exceptions to the general rule that the insurer is not liable for loss that has occurred during the notice period. The first exception requires that the breach of the warranty has no effect on the occurrence of an insurance accident. In other words, the insurer would be exempted from liability only if the breach of the warranty had an impact on the incident. This exception is modelled from Section 11(3) of the IA for the risk-mitigating clauses,[83] the rule of which indeed introduces a requirement for causal relationship into English law, at least from the back door.[84] In a risk-mitigating clause, the insurer still has the possibility of being liable for the loss after the breach of the warranty, provided that the insured can prove that the breach of warranty could not result in the increased risk that has already occurred.[85]

[82] Clause 3-11 of the NMIP 2019.
[83] See Özlem Gürses, "Section 11 of the Insurance Act 2015: When does a Term Define the Risk as a Whole in an Insurance Contract?" (2020) 3 *Journal of Business Law* 184, 189. A risk-mitigating clause targets particular types of loss which might occur, such as loss of a particular kind, at a particular position and at a particular time.
[84] Soyer (n 1 above), p 119, and Zhu, Pan and Jin (n 15 above), p 233.
[85] IA 2015, s 11.

The purpose of such a rule is to prevent an insurer from relying on a specific warranty so as to avoid any liability resulting from other irrelevant warranties.[86] Thus, the scope of this exception is extremely limited. Take, for example, a case where the contract requires that three crews shall be on a night shift, but one night only two crews were on duty. During the next day, the ship suffered damages due to a collision. In this scenario, based on breach of the warranty, the insurer could not refuse to pay out compensation, since there was no causal link between the damage and the breach. Furthermore, under the design of the revised CMC draft, the exception applies to the warranty only. There is a possibility that the exception could be circumvented by agreeing on similar clauses, such as the alteration of risk clause, in the contract. By contrast, under English law, in addition to the application in warranty, Section 11(3) may apply to other similar rules under different labels,[87] such as condition precedents and suspensory provisions. In actual fact, the English rules focus more on the substantial contents of the clause rather than the form of the clause, the practice of which can ensure that this exception cannot be undermined by employing other similar rules.[88]

For the second exception, the insurer is liable for damages during the notice period when the incidents occur after the insured has corrected the breach. However, the correction of the breach does not mean that the breach has had no effect on the occurrence of the insurance accident, or that the risk can go back to the same level as at its inception. Similarly, this exception rule is also learned from the IA 2015. Under English law, the insurer is liable when the loss occurs before the insured's breach or after the breach has been remedied.[89] As to when a breach of warranty is recognised as being remedied, section 10 (5) of the IA 2015 provides two explanations. In some circumstances,[90] the warranty is considered to have been remedied when the risk becomes substantially the same as the risk initially anticipated by the parties. In some other cases, the insured's cessation of the breach of warranty is deemed to be remedied.[91] However, the law does not explain "essentially the same"; and "cessation of the breach" does not necessarily mean that the risk can be reduced to a level acceptable to the insurer. Thus, in some cases, even if the breach has been remedied, the insurer may attempt to deny the application of Section 10(4) and (5) by claiming that the risk is not restored to the level at which the parties anticipated it to be at inception. Some scholars hold the view that, according

[86] Soyer (n 1 above), p 118.
[87] IA 2015, s11(4).
[88] Soyer (n 1 above), p 120.
[89] IA 2015, s10 (4).
[90] IA 2015, s10 (6).
A case falls within this subsection if: (a)the warranty in question requires that by an ascertainable time something is to be done (or not done), or a condition is to be fulfilled, or something is (or is not) to be the case, and (b) that requirement is not complied with.
[91] IA 2015, s10 (5).

to "attributable to something happening", the mere fact of a breach is not enough. To deny the application, the insurer must prove that the breach brings about a new character, and this character leads to the loss.[92] For example, say that the insurance contract specified the navigation route and an area where navigation was restricted. To save the voyage, the vessel sailed into the restricted area. The violation of the warranty was corrected when the vessel safely left the restricted area and returned to the prescribed route. However, due to alteration to the course, the scheduled sailing date changed. In the subsequent voyage, the vessel encountered bad weather, and an insured accident occurred. Under the design of English law, whether the insurer should be liable for the loss is based on further analysis of Section 10 of the IA 2015. However, under such a circumstance, from a semantic interpretation of the revised CMC draft, it seems that the insurer should be liable under Chinese law, since the damages occurred after ceasing the breach.

In terms of the alteration of risk, Chinese law does not provide any exceptions. As a matter of fact, some other civil law countries contain exceptions to the legal consequences of the alteration of risk. For example, the insurer cannot invoke the alteration of risk rules and discharge himself from liability when the alteration of risk has no effect on the occurrence of the damages[93] or has ceased to be material to the insurer.[94]

Although the provisions on the exceptions to the general warranty rules in the revised CMC draft are not perfect, they are similar to the exceptions to the alteration of risk in some civil law countries. The two exceptions can be improved through further learning from the English law. For example, in further revisions in association with the marine insurance warranty, the legislators may consider expanding the application scope of the first exception to realise substantial fairness. Then, for the second exception, the interpretation of "corrected" should be clearly explained, and the judges can be required to analyse the causation relationship in each specific case.

4. The Way Forward to Improve the Warranty in Marine Insurance

This paper seeks to find ways to improve the warranty rule so as to facilitate better risk control in Chinese marine insurance law and practice. As discussed in the paper, the warranty in the

[92] Soyer (n 1 above), p 114.
[93] Article 24.3 of the DTV-ADS 2009.
[94] Clause 3-12 of the NMIP 2019.

current CMC is problematic, and the drawbacks mainly exist in the following three different aspects:

1) There lacks a definition, classification, and identification of warranty, thus making it difficult in practice to determine whether a particular clause or provision is a warranty.
2) Even if a clause is identified as a warranty, the CMC lacks detailed rules about the conditions that should apply to the warranty clause.
3) The provisions on the legal consequences of a breach are very ambiguous, and their effects in softening the harsh legal consequences of the breach of a warranty are limited.

Similarly, the provisions covering an alteration of risk in the Insurance Law may also apply for the purpose of controlling the risk in marine insurance in certain cases, but the above three main problems are still not completely resolved.

To deal with any loopholes and problems with the warranty, the revised CMC draft tries to reform the warranty rules from the following aspects:

1) The definition of warranty is added.
2) The insurer's duty of notification is included, and the insurance contract may be terminated only after the insurer's notice of cancellation reaches the insured.
3) The draft also endeavours to ease the harsh legal consequences of breaching the warranty. On one hand, the rule sets a limit on identification of the warranty in order to avoid any expansion of its application. On the other hand, when a warranty is in breach, the insurer is still liable for damages incurred during the notice period (i.e., from the insured's breach to the time that notice of such reaches the insured) in two exceptional situations.

Despite the improvements made in the revised CMC draft, we nevertheless find that further improvement is still necessary. In fact, different approaches for its improvement have already been widely discussed in Chinese academic circles. The first approach is to further reform the warranty in the CMC in accordance with English law. Indeed, the difficulty in determining a warranty can be solved by modelling it on the rules of implied warranty in the MIA 1906 together with the experience accumulated in English law precedents. However, the above-mentioned second and third drawbacks cannot be remedied by simply learning from the English law, due to deficiencies in the English law itself. The second approach claims that the

warranty in Chinese marine insurance law should simply be replaced by the alteration of risk rule, since this rule deals better with the identification of risk alteration and the requirements for risk alternation. Nevertheless, none of the drawbacks mentioned above can actually be solved by the existing Chinese alteration of risk rule due to its own inherent drawbacks. In addition, even if the alteration of risk rule were to be improved by learning from other civil law countries, it would still not be able to completely replace the warranty; this is because, owing limitations on its adjustment range, the alteration of risk rule can be applied only after the inception of the risk, which means it cannot deal with a promise at the inception of the risk.[95] Thus, these two approaches are not essentially ideal.

Based upon the very in-depth discussions in this paper, the reform of warranty in Chinese marine insurance law may consider the following three points:

1) Warranty in the marine insurance contract shall refer to a provision that the insured has the obligations of act or omission, or that the insured affirms or negatives the existence of a state of fact. Whether a provision can be a warranty shall be decided by the significance of its breach, the impact of its breach on the covered risk and the adequacy of the remedy for its breach. In addition, a warranty may be express or implied, and an express warranty may be either a specific or general express warranty.
2) If the insurer attempts to claim a breach of an express warranty under the CMC, he should prove four conditions, including confirming that a significant breach has occurred, proving that the insured had explicit knowledge of the circumstances constituting warranty and the remedies the insurer may take, drawing the reasonable attention of the insured towards the warranty clause in the insurance contract, and proving fulfilment of the duty of notification by both parties. In particular, in order to demonstrate the significance of the breach, as well as analysing whether a breach goes to the very root of the contract, emphasis can be put on both the continuity and the predictability of the breach.
3) Other than for the specific express warranty, the legal consequences for the breach can be divided into termination and modification based on the subjective states of the insured and the fulfilment of the duty of notification. On the one hand, the warranty rule should be inclined towards the insured, who is the receiver of the standard form. If the breach of warranty is not caused by the insured, and the insured has fulfilled the

[95] Soyer (n 38 above), p 8 Para 1.16.

obligation of notification, in principle the insurer should first modify the contract. However, if the parties fail to reach an agreement, and the insurer then terminates the contract, the insurance contract should be terminated when the notice of cancellation reaches the insured. On the other hand, if the insured violates the warranty intentionally or through gross negligence, then the results will be different. When the insured violates the notification obligation, the legal consequences for the insured will be more severe. If, without justifiable reason, the insured fails to notify the insurer about the breach in a timely manner, the insurance contract shall then be terminated on the date of the breach. If the insured informs the insurer of his breach of warranty on time, and the insurer decides to terminate the contract, the insurance contract shall be terminated when the notice of cancellation reaches the insured. In all situations, if there is a notice period, the insurer should not be responsible for damages incurred during the notice period, unless the loss is not caused by the breach of warranty. Besides this, it is noted that failure of the insurer to give timely notification about his decision may result in a waiver of his rights to the remedy.

With the above-suggested changes, it is hoped that the warranty rule in Chinese marine insurance law will be further improved, and that a fairer balance can be struck between the insurer and the insured.