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Insurance Policy Terms - A Comparative Study of Nigerian, Australian and the Uk Laws

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Abstract

This paper attempts to examine the notions and workings of conditions and warranties in three distinct jurisdictions – Nigeria, Australia and the UK with a view to suggesting policy corrections and legal amendments for Nigeria's developing insurance practice. It is discovered that there is a nagging dearth of literature appraising the significance of insurance policy terms in Nigeria against the backdrop of other jurisdictions to enhance the Nigerian circumstance. Filling this gap in knowledge is what this literature has made the theme of its study – critiquing the deficiencies that the regulatory and legal provisions for Nigerian insurance practice bears for policy terms vis-à-vis those of advanced legal systems such as Australia and the UK. Insurance policy terms in academic and research circles are not discussed about enough, hence this research work. Given the monstrous impact that misplacing terms of insurance policy can bear for parties to the contract, it thus becomes a significant issue for discourse. Adopting a qualitative approach of research methodology, this paper uses books and rated journal articles in the process to achieve the results it sought to. While it is pointed out that these countries enjoy marked similarity in their insurance laws owing to their roots with the King's Law, it is also noted how they each differ especially in terms of their advancement and equitable approach. Critiquing the defects present in the common law perception of insurance policy, this seminar paper appraises what these legal systems have done about improving their insurance laws in that respect. Thereafter, recommendations are made to push for better conditions for the operations of the terms of insurance contract especially as Nigerian insurance laws are affected.

Keywords: Insurance policy, policy terms, conditions, warranties, Nigeria, Australia, the UK

1. Introduction

This research contribution attempts to critically examine the corpus delicti of insurance laws in Nigeria, Australia and the UK as it impacts insurance policy terms. The central purpose of this paper is to provide ideas and suggestions that could better help Nigeria's insurance practice improve in light of the deafening impact that conditions and warranties (normal contract terms) bear for the sanctity of insurance policies. While it is pontificated that the statutory interventions under Nigerian insurance laws have corrected the maladies of the pre-existing common law purview of the scope and practice of insurance law, it is nonetheless appraised that the legislative provisions yet need improvement.

Under normal contractual dealings, some difference is usually made between conditions and warranties which are noted as terms of the contract. The difference identifies the thin lines existent between the validity of and/or liability to the contract. According to Agomo[1], a condition is defined as the statement of fact or promise, forming an important term of the contract. In the event that the statement of fact is untrue, or the promise unfulfilled, the aggrieved party may approach such breach as a repudiation, which releases them from a further performance of such contract[2]. A

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[1] Agomo Chioma. *Modern Nigerian Law of Insurance* (University of Lagos Press, 2003)

[2] Irukwu Joe *Fundamentals of Insurance Law* (Witherbys Printing Ltd, 2009)

warranty has been stated to be a less essential contractual term; it refers to an implied or express term that the parties insist shall be part of the contract, but only guarantee to the express term[3]. The courts in a number of cases[4] have not hesitated to infer that the performance of the terms by the parties turns out as either a condition precedent or subsequent to the either party's liability.

Nevertheless, the end-result of conditions and warranties in insurance[5] contracts differs from other forms of contract. These positions insurance contracts assume are unique compared to other contractual deals. Insurers usually perceive discussions surrounding conditions and warranties in the context of the policy[6]. What obtains in practice is to introduce in the policy, certain clauses that are usually referred to as warranties[7], however, they may bear the effects of conditions and the insurer can explore the window of discharge from the contract in that event.

In particular terms, the insurer welds a range of terms in insurance documents, to wit: the proposal term, insurance certificate, and the policy[8]. Discharge or avoidance is neither exhaustively clarified from the very onset. In practice, the insured may feel entitled to let go of value on the insurance policy. It must be noted that insurance contracts in common law jurisdictions is broadly regulated by the common law rules as improved upon by statutes to address the exigencies of modern needs. Nigeria, Australia and the United Kingdom (UK) being the select jurisdictions under this study with some common legal roots traceable to the principles stated under the English Marine Insurance Act (MIA) 1906 are going to form the objects of study of this analysis[9].

This paper splits into several parts. A part considers the common law perception of the categorization and enforcement of insurance policy. Another part looks into critiquing the situation of insurance policy as it were under common law. The fourth part examines the statutory interventions on the principles of common law in the select jurisdictions. The next part evaluates the work altogether as affecting the operations of conditions and warranties under the extant insurance laws of the select jurisdictions. Drawing inspiration from the improved versions of the

[3] Irukwu, Joe (B). *Insurance Law and Practice in Nigeria* 3rd ed. (Heinemann Educational Books, 1978)

[4] See Poussard v Spiers (1876) 1 QBD 410; Betini v Gye (1876) 1QBD 410. Yerokun commented that in judicial comprehension, breaching conditions, in a normal contract, lets the party aggrieved to repudiation, and whereas, breaching warranty solely entitles him just to damages. See Yerokun Olusegun *Insurance Law in Nigeria* (Nigerian Revenue Projects Publications, 1992) P. 38

[5] Insurance forms a cognizable part of the management of health, business, and other relevant affairs of human life. As terms of contract are developed to speak to the insurance deals, there is likelihood to misjudge the position of things. This is what the terms "conditions" and "warranties" are left to cater to when construing meaning to the terms of an insurance contract which is often called a policy

[6] Ibid, P. 72. Indeed, the dual terms of conditions and warranties have been captured as synonymous with respect to the foundation of insurance contract.

[7] An insurance warranty has been fondly referred to as the most usually used clause in preventing risk in practice. Since it has been severely criticized for several decades, the legal regime relating to insurance warranties as well as other risk control clauses have been lately reformed by the United Kingdom Insurance Act 2015, which is applicable to all insurance contracts that are concluded after August 12, 2016 in the United Kingdom. Soyer, Baris "Risk control clauses in insurance law: law reform and the future" *The Cambridge Law J.* 75(1) March 2016, PP. 109 -27 https://doi.org/10.1017/S0008197315000963

[8] Zhang, Z. & Zhang X. "Changes in insurance contract standards under artificial intelligence scenarios" *Proceedings of the 2022 2nd Intl. Conf. on Economic Dev. And Business Culture (ICEDBC 2022)* December 2022

[9] According to Anifalaje Kehinde (2022), the MIA 1906 in Nigeria was enacted *mutatis mutadis* as the MIA 1961. Identically, the MIA 1906 gave inspiration to Australia's MIA 1909 while for the UK; the extant laws include the Consumer Insurance (Disclosure and Representations) Act (CIDRA) 2012; the Insurance Act (UK IA) 2015; the Consumer Rights Act (CRA) 2015. See Anifalaje, Kehinde "Legal controls of terms of insurance contracts in Nigeria: a comparative analysis" *Common Law World Review 51*(1-2) 111 (2022) https://doi.org/10.1177/1437795211072305

Australian and the UK laws, this article attempts to clearly appreciate how Nigeria can develop solutions to some of its persisting challenges that an unsustainable purview of insurance terms and contracts bear for it.

2. The Categorization and Enforcement Insurance Policy: A Common Law View

It is generally agreed that under the general law of contract, the statuses of conditions and warranties are different in affecting the realities of the parties to the contract. It is such that the breach of a condition under general contract affords the aggrieved party the chances of rescinding the contract altogether whereas that of a warranty grants the affected party the right to damages only[10]. However, under insurance contract, this is apparently not the situation as the courts - especially English courts - have at sundry times[11] held that the breach of a warranty makes the insurance policy avoidable.

In certain Nigerian cases, the move of the counselors to defend a breach of warranty using certain brilliant novel defences on grounds of illiteracy was counteracted by the courts as unworkable. In those Nigerian cases[12], the following defences were wielded:

a) That the assured who had breached the warranty due to his quasi-literacy, was incapable of understanding and appreciating the technical significance of the term 'warranty' and

b) That the position of the business of the insured as a petty trader made it unthinkable to expect him to act in strict compliance with the warranty.

It must be commented that the rejection of these defences by the court is not so much as to support unfairness but to uphold the sanctity of warranties when it comes to insurance law in Nigeria. Again, it must be noted that it is only in marine insurance contract that implied warranties exist since the Act provides that a warranty in a marine policy may be implied or express[13]. In every other branch of insurance, a warranty must be express and need to be part of the written policy or welded into the policy by way of an endorsement expressly.

2.1. Ordinary Policy Conditions

Ordinary policy conditions have been stated to mean either implied or express terms of the contract of insurance. The parties' mutual intention, as far as that may be gleaned from the policy, is, nevertheless, important in the determination of whether a certain contractual term is a condition or not[14]. According to Anifalaje[15], policy conditions refer to terms that neither avoidthe policy when a breach occurs or restrict the risk, but put particular duties for the enlargement or restriction of the parties' rights. The case of *Brown v Zurich General Accident and Liability Insurance Co. Ltd*[16],

[10] Chioma, "Modern Nigerian Law of Insurance*"* P. 23

[11] For instance, the Commercial Court in London, lately, ruled that breaching a particular policy provision noted as a warranty in a building insurance policy permitted an insurer to avoid a claim for a fire coverage. This was the position in the case of *Blue Bon Ltd v. Ageas (UK) Ltd* [2017] EWHC 3301 (Comm). It is surprising to note that despite the reforms purportedly introduced by the UKIA 2015, this provision of the insurance law has tarried for more than a century as can be seen in *Dawson Ltd v. Bonnin* (1922) 2 A.C. 413

[12] *Amaechi & Anyanwu v Norwich Union Fire Ins. Society* (1958) Suit No. LD 33/1958; *Alex Okoli v. WA Provincial Ins. Co. Ltd* (1963) Suit No JD/42/63

[13] The definitions to 'warranty' under the Marine Insurance Act 1961 clearly supports this under S. 34(1)(2) of the Act.

[14] Yeo, Hwee "Of warranties and terms delimiting risks in insurance contracts" *Research Gate* (2007) https://www.researchgate.net/publication/228227200_of_warranties_and_terms_delimiting_risks_in_insurance_contracts

[15] Anifalaje, Kehinde "Legal controls of terms of insurance contracts" PP 109 – 41

[16] Ibid, Kehinde, citing Brown v Zurich (1954) 2 Lloyds Rep. 243

as an instance, was cited by the insurance law scholar to show that the express situations of the policy could be related to the need to show the presence of other policies that are effected by the person insured on the same subject matter of insurance[17]. The same rationale underpinned the *ratio decidendi* in *Hauwa v Nig. People's Ins. Co. Ltd*[18]where a term of the motor policy in quo was to the end that the insured shall assume all reasonable responsibilities to secure the motor vehicle from damages or loss and to keep it in a state which is both safe and efficient for use on a road and for purposes stated in the policy and Schedule. It was gleaned that the court embraced the representation of the insurers that the term remains a condition of the policy.

2.2. Conditions Precedent

Conditions precedent in insurance contracts are comprehensively of three types, namely: conditions precedent to the validity of the contract on its own; conditions precedent to attaching insured risks and condition precedent to the insurers' liability to honor a claim[19]. In the opinion of Yerokun[20], a condition precedent need to be observed in strict compliance regardless of its relevancy to the insured risk as not complying could bear some consequence on either the persisting validity of the policy of the right of recovery of the insured relating to a certain loss without impacting the validity of the policy.

Concerning the conditions precedent associated with conduct obligations relating to attaching the risk run by the insurer, the performance thereof by the insured is so important to the working of the contract as well as to the liability on the insurer's part there under. In *Milton Furniture Ltd v British Insurance Ltd*[21]., it was held that a General Condition 17 of the insurance policy provides that the due observance and fulfillment of every condition, provision and endorsement of the policy remains a condition precedent to any liability on the side of the insurers under the policy[22]. Also, the requirement of some notice of anticipated proceedings against those insured by motor accidents victims as in *Yorkshire Ins. Co. Ltd. V. Haway*[23]and *Northern Ass. Co. Ltd v Wuraola*[24] has been noted to be a condition precedent to the insurer's liability for the satisfaction of any claim coming there from. Moreover, it is now settled law that the payment of premium is a condition precedent in a valid insurance contract and no cover concerning an insurance risk shall exist unless the premium is paid in advance[25].

2.3. Policy Warranties

In an insurance policy, warranties are often the written terms of the contract in which the insured warrants that either that certain clarifications of facts are correct, or that they are not just correct but will likewise stay correct, or that they will assume the expected performance of some duty

[17] Kehinde "Changing legal perspectives of the requirement of insurable interest in insurance contracts" (2020) *Commonwealth Law Bulletin* https://doi.org/10.1080/03050718.2020.1812099

[18] (1972) NCLR 168

[19] Marano Pierpaolo. & Noussia, Kyriaki (eds) *Transparency in insurance contract law* AIDA Europe Research Series on Insurance Law and Regulation 2 Springer International Publishing (2019)

[20] Olusegun "Insurance Law in Nigeria*"* (1992), p. 218

[21] (2015) ECWA Civ. 671

[22] Kehinde (2022) however, notes that, a contrary opinion was, however, held in Re Bradley (1912) 1 K.B. 415; it was held that the condition was not a condition precedent to the insurers' liability by virtue of the construction of the language of the policy but a collateral promise associated claims

[23] (1969) NCLR 454

[24] (1969) NCLR 4

[25] S. 50(1) of the Insurance Act 2003

particularized in the insurance policy[26]. Most warranties are designed on an express note by the parties in any way they want as the usage of the phrase 'warranty' has been said to be indicative[27]. However, it is by no way determinative of the intention of the parties to that effect. This principle was consolidated upon in the matter of *HIH Casualty and Gen. Insurance Ltd v New Hampshire Ins. Co*[28] where it was established that one test is whether it is a terminology that goes to the root of the deal. Another test in that regard is its materiality or descriptiveness on the risk of loss and the last one being whether damages would be inadequate or unsatisfactory remedy.

Following S. 35(3) MIA 1906, Anifalaje[29] notes that an implied warranty does not preclude an express warranty except it is not consistent therewith. Warranties may also be connected to the past or present fact and it could be a promissory one. In the matter of *National Reserve Insurance Co. v Ord*.[30], it was held that a consideration of whether a warranty is promissory or persisting, on the other hand, is relevant before it is suitable to determine the time at which the warranty is made[31].

2.4. Consequences of Non-compliance with Terms of Policy

In general, the burden of proof of breaching a term of the insurance policy depends on the party who alleges a breach. As a matter of principle, breaching an ordinary condition will not bear any grave impact on the insurance policy but the aggrieved party who is often the insurer could lay claim to damages if such is proved. In this situation, the aggrieved party is often put into election either to take the contract as repudiated, particularly if it is a term that gets to the root of the contract, or affirm same and request for damages[32]. As against the condition precedent that demands strict compliance, substantial performance of a condition expressed in general terms is enough. This is nevertheless subject to the stipulation of an ordinary condition agreed to by both parties to the end that the insurance policy shall not bear any effect upon the breach of the condition[33].

Moreover, in *Bluebon Ltd v. Ageas (UK) Ltd & Ors,* it was held that a real warranty remains a term of the policy that comes consequent as a condition precedent to a cover taking place under it, instead of in relation to any certain risk. Following such breach, the release of an insurer applies automatically and is independent of a decision of the insurer to approach the contract as an end. It has been suggested that the effects of a breach of condition have to do with two things. One is whether such condition is a condition precedent to the validity of the policy and the other is whether the condition is a condition subsequent of the policy[34]. It is opined that where the breach of the condition is precedent it goes on to affect the entirety of the contract. The validity of the policy has

[26] See *Dawsons Ltd v Bonin & Ors*. (1922) 2 AC 413 where it was held that 'warranty' means that a certain state of facts at present or in future remains a contractual term, and more so, that if the warranty is not fulfilled, the insurance contract is void.

[27] Enakireru Eric "An examination of conditions and warranties in a contract of sale of goods" *African Scholar Publications & Research Intl. 7*(23), 59 - 76 ISSN: 2276 – 0732 (Dec. 2021)

[28] (2001) 2 Lloyd's Rep 161

[29] Kehinde "Legal controls of terms of insurance contracts" P. 119

[30] 123 F.2d 73 (9th Circuit 1941)

[31] The ratio for decision in *Joseph Gordon, Inc. v Mass-Bonding & Ins. Co*., 299 N.Y. 424, 128 N.E. 204 (1920) is also in tune insisting that so long a breach of some immaterial warranty will not prevent recovery regardless.

[32] This was the position of law in *Friends Provident Life and Pensions Ltd v. Sirius Intl. Ins. Corp* (2005) EWCA Civ. 601

[33] See *Folayomi v. Mercury Assu. Co. Ltd* (1973) 3 UILR 424; *Mokwe v. Royal Exchange Assurance (Nig.) Ltd* (1974) 4 ECSLR 280

[34] Olusegun "Nigerian law of insurance" P. 225

to do with the condition being fulfilled before it turns operative[35]. Whatever is the loss that occurs prior to the condition being fulfilled is not counted as falling within the policy and as such the assured cannot hence make recovery.

Condition precedent simpliciter which stresses how valid a policy is needs to be distinguished from the condition precedent that goes to the liability of the insurer. For the former, Yerokun[36] is of the view that it is in denial of the existence of the policy or any contract whatsoever. The policy remains an evidence of a concluded contract. In the event that the parties are yet to entirely arrive at some bargain, it is to say that no contract or policy is in operation. However, for the latter, the author commented that a valid contract exists, but a stipulation is put in the policy which stands as a condition precedent to the insurer's liability. Where such condition is breached, it may foil the insured's chances for recovery. In that event, the breach may impact the claim but never the validity of a policy and the non-fulfillment of a condition precedent do not debar the insured from subsequent recovery of any loss that takes place[37]. The breach of a condition remains an issue which in all matters of contract must be proven by the party who is in a position to benefit from a breach occurring. The breach of a condition precedent to inform the insurer appellants of any impending prosecution was adjudged as sufficient to prevent the respondents insured from laying claims to indemnification[38].

On the other hand, breaching a condition subsequently impacts the policy as the insured cannot make recovery of the loss. Nevertheless, the insured is not to incur the loss of benefitting from such liability by technical or narrow construction of the terms prescribing the formal requisites for positioning the rights accrued accessible for the possibilities of indemnity. This principle enjoys judicial backing in *Martins v. Natl. Employee's Actual Gen. Ins. Association Ltd*[39]where the court found that there lays no defence to some claim to indicate that notice was not issued as demanded by the condition. Thus, the insurer was held liable for the satisfaction of the judgment obtained against the insured concerning the liability covered. Moreover, where it occurs that an insurer indemnifies a policyholder by paying under authority of law, even though the policyholder breaches a condition of the policy, and the insurer pays without informing him of the breach, or requesting for reimbursement, the insurer is not prevented from the denial of this liability to indemnify the policyholder or from some entitlement to be reimbursed by the policyholder[40].

Division of the Warranty[41]

One of the approaches that the court may consider on some other occasion is dividing the warranty. More than often, the requirement that records of inventory and sales and purchases accounts be put in some iron safe and that failure to generate the books after loss will make the policy void is to obviate the mischief that may arise due to the non-ascertainment of the amount of loss on the goods. To the court, a breach of this condition does not make the policy void but works for the prevention of recovery for loss on merchandise or stock in trade. There seems to have been

[35] Ryans, J., Even-Tov, O., & Solomon, S. "Representations and warranties insurance in mergers and acquisitions" *Reviews of Accounting Studies* (2022)

[36] Ibid, P. 226

[37] The author references the case of *Hoods Trustee v Southern Union Gen. Insurance of Australia* (1928) Ch. 792 (CA)

[38] *Northern Assurance Co. Ltd v. Wuraola* (Op. Cit) In the case, the respondent's car was involved in an accident upon which he was prosecuted and pleaded guilty and he did not give notice to the insurer appellant.

[39] (1969) N.C.L.R. 46

[40] *The Yorkshire Ins. Co. Ltd. v. S. Haway* (1969) A.L.R. 464

[41] For a more expansive study, it is recommended to peruse the work of Jerald, H. S. (1965) The divisibility of warranties in insurance policies *Vanderbilt Law Review 719* https://scholarship.law.vanderbilt.edu/vlr/vol18/iss2/12

palpable willingness to divide this certain warranty and turn back from voiding a policy completely unless the risk of not being capable of determining the complete inventory gets increased.

When the cover is fire insurance, the court had held in *Home Insurance C. v Shriner*[42] that for there to be sufficient compliance to avoid a warranty breach the safe must have been closed, even though the combo dial was left such that the burglars could conveniently rifle the safe, and in the course of the ensuing felony a fire gutted the building destroying the records. The same reasoning has been devised in situations where the employee's negligence caused a warranty to be breached which has been found to be part of the risk insured against when the 'iron safe' clause was invoked.

As such, it is safe to mention that the courts have used positive activism in dividing the warranty by finding that the bookkeeper's negligence was part of the risk that was insured by the insurance company. It was such that failure to make available the needed records due to the negligence of the employee neither could nor bar the recovery.

3. A Critique of the Situation under Common Law

There are perceived anomalies that enforcing common law rules occasion one of which concerns the contractual relationship of the parties as the basis of the contract clause that has been the most common and easy means of designing warranties by the assurer. In the words of Anifalaje Kehinde[43], for consumer policies in specific, the basis of contract clauses were often not stipulated in the policies on their own but in proposal forms, which should not be so. The recital contained in the insurance policy that the proposal form ought to be the basis of the contract, not just converts every representation in the form into material facts, but also brings a warranty of the truth of the statements in response to the questions contained therein. Therefore, it was clarified[44] that the contract could be avoided in the event that any of the responses were discovered to be unreal, regardless of its relevancy to the risk insured nor the knowledge of the insured regarding whether the answers were false or true. In *Thomson v Weems*[45], it was held that the truth of the specifics in the declaration was warranted and that their untruth, aside from any issue of fraud and recklessness, vitiated the policy.

A similar position was maintained in *Anderson v Fitzgerald*[46]where the apex court in the UK reversed a jury's decision and returned a verdict for the insured on the ground that the questions were immaterial and found that the basis of the contract clause displaced any issue of materiality from examination by the jury. On Nigerian soil, *Akpata v African Alliance Ins. Co. Ltd*[47]also corroborated this point when it was held that the basis of contract clause applies when the deceased having warranted the truths of the statements within the proposal and having conceded that they create the basis of contract and that the contract should be announced null and void if any of the statements were unreal.

Another necessary issue is the requirement that warranties need to be literally and strictly followed by the insured, as the insurer was absolved of liability if it were otherwise. The cases of *Bank of*

[42] 235 Ala. 165, 177 So. 890 (1937)
[43] Kehinde "Legal controls of terms of insurance contracts", P. 125
[44] Ibid, It was further highlighted that the Scottish and English Law Commissions explained the clauses relating to basis of contract as a certain harm that helps insurers in using a frame of words that few policyholders relate to in extending the cover that can avail them for misrepresentation to take care of answers that are irrelevant to the risk, or are made without negligence or fraud.
[45] (1834) 9 AC 671
[46] (1853) 4 H.L. Cas 484
[47] (1967) 3 ALR Comm. 264

Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd[48]*; Quebec Marine Ins. Co. v The Commercial Bank of Canada*[49]have been constantly referred to in expatiating on the vagaries of the strict compliance of the insured with the terms of warranties. It was irrelevant in this example that not complying by the insured bore no consequence on the loss for which a claim is made, nor that it reduced the risk insured against, nor that it had been cured and the warranty complied before the occurrence of the insured risk. Observably, in spite of the strict construction and enforcement of policy terms by the court, it is worthy of note that insurers yet use proposal forms that do not declare in clear and unambiguous terms the occasions around which they could avoid liability. With limited knowledge of the intricacies of the insurance contract and inadequate notice to the person insured, many have become prey of the traps of such unclear and ambiguous policy terms[50].

Another worrying situation that pops up concerning the contractual relation of the parties is the usual practice of giving only the certificate of insurance without the policy, which is prevalent among insurers in motor vehicle insurance policies within Nigeria. Normally, the policy, aside from offering a long-tail description of the risk to be taken care of and matters associated thereto, has more general insurance contract terms that should be within the reach of the insured[51].

4. Statutory Implications on the Common Law Rules in Select Jurisdictions

4.1. Nigeria

There are a range of legislative protections catering to the interests of the parties to insurance contracts in Nigeria. One of such is S. 55(1) of the Insurance Act 2003, a breach of term, whether referred to as a warranty or condition, would no more occasion any right by or offer a defence to an insurer against a person who is insured unless the term is equally material and relevant to the risk or loss that was insured against. As a result, the hitherto unqualified legal privilege that the insurer had to do away with a duly implemented or legitimate insurance contract has been curtailed as avoidance is now built on the twin preconditions of 'relevance' and 'materiality' of any alleged breach of such term by the insured to the insured risk, notwithstanding the traditional catchwords of 'condition' and 'warranty' of the insurance contract in quo.

Also, following S. 55(2) of the Act, despite whatever any other written law may bear, an insurer will bear no right to reject an insurance contract or insurance claim, either partially or entirely, due to the breach of some term of an insurance contract unless such a breach occasions fraud or a breach of a fundamental term of the contract. In addition, going by S. 55(3), if the insured, at each time after a breach of a material term has been committed, presents an insurance claim to the insurer, but the latter bears no right to reject the contract either wholly or partly due to that breach not amounting to a fraud or a breach of a fundamental term of the insurance contract, the insurer shall only be liable to indemnify the insured only for the proximate loss devoid of the remote loss which has been caused by the breach of the term. Yet, S. 55(4) provides that the insurer has the right at all times to avoid a contract of insurance due to an actionable breach by the insured prior to the occurrence of the loss or risk insured against.

The scope of the Motor Vehicles (Third Party Insurance) Act (MVA)[52] in providing for risks of bodily injury or death to third parties protruding out of the usage of motor vehicle remains another

[48] (1992) 1 AC 233
[49] (1869 – 71) LR 3 PC 234
[50] This situation is best captured studying the case of *Royal Exchange Assurance Co. Ltd. V Chukwurah (1976) NCLR 191*
[51] See *NAC Ltd v Wuraola (Op. Cit.); Yorkshire Ins. Co. Ltd v Haway* (1969) NCLR 454
[52] Cap M 22 LFN 2004

milestone in the statutory impact in terms of insurance contract in Nigeria. For instance, by S. 8 of the MVA, any condition in the policy issued in pursuit of the provisions thereof, which stands to exempt or limit the insurer from any liability in the event leading to a claim under the policy has no implication whatsoever[53].

In general, while the insured is expected to make payments of the premium as agreed, failure to so do would not remit the insurer from the liability which has been agreed under the contract unless there stands a provision in the contract to that effect, or the failure to make such premium amounts in the situation of the repudiation of the contract[54]. Notably, however, this common law rule no longer applies in Nigeria given the provisions of S. 50 of the Insurance Act that has made the payment of insurance premiums a condition precedent to the validity of an insurance contract and that there exists no cover for an insurance risk unless the premium is paid in advance[55].

S. 9 of the Act stresses that dependence on restriction clauses available to the insurer to avoid liability has been truncated. Hence, where an insurance certificate has been delivered to the insured, insurers cannot decline liability on the basis that some restrictions imposed on the extent of the policies applicable to such 3rd party risks have not been complied with. Yet, S. 10(2) of the Act as observed by Anifalaje has made it a condition precedent to the insurer's liability to satisfy 3rd party judgments on mandatorily insured liabilities that notice must be extended to the insurer before or in 7 days of the start of the proceedings in which such a judgment is awarded. A similar provision is provided for under S. 69(2) of the Insurance Act[56]

These provisions target the protection of the rights of 3rd parties to liability insurance deals regardless of whatever concession might have been reached by the relevant parties. The contractual right of the insurer has likewise been the beneficiary of the proviso to S. 8 that permits inserting the provisions in the insurance policies that would facilitate it in recovering from the insured any amount it would not have liability to pay due to non-compliance with the policy conditions by the insured but for the law. This also applies to S. 9 that offers express statutory entitlement to recover from the person insured.

4.2. The UK

Sundry calls[57]for significant reforms have been made towards impacting insurance warranties. Seemingly consequent upon these calls, in the United Kingdom, most of these reforms have been animated via statutory developments. The United Kingdom Insurance Act (UKIA) 2015 significantly impacting the common law principles; the Consumer Insurance (Disclosure and Representation) Act (CIDRA) 2012 enacted to provide for disclosure and representations relating to consumer insurance contracts; and the Consumer Rights Act (CRA) 2015 have notable provisions catering to the problems linked with policy terms at common law. In specific, CIDRA has abolished the usage of the basis of contract catchwords and its punitive implications in insurance contracts by forbidding insurers from turning into a warranty, any representation made by a consumer in relation to a proposed consumer insurance deal or of the terms of the change or

[53] Thus, according to Kehinde (b), conditions which are not associated with the risk insured but which merely needs the insured to tender notice of loss or proceedings as in *Martins v. Natl. Employers Mutual Gen. Ins. Association Ltd* would bear no effect as against a 3rd party who claims from the insured. See also, *Sule v Norwich Union Fire Insurance Society* (1971) NCLR 271.

[54] Ibid

[55] See the case of *Industrial and General Insurance Co. Ltd v Adogu* (2010) 1 NWLR (Pt. 1175) 337

[56] Op Cit.

[57] Baris, Soyer (2008) "Reforming insurance warranties – are we finally moving forward?" *Reforming marine and commercial insurance law (1st ed.)* Taylor & Francis Group (2008)

of any other contract[58]. The UKIA has also done this in one its sections[59], and the importance of this Act is further underscored by provisions[60] of the Act rendering ineffective any term in non-consumer policies which can worsen the position of the insured regarding any representation to which S. 9 is applicable than the insured would be in by virtue of that section.

Some celebrated insurance law practitioners have recently related that the UKIA 2015 has abolished a number of the punitive implications of breaching the obligation of utmost good faith or warranty breaches in insurance deals[61]. Rather, it has stipulated more equivalent solutions for such breaches, which includes premium modifications for definite misrepresentations. In further explaining what situations misrepresentations in the application for an insurance application may result in the basis for rescission, the learned postulators[62]also observed that the UKIA 2015 expunged the 'basis of contract' clauses as far as insurance deals are concerned. It must be noted that such clauses, by implication, elevate the answers of an insured to the questions posed by the insurer to the level of contractual warranties. Where, in fact, the answers of the insured are relevant misrepresentations, the insurer may void the contract.

The substance of the UKIA 2015 maintains that a policy breach will interrupt the right of the policyholder to indemnity. Such right, according to the provisions of the insurance law, will be reinstated automatically the moment the breach is cured. Also, a notable change in the UK insurance law has been introduced that eliminates the ability of the insurer to defend against a claim for indemnity due to a breach from the insured that did not increase the risk of loss. The Act likewise cut ties with technical or mechanical breaches, giving room for only breaches that are really material, however, the burden to prove non-materiality is on the insured.

More so, CIDRA[63] also abolishes the rule of law in S. 20 of the MIA 1906 concerning material representations made by the insured or his agent to the insurer before the negotiation of some marine insurance contract or prior to the time the contract is concluded. In addition, the UKIA provisions[64] provides that any rule of law with the effect of discharging the insurer of its liability under an insurance contract due to a breach of implied or express warranty in such contract is done away with. This provision, in the opinion of Anifalaje[65], remedied the ills of the common law principle which absolved the insurer of its responsibility under the insurance contract even where the alleged breach has been cured by offering statutory recognition to the suspensory panacea used in certain cases[66].

In addition, the statutory intervention afforded to the insured's cause is more amplified under the CRA 2015 where consumer contracts between a consumer and a trader is regulated. In that manner, fairness is to be determined by accounting for the state of the contract's subject matter or of the notice forwarded. Under S. 64 of the CRA, it is explained that any term that satisfies the demand

[58] See S. 6 of the Act
[59] See S. 9
[60] See S. 16(1) of the Act
[61] Villagran, Leonidas (2016) "The UK Insurance Act 2015: the shift in marine insurance warranties regime" Villagran Lara Abogados http://www.villagranlara.com/the-uk-insurance-act-2015-the-shift-in-marine-insurance-warranties-regime/# (N.P.)
[62] Ibid, (N.P.)
[63] See S. 11 of the Act
[64] See S. 10 of the Act
[65] Anifalaje, Kehinde "Legal controls of terms of insurance contracts" P 135
[66] Some of these cases are identified by the insurance law scholar as *Kler Knitwear Ltd. V. Lombard Gen. Insurance Co.* (2000) Lloyd's Rep IR 47*;* as well as *Farr v. Motor Traders Mutual Insurance (1920)* 3 KB 669 whereby the duty of the insurer gets suspended in the course of the timeframe of the breach.

of transparency is, nevertheless, excluded from consideration of fairness. In the same way, it is clarified[67] that that a notice becomes transparent if it is shown in intelligible and plain language and is legible.

More so, the common law principle of *contra proferentem*[68]is also given statutory expression under S. 69 of the CRA such that where a term possesses diverse meaning, the meaning that is most amenable to the consumer gets to prevail. The court is legally enabled to, on its own, look into the fairness of a term of contract even if none of the parties to the proceedings has raised the point, or shown that it desires to raise it, the moment it is satisfied that it has before it adequate legal and factual backing to make it examine the fairness of such term[69].

4.3. Australia

In many ways, the Australian legislative interventions have meant well for the disposal of insurance policy terms while still providing rooms for improvements via judicial activism and a seeming outright support lent to the insured. The Australian Insurance Contracts Act (ICA) 1984 has hugely impacted pre-contractual positions held by the insured and the liability of the insurer concerning the breach of the terms of insurance contract after concluding such contract in a real profound manner. As against S. 11 of the CIDRA, S. 24 of the ICA fails to introduce express provisions to abolish S. 20 MIA, but has successfully repealed the basis of contract clauses by making any pre-contractual statement made by the insured to the insurer regarding the existence of a state of affairs of zero import as a warranty.

It is opined that such a statement is to be approached as mere representation and not taken as having been turned into a warranty. Moreover, different from the UKIA 2015[70] that emphasizes restricting the application thereof to warranties and risk particular terms; S. 54 of the ICA is applicable to every policy term including terms associated with conduct duties, warranties, claims procedure and those excluding or limiting the insurer's liability[71]. Furthermore, as against what applies under common law, S. 54 of the ICA similar to Nigerian's Insurance Act, demands that a causal link exists between a perceived breach of a term of insurance policy and a loss.

In addition, by the adoption of the proportionality and causation sieves, S. 54 has, generally, sought to strike a balance in the interests of the parties contracting and bring about fairness in settlement of claims. Therefore, the right of the insurer to repudiate a claim, under S. 54(1) of the ICA, is now reliant on the level to which it has been prejudiced following any move by the assured or of some other individual after the policy has been concluded, which would have made the insurer to reject the claim either entirely or partly and its liability concerning the claim is also brought down by the amount that rightly represents the extent to which its interest has been so prejudiced by the act complained of.

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[67] Op. Cit.

[68] The rule is a legal doctrine in the law of contract that states that any clause taken to be unclear should be interpreted against the interests of the party who designed, introduced, or demanded that a clause be factored in. The *contra proferentem* doctrine is a guide to the legal elucidation of contracts and is normally applicable when a deal is challenged in the court of law. See more at McCunn Joanna "The *Contra Proferentem* Rule: contract law's great survivor" (2019)*Oxford J. of Legal Studies* 483 – 506 https://doi.org/10.1093/ojls/gqz002

[69] This is well provided for under S. 71 of the CRA.

[70] The risk control clauses in the Act are usually used in insurance deals with the intendment of preventing the insured from carrying out the alteration of the risk while the policy continues.

[71] Anifalaje (1972) P. 138

But, where the act complained of can fairly be taken as being the basis or contributory factor to the risk insured, the insurer could absolve himself from settling the claim. In notable particular circumstances, the insurer would yet be liable to make payments either wholly or partly of the claim depending on the evidence available at the court's disposal. Hence, by adopting the causation test, the insured is covered if they are able to prove that no part of the loss that occasioned the claim was caused by the act in quo[72]. Also, where they successfully prove that some part of the loss that elicited the claim was not brought about by the act, the insurer loses their entitlement of refusal to pay the claim as far as that part of the loss is concerned.

One other way in which Australia has addressed the shortcomings of its insurance policy terms provisions is that, in circumstances where the act complained of was carried out so as to cover a person's safety or for property preservation, or where it was not expectedly possible for the assured or other person not to commit the act, the assurer may not be opportuned to refuse to pay the claim based on that act *ipso facto*. The insured's interest is afforded increased protection under the ICA where it is stated that the insurer has no basis relying on any uncommon provision in the insurance contract, unless it gives notices to the insured in writing, and prior to the time the contract is concluded, of the outcome of such uncommon provision.

5. Recommendations: Pushing for the Better under Nigerian Laws

The above statutory measures regulating conditions and warranties as terms of insurance policy in Nigeria, the UK, and Australia have greatly reformed the abysmal dysfunctions that characterized the common law positions. Hence, it is suggested that those developed in the more advanced legal systems could be replicated in addressing the perceived ills of the current Nigerian legal provisions on insurance matters with particular focus on the policy terms of conditions and warranties. It has been suggested that the usage of basis of contract clauses need to be expressly prohibited, without any qualification, in insurance contracts in Nigeria. Rather, added to the test of relevancy and materiality of a policy term as contained in S. 55(1) of the Insurance Act[73], where the insurer makes use of the basis of contract, each representation perceived to be a policy term need to be taken on its own merit relying on likely prejudice to the insurer.

Very importantly, the facility available to the insurer to repudiate a contract of insurance once an element of fraud has been discovered needs to be reconsidered. Unfortunately, many insurers have hid under this cloak to repudiate an entire contract while stifling the overall objectives of the policy when it is clear that other fundamental terms of the contract have been made and kept in good faith by the insured. The courts needs to lift this veil and pierce into it so that the very equitable objective of finding a soft ground is attained such that the interests of the vulnerable insuring public who at times make innocent misrepresentation often seen as fraud by the companies are not vitiated in the final analysis.

In all, S. 10 of the Australian's Insurance Act 2015 that insists that where the breach alleged has not in any way expanded the risk of loss, such breach has been cured by the insured prior to the time of occurrence of the risk insured, the insurer should be made liable to settle the insured's claim as agreed. Yet, on a critical note, it is argued that brandishing the relevancy and materiality test to mitigate the harshness that a strict observance of conditions and warranties may occasion is not enough. This is because determining such traits would be open to the objective consideration

[72] The same opinion seemed to have been maintained in the work of Jeff, S.G. (2022) The reform of insurance warranty in Nigeria: which way forward? Being a thesis submitted to the University of Bangor, School of Law in fulfillment of the requirements for the award of degree of Doctor of Philosophy

[73] In Nigeria

of an intervening third party and does not help the ease-of-doing-business process; hence can be deemed as being not business-friendly in deserving situations. Hence, while the courts and other alternative dispute resolutions mechanism continue to dispense their duties, the Nigerian law needs to incorporate certain elements that will help ensure that there is a proper implementation of the terms of the proposal form agreed on by the parties to the contract.

Thus, a provision for reform may address the place of ensuring proposers (the to-be insured) have adequate explanation of the terms to them. Insurance companies need to be directed by the relevant regulatory bodies to educate their prospective clients on what they are conceding to. The hastiness with which most of these companies get to have the insured enter into the agreement without the clearest explanation of the terms need to be berated by the Nigerian Insurance Commission. Some of the clients to the motor vehicle insurance policies are less-than-literate and illiterate people, hence the need for utmost due diligence in helping these susceptible folks get the memo clearly. And like Anifalaje[74] has contributed, where there is any affective ambiguity in the terms of the policy, such unfavorable terms must be heavily construed against the insurer[75]. What could be deemed as an extra input to be made by the insurance companies mandated by the regulatory bodies under law are positive attempts to ensure the insured carry out the conditions and warranties duly and timorously. This is so suggested to reduce the chances for litigation or disputes occurring at the end of the day.

The reform of the historically inequitable legislation of insurance warranties in transactional insurance has seen its debuts in Australia, Nigeria, and the UK. Even though certain authors[76] have remonstrated these reforms as replete of errors and that not one of them can be depended upon to offer steady equitable and reliable results, it is, however, argued that these cannot be thoroughly proven to be so as the provisions (especially those of Australian insurance laws) enable the courts to interrupt unfair terms that may work hardship for the affected parties in the right circumstances[77]. This is to mean that there are no hard and fast rules for which the extant legislations can handicap the courts in achieving substantial justice as and when due. To further debunk Owen's claim that the reforms are ineffective, it has been shown that Australian Securities and Investments Commission boast of a strong record of acting equitably upon unfair terms of contract in other financial services deals[78].

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[74] Ibid, P. 140

[75] See also Anifalaje "Quest for a legislative reform of the status, duties and liabilities of insurance intermediaries in Nigeria" 2022 (36) *Spec.Juris* 347 – 70

[76] Owen, Alastair *The law of insurance warranties – flawed reform and a new perspective* Routledge, Taylor and Francis Group 1st ed. (2021)

[77] Concerning unfair contract terms regime, reforms to the Australian Securities and Investment Commission Act 2001 (Cth) indicate that insurance deals will be impacted by unfair contract terms legislations beginning from April 5, 2021. Under S. 12BF, a term of a consumer deal or 'small business contract' stands void where three elements can be spotted. To begin with, that (i) the term is unfair (ii) the contract is a typical form contract, and lastly, (iii) the contract is a financial product, or a contract for the supply, or likely supply, of services that are of a financial nature. Senior insurance lawyers from the high-profile global law firm, Norton Rose Fulbright, further remarked that relevant policy wordings should be assessed to ensure unfair contract terms are expunged, which may be a strenuous exercise since it might lead to modifications to underwriting decisions and requirements. ASIC may thereby choose to move against an insurer for factoring in unfair contract terms in contractual deals. See Giblett, Raymond Chan, Timothy "A guide to 2021 insurance regulatory reforms" (Australia) February 2021

[78] Ibid (N.P.)

6. Conclusion

The thematic preoccupation of this article is to study in fuller glance the need for improvement in the regulatory and legal provisions of insurance laws supporting policy terms in diverse jurisdictions so as to offer lessons for Nigeria. This study has sliced through the beehive of conditions and warranties as terms of insurance contracts against the backdrop of Nigerian, Australian and the United Kingdom's insurance laws. Having examined the common law view of insurance policy categorization and enforcement, the defects contained in conditions and warranties are pointed out. This is done with a view to also appreciate the approaches that the statutory positions on these common law rules in these select jurisdictions take. Forthwith, recommendations are offered to help improve on the Nigerian legal provisions so that the perceived ills can be remedied. With concerns in technology development and artificial intelligence, and the accompanying novel statuses that insurance policies may assume, it is advocated that these diverse legal systems would need to evolve to manage the emerging insurance trends. A wave of consistent amendments of the laws, judicial activism and strategic regulation of the insurance sector is needed in Nigeria to address the crises that misconstruing insurance policy terms can bring about.