REELING BACK IN HISTORY TO UNDERSTANDING MARINE INSURANCE/ PROTECTION & INDEMNITY CLUBS (P&I)

MARINE INSURANCE

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Gaurangi Patil, *associated with Indian law firm BRUS CHAMBERS, reels back in deep rooted history to understand marine insurance*

Maritime law is one of the most established and oldest types of law. It generally covers laws or rules that govern tort, contract, marine commerce, ships, shipping, and worker compensation claims that arise on the world's navigable waters

Admiralty law, also referred to as maritime law is a distinct body of law which governs maritime questions and offenses. It is a body of both domestic law governing maritime activities, and private international law governing the relationships between private entities which operate vessels on the oceans. It deals with matters including marine commerce, marine navigation, shipping, sailors, and the transportation of passengers and goods by sea. Admiralty law also covers many commercial activities, although land based or occurring wholly on land, that are maritime in character.

The earliest authenticated insurance contract (i.e. That which displays the characteristics of insurance in the sense of a transfer of risk of loss due to a fortuitous uncertain event in lieu of payment of consideration /premium), is a marine insurance contract on a ship. Marine Insurance is not of recent origin. Its existence can be traced back to several centuries. Questions concerning it have naturally been coming up for a number of years and the law concerning it had taken a definite shape much prior to 1906 when the English Marine Insurance Act was passed with a view to codify that law.

As we look back in history at who first felt the need for a guarantee against loss (i.e insurance), and who gave them that guarantee. Way back in Babylonian times, around 2100 B.C., the Code of Hammurabi was the first basic insurance policy. This policy was paid by the traders in the form of a loan to guarantee the safe arrival of their goods by caravan. Of course, caravans faced the same kind of perils our transportation industry faces today – like robbery, bad weather and breakdowns. Than in the year 3000 BC when Chinese merchants dispersed their shipments amongst several vessels so as to abridge the possibility of damage to the product(s). The earliest account of insurance came in the form of 'bottomry', a monetary payment that protects traders from debt if merchandise is lost or damaged.

As history progressed, the needs for insurance increased. The Phoenicians and the Greeks wanted the same type of insurance with their seaborne commerce In medieval times, the guilds protected their members from loss by fire and shipwreck, paid ransoms to pirates, and provided respectable burials as well as support in times of sickness and poverty

Then came the very first actual insurance contract, signed in Genoa in 1347. "The Santa Clara" dated 1347 in Genoa. The policy is in the Italian language and appears in the form a maritime loan to avoid the canon (church) prohibition against usury. Policies were signed by individuals, either alone or in a group. They each wrote their name and the amount of risk they were willing to assume under the insurance proposal. That's where the term underwriter came from.

By this time, the practice of insuring cargo while being shipped was widespread throughout the maritime nations of Europe. Then in London, in 1688, the first insurance company was formed. It got its start at Lloyd's Coffee House, a place where merchants, ship-owners, and underwriters met to transact their business. Lloyd's grew into one of the first modern insurance companies, Lloyd's of London. Lloyd came up with the idea of insuring the cargoes by insuring them for a premium. The first premium paid was for £100 for a ships cargo. Within six months, this business proved so successful that he opened offices in London. He based it in a building near the docks, and named it Lloyds House. That was the start of Lloyds of London which today, has a reputation second to none.

In India, insurance has a deep-rooted history. It finds mention in the writings of Manu (*Manusmrithi*), Yagnavalkya (*Dharmasastra*) and Kautilya (*Arthasastra*). The writings talk in terms of pooling of resources that could be re-distributed in times of calamities such as fire, floods, epidemics and famine. This was probably a pre-cursor to modern day insurance. Ancient Indian history has preserved the earliest traces of insurance in the form of marine trade loans and carriers' contracts. Insurance in India has evolved over time heavily drawing from other countries, England in particular.

1818 saw the advent of life insurance business in India with the establishment of the Oriental Life Insurance Company in Calcutta. This Company however failed in 1834. In 1829, the Madras Equitable had begun transacting life insurance business in the Madras Presidency. 1870 saw the enactment of the British Insurance Act. In 1907, the Indian Mercantile Insurance Ltd, was set up. This was the first company to transact all classes of general insurance business. In 1914 The government of India established publishing returns of Insurance Companies in India. Specifically in shipping India has undergone wide changes and a considerable expansion and it became mandatory to legislate it for smooth working and development of Indian Marine Insurance.

In India the law of marine insurance has been put in a statutory from since 1963. Marine Insurance Act, 1963. The preamble to the Indian Act states that it is " an Act to codify the law relating to marine insurance." The canon of construction generally applicable to a codifying statute is well known: the language of the statute must be given its natural meaning, regard being had to the previous state of the law only in cases of doubt or ambiguity. [Bank of England v Vagliano Brothers, (1891) A.C. 107, 144 H.L. (per Lord Herschell)]

Maritime or marine insurance covers the loss of or damage to a ship or boat, as well as the loss or breakage of cargo over water, land or air. Maritime insurance is essential for any ship owner or cargo business**.** Each country typically have their own laws dealing with insurance matters however, marine insurance is peculiar in that by the very nature of international marine transit there are common factors governing marine insurance across the world, expressed as 'over the seabed and the ocean floor'

Admiralty Courts assume jurisdiction by virtue of the presence of a vessel being in its territorial jurisdiction irrespective of whether the vessel is national or not and/or whether registered in the specific country or not and wherever the residence or domicile or their owners may be. Some of the common primary aspects of marine insurance across the world are; Seaworthiness of a Vessel, Limitation of Ship owner's Liability, Personal injuries to passengers, Cargo Claims, Personal injuries to Seamen & Maintenance and cure, Maritime Liens and Mortgages, Salvage and Treasure Salvage, Marine Pollution, War Risks, Terrorism & Piracy.

Marine Insurance are contracts but despite of being a contract it does not apply the general principles of contract law.. Most of the law of marine insurance is in essence pure interpretation of the contract contained in the common form of marine policy.[(Section 22, English Act of 1906)]. The basic principle of a contract of insurance is that the indemnity recoverable from the insurer is the pecuniary loss suffered by the assured under the contract. Thus, as per the enactment, a contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.[Indian Marine Insurance Act, 1963, Section 3 (Section 1, English Act of 1906)].

The formal instrument embodying the contract of marine insurance is called " the policy"; and " the slip" or "covering note", is the informal memorandum that is drawn up when the contract is entered into. The subject- matter insured and the consideration for the insurance are respectively known as " the interest insured" and "the premium". The person who is indemnified is "the assured" and the other party is styled "the insurer" or "the underwriter" so called because he subscribes or underwrites the policy.

"Loss" includes damage or detriment as well as actual loss of property arising from maritime perils.

In Richards v Forest Land, Timber and Railway Co. Ltd {[1941] 3 All ER 62, HL, (per Lord Wright)} it was observed,

" The Act is merely dealing with a particular branch of the law of contracts- namely, those of marine insurance. Subject to various imperative provisions or prohibitions and general rules of the common law, the parties are free to make their own contracts and to exclude or vary the statutory terms. The object both of the legislature and of the courts has been to give effect to the idea of indemnity, which is the basic principle of insurance, and to apply it to the diverse complications of fact and law in respect of which it has to operate. In this way, the law merchant has solved or sought to solve, the manifold problems which have been presented by insurances of maritime adventures."

A marine policy is only a promise of indemnity giving a right of action for unliquidated damages in case of non-payment. However, a contract of marine insurance must be embodied in a policy. Section 24 of the Indian Act[4] enacts as follows:

A contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

By the Indian Stamp Act, 1899, Section 7(1), no contract for sea-insurance shall be valid unless the same is expressed in a sea policy. Accordingly, where the appellant had sued the respondent for damages for breach of a contract to issue policies of marine insurance upon goods to be shipped by it, it was held that the contract alleged was a contract of sea insurance and, not being expressed in a policy, was unenforceable.[Surajmull Nagoremull v. Triton Insurance Co. Ltd., (1924) L.R. 52 I.A. 126, 129 (per Lord Sumner)].

A marine policy, must also specify certain essential matters, and section 25 of the Indian Act[(Section 23, English Act of 1906)] enumerates them as follows:

1. The name of the assured, or of some person who effects the insurance on his behalf:
2. The subject matter insured and the risk insured against;
3. The voyage, or period of time, or both, as the case may be, covered by the insurance;
4. The sum or sums insured;
5. The name or names of the insurers.

A marine policy must be signed by or on behalf of the insurer (Section 26 0f the Indian Act), and such policy may either be a "voyage" policy or a "time" policy or a combination of both.[Where the contract is to insure the subject-matter "at and from", or from one place to another or others, the policy is called a "voyage policy", and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time policy": Indian Marine Insurance Act, 1963, Section 27 (= Section 25, English Act of 1906)].

A contract of marine insurance is uberrimae fidie or, as enumerated in Section 19 of the Indian Marine Insurance Act, ' a contract based upon the utmost good faith.'[49] The notion of utmost good faith, the cardinal principle governing the marine insurance contract, is a well-established doctrine derived from the celebrated case of Cater v. Boehm[50], decided long before the inception of the Act. With the codification of the law, the principle found expression in Sections 19-22: In section 19 is presented the general duty to observe the utmost good faith, with the following sections introducing particular aspects of the doctrine, namely, the duty of the assured (section 20) and the broker (section 21) to disclosed material circumstances, and to provide making representations (section 22).[Hodges, Susan, CASES AND MATERIALS ON MARINE INSURANCE LAW, Cavendish Publishing Limited, p. 213.]

Thus, the obligations to disclose and to abstain from misrepresentations constitute the most significant manifestations of the duty to observe utmost good faith. The only remedy available to the innocent party in case of any such breach is avoidance ab initio, that is, avoidance from the very beginning, even though the breach may have occurred during the course of the contract. Section 19, by the use of the word 'either', has made it amply clear that the duty to observe utmost good faith operates on a bilateral basis. There is no doubt that the obligation to disclose material facts is a mutual one imposing reciprocal duties on insurer and insured. In case of marine insurance contracts, section 17 (of the English Act) in effect so provides [Banque Financiere de la cite SA v. Westgate Insurance Co. Ltd., [1987] 1 Lloyd's Rep 69; Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain: Cater v. Boehm, (1766) 3 Burr 1905 (per Lord Mansfield)].

In basic term there are three main type of Marine Insurance, P & I Club, Hull and Machinery and Cargo. Hull and machinery insurance is to protect the ship owner's investment in the ship. It is basically a property insurance which covers the ship itself, the machinery and equipment. The owner will be protected for losses caused by loss of or damage to the ship and its equipment. Furthermore, the insurance covers some liabilities, normally collision liability with another ship (known as RDC – "Running Down Clause")and sometimes also liability for colliding with other objects than another ship (known as FFO - "Fixed and Floating Objects). Since the conditions vary, it is recommended that the Master finds out how the insurance is placed for the ship. Very often these liabilities are handled by the owner's P&I club. The third part of the insurance is cover for salvage and general average contributions.

Typical hull and machinery claims include: Total loss of the ship, Damage to the ship, engines and equipment, Explosions and fires, Groundings – damage to the ship, salvage of the ship and possible contribution in general average, Collisions – damage sustained to the ship and sometimes also liability towards the other ship (RDC) and Striking other objects – damage inflicted to own ship and sometimes also liability towards the owners of the other object (FFO). The hull and machinery cover will include a "Trading Warranty", clause stipulating where the vessel may trade. This has nothing to do with any trading agreement in any charter party. It is important to check these trading limits as a breach may jeopardize the cover. Life saving is normally accepted even if trading limits are breached.

Hull and machinery cover is often arranged and placed in the insurance market by a professional insurance broker. It is quite common that the insurance cover is spread to many insurers in various countries. The insurers in the hull and machinery market are either companies or syndicates. The company or the syndicate will have an underwriter who signs the policy or the slip produced by the broker for his share of the cover. The biggest single market for marine insurance is Lloyd's in London. Lloyd's consists of a number of syndicates writing shares on insurance covers. There are many cover which Hull and Machinery insurance covers few of which are

1. **War Insurance**. The Hull and Machinery, and most other marine insurance covers, exclude any loss, damage or liability due to war or warlike situations (i.e. civil commotion, terrorism). The war cover has separate trading limits (called "Listed Areas") where trading may be restricted or subject to additional premium.
2. **Loss of Hire Insurance**. To protect a loss of a charter hire or freight income many owners elect to purchase a loss of hire cover Depending on the conditions, the cover may include slow steaming as a result of a physical damage to the ship. The cover may also include time lost due to deviation to a repair yard. Correct and accurate log entries are therefore important in such situations.

Cargo Insurance is that where the owners of cargo, which is to be transported by sea, usually cover their financial exposure against loss of, or damage to cargo for declared value. Cargo insurance is provided byte Syndicates at Lloyd's but more commonly by professional insurance companies around the world. They keep records of their losses and use this information to help them calculate premiums for insurance of certain types of cargo in varying kinds of marine transportation, i.e. in bulk, packaged, containerized, refrigerated, chilled, in tanks etc. The cargo insurer will compensate the owner of the cargo for any loss or damage to the cargo Thereafter they may claim compensation for their loss from the carriers of the cargo.

P&I stand for Protection and Indemnity. P&I is insurance in respect of third party liabilities and expenses arising from owning ships or operating ships as principals. It is a ship owner's insurance cover for legal liabilities to third parties. P&I insurance are usually arranged by entering the ship in a mutual insurance association, usually referred to as a "club". Ship-owners are members of such clubs. Legal liability is decided in accordance with the laws of the country where an accident takes place. The P&I insurance cover for contractual liability is agreed at the time the owner requests insurance cover from the club and is usually in accordance with the owner's responsibility under crew contracts or special terms relating to the trading pattern of the vessel.

Both P&I Clubs and conventional marine insurers are governed by the provisions of the Marine Insurance Act 1906. Marine insurers provide cover for known quantifiable risks, mainly Hull & Machinery insurance for ship-owners, and Cargo Insurance for cargo owners. By contrast, P&I Clubs provide insurance cover for broader indeterminate risks, such as third party liabilities that marine insurers are loath to cover. Third party risks include a carrier's liability to a cargo-owner for damage to cargo, a ship's liability after a collision, environmental pollution and war risk insurance; (although some marine insurers are also prepared to cover war risks).

The development of P& I Club was considerably faster. Eventually P& I Club were consisting remote descendants of the many small hull insurance. Clubs that were formed by British ship-owners in the 18th century. These were set up by groups of ship-owners, drawn in each case from a small geographical area. Until the early part of the 19th Century, the insurance industry had not felt it appropriate or necessary to offer any additional insurance to cover risks other than the cargo on board and the ship itself.

However, the situation was changed by a Judgment given by the English Court in 1836 relating to a collision case called 'De Vaux v Salvador'. The Judges ruled in this case that an ordinary policy against perils of the sea does not cover damage done to another vessel by collision. That exposed ship-owners insured under the traditional hull policies to enormous potential liabilities for which they were uninsured. The ship owners could not bear such new risk therefore they approached their Hull underwriters and requested a amendment to cover the new risk. However the ship owners will still not satisfied with their position and thus they wanted to seek more comprehensive 'protection' from somewhere else to ensure that their business could be developed in a healthy way. This is the most obvious factor leading to the creation of the early protecting clubs.

In the mean time, other liabilities toward third parties were also more and more frequently imposed upon ship-owners. For example, after the application of Lord Campbell's Act of 1846, the injured crew members and the dependants of crew members who were killed were entitled to seek compensation from their employers. And also, the Harbour, Docks and Piers Clauses Act of 1947 allowed harbour authorities to recover the damage done to port property by a ship from the ship-owners, whether there was any negligence or not, etc.

In order to provide the ship-owners with a solution to alleviate those new burdens, Mr. Peter Tindall, an insurance broker and ex-manager of hull insurance clubs, set up the first 'Protection Club', the Ship-owners' Mutual Protection Society in 1855. The framework and system of existing hull clubs were adopted and the risks covered by that first 'Protection Club' were limited to liabilities for loss of life, personal injury, property damage and the risk of running down other vessels which is not covered by the ordinary hull policies. At the time when protection club was firstly introduced to shipping industry, cargo claim were still not a serious burden for the ship-owners. Ship-owners were always able to take advantage of an unusual anomaly of the law that existed to avoid being responsible for any cargo damage.

However, again, the position was changed by a case called The Westerhope in 1870. In this case, the vessel was carrying a cargo bound for Cape Town but proceeded instead first to Port Elizabeth and then was lost off the coast. The court decided that the ship-owner were not protected by the exceptions in the contract of carriage due to committing a deviation and held that they were liable for full value of the cargo. Following the incident, the ship-owners very nervous about the new risk and thus Mr. Mitcalfe who was an underwriter on the request of ship owner formed a new club in 1874 providing insurance to these potential cargo liabilities, called 'Indemnity Club'.

The functions of 'Indemnity Club' and 'Protection Club' are similar in nature and the only thing different is the scope of risks covered. Thus there was no issue in combining the two clubs and save cost and also improve claim efficiency. Consequently, the first 'P&I Club' was formed by amalgamation of an 'Indemnity Club' and a 'Protection Club' in 1886, providing a very comprehensive cover on ship-owners' liability.

The P&I cover may include liability for collisions (“RDC”), for example when the member’s ship is in collision with another ship, or when the entered ship strikes a fixed object, i.e. a quay, dock or buoy (“FFO”).However, collision and striking liabilities are often included in the ship’s hull and machinery cover, for instance under the Norwegian Insurance Plan. Therefore, it is important for a Master to ascertain whether his vessel’s collision insurance (collision between ships) and striking insurance (i.e. when a ship strikes a fixed or floating object which is not another ship) is covered under his P&I policy or under his hull and machinery policy. To be safe, it is always wise for a Master to inform the P&I club, or the club correspondent, if his vessel is in collision with another vessel or a fixed object.

P&I insurance covers an owner’s liability for all deaths, personal injuries and illnesses which occur on board, including death or injury to crew, passengers, stevedores, pilots and visitors to the ship

P&I insurance also cover a ship owner’s liability to pay for the costs of repatriating crew members who become sick or are injured onboard. The insurance also covers the crew’s hospital bills and costs offending replacement personnel to the ship if necessary.

P&I insurance also covers the owner’s liability for loss of crew belongings in cases of shipwreck or fire on board. The cover only applies to items which are deemed to be reasonable for any crewmember to have with him on board. A crew member traveling with unusually expensive items, such as laptop computers, gold watches etc should make sure that he has such items separately insured.

One of the major functions of Protection and Indemnity insurance is to cover a ship-owner or the charterer of a ship, for liability for loss of, or damage to, cargo if there has been a breach of the contract of carriage. This breach of contract usually means that something has happened to the cargo while it was on board the ship or being loaded or discharged, and for which the owner or charterer can beheld responsible, i.e. shortage or damage to the cargo. The P&I club will usually take over the handling of such claims on behalf of the assured.

Other risks covered include liability for stowaways, liability for oil pollution and other types of pollution and legal liability for wreck removal if the ship sinks and is blocking free navigation for other vessels. In short, P&I insurance is a very comprehensive type of insurance cover which makes it easier for a ship-owner or charterer to trade in international shipping transportation. P&I is as important to a prudent ship-owner as his Hull and Machinery insurance cover. Passenger claims are also included in P& I Clubs.

Mutual P& I insurance mean that the members of the club are its owners and share in its results. Therefore premiums are also mutual and estimated for a given policy year and finally decided when the year is closed which is minimum (but also normally)three years later. Premiums are therefore referred to as” calls”. An Estimated Total Call is calculated for any given ship. Calls may be charged all in advance, the full Estimated Total Call or divided into Advance and Supplementary Calls. The benefit of charging Estimated Total Call the first policy year is that the member may be able to fully budget his costs. Before the policy year is finally closed, the club can decide to cover the claims and to charge an Additional Supplementary Call. There as on why accounts are kept open is that cases continue to develop and could over time become more, or less, expensive than initially anticipated.

The marine insurance has also certain risk involved which is covered to some extent by insurance like Barratry of Master Officers or Crew it means that the master, officers or crew of a vessel may commit an unlawful act that results in a loss to the owner of the vessel. Smuggling would be an example of barratry, Collision A risk for vessels at sea is that two or more vessels may collide. This can happen in adverse weather conditions, such as fog, and in busy shipping lanes, Deliberate Damage by Government Agency in the event of an environmental hazard at sea, such as an oil spill.

P&I is a special type of marine insurance. It is a liability insurance that a prudent ship owner, manager or charterer needs, particularly if the ship is employed in international trade. P&I insurance cover a ship-owner or charterer for liabilities and losses in direct connection with the operation of the ship.

The purpose of marine insurance has been to enable the ship owner and the buyer and seller of goods to operate their respective business while relieving themselves, at least partly, of the burdensome financial consequences of their property’s being lost or damaged as a result of the various risks of the high seas. Marine insurance is quite an old insurance term which is meant to cover the loss pertaining to shipment; ship etc. Marine insurance typically fulfills all your overseas transportation requirements and give you complete peace of mind.

BRUS CHAMBERS
ADVOCATES & SOLICITORS

8, Rajabahadur Mansion, 3rd Floor, Ambalal Doshi Marg, Fort, Mumbai 400001, India.
Contact Partner: Shrikant Hathi
Mob: +91-976-9946865
Off: +91-22-22659969
Email: contact@bruschambers.com
Web: bruschambers.com