Development Of Laws Relating To Marine Insurance In India

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INTRODUCTION

Historical Development

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.

Contrary to popular belief, Lloyds' of London was not the first group of people to offer insurance for maritime commerce. The first form of marine insurance dates back to the year 3000 BC when Chinese merchants dispersed their shipments amongst several vessels so as to abridge the possibility of damage to the products. 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.

Another form of early insurance was the 'general average'. During cargo shipments in 916 BC, a merchant would accompany his cargo to see that it was not jettisoned, or voluntarily thrown overboard by the crewmen in times of a storm or sinkage. To guard against this mutual interest of safety and quarreling amongst merchants, the Rhodians initiated the 'general average', which ideally meant that a person would be compensated through pro rata contributions of other merchants if their goods were jettisoned during shipment.

From the 11th century to 18th century, a few additional breakthroughs occurred in marine insurance. In 1132, the Danish began to reimburse those who experienced loss at sea. In 1255, 'insurance premiums' were used for the first time as the Merchant State of Venice pooled these premiums to indemnify loss due to piratry, spoilage, or pillage. The first marine insurance policy was introduced in 1384 in an attempt to cover bales of fabric traveling to Savona from Pisa, Italy. Within the next century, merchants from Lombard began the first insurance practice in London. Finally, in 1688, Lloyd's of London, named after Edward Lloyd, began the risky business of insurance underwriting. From a Coffee house in London, it has now grown to become the largest marine insurance underwriters in the world. [1]

The law relating to marine insurance was codified in England by the Marine Insurance Act of 1906, and this Act came into force on January 1, 1907. This was proposed and initiated in an attempt to clarify and set forth the regulations and policy variables associated with marine insurance agreements. This enactment purported to codify only those principles of the law which related exclusively to marine insurance and expressly enacted that the rules of the common law, including the law merchant, save in so far as they were inconsistent with the express provisions of the Act, were to continue to apply to contracts of marine insurance.

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[1] http://www.acs.ucalgary.ca/MGMT/inrm/industry/marine.htm.

Development of Indian law

Since independence Indian shipping had undergone a considerable expansion, and it became mandatory for an Indian legislation consistent with Indian conditions, for the smooth development of Indian marine insurance. Prior to legislation, questions turning on this branch of law had to be decided by the general law of contract and the English decisions based on the common law rules of contract.

The Indian enactment is a substantial reproduction of its English counterpart, following its plan closely and deviating from it at some places, only unnecessarily.

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.[2]

But, as in the case of its English counterpart, the Indian Act embodies only some and not all of the legal principles and rules of marine insurance, and its language is so extremely concise and general that its full import and meaning can scarcely be understood without referring to the existing law which it was intended to express or to the decided cases from which that law was evolved.[3]

In India the law of marine insurance has been put in a statutory form since 1963.

CONTRACT OF MARINE INSURANCE

Most of the law of marine insurance is in essence pure interpretation of the contract contained in the common form of marine policy.[4] 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.[5]

A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or any land risk that may be incidental to any sea voyage.

Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as

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[2] Bank of England v. Vagliano Brothers, (1891) A.C. 107, 144 H.L. (per Lord Herschell).

[3] Cf. Rickards v. Porestal, (1942) A.C. 50, 79 H.L. (per Lord Wright).

[4] Kulukundis v. Norwich Union Fire Insurance Society, (1937) 1 K.B. 1, 34 C.A. (per Scott L.J.).

[5] Indian Marine Insurance Act, 1963, Section 3 (= Section 1, English Act of 1906).

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defined, by the Act.[6]

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.

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.[7]

The phrase "Perils of the sea" refers to dangers that are particularly incident to the sea or navigation thereof.[8] It refers only to fortuitous accidents or casualties of the sea or caused by the sea. It was not necessary that there must have been strong winds and/or waves at the time of the accident to constitute "peril of the seas".[9] There must be some casualty, something that could not be foreseen, as one of the necessary accidents of adventure.[10]

A "marine adventure"[11] includes any adventure where- a. Any insurable property (that is to say, any ship, goods[12] or other movables[13]) is exposed to maritime perils; b. The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils; c. Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of

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[6] Indian Marine Insurance Act, 1963, Section 4 (Section 2, English Act of 1906).

[7] Indian Marine Insurance Act, 1963, Section 2(e) (Section 3(2), English Act of 1906); Thames v. Hamilton, (1887) 12 App. Cas. 484, 498 H.L. (per Lord Herschell).

[8] Thus, rain is not a peril of the sea, but ice obstructions and shoals form some of the vicissitudes of navigating the seas: Canada v. Union Marine, (1941) A.C. 55, 64 P.C. (per Lord Wright).

[9] The Xantho, (1887) 12 App. Cas. 503, 508-91; Hamilton v. Pandorf (1887) 12 App. Cas. 518, 523 H.L. (per Lord Herschell).

[10] Stewart v. New Zealand, (1912) 16 C.W.N. 991, 996 (per Chaudhuri J.).

[11] Indian Marine Insurance Act, 1963, Section 2(d) (= Section 3(2), English Act of 1906).

[12] "Goods" means goods in the nature of merchandise, but does not include personal effects or provisions or stores for use on board a ship; Rule 17 of the Schedule to Indian Marine Insurance Act, 1963.

[13] "Movable" means any movable tangible property, other than a ship or goods, and includes money, valuable securities and other documents; Indian Marine Insurance Act, 1963, Section 2(f).

indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.[14]

In principle marine insurance is a contract of indemnity, however, in practice it by no means results always in a complete indemnity.[15]

In Richards v. Forest Land, Timber and Railways Co. Ltd.,[16]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."

Thus, whilst the overriding principle of insurance is that of indemnification for losses sustained, the courts accept the fact that, because there must be an element of freedom for the parties to the insurance to contract on whatever terms they deem fit, in many instances, the indemnity is unlikely to be perfect.[17] This is largely attributable to the fact that both the common law and the enactment[18]endorse the fact that the value fixed by the police is conclusive of the insurable value of the subject matter insured. This allows the parties the freedom to set the value of the subject matter insured at whatever figure they so wish. Provided that any over valuation is not so excessive as to offend the cardinal principle of the duty to observe utmost good faith, the law of non disclosure of a material fact, and of misrepresentation and the rule against wager, the courts are obliged to uphold the value fixed in the policy as conclusive. [19]

The most general rule of construction of a marine policy is that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it; and these terms are to be understood in their plain, ordinary and popular sense, unless they have by the known usage of trade acquired a peculiar meaning distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate

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[14] Castellain v Preston (1883) 11 QBD 380, CA, (per Brett LJ).

[15] British & Foreign Marine Insurance Co., (1921) 1 A.C. 188, 214 H.L. (per Lord Sumner); Maurice v. Goldsbrough, (1939) A.C. 452, 466-7 P.C. (per Lord Wright).

[16] [1941] 3 All ER 62, HL, (per Lord Wright).

[17] A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify: Irving v. Manning, (1847) 1 HLC 287, (per Patteson, J.).

[18] Indian Marine Insurance Act, 1963, Section 29(3) (= Section 27(3), English Act of 1906).

[19] Hodges, Susan, CASES AND MATERIALS ON MARINE INSURANCE LAW, Cavendish Publishing Limited, p. 2.

intention of the parties, be understood in some other special and peculiar sense.[20]

If there is any discrepancy between the printed clause in a marine policy and the stamped or written clause, the latter, on ordinary principles of construction, will prevail, since the stamped or written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, whereas the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.[21]

REQUIREMENTS OF TAKING AN INSURANCE POLICY

Apart from the foremost requirement of entering into a contract of insurance it is essential that the contract contains an insurable interest in the subject matter, which has a value and is not a contract by way of wagering.[22] Also the policy must be in compliance with the provisions mentioned under sections 24 to 34 of the Indian Act[23]and the Rules mentioned in the Schedule.

INSURABLE INTEREST[24]

Marine Insurance Act, declares void all marine insurance polices where insurable interest does not apply at time of loss. In the Act, Insurable interest is defined as-

Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure. In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or damage thereto, or by the detention thereof, or may incur liability in respect thereof. [25]

The essence of "interest", is that-

a) There should be a physical object exposed to sea perils, and

b) The assured should stand in some relationship, recognized by law, to that object, in consequence

[20] Robertson v. French, (1803) 4 East 130, 135 (per Lord Ellenborough C.J.); Hart v. Standard Marine Insurance Co., (1889) 22 Q.B.D. 499, 501 (per Brown L.J.); Birrel v. Dryer, (1884) 9 App. Cas. 345, 353 H.L. (per Lord Watson).

[21] Robertson v. French, (1803) 4 East 130, 135 (per Lord Ellenborough C.J.); Canadian v. Canadian, (1947) A.C. 46, 57 P.C. (per Lord Wright); Renton v. Palmyra Trading Corporation, (1957) A.C. 149, 168 H.L. (per Lord Mortos).

[22] Indian Marine Insurance Act, 1963, Section 6 (= Section 4, English Act of 1906).

[23] (= Section 22 to 32, English Act of 1906).
[24]http://www.staff.ul.ie/greenfordb/claims/Lecture 17 Insurable Interset.ppt.

[25] Indian Marine Insurance Act, 1963, Section7 (= Section 5, English Act of 1906).

of which he either benefits by its preservation, or is prejudiced by its loss, or mishap thereto.[26]

c) The insured must bear some relationship to the insured thing whereby she stands to benefit by its safety or be prejudiced by its loss or by incurring liability. That is to say, insurable interest exists where insured stands in a legal relationship to the property or otherwise stands to suffer loss as a result of its destruction.[27]

The Indian Act does not profess to give an exhaustive definition of "insurable interest". Nor is it possible to define the expression "insurable interest" exhaustively, but the general rule is clear that to constitute "interest" insurable against a peril, there must be an interest such that the peril would, by its proximate effect, cause damage to the assured.[28]

Attachment of Interest

Section 8 of the Indian Act of 1963[29], states in the following words when "interest" must attach: -

1. The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:

Provided that where the subject-matter is insured "lost or not lost", the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

2. Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss. The main problem with insurable interest concerns the time at which the interest must attach; as a general rule (given under section 8, above), the assured must, at the time of loss, have an insurable interest in the subject matter insured. In contracts of international sale of goods, it is not always easy to ascertain at any given time whether the property has in fact passed from seller to buyer.

The existence of "interest" is a condition to effective insurance. It is often a difficult question to determine the exact moment when under a contract of sale, the risk passes from seller to buyer. Prima facie, the risk passes when the property passes; but under the terms of the contract they may pass at different times. When the buyer insures goods, the question is whether, on the true construction of the contract, the risk has passed to him at the time the loss occurs.

Thus, the law recognizes certain exceptions to the general rule that the assured must have an insurable interest at the time of the loss. First, if the policy offers cover on a 'lost or not lost' basis, then the assured

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[26] Chalmers on Marine Insurance Act, 1906, 5th Ed., p. 12.

[27] Lucena v. Crauford, (1806) 2 Bos. & P. (N. R.) 269, 321 H.L. (per Lord Eldon); Macaura v. Northern Assurance, (1925) A.C. 619, 627 H.L. (per Lord Buckmaster).

[28] Seagrave v. Union Marine, (1866) L.R. 1 C.P. 305, 320 (per Willes J.).

[29] Section 6 of the English Act.

is, according to the proviso to section 8(1)[30] permitted to recover under the policy even though the loss was sustained before the insurance was effected. This exception operates to protect an assured who might have purchased goods without knowing whether or not they have already been lost at sea. Secondly, an assignee of a policy can acquire an interest in the subject matter insured even though the policy was assigned to him only after the loss, provided of course, that the assignor himself had, at the time of assignment, an interest to assign.[31]

Moreover, a defeasible or contingent interest (section 9 of the 1963 Act), partial interest (section 10), Bottomry[32] (section 12), masters and seamen's wages[33] (section 13), Advance freight[34] (section 14) and charges of interest[35] are all cases of insurable interest.

With reference to assignment of interest, Section 17 of the Indian Act[36] provides: -

"Where the assured assigns or otherwise parts with his interest in the subject matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not affect a transmission of interest by operation of law."

Where a cargo of tallow was insured "warehouse to warehouse" by purchasers and the cargo was delivered short for transit and the missing quantity was never in transit and never became the property of the purchasers, they were held to have no insurable interest and the underwriters were held not liable for the missing quantity.[37]

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[30] Proviso to Section 6(1) of the English Act.

[31] Hodges, Susan, CASES AND MATERIALS ON MARINE INSURANCE LAW, Cavendish Publishing Limited, p. 39.

[32] The lender of money on bottomry or respondentia has an insurable interest in respect of the loan.

[33] The master or any member of the crew of a ship has an insurable interest in respect of his wages.

[34] In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.

[35] The assured has an insurable interest in the charges of any insurance that he may affect.

[36] Section 15 of the English Act.

[37] Halsbury's Laws of England, 3rd Ed., Vol. 22, p. 100 f.n. (f); Plata v. Lancashire Hamburg-Amerika Linier, (1957) 2 Lloyds Rep. 347.

VALUATION OF INSURANCE

The insurable value of the subject matter insured is relevant in determining the measure of indemnity in the case of an unvalued policy, and in the case of a valued policy when the valuation is not conclusive or has to be apportioned.[38]

A clear delimitation of insurable value is necessary

a) to fix the measure of indemnity in the case of an unvalued policy,

b) to fix the measure of indemnity in the few cases in which a valued policy can be opened up, and

c) to furnish an approximate standard for fixing the value in a valued policy.

According to modern practice, unvalued policies are very rare, being practically confined to goods and in a few instances to freights payable on arrival. Other interests are almost invariably insured by valued policies. As regards goods, a voyage policy on goods is an insurance of the adventure, as well as an insurance on the goods themselves.[39]

OTHER POLICY REQUIREMENTS

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[40] 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.[41]

A marine policy, must also specify certain essential matters, and section 25 of the Indian Act[42] enumerates them as follows:

[38] Halsbury's Laws of England, 3rd Ed., Vol. 22, p. 127.

[39] British & Foreign Marine Insurance Co. v. Sanday, (1916) 1 A.C. 650, 672 H.L. (per Lord Wrenbury).

[40] Section 22, English Act of 1906

[41] Surajmull Nagoremull v. Triton Insurance Co. Ltd., (1924) L.R. 52 I.A. 126, 129 (per Lord Sumner).

[42] Section 23, English Act of 1906

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.[43]

As regards the designation of subject matter, Section 28 of the Indian Act[44]provides:

The subject-matter insured must be designated in a marine policy with reasonable certainty. The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy. Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured. Marine policies may either be valued or unvalued/ open, but must not be "doubly insured", that is to say that there must not be two or more policies effected by or on behalf of the assured on the same adventure, and the sum insured in such a case should not exceed the indemnity allowed by this Act.

This is applicable in case of two or more insurance policies on the same subject- matter and by the same person. It does not apply when different persons insure the same subject- matter in respect of different rights.[45]

Over insurance includes 'ppi policies'.[46] This is because, if both a marine policy and a ppi policy are effected upon maritime property and, in the event of a loss, the insurer chooses to 'honour' the ppi policy, the indemnity, when added up under both policies, would amount to over insurance.[47]Where the assured is over- insured by double insurance,

a) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the

[43] 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).

[44] Section 26, English Act of 1906

[45] The reason for that is obvious enough. Where different persons insure the same property in respect of their rights they may be divided into two classes. It may be that the interest of the two between them makes up the whole property: North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co., (1877) 5 Ch D 569, CA (per Mellish LJ).

[46] A 'ppi' policy (policy proof of interest), is deemed to be a gaming or wagering contract by the Act, and hence void.

[47] Thames and Mersey Marine Insurance Co. Ltd. v. 'Gunford' Ship Co. Ltd. [1911] A.C. 529, H.L.

indemnity allowed by this Act;

b) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;

c) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;

d) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.[48]

A policy may be limited to covering only total losses. Alternately, the policy may indicate that it includes all types of partial loss, called "average", or it may distinguish between different types of averages, covering "general average", which is average caused deliberately to save all the interests in the voyage from total loss, but excluding particular average, which is average caused accidentally by the "perils of the seas".

The word "average", whose origin is discussed towards the beginning of this paper, may be taken to mean material damage or pecuniary loss sustained in the course of a marine adventure, and the character of the loss may either be particular or general. General Average is a partial loss, voluntarily and reasonably incurred in time of peril for the safety of the joint adventure; which is contributed to by the owners of all property saved, e.g., ship, freight and cargo. It is the result of a voluntary act, and the loss is subject to contribution by the owners of all the property saved by the general average act. These interests are usually the ship, the freight in the course of being earned, and the cargo respectively. The liability to contribute to general average arises primarily out of the carriage of goods by sea, and is, in England, a common law liability to which the owners of the property are subject, whether they are insured or not.

Further, the policy may be in the form of the Rules mentioned in the Schedule to the Act.

DUTIES OF THE PARTIES

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).[51]

[48] Indian Marine Insurance Act, 1963, Section34 (2) (= Section 32 (2), English Act of 1906).

[49] LIC v. Ajit Gangadhar Shanbhay, AIR 1997 Kant. 157.

[50] (1766) 3 Burr 1905.

[51] 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.

Reciprocal duty

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.[52]

Moreover, the duty of good faith is an independent and an overriding duty, with the ensuing sections on disclosure and representations providing mere illustrations of that duty. Also, section 19 has been construed as having imposed on the parties a continuing duty to observe utmost good faith.[53]

Scope of insurer’s duty of disclosure

The duty falling upon the insurer must at least extend to disclosing all facts known which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he sees cover with that insurer.[54] The extent of the insurer’s duty of disclosure in that sense is pre- contractual.

Scope of assured’s post- contractual duty of disclosure

Even though there have been suggestions that like the ensuing sections, the assured’s liability under section 19 would also not be beyond the formation of the contract. But, according to Hist J in the ‘Litsion Pride case’[55], an assured is undoubtedly under a continuing duty to disclose relevant information even after the conclusion of the contract. This case also drew out two limbs of the duty, namely the duty to disclose relevant information, and the duty not to make fraudulent claims.[56]

Assured’s pre- contractual duty of disclosure

Section 20 has imposed a strict and absolute obligation upon the assured to disclose to the insurer every material circumstance[57] ‘before the contract is concluded’.[58]This means that it is for the assured to take

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[52] 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).

[53] Container Transport International Inc and Reliance Group Inc v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. [1984] 1 Lloyd’s Rep 476, C.A.

[54] Banque Financiere de la cite SA v. Westgate Insurance Co. Ltd., [1987] 1 Lloyd’s Rep 69.

[55] Black King Shipping Corporation v. Massie, ‘Litsion Pride’, [1985] 1 Lloyd’s Rep 437.

[56] A fraudulent claim is one that is ‘willfully false in any substantial respect’: Goulstone v. Royal Insurance Company (1858) 1 F&F 276, 279.

[57] Every circumstance is material which would influence the judgement of a prudent owner in fixing the premiums, or determining whether he will take the risk: Pan Atlantic Insurance Co. Ltd. V. Pine Top Insurance co. Ltd., [1994] 2 Lloyd’s Rep 427, HL.

the initiative to reveal to his insurer all material circumstances, and not for the insurer to inquire. Under this section, mere non-disclosure is sufficient to constitute breach, and the presence of mens rea is inconsequential.

Another duty imposed on the assured under section 22 is that every material representation made by him must be true, otherwise the insurer may avoid the contract.

RIGHTS OF INSURER ON PAYMENT

The Marine Insurance Act provides for three rights to an insurer, namely, the right of subrogation, the right of contribution and the right of under insurance.

The right of subrogation[59]is a necessary incident of a contract of indemnity, and, speaking broadly, the insurer in the absence of special contract, must exercise all remedies arising from subrogation in the name of the assured.[60]An underwriter is entitled only to the rights of the assured in respect of the subject matter insured, in so far as he has indemnified the assured.[61]

As a contribution among insurers, Section 80 of the Act enacts: -

1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

As per Halsbury's Laws of England, a condition must be satisfied before a contribution can be said to arise. The condition is that: " Each policy must be in force at the time of the loss. There is no contribution if one of the policies has already become void or the risk under it has not yet attached; the insurer from

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[58] Duty under section 20 comes to an end on the termination of the contract. However, duty under section 19 exists even after its termination.

[59] Subrogation is a process in insurance law whereby an insurer, having indemnified an assured, has transferred to himself all the rights and remedies of the assured with respect to the subject matter as from time of the casualty. However, those rights and remedies brought about by way of subrogation, may only be acted upon in the name of the assured who has been indemnified: Esso Petroleum Co. Ltd. V. Hall Russell and Co. [1988] 3 WLR 730, HL (per Lord Jauncey).

[60] Simpson v. Thomson, (1877) 3 App. Cas. 279, 293 (per Lord Blackburn); "The general rule of law is that where there is a contract of indemnity, and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back: Burnard v. Rodocanachi (1882) 7 App. Cas. 333, HL (per lord Blackburn).

[61] A.G. v. Glen Line, (1930) 37 Ll. L.R. 55 H.L.; Yorkshire Insurance Co. v. Nishet Shipping Co., (1962) 2 Q.B. 330.

whom contribution is claimed can repudiate liability under his policy on the ground that the assured has broken a condition."[62]

Under section 81 of the Act, the insurer is not liable to the assured for any sum in excess of the amount actually insured, and thus in a case of under insurance it is the assured who himself will be the insurer for the balance amount.

CONCLUSION

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. Thus, in other words, marine insurance adds the necessary element of financial security so that the risk of an accident occurring during the transport is not an inhibiting factor in the conduct of international trade. The importance of marine insurance, both to assureds, in terms of the security it provides and its cost element in the overall economics of running a ship or transporting goods, and to countries, particularly developing countries, in its impact on their balance of payments position, cannot be overemphasized.

It is well known that in India, until the coming into operation of the Indian Act of 1963, the courts used to follow the principles of English law and decisions based on such principles as well as the provisions of the English Act, viz. the Marine Insurance Act, 1906. The Indian law is a direct take- off from its English counter part, and so, whenever it is not self evident, case law spanning over two centuries is to be looked into to arrive at the true position. Moreover, the Marine Insurance Act itself being a codification of previous case law, an appreciation of past authorities is not only an essential requirement to the understanding of the legal concepts generally, but also of paramount importance when wishing to gain an insight into the very constitution of the sections within the Act.

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[62] Eagle Star Insurance Co. v. Provincial Insurance plc, [1993] 2 Lloyd's Rep 143, PC.