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MARINE INSURANCE POLICIES ON RATIONALE BEHIND EXCLUSIONS - AN CONCEPTUAL ANALYSIS

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ABSTRACT

The equilibrium concept must be applied across jurisdictions; each country's institutions are not just an internal equilibrium outcome, but institutions in different countries also affect each other as they evolve over time. This is particularly the case for institutions in international market, in which the parties to a dispute may often inhabit different jurisdictions, and in which inter-jurisdictional competition may constrain individual governments' ability to regulate or shape the governance institutions within their borders. As the subject matter of this study is marine insurance policies and exclusions, it is inevitable to first understand the origin of the institution prevalent in the ancient time to the system that followed and developed over the years to be presently called as marine insurance market.

KEYWORDS: *Marine Insurance Policies, Internal Equilibrium And Jurisdictional Competition*

INTRODUCTION

Recent literature has emphasized the importance of the organization and governance of markets. Participants in many market transactions face a fundamental problem of exchange due to the possibility of cheating, and markets can function only when these enforcement problems are overcome, either informally by the parties themselves, or by the formal/legal institution of the state. In order for governance institutions (whether formal or informal) to be effective in preventing opportunism, much depends on who has the expertise necessary to detect cheating, and how that information is used. To enforce honest trade informally using social norms, for example, market participants must be able to identify and punish those who have broken prevailing norms of behaviour, and have incentives to punish them. Equally, however, in order for judges be capable of effectively enforcing honest trade, they need to be able to discover players' past actions in particular cases, and motivated to punish those who are found to have violated formal rules.

Because of the courts' limited ability to verify past actions, and other costs of relying on formal enforcement, informal enforcement plays an important role even in a modern market economy. Some cases have revealed an additional dilemma inherent in relying on formal governance; if the state has the power to punish cheaters and enforce contracts; it also has the power to expropriate

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market participants. Thus, coercion-constraining institutions are required to constrain predation by political rulers. This perspective emphasizes that well functioning markets supported by a state legal apparatus must be an equilibrium outcome of a game in which the motives of state actors enact effective laws and regulations and to impartially enforce contracts are explained endogenously.

Another important, but as yet incompletely understood phenomenon is the persistent differences in governance institutions across countries or jurisdictions. It has been widely noted that efforts to deliberately transplant formal legal institutions from one country to another have frequently produced unanticipated and undesired consequences. At the same time, institutions in different countries are interlinked: alternative governance system learns from, adapt, and compete with each other for adherents. As they spread, an institution that may begin as flexible and informal local orders tend to become increasingly global and mandatory and harden into rigid formal rules.

Therefore, the equilibrium concept must be applied across jurisdictions; each country's institutions are not just an internal equilibrium outcome, but institutions in different countries also affect each other as they evolve over time. This is particularly the case for institutions in international market, in which the parties to a dispute may often inhabit different jurisdictions, and in which inter-jurisdictional competition may constrain individual governments' ability to regulate or shape the governance institutions within their borders. As the subject matter of this study is marine insurance policies and exclusions, it is inevitable to first understand the origin of the institution prevalent in the ancient time to the system that followed and developed over the years to be presently called as marine insurance market.

THE CLAIMS MARKET

The most key limit of marine protection assurance or other than some other insurance is to trade the risk and redistribute it. Through marine protection a guaranteed trades the peril of money related incidents to the safety net provider, who, along these lines redistributes the threat with wonder and reinsurance arranges. An agreement of marine protection is an assumption under which a guaranteed, who endeavors a marine experience, legally binds the guarantor to pay a total of money or its proportionate, upon the occurrence of nitty gritty event, including some segment of powerlessness as to time or the likelihood of occasion, which impacts the bonafide enthusiasm of the guaranteed in the topic of protection. The guaranteed in another sense is truly acquiring his "noteworthy peacefulness", the imperceptible thing, which would not have any development if such flawed event does not occur at all. As marine experience is stacked with complexities and indeterminate risks, clearly that marine protection security has given financial confirmation to various oceanic purveyors.

As demonstrated by R. Thomas, the agreement of marine protection is an exceptional (protection) contract of repayment which secures against physical and different misfortunes to movable property and related interests, and in addition against liabilities happening or emerging over the span of voyage. Such an agreement of repayment is seen by an approach issued by the guarantor to the guaranteed as the evidence of cover, usable in case of fractional or aggregate loss of the topic or liabilities developing along these lines. Regardless, when the claim on a marine protection arrangement has become a case the conditions are extended to a more capricious sensation. Various operators and gatherings acquire or releases enthusiasm for the case inside this move period. The amount of people to be ensnared in such cases is past imaginative vitality. In the protection claims showcase approach and the associations or affiliations who decide extreme risk has a real part to play. To welcome the part of the arrangement and these affiliations it is certain to understand the cases advertise first.

THE STRUCTURE OF MARINE INSURANCE MARKET

An unmistakable component of marine protection is how much it is global in degree. Most load protection is naturally universal since the scope of products transported via ocean as a rule includes transport starting with one nation then onto the next. Consequently, the shipper or dealer of the products and the proctor or the purchaser frequently speaks to separate people subject to various laws and talking diverse dialects. The guarantors of the merchandise might be arranged in the nation of the dispatcher or the proctor or in the third nation having no other contact with the vehicle than through the protection contract. Body protection is worldwide accordingly of the danger of misfortune or harm to the vessel happening abroad and of the propensity for some shipowners to place all or part of their protection in a nation other than a nation where they are arranged. A figure included this last propensity has been the expansion in the quantity of vessels claimed by shipowners from nations, including creating nations, which need adequate ability to give marine protection cover to such neighborhood vessels, consequently requiring numerous shipowners to get their protection scope with back up plans arranged in few created showcase economy nations, for example, UK, Northern Ireland and USA. Along these lines, it is not in the least phenomenal for a shipowner to safeguard all or part of the estimation of his vessels specifically in another nation, despite the fact that may have no association with this nation other than the protection contract.

Extensively, the direct of marine protection can be isolated into that which is led revenue driven, alluded to here as "business protection" and that which is attempted for shared advantage, alluded to as "common protection". Common protection includes gathering of people or

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enterprises concurring ahead of time to add to counterbalance each other's misfortunes. At the end of the day, every individual from the gathering is it might be said safety net provider for each other part. At the point when a misfortune is acquired by one individual from a gathering, the various individuals contribute rateably as per a foreordained recipe, so that the misfortune falls equitably on all individuals. Since commitments are just proposed to balance genuine misfortunes, there is common protection, instead of business protection, no expectation of aggregating a benefit (which would just collect to the individuals' event regardless).

The common protection game plans are by and large constrained to the development of relationship of ship proprietors covering the danger of property misfortune, alluded to just as body protection, and the danger of causing liabilities regarding the operation of their vessels, alluded to as risk protection. Right now, there are an extremely set number of common affiliations offering frame protection cover to maritime vessels (frequently alluded to as "body clubs"). At some point such clubs offer obligation protection also. Most shared marine protection affiliations give just obligation protection cover. Liabilities for which transport proprietors require protection cover can be as, entomb alia, payload claims, asserts by group for damage and disorder, impact obligation claims, and claims for wreck expulsion. Shared affiliations offering protection for these liabilities are called Protection and Indemnity (P&I) clubs.
Subsequently of the common character of the P and I and other structure clubs, it is felt that the legally binding relationship existing in such clubs (which appears as enrollment guidelines) is moderately less needs close investigation at this stage. Moreover, attributable to the huge extent of marine protection, it is not achievable to embrace here a sweeping investigation of both common protection and business protection. Consequently, this report focuses on the a safe distance legally binding connection between the guaranteed and the guarantor as it exists in the business markets, which considered more fitting reason for the present examination.

CLAIMS MARKET OF MARINE INSURANCE

Prior to the contract comes to present the first move by the assured towards obtaining a marine insurance for the subject matter is to appoint a broker to initiate the procedure. The broker selected by the assured can be autonomous or as proposed by the underwriter. The brokers play a focal and predominant role in this phase of contract. Thus, it is an essential desideratum that the brokers must be familiar with the nature of their client’s business and the points of confinement and exclusions of marine insurance products on the market. Two cases have endorsed this perspective and in both the cases, the broker was found to have neglected to have a legitimate respect for these matters and held liable for the uninsured losses.

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NOTEWORTHY POSITION OF BROKER

Nevertheless, as soon as the claim arises the assured will ordinarily contact the intermediaries who negotiated the contract with his insurer, evidently with no exception, the broker. Intimating the insurance company about the loss or damage is the first step which shall be done instantly by the assured or his agent in such circumstances. The broker is supposed to give immediate notice to the insurer of the loss or damage to the subject matter insured. Further the broker carries out the survey and claim procedure whereby the documents are put to consideration before the insurer. It is when if the insurer declines to indemnify for the loss or damage for any reasons, the case emerges. In spite of the fact that it is redundant that when the case for insurance claim arises the same broker who initiated the process will be accessible to represent the assured, if the same has been provided by the insurer. In simple and straightforward circumstances in any case the assured does not have to be represented by anyone whatsoever, but it is in perplexing circumstances where the presence of the broker is inevitable.

On the off chance that the same broker has been provided by the insurer, he may avail the services of an alternate broker when the original broker is not accessible. Otherwise, the assured is free to avail the services of the broker who has specialized knowledge in the marine insurance law and practice and who according to assured may represent his best interest. Subsequently, in practice the assured will entrust his interest on a broker with whom he was long standing affiliation, not necessarily the original broker (and unless the integrity of the original broker is in question) however in any association with such broker. Once the choice of broker is made by the assured, the named broker then collects documentary evidence with the end goal of trial or negotiation as the case may be. The broker is additionally responsible to figure the measure of risk and investigate circumstances on his side to support assureds' claim. The findings of his investigation and evidences secured by the broker are further utilized in the adjustment of the claim.

At this juncture, the issue emerges when if the broker appointed by the assured acts in a dual capacity for assured as well as the conflicting insurer. This is one of the complex issues of law which muddles the situation. Till 1969 this practise was widespread and commonly observed by Lloyd's underwriters and companies in London market to invite services of brokers to pass instructions to surveyors and assessors. The practice was condemned by Mr. Justice Megaw in Anglo-African Merchants Ltd and another v Bayley on the ground that same agent cannot serve two masters. Until another case, North & South Trust Co. V Berkeley, it got to be more troublesome for brokers as the clients asserted that they were entitled to see assessor's reports secured by the brokers under the instructions of the underwriters and in the meantime they were restrained by the underwriters to uncover the same. The position of the broker in this case relied on Megaw J's opinion that the broker is first assureds' agent and not insurers, but brokers convolutes the situation by accepting undertakings from both as principals. This practice is condemned to a bonafide claim in the insurance market.

MERITS AND DEMERITS OF POLICY EXCLUSIONS

The most imperative part of the marine insurance market is its international character, which requires a cargo owner and shipowner to move their cargo and vessel respectively in different countries. In such scenarios, the buyer or seller or owners are subjected to the laws of different nations, as the case may be, of consignee or consignor or even a third nation for that matter, having no other contact with the transport except the insurance contract. In this position of insecurity, the assured has no other recourse but insurance claim in the event of loss, unless the party causing loss is ready to pay compensation. The insurance provides a speedy compensation for the loss which aids the assured to carry on business, amid the process of litigation and bestows power on insurers to be subrogated in the event of recovery. Nonetheless, if the claims fall within the ambit of these exclusions, it opens floodgates for enormous litigations between insurers, claimants, defendants and other parties.

Now these various exclusions are either embedded in the policy or under Marine Insurance Act, 1906. On the off chance that the insurer is to decline a claim based on these exclusions, the loss caused to the subject matter in issue must pass two tests. The loss must be proximately caused by these exclusions. The proximity of cause is examined, which expounds how it is attached to the subject matter in issue. The relation between the subject matter and cause of the loss must be so close that no other cause could have made the loss than the proximate one. If the first test is passed by the 'cause of loss', then the second factor must also be considered to evaluate whether the cause is an excluded one, it is called 'fortuity test'.

Thus, if the cause of loss is not accidental and it is something which was meant to happen in the due course of business, then the loss is excluded one. If the 'cause' does not pass both the tests, then the claim is destined to be rejected. If these two tests are applied to each of the statutory exclusion, then the merit and demerit of can be comprehended effectively. Accordingly, now that we have explained these terms, it is time to apply these tests to exclusions in order to examine their usefulness.

CAUSA PROXIMA TEST

It is believed that the proximity of cause, alternatively called as causa proxima, is the most important stage of test of claim, which ultimately determines whether the claim is recoverable or not. In the course of this study, two methods of case proxima were observed, which existed without any defining nomenclature and a third method was recommended to procure more accurate conclusions. These two methods are called time method and efficiency method sequentially. They, as the name suggests, determine the cause of loss on the basis of 'lost cause in time' and 'the most efficient cause' respectively. Consequently, a third method has been developed with the help of the case Cory v Burr in the course of this study and named as 'the triggering method'. Where the real cause of loss which actually triggered the whole chain of events is identified and then if found to be caused by an insured peril, the insurer can be made liable for the claim. However, it does not mean that the third method rule out the other two, but may be used in more complex situations where the time method or efficiency method fails. Time method is rather used for simple situations where discovering the proximate cause of loss is vividly clear. Notwithstanding, it should also be kept in mind that efficiency method may remain a predominating method irrespective of survival of time method.

Nevertheless, while applying causa proxima test to the statutory exclusions, it hardly creates any controversial situation; except for the part when the test is applied to delay. Even in the situation where, by applying causa proxima test it is learned that the proximate cause of delay is a peril insured against, when the loss is caused by that delay the claim is still not recoverable. The study has found that the delay is such a phenomenon which is neither in control of the cargo owner nor under control of shipowner, unless ship has not sailed from the required destination. The exclusion of delay can only be justified where the shipowner (if shipowner is the assured) has failed to act with reasonable dispatch; or in case of a cargo owner (when cargo owner is the assured) if he has failed to deliver the goods in a reasonable time. Otherwise, there can hardly be any situation where the assured may non-fortuitously interfere with the operations of transportation which will lead to delays of the subject matter insured causing loss. It is suggested that such provision must be modified and altered to such an extent where the wordings may stand justified in relieving the insurer from his liability.

RATIONALE AND TEST OF HYPOTHESIS

In this study it is found that the statutory exclusions as well as exclusions created under marine insurance policies have enormous value. If we first consider policy exclusions, it is clear that the intention of the insurers is to fetch more premiums. Consequently, more the risk involved more will be the rate of premium. This premium is likewise decided on the basis of prevailing conditions en route as well as the recent liabilities the underwriter had to undergo. As far as prevailing conditions en route are concerned example can be given of 'superstorm sandy' that hit United States in the year 2013. It essentially increased premium rates from 10% to 30%. On the positive side, it is likewise observed that insurers have objectively covered every foreseeable loss by taking more elevated level of premiums.

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Many a times it is also found that insurers tend to cover even the statutory exclusions under Marine Insurance Act, 1906. The best example of this inclination is the 'Institute Malicious Damage Clause' of 1/8/82. Where there is no explanation as to why an insurer must cover a loss which is a consequence of a wrongful act of a person who is either agent of assured or somehow connected to the same maritime adventure, the insurers have stretched their arms to cover even such exclusion.

The denial of claim on the other hand is altogether a separate issue. While the instances of fraud or non-disclosure on the part of insurers are seldomly found, the denial is typically based on legal technicalities. Perhaps it is the most vulnerable point where an assured scarcely engages in a legal battle, for insurers it's like a home ground. Such technicalities have been discussed in this study, mention can be made of the contradictory arrangement of inherent vice and rats or vermin under section 55 (2) (c).

Where the insurers invariably provide cover for inherent vice, there is no such standard clause in existence which may cover rats or vermin leaving the statutory exclusion prevail over the policy. In such a situation, if the policy does not explicitly indicate anything about rats or vermin, the statutory exclusion relieves the insurer from the liability. Now here the perplexing situation arises. As discussed earlier there is practically no distinction between vermin and inherent vice, the insurer may run away from his liability using this technical shortcoming.

Nevertheless, it has additionally been observed that insurers may sometimes accept the claim even in cases where the insurer is not liable to pay, for one of two reasons: first, that the assured has a goodwill in the market and the insurer does not want to lose him as a client, and second, in order to prevent such a claim from turning into a precedent for future claims. Conclusively, it can be stated that the propensity of insurers is more assured oriented and commercial in nature. Hence, for higher premium any statutory exclusion can be contracted out. Apparently, the same has also been provided by the Act, which appears to be more adaptable in that sense.

Notwithstanding, the first hypothesis of the study stands proven in many cases, however not in its entirety. Delay, rats (out of rats or vermin exclusion), inherent vice in certain situations are found to be redundant, whereas others may be kept intact. Subsequently, the study does not entirely rejects the comprehension of the framers of the Marine Insurance Act, 1906, then again, expects the amendments which are more suitable to the modern marine insurance market. In practice, however, the insurance market has already gone past these conundrums. The standard clauses, such as Inchmaree Clause, Liner Negligence Clause, etc. have proven to be more effective than anticipated. So such changes may have a little impression on the current established purveyors of the market, but on the other hand for a tenderfoot they are vital.

The second hypothesis is proven on the basis of examination of the Institute Cargo Clauses, that often the insurer can be misdirected by the policy, considering his cargo is insured for any accepted loss. The W.P.A. Clause or the F.P.A. Clause rejects loss too many goods, unless they are lost or damaged by stranding, burning or sinking, placing assured in a vulnerable position where he has received partial goods and lost the remaining. Perhaps the location of the memorandum or the ICC average clauses must not be so inconspicuous and more orientation about its operation must be provided to the assured before he accepts the policy from the insurer. It is fascinating to observe that the duty of disclosure is frequently placed on assuring and in the most recent two centuries scarcely twice insurer was questioned for his part of duty.

Finally, the third hypothesis are not completely invalidated, but needs more verification, for which this study is deficient. It is observed that the underwriters are inclined towards fetching more premiums than actual protection of the interest of assured, thereby encouraging taking more risks. However, the statistical investigation of the ratio of litigation against the satisfaction of claims has not been embraced by any institution so far. So the outcome stands unanswered. To prove the hypothesis, there is a need for more non-doctrinal research with an extensive team of researchers to survey all the marine insurance companies in UK (or any significant maritime nation for that matter) and records of their claims and reports of their annual claim approvals.

CONCLUSION

Marine insurance from the ancient time has been vicariously contributing to the maritime industry by providing financial security to oceanic actors such as shipowners, buyers and seller of goods. Such financial security aids in reducing the apprehension of loss of or damage to property amid the transportation of subject matter, thusly encouraging international trade. The international character of this subject makes the problem more intriguing. The raison de entrée of the entire arrangement of marine insurance is due to this international nature. The transportation of goods is generally from one country to another, and the reason of choosing sea as mode of transportation is that it is the cheapest form of transportation and can carry the bulkiest of cargo.

On the other hand, the sea is loaded with complexities and no part of the ocean can be conjectured to be perfectly safe for transportation for all time. The conditions under the sea are continually changing and in this manner make it an unpredictable place. Transporting goods via sea is a risk in itself which can be aggravated by perils of the sea, like hurricane, gales, thunderstorms, storms, wind, etc., on the other hand, there may likewise be internal factors putting ship at risk like fire, explosion etc. Subsequently for taking such risk, the cargo owner or ship-owners must have some assurance that in the event of loss, there will be sufficient resources for him to carry out business operations in future. Otherwise, maritime trade will not be a place of attraction for business.

Keeping this in mind for centuries, numerous groups of people have been providing such assurance to the maritime purveyors by way of insurance. Although, it is necessary to comprehend that the institution of insurance is inevitable to encourage nations to participate in maritime trade, it is likewise necessary to analyse the current functioning of these institutions, to acknowledge whether they have protected the sanctity of the business. The research has taken into account many aspects of marine insurance, where it contributes to the failure of claims from assured. The investigation of the same can be initiated with merits, demerits and the implications of the exclusions under marine insurance policies.

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