"*Marine insurance and its legal aspects in India: Perils of the Sea*"

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Abstract

In the era of globalisation, maritime transportation has been the spine of international trade having more than 80 per cent of the merchandise transportation done by the sea .But marine transport involves a lot of risk to the goods being carried and also the ship carrying them. Thus, to facilitate trade and commerce and to mitigate the risk of financial loss to property, they should be insured as it provides security and protection to individuals, communities and businesses. It provides for risk sharing and encourages businessmen to innovate and to engage in more risky businesses which ensure a higher level of economic activity in the country. Marine insurance is thus an important component of international trade and commerce.

The authors through this research paper crave to analyse the various risks that are not covered under the marine insurance, its repercussions and the legalities related to it.Furthermore, the authors will attempt to throw some light on the historical background of the marine insurance and the various legislations governing marine insurance in India. The paper will provide an insight of maritime laws of India.

Keywords: maritime laws, marine insurance, mitigation of risk, legalities of marine insurance.

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Introduction:

In today's time, business knows no boundaries. People have access to all sorts of product and services as cross border business has become prevalent. But, the farther our goods are the more risk is exposed to them. Marine insurance is one of the oldest insurance in the world.In the era of globalisation, maritime transportation has been the spine of international trade having more than 80 per cent of the merchandise transportation done by the sea .But marine transport involves a lot of risk to the goods being carried and also the ship carrying them. Thus, to facilitate trade and commerce and to mitigate the risk of financial loss to property, they should be insured as it provides security and protection to individuals, communities and businesses. It provides for risk sharing and encourages businessmen to innovate and to engage in more risky businesses which ensure a higher level of economic activity in the country. Marine insurance is thus an important component of international trade and commerce. The marine insurance laws are India governed by Marine Insurance Act 1963 and guided by the clauses under the Institute of London Underwriters (ILU) and international commercial contracts popularly known as "incoterms".

Without the facilitation of marine insurance in order to manage the long distance trade, it would have been very much complicated to manage the expansion of maritime. The method of trading overseas would have been more risky and costly. And the various developments in maritime would have taken an altogether different route and pace.

"In a marine insurance contract, an insurer 'underwriter' agrees to assume some portion of the maritime risks on a vessel or cargo, or both, in exchange for a premium. The risks covered may include a variety of risks at sea or in port, for a particular voyage or for a period of time."[3]

The existence of the contract of marine insurance can be traced back to centuries. It is the contract of marine insurance which is the 'earliest authenticated insurance contract' displaying the characteristics of insurance in terms of risk transfer due to any inevitable event in lieu of any payment of premium. 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.

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[3] Christopher Kingston, *Marine Insurance in Britain and America, 1720-1844: A Comparative Institutional Analysis*, EHS (Aug. 17, 2014, 11.13 PM), http://www.ehs.org.uk/dotAsset/332686ee-2db9-4f09-abc6-cb900150d473.pdf

The paper deals with various aspects of risks that are involved during a voyage through waterways. It is distributed in several parts. Part I deals with the historical evolution of marine insurance, which traces back to its origin and a subpart deals with the development of Indian history. Part II deals with the essentials of marine insurance and the various components that constitute a valid marine policy. Part III deals with the main chapter that the paper is focussed on, that is the various risks that are not covered under marine insurance. And lastly Part IV deals with the Indian maritime laws and the various judicial pronouncements that have set a precedent. The various instances governing the law of the sea will be dealt in a manner that maximum could be achieved with reference to insurance.

History:

The history of marine insurance can be traces back to several centuries, where it merely was seen as a mode of securing the interests of ship or the cargo owners, who faced various difficulties during an overseas voyage. "Marine insurance has facilitated the development of long-distance trade and as such has influenced economic growth and progress of, in particular, seafaring nations in the early modern period."[4]

"In the Middle Ages, contracts such as "loans on bottomry", which were repayable only if a voyage was successful, had served a marine insurance function…However, marine insurance corporations had not yet emerged, and underwriting was still carried out entirely by private individuals, frequently themselves merchants, who underwrote specific risks on an individual case-by-case basis (several private underwriters each covering portions of a risk)."[5]

Marine insurance can be described as mother of all insurances. It is said to have originated in England due to the frequent movement of ships and cargos over high seas for the purpose of trade and commerce. Marine insurance is the oldest form of insurance. Marine Insurance is not of a recent origin and its existence can be traced back to several centuries. It has been around as long as human existence as the main concept of Marine Insurance is that of spreading risk.

The first written insurance policy can be seen in on a Babylonian obelisk monument where the code of King Hammurabi is carved. The "Hammurabi Code" was one of the first forms of written laws. It offered the basic structure for an insurance in which the debtor was not topay back his loans in case some catastrophe made it impossible to do so.

The insurance law was first codified in the year 1906. The English Marine Insurance Act was passed in 1906 but the laws concerning it had taken a shape much prior to the passing of this Act.

The origin of maritime law can be traced in Greek and Roman maritime loan. It is known to be the earliest and well-built kind of insurance. Several marine insurance contracts were advanced in cities like Genoa and several other Italian cities during the 14th century and then eventually spread to the northern Europe. Though the origin of modern marine law insurance has its traces in Lex Mercatoria i.e. law of merchants.

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[4]Sabine Christa Go, *Marine Insurance in the Netherlands 1600-1870 A comparative institutional approach*, UBVU(Aug. 17,2014, 13:13 PM), http://dare.ubvu.vu.nl/bitstream/handle/1871/15525/8950.pdf?sequence=5
[5]*Supra* note 1

A specialised chamber was established in 1601 in England which was separate from the other courts in England. In the late 17th century London's importance was growing as a centre for trade which led to the demand for marine insurance. Edward Lloyd had opened a coffee shop on the Tower Street in London in the late 1680's. His coffee shop soon became a popular place for ship owners, ship captains, and merchants, and thereby a reliable source for the latest shipping news.

Lloyd's Coffee House soon became the first marine insurance market. It had become the meeting place for people in the shipping industry who were wishing to insure cargoes and ships, and also those who were willing to underwrite such ventures. Owing to these informal meetings soon the Lloyd's coffee house became an insurance market. The members who were participating in the insurance arrangement eventually formed a committee as the Society of Lloyds' and moved to the Royal Exchange on Cornhill. The establishment of insurance companies, the growth of British Empire and a developing infrastructure of specialists (like shipbrokers, admiralty lawyers, surveyors, bankers, loss adjusters, general average adjusters, etc) gave English law a prominence in the area of Marine Insurance and it is due to this reason that it forms the basis of almost all modern practices.

The law on marine insurance was first codified by the Marine Insurance Act of 1906 in England, and this Act came into force on January 1, 1907. It was proposed to clarify and set forth the regulations associated with marine insurance agreements. This enactment codifies only those principles of the law which relate exclusively to marine insurance and expressly enacts the rules of common law; including the law merchant, save in so far as they were inconsistent with the express provisions of the Act.

Development of Indian Law

Since independence, Indian shipping has undergone a considerable expansion. Thus, it became mandatory to enact an Indian legislation for the smooth development of marine insurance law in India which would be consistent with the conditions in India. Prior to legislation, questions relating to marine law were decided on the general law of contract and the English decisions which were based on the common law rules of contract. The Indian law on marine insurance is in essence an interpretation of the rules contained in the common form of marine policy.

"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."[6]

The Oriental Life Insurance Company was set up in Calcutta in the year1818 which started the life insurance business in India. The company however failed in 1834. In 1829, the Madras Equitable began transacting life insurance business in the Madras Presidency. The British Insurance Act was enacted in the year 1870. In 1907, the Indian Mercantile Insurance Ltd was set up. It was the first company which began to transact all classes of general insurances. In 1914 the GOI established the publishing returns of Insurance Companies in India. Specifically in shipping law India has undergone a wide change and considerable expansions and thus it became mandatory to codify it for smooth working and development of Marine Insurance law in India.

In India the marine insurance law was put in a statutory form in the year 1963- Marine Insurance Act, 1963. The preamble to the Act states that it is "an Act to codify the law relating to marine insurance." In the case of *Bank of England v Vagliano Brothers*[7], Lord Herschel said that "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.

[6]M.Venkatesh, *A Study of "Trend Analysis in Insurance Sector in India"*, 2, IJES, 1, 1 (2013)
[7]*Bank of England v Vagliano Brothers*,(1891) A.C. 107, 144 H.L

Essentials of Marine Insurance:

Marine insurance is a contract but despite of it being a contract, the general principles of contract law are not applicable to marine insurance contracts. The general or basic principle which is followed by the contract of marine insurance is the contract of 'indemnity'. Under the contract of indemnity, this is recoverable in the form of pecuniary loss from the insurer by the insured. Thus, according to Section 3 of Indian Marine Insurance Act, a contract of marine insurance is a contract where by the insurer undertakes to indemnify the assured, in a manner and to the extent there by agreed, against marine losses, that is to say, the losses incident to marine adventure.

During the eighteenth century, when marine insurance was emerging as sector in itself, it was contended with various uncertainties and complex situation, which in turn created various problems in the agency of the insurer and the insured. Majorly three kinds of agency problems were faced by them:

Firstly, where there was a probability of a ship or the cargo getting lost or damaged, which would depend on various factors including the route, distance, and quality of the crew and in times of war, the threat of the ship getting caught by the enemy vessels. Such kinds of risk are taken into consideration by the underwriter while determining the premium.

Secondly, certain situations where the hazard is on the part of the insured, which may range from taking excessive risks to deliberately sinking the ship or cargo or misrepresenting the value of the goods or even insuring a ship which is already lost.

Thirdly, a major concern for the people buying insurance is the financial stability of the underwriter. Underwriters may fail to incur the loss when any major hazard happens.

Due to such exposure of risk to the insured and the agency problems arising between the insured and the insured, merchants focused on choosing more reliable underwriters and were willing to pay high amounts of premium making the insurance financially secured.

"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."[8]

Section 25 of Indian Marine Insurance Act specifies the essential matters that should a part of the marine policy:

1. The name of the insured or any other person on his behalf.
2. The voyage or time period or if both covered under the insurance.
3. The subject matter and the risk against which it is insured.
4. The name of the insurers.
5. And the amount or the sum insured.

"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."[9]

In general, the marine insurance is governed by certain fundamental principles which are listed below:

Principle of indemnity: The contract of marine insurance is a contract of indemnity. And the insured is entitled to claim the actual loss incurred from the insurer.

Principle of utmost good faith: A contract of marine insurance is a contract of utmost good faith. The insured as well as the insurer must disclose each and every information in their best interest and which is essential to the contract. Any non-disclosure will give the choice to the other party to make the contract void any time.

Principle of Subrogation: According to the principle of subrogation, when the loss is already met, the insurer steps into the shoes of the assured person, and is entitled to all the remedies and rights which are available to the insured against either the third party or the insured party itself.

Principle of Proximate Cause: This particular principle is based on the Latin maxim of 'in jure non remota causa sed proxima spectator' which means that any law which is an

[8]Gaurangi Patil, *Reeling Back In History To Understanding Marine Insurance/ Protection & Indemnity Clubs (P&I)*, BRUS (Aug. 17, 2014, 11:08 AM), http://www.brus.in/publications/shipping/MI.pdf

[9]*ibid*

immediate and not a remote cause should be considered while measuring the damages. And where any loss is caused due to series in succession, the nearest cause of loss must be taken into consideration.

Risk not covered under marine insurance:

Whether it was haunting giant elk in a group to spread the risk of being the one gored to death or shipping cargo in several different caravans to avoid losing the whole shipment to a marauding tribe, people have always been wary of risk.

"The hazardous nature of maritime commerce during the Age of Sail made marine insurance a crucial input in the expansion of trade, and this impelled the development of increasingly complex institutions for sharing marine risks."[10]

"In order to accurately assess the risk of a voyage, an underwriter had to have access to prompt and accurate intelligence on the movements and condition of particular ships, on political developments at home and abroad, and on the character of the merchant being insured and the captain of the vessel, as well as the experience to weigh this information correctly in order to determine what premium to charge."[11]

Risks that are covered by the Marine Insurance are:

1.) Total loss is the kind of loss that makes the property worthless to the insured. Total loss is categorized in two types:

a) Actual total loss, where in the object or the subject-matter insured is destroyed or damaged in a way that it ceases to be a thing of that kind insured.

b) Constructive total loss is where in the object or the subject-matter insured is abandoned on account of the total loss appearing to be inevitable.

2.) Particular average signifies a partial loss or damage sustained by any ship or cargo or freight due to any accidental cause.

3.) General average is actually a voluntary sacrifice considering the common safety.

Several other risks that covered by marine insurance clause are perils of the sea, fire, war, pirates and thieves, Jettison, strikes and barratry.

[10] *Supra* note 1
[11] *Supra* note 1

Risks that are specifically excluded from theInsurance Contract:

“Losses due to leakage or boathook losses in case of goods packed in bags may be excluded by the insurance contract itself. Solidification of palm and coconut oil may be excluded, unless heated storage is available.

Delayed Arrival: Loss of profit, market loss due to delayed arrival or deterioration arising due to delay is excluded.

Ordinary and Unavoidable Trade Losses: Shrinkage and evaporation in the bulk shipment or infestation in case of copra are excluded, unless specifically provided.

Violence:Certain perils such as wars, strikes, riot and civil wars are excluded, unless specifically endorsed.

Dangerous Drugs Clause: Insurance policy stipulates losses connected with shipment of opium and other dangerous drugs are not paid unless specified conditions are met.”[12]

Under Normal circumstances, certain goods carry an inherent vice like easy breakage. Any damage caused to any easily breakable or fragile glassware or good shall not be covered under marine insurance if it has not been packed properly. Also damage caused during the original packaging is excluded.

“The word “risk” being in this context to refer to the risk of loss occurring in connection with insured property, and the risk of loss can include not only actual property in return for the payment of premium by the assured losses but also financial losses, such as those resulting from the loss of freight, passage money, commission or profit as well as certain types of liabilities incurred to third party.”[13]

“Insurance was created as a mechanism to protect insured’s against the financial consequences of an unforeseen, potentially catastrophic individual loss. The number of covered perils has expanded and contracted over time to match the changes in exposure’s severity, frequency and ultimate costs; but the original concept of protecting the insured’s

[12]*Risks Not Covered By Marine Insurance*, HOW TO IMPORT EXPORT (Aug. 15, 2014, 13:03 PM), http://howtoexportimport.com/RISKS-NOT-COVERED-BY-MARINE-INSURANCE-487.aspx

[13]*Legal Aspects Of Marine Insurance In India,* LAW TEACHER (Aug. 15,2014, 13:05 PM), http://www.lawteacher.net/commercial-law/essays/legal-aspects-of-marine-insurance-law-essays.php

financial condition has not changed. However, insured's are not protected against every possible source of financial loss."[14]

In order to understand the six reasons of excluding certain risks from the marine insurance clause we need to first understand the three major categories of exclusion. The categories being: 1) excluded "perils" wherein the peril is defined as any actual loss arising out of any damage that results in a financial loss, 2) excluded "hazards" wherein the hazard is defined as something that increases the chance of occurrence of a financial loss, 3) excluded "property" wherein the property may include anything tangible or intangible.

After understanding the three main categories of exclusion, it becomes easy to categorise the losses not covered in one of the six reasons stated below:

1) The exclusion categories namely the peril, or the hazard or the property can be covered in a better manner elsewhere. For instance, any money loss is not covered under the commercial property loss because this can be better covered under any 'crime policy'.
2) The damage or the loss may be catastrophic in nature. The marine insurance policy usually covers the individual disasters, not a community disaster.
3) The loss that has occurred may not be accidental or unforeseen in nature. According to the general marine policy, any insurable loss is that which is either accidental or unforeseen in nature. Intentional acts done in order to gain the benefit of insurance will not be termed as insurable.
4) The carrier of the insurance may be willing to provide the insurance but just need more information and premiums. The reason sometimes certain risks are excluded from the marine insurance is that the insurance carrier may be willing to have a higher premium of the risk insured and the insurer may not be willing to do so.
5) The carrier of the insurance wants to control the granted amount of coverage. This happens when the coverage of a risk is excluded from the policy but an additional coverage is given to cover the risk. It may seem confusing but giving the additional coverage in predetermined amounts actually reduces the confusion. The tactic is highly used in property and liability coverage.

[14] Christopher J. Boggs, *Six Reasons the Loss is Excluded*, MY NEW MARKETS (Sept. 9, 2014, 16:27 PM), http://www.mynewmarkets.com/articles/99788/six-reasons-the-loss-is-excluded

6) The loss of the damage is arising out of any business risk. In such type of exclusions, it involves the business risk wherein the chances of loss or of no changes or gain. Insurance is not given for any bad business decision. Also any voluntary delay or loss of market will not amount to risk getting insured.

Maritime laws in India:

Admiralty law which is also referred to as maritime law is a distinct body of law which governs maritime questions and offenses. Admiralty law is a body of both private international law that governs the relationship between private entities who operate vessels on the sea, and domestic law governing maritime activities. It deals with matters including marinenavigation, marine commerce, sailors, shipping and the transportation of passengers and goods by sea. In India, as stated earlier, the law of marine insurance was put in statutory form in the year 1963 through the Marine Insurance Act, 1963.

Maritime or marine insurance covers the loss or breakage of cargo over water, air or land as well as the loss or damage to a ship or boat. Maritime insurance is crucial for any ship owner or cargo business. Each country has its own laws dealing with insurance matters however, marine insurance is peculiar. In marine insurance by the very nature of international marine transit there are common factors that govern marine insurance across the world.

The court in Richards v Forest Land, Timber and Railway Co. Ltd {[1941] 3 All ER 62, HL, (per Lord Wright)} said that, " 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."[15]

A marine policy is nothing but a promise of indemnity giving a right of action for unliquidated damages in case of non-payment. Section 24 of the Indian Act 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."[16]

The Supreme Court of India is the highest court in India and its decisions are binding upon all courts and tribunals in India. Up till the time of the Supreme Court's decision in M v Elizabeth in 1993, the jurisdiction of Admiralty courts in India, were restricted to the claims

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[15]Richards v Forest Land, Timber and Railway Co. Ltd ,[1941] 3 All ER 62, HL

[16]*Supra* note 7

under the British legislations. The Supreme court laid down that there is no reason to think that the jurisdiction of the High Courts have stood frozen and atrophied on the date of the Colonial courts of Admiralty Act, 1890 and that the High Courts are superior courts of records with unlimited jurisdiction with inherent and plenary powers to decide on their own jurisdiction to redress grievances according to the principles of natural justice , equity and good conscience where statute is silent and judicial intervention is required. Accordingly, in view of there being no Indian Statute governing the Court's jurisdiction in regard to maritime claims, the Supreme Court made the principles of International Conventions on Maritime laws applicable in India as part of India's common law.

The GOI circulated a draft bill for an Admiralty Act 2005 seeking to repeal all the obsolete legislations and to bring in their place a comprehensive law to regulate the claims, jurisdiction, procedure etc. in Admiralty of India.

In addition to the above, there are other legislations applicable in India in relation to maritime law. They are the (Indian) Carriage of Goods by Sea act, 1925, the (Indian) Bills of Lading Act, 1856, (Indian) Merchant Shipping Act, 1958, the Multimodal Transportation of Goods Act, 1993 and the Major Ports Act, 1963. Apart from this legislation, there are judgements of various courts in India, which has laid down general principles of maritime law as is recognised and practised in India.

"The Supreme Court in the case of (AIR1997 SC 544/ (1996) 8 Scale 505; also see AIR 1978 AP 306) held that ports in India are entitled to obtain and demand unconditional security before allowing a foreign vessel that has caused damage to port property from sailing out of the port and such security would be based on the port's estimates of the damage as well as the costs of repairs / replacements. However, the quantum of the liability could later be challenged by way of a civil suit by the owner."[17]

"Under the Admiralty offences (Colonial) Act, 1849, the Court of Sessions of Greater Mumbai convicted 17 pirates who pirated a cargo vessel flying the Japanese flag in the Indian Ocean. Upon receipt of information regarding the piracy of their vessel from the Japanese owners of the vessel, two vessels of the Indian Coast Guard intercepted the pirated vessel and apprehended the 17 pirates and escorted the vessel to the Mumbai port. On arrival at

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[17] V. Subramanian (Kumar), *Shipping/Maritime Law in India,* PAND INDIA (Sept. 13, 2014, 18:13 PM), http://www.pandiindia.com/ShippingMaritimeLaw.htm

Mumbai, all the 17 pirates of Indonesian origin were arrested and charged. The prosecution was successful in getting a conviction of the pirates inter alia under the provisions of the aforesaid act. This was the first time in relation to piracy in the world that the pirates were not only arrested but were also successfully convicted."[18]

[18] *ibid*

Conclusion:

Marine insurance acts as a mechanism that helps in mitigating risk caused during any hazardous situation which as a consequence causes financial loss to ship, cargo or any goods or property while transporting it overseas. The purpose of marine insurance is to secure the risk of the ship-owner, or the cargo or any movable property that may suffer from any financial instability during a voyage. But there are certain risks that an insurer does not prefer to insure in order to make his position secure as an underwriter. These risks which are not covered in a marine insurance are usually the risks which are either the negligence of the ship-owner or the cargo owner, or a packaging fault which is negligence arising due to human act which an underwriter would not prefer to insure.

The evolution of maritime law in India is of recent past. There are several statutory provisions that deals with various aspects of admiralty law and certain judgement from various courts have set precedents for dealing with admiralty law issues. But the evolution can be traced back to several centuries where Lloyd’s coffee house became the first marine insurance market. There have been several interpretations in past decades concerning the risks that should be covered in marine insurance. But certain risks are exclusively excluded from the list to protect the underwriter’s interest.