Callidus News

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EXCEPTIONS TO MARINE INSURANCE

Way back in Babylonian times, around 2100 B.C. a basic form of insurance policy originated. This policy was paid by the trading community to guarantee the safe arrival of their goods by caravan; in those times, getting the caravan with all its goods intact was an impossibility and traders had to endure losses. As history progressed, the need for insurance coverage increased. The Phoenicians and the Greeks wanted a similar type of insurance with their seaborne commerce. In medieval times, the guilds protected their members from loss by fire and shipwreck, paid ransoms to pirates, and provided respectable burials as well as support in times of sickness and poverty. The first actual marine insurance contract was signed in Genoa in 1347 ("The Santa Clara" dated 1347 in Genoa). This policy was in the form of a maritime loan to avoid the canon (church) prohibition against lending/loans. Later the popularity of insuring marine risks crossed boundaries and spread across Europe. Then in London, in 1688, the first insurance company was formed. In India, the law of marine insurance, as expected is a replica of the English Act on Marine Insurance and has been put in a statutory form since 1963.

The Preamble to the Indian Act states that it is "an Act to codify the law relating to marine insurance." The principle of construction generally applicable to a codifying statute is well known viz, 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.

THOUGHT for the MONTH

The only limit to our realization of tomorrow is our doubts of today

FRANKLIN D. ROOSEVELT

Callidus

This article specifically deals with the exceptions to the insured perils as applicable to marine insurance in India. As a regular practice, globally all insurance companies work on gaining premiums without paying out for losses, and undoubtedly this is one of the most profitable businesses in the world. Hence, it is all the more important to know what exactly the marine insurance policy covers and exempts. In Marine insurance the concept of coverage and accepted risk is of importance, the insured must know which risks are covered and which aren't. This is the cardinal rule based upon which one would consider a particular policy.

EXCLUSIONS

Excepted perils are perils which would be insured peril, if not for the exception. i.e. excepted peril is mainly marked as a subclause or diversion to the insured peril. For instance, in cases of Fire a particular Marine Insurance policy might provide coverage. Still, it might also include a proviso to cover circumstances where the fire is deliberately started, that is, as much as the peril 'fire' is covered under a policy the exception of fire caused deliberately is added to avoid coverage.

Section 55(1) of the Marine Insurance Act of 1963, provides for the framework for all included and excluded losses under Marine Insurance. It applies the principle of proximate cause as the underlying rule for determining the liability of the insurer. This section specifically states that there are particular exclusions for which the insurer will not be liable.

The most commonly encountered excepted perils are those set out in Section 55(2) of the Indian Marine Insurance Act, 1963, namely: a) Loss caused by the assured's wilful misconduct b) Loss caused by delay c) Ordinary wear and tear d) Ordinary leakage and breakage e) Inherent vice of the subject-matter insured f) Loss caused by rats or vermin and g) Injury to machinery not proximately caused by maritime perils.

This section prefaces the exclusion with: 'Subject to the provisions of this Act, and unless the policy otherwise provides,' then goes on to state that '… the insurer is not liable for any loss caused by ordinary wear and tear ordinary leakage and breakage, inherent vice or nature of the subject matter insured, or for any loss caused proximately by vermin or rats, or any injury to machinery not proximately caused by maritime perils.' Reliance is therefore placed on the act itself to provide for the necessary defences to the insurer. The insurer is liable for losses proximately caused by a peril insured against and nothing more. The question of proximate cause has been discussed and settled in many legal cases over the centuries, that it is the cause proximate in effect to the insured loss, which must be looked to, rather than the cause necessarily proximate in time to the loss or other remote causes.

This aspect was considered in Reischer v Borwich (1894) where a tug had been insured against the risk of collision and damage endured in a collision with any other object, but not against the perils of the sea, per se. It was held that the assured could recover a total loss under the policy since the proximate cause of the loss was the collision, because the consequences of the collision (the broken pipe) had never ceased to operate and that this was, therefore, the cause proximate in effect, if not in time.

As to the question of where the responsibility lies for proving that the loss has been proximately caused by a peril insured against, it is a settled position under most legal systems that the burden of proof is upon the party making a claim or making an assertion to prove that their allegation is correct. In order to discharge the burden of proof, the assured does not have to exclude all possibilities as to how the particular damage has occurred. They are, only required to demonstrate that the balance of probabilities is in favor of the loss being proximately caused by a peril insured against. If a particular loss is equally likely to have been caused by a peril not covered by the policy, then the assured will have failed to discharge the burden of proof and will, therefore, be unable to sustain a claim against his insurers.

Once the assured has made out a prima facie case that the loss or damage has occurred as a result of a peril insured against, the burden of proof then shifts to the underwriters to set up a counter-argument; that the loss or damage resulted from a peril not insured against. Alternatively, the insurers have to prove the wilful misconduct of the assured or his privity to wilful misconduct, a breach of warranty or that the loss or damage comes within the terms of an exceptions clause.

WILFUL MISCONDUCT-

Section 55(2)(a) excludes the liability of an insurer for the wilful misconduct of the assured. Now what constitutes wilful misconduct has been discussed in length in various case laws and in gist this could be capsuled as improper conduct, which could be in the form of mere negligence, gross indifferent negligence, reckless disregard, and wilful misconduct, it is necessary to identify the qualities of an act which would amount to 'wilful conduct. The shipowner who has sent an unseaworthy ship to sail with reckless disregard constitutes an act of wilful misconduct. Any loss attributable to unseaworthiness to which the assured is privy or any loss attributable to the wilful misconduct of the assured will prevent recovery under the insurance policy. In the case of Thomson v. Hopper, the Court held that the inaction of the assured in showing disregard and indifference will amount to wilful misconduct.

DELAY

Section 55(2)(b) excuses the insurer from any loss caused due to delay even if the delay is caused by an act insured against. The proximate cause rule applies here. There might be multiple causes for the delay but the most apt cause must be looked into. According to the referred legislation, only the last cause needs to be looked into and others neglected even though the result might have not occurred without them. But the term 'risk' and attachment of risk need to be examined carefully before attributing something as recoverable under any insurance policy. Thus if the peril causing the delay/loss is accidental, then it would fall within the meaning of the expression 'risk'. But if the delay is

expected by usual wear and tear, it could not be brought within the ambit of 'risk'.

ORDINARY WEAR AND TEAR

Under Section 55(2)(c) the insurer is not liable for ordinary wear and tear . In the famous case of Miss Jay Jay, the Court held that the damage caused due to ordinary action of wind and waves was ordinary wear and tear. No ship can navigate the ocean under the most favorable circumstances without suffering a little decay or depreciation in value which is a part of the ordinary wear and tear if it arises from the ordinary operations of the usual causalities of the voyage. The insurer is liable only when the loss is beyond this ordinary wear and tear. Likewise, ordinary leakage and breakage also comes within this exclusion. Unless there is an express clause saying that the insurer is liable under the policy for ordinary leakage and breakage, in the normal course of events, the assured is not entitled to a claim under the same.

INHERENT VICE

The term 'Inherent Vice' refers to a loss arising from "qualities inherent" in the goods insured. In sea voyage various types of cargo are being shipped around the world, inherent vice is a strong possibility in certain cargoes, i.e. perishable cargo fruits and vegetables, wine, cocoa and coffee beans, other hard metals iron and steel products, Plant and animal based products including ,wood, nuts, fish meal, leather goods, hides and skins. As inherent vice is an exception to liability, the burden of proof is on the insurance company/insurer to provide a reason for declining the claim. In any case, a fortuitous event must trigger the accident or loss for attachment of risk for losses covered. In Global Process Systems Inc v Syarikat Takaful Malaysia Berhad, the Supreme Court of India held that the exception of inherent vice was limited to cases where the inherent vice was the sole cause of the loss or damage and no external fortuitous event participated in causing the loss or damage. 'Inherent vice' includes inadequate packaging. Insufficiency of packaging is an express exclusion under the Institute Cargo Clauses (A) (1/1/82) and (1/1/09). However, like the other exceptions referred to in Section 55(2) (b) and (c). the parties could agree that the policy covers losses caused by such perils. The "inherent vice" exclusion can also apply to a loss which, due to the manner in which the cargo is shipped, is regarded as inevitable. The damage that occurs in the course of ordinary handling and transportation of cargo, without the intervention of a fortuity, can be due to Inherent Vice and would be excluded from coverage. Also, one of the 17 exceptions to an ocean carrier's liability in an ocean Bill of Lading is "inherent vice".

RATS AND VERMIN

This exclusion of Rats and Vermin and its relevance in the present world is hard to contemplate. This exclusion applies to the extent cargo owners cannot claim insurance where the cargo is gnawed away by rats and vermin and the sea has no role in the damage caused to the cargo. The incursion of the sea to the cargo is one of the important factors to cover under the perils of the seas.

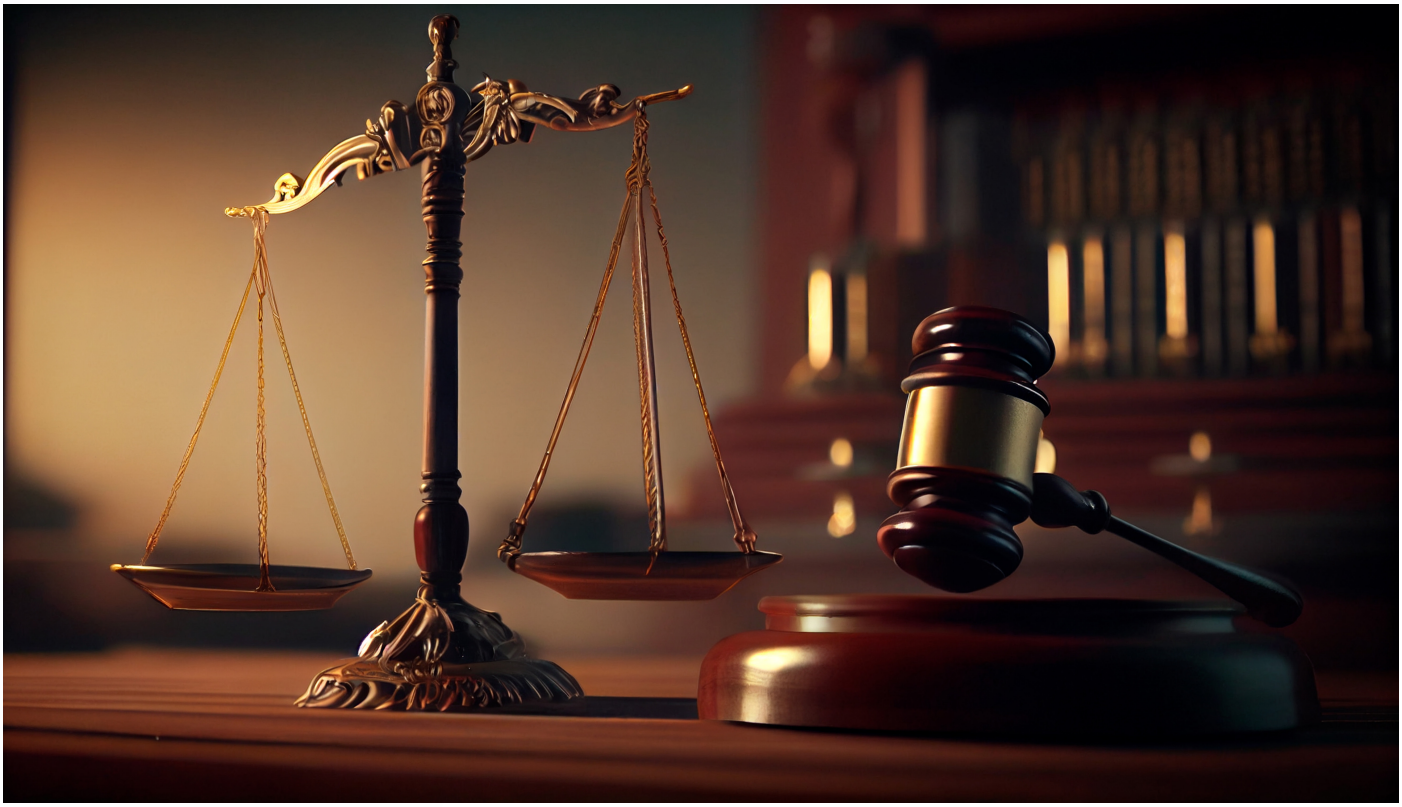
INJURY TO MACHINARY

This exclusion could be used only in circumstances where a covered peril did not cause injury to machinery. Any injury to machinery or bursting of boilers due to a covered peril will be eligible for insurance. However, if such machinery failures are a result of ordinary wear and tear or gross negligence, the claim will not be entertained.

To conclude this brief note on exclusions, it is imperative to understand that marine insurance is unique and the assured at all times need to know the perils that are covered and the perils that are not covered. The purpose of Marine Insurance is to protect coverage for both Ship, Cargo, crew and passengers. This is an indemnity contract and the basic rule lies in the Insurer's duty to indemnify the insured for losses covered under a marine policy. This allows all the parties interested in the marine voyage to conduct trade without getting burdened by the financial consequences. However, one needs to note the exclusions as above or applicable under their respective legislations and expressly excluded in the policy to know the exact coverage for the policy. Thus excluded losses in marine insurance are an important aspect to keep in mind while dealing with marine insurance ■

LIMITATION OF LIABILITY UNDER THE NEW MARITIME CODE

The nature of the trade through ships quite often involves them in incidents that lead to claims. The claims may be for personal injury, property damage such as damage to ships, damage to other properties during accidents, cargo damage, etc. Hence, it is very important for the various stakeholders in the Maritime industry to be able to determine their liability in the event of an incident and to protect themselves from unlimited liability that can even lead them to go bankrupt. When it comes to the UAE, it had already ratified the 1996 Protocol through Federal Decree Number 167 of 2020 on 10 November 2020, and it ratified the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 76) in 1997. Despite the ratification and inclusion of the provisions in the previous UAE Maritime Code (Federal Law Number 26 of 1981, hereinafter



"Old Code"), it had a few limitations which made it practically very difficult to implement the same. This article aims to briefly discuss the changes brought in by the new UAE Maritime Code (Federal Decree-Law No 43 of 2023, hereinafter "New Code") and its effects.

More Aligned with the International Regime:

Firstly, in the Old Code, the limitation of the shipowner's liability was capped in terms of Dirhams, however, in the New Code, the Limitation of Liability calculations have been given in terms of SDR calculations which is more aligned to the international conventions.

Establishment of Limitation Fund:

One of the biggest issues highlighted for the Old Code was how, in spite of a provision to limit the liability, there were no provisions to establish a limitation fund which is very important when it comes to implementing the same. There were no specific powers granted to the UAE Courts or any other entity to establish a limitation fund which led to many contradicting decisions in the past.

Under the New Code, Article 85 permits the person seeking to limit liability to establish a fund by the provision of a guarantee, having the effect of granting exclusive jurisdiction to the UAE court to adjudicate claims related to limitable debts and barring creditors from taking action against those funds or other assets. The party seeking to constitute a fund will have to submit a request to the court though under the Convention, no such request is required, and the party may simply deposit cash into court.

When it comes to the kind of deposits that may be accepted towards the limitation of liability fund, even in the New Code, there is no provision to accept a P&I Club LOUs which is allowed in other major foreign jurisdictions. However, considering that there is a specific provision to allow the release of an arrested vessel by depositing P&I Club LOUs, there is a high possibility that such LOUs may be accepted by the UAE Courts eventually.

A Carrier's Right to Limitation of Liability

In most common shipping jurisdictions, the rules that apply to the carriage of goods by sea are governed by the Hague-Visby Rules. The Hague-Visby Rules place mandatory rights and obligations between the concerned parties. Even though the UAE has not ratified HVR, it had implemented the provisions and the principles of the same even in the Old Code. Now, with the introduction of the New Code, the position has not changed much. However, the difference is that there are some changes that make it even more into line with the Hague-Visby Rules. Specifically, in relation to the SDR figure calculations.

Earlier, in the Old Code, the limitation calculated in terms of Dirhams was 10,000 Dirhams per package (about US$ 2,723 per package), which is significantly higher than what is provided in the Hague-Visby Rules as per which, the liability of a carrier is limited to 666.67 SDR per package (about USD 880.1). In the New Code, there has been an attempt to align it with the international regime by making the liability of the carriers limited to 835 SDR per package (about USD 1,110), which is a much smaller

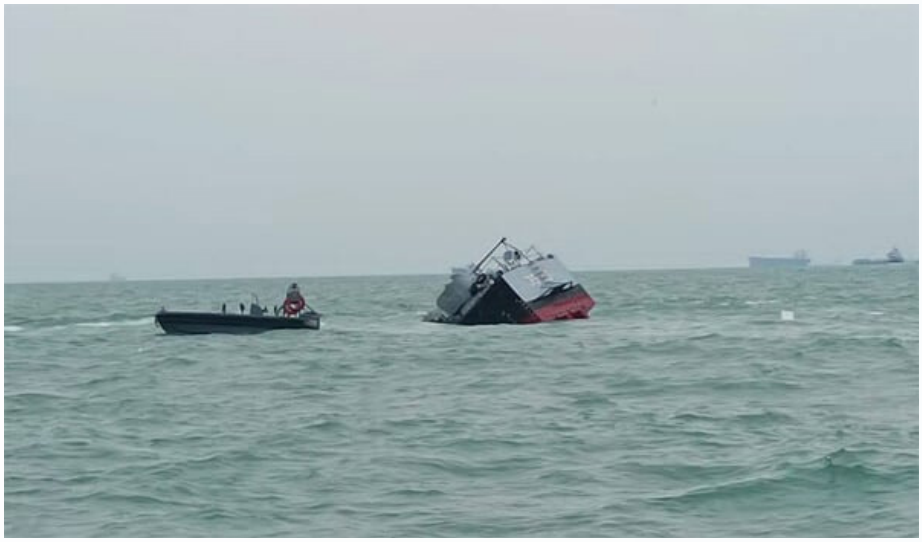
value when compared to the Old Code.

Application and Enforcement:

Even though the New Code provides practical ways to implement the limitation of liability provisions which is considered a crucial element of Maritime Law, the courts in UAE has been extremely hesitant to enforce such limitation of liability in the past as they tend to place a substantial burden upon the party seeking such limitation. While the UAE is increasingly looking to make it a maritime hub by attracting major players in the shipping industry, a conducive legal framework that is aligned with the international regime is always welcome. However, the way it is implemented by the UAE Courts needs to be monitored before we can comment on any possible effects of such a change ■

HOT NEWS

HOT NEWS: ALL HANDS SAVED AS ROYAL MALAYSIAN NAVY PATROL BOAT SINKS



On August 25, the Royal Malaysian Navy confirmed that all 39 crewmembers aboard the KD Pendekar were safely rescued after the vessel sank during a patrol mission. The KD Pendekar, a 45-year-old fast attack boat, was patrolling near the south-eastern tip of the Malaysian peninsular close to the Singapore Strait when it began taking on water.

The incident occurred around noon local time when the patrol boat, which displaced 260 tons and measured 141 feet in length, started flooding in its engine room. Despite the crew's efforts to control the situation, the flooding spread uncontrollably, causing the vessel to list and eventually sink. The crew was evacuated and rescued by a nearby commercial vessel, with no injuries reported.

Preliminary suspicions suggest the boat may have struck an underwater object. A board of inquiry has been convened, though officials are advising against speculation. The Navy has initiated a salvage operation, but the vessel was reported to be fully submerged approximately four hours after the sinking.

The KD Pendekar was one of four patrol boats built for the Malaysian Navy by Karlskrona Varvet Shipyard in Sweden and was commissioned in 1979. Known for its speed of 34 knots and agility, the vessel was primarily used for search and rescue missions and patrols against illegal fishing activities. The boat was equipped with 57 mm and 40 mm/70 guns and had originally been fitted with Exocet anti-ship missiles, which were planned to be removed due to outdated technology.

This loss highlights ongoing concerns about the Royal Malaysian Navy's ageing fleet. A recent report indicated that half of the Navy's fleet exceeds its projected lifespan, with delays in acquiring replacements. New ships are not expected to be delivered until 2026. In response, Defense Minister Datuk Seri Mohamed Khaled Nordin announced that inspections would be conducted on a third of the fleet, and an investigation into the sinking would be undertaken.

The Royal Malaysian Navy expressed gratitude to Maritime Malaysia, the Royal Malaysian Police, and the commercial maritime community for their support during the rescue and salvage efforts ■

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