The History, Evolution and Legislative Framework of Marine Insurance in England.

By

Dr. Kyriaki NOUSSIA

Due to its nature as the most ancient form of insurance, marine insurance law is dealt with separately than other forms of insurance. The codification of law in this field dates back to 1906, yet it continues to be in force and widely accepted although it has been further "ornamented" in the course of time via accompanying instruments. This article sets out to examine the history of marine insurance law in England and provide a critique as to the effectiveness of the statute(s) and other regulatory instruments in force. It is of special interest to note that despite the numerous proposals to abolish the Marine Insurance Act 1906, the introduction of a new code would not necessarily prove to be "panacea". The fact that perfection is difficult to be sought – if not impossible – together with the role that the judiciary has played in exemplifying the weaknesses of the various regulatory instruments, poses the need for an overall critique and reflections regarding the necessity of developments in the field.

Early Historical Background.

Marine Insurance, the oldest of the many forms of protection against losses, has a long history of great interest. The ancient Phoenicians, the Greeks, the Romans were in the habit of guarding themselves against some of the risks of maritime enterprise by various systems of insurance, whether in the shapes of loans or mutual guarantee.[1]

It is believed that, the loan form known under the name of '*Bottomry'* is one of the oldest. It may be defined as the mortgage of a ship, i.e. her bottom or hull, in such a manner that if the ship be lost, the lender likewise loses the money advanced on her; but, if she arrives safely at the port of destination, he, not only gets back the loan but in addition, receives a certain premium previously agreed upon.

It is probable that the system of insurance arising out of Bottomry came to be not only the oldest but also the most wide-spread form of marine insurance, principally for two reasons i.e. the extreme simplicity of the transaction and the desire to escape the penalties of the laws against usury. The form of marine insurance, known as Bottomry, soon grew out and developed into the modern system of insurance.

The Lombards.

Over the centuries, various forms of marine insurance have flourished in Europe. The Hanseatic merchants of northern Europe had an insurance centre based at Bruges, best known as the first *'Chamber of Insurance'* and in 1432, the city of Barcelona also laid down the first recorded statute for insuring ships.

Meanwhile, the first form of marine insurance in Britain had been started by a group of Hanseatic merchants and was later carried on by some German colonists who were the first

[1] Although it was probably the Greeks and the Phoenicians who were among the very first to have insured against maritime loss, however, the first existing record of marine insurance appears to have originated from a Roman edict of AD 533, in the reign of Emperor Justinian.

known London underwriters to have exercised marine insurance almost exclusively with no apparent sign of competition for many years. It was only until the late years of their existence that they were faced with competition from another group of foreign immigrants, *'the Lombards'* - who took their name from the name of the street where their businesses and trading firms were established i.e. Lombard Street – who begun marine insurance by advancing sums on Bottomry loans. The activity of the Lombards came to an end when England's foreign trade came to the hands of Englishmen. Although gone, they are memorable for they are the ones who brought marine insurance practice into general use, making it acceptable to the trading community at large by the introduction of proper rules and regulations.

Early English Marine Insurance.

The commencement of the 17th century formed the starting point of a new period in the history of marine insurance in Great Britain. During the first period, dating back to the beginnings of foreign commerce and ending within the 16th century, marine insurance was carried on chiefly, if not entirely, by foreigners; while during the second and subsequent period it fell into native enterprise.

A distinct line and division between the two periods was formed by the Elizabethan Act of 1601 which is the first statute prepared by the English Government and passed by the Parliament. It was titled *'An Act Concerning Matters of Assurances Amongst Merchants'* and it is highly memorable as the first in the statute-book regarding marine insurance. The Act of 1601 also established the Court of Insurance. The Court was unfavourably looked upon both by the mercantile community and the courts of common law and as a result had very little function.

The Founder of Lloyd's and the Rise of Lloyd's Coffee House.

Until 1666, the business of underwriting is not known to have been carried in any other specific fixed localities other than at the private offices of bankers, money-lenders and others who also pursued their own avocations besides. After this period, numerous coffee houses were gradually established in the City of London for the purpose of underwriting. Within a few years they sprung all over London, and merchants visited them chiefly, if not entirely, for business purposes.

The first London coffee house was opened in 1652, by a Mr. Bowman, in St. Michael's Alley, Cornhill, London. The *'Lloyd's Coffee House'* originally located in Tower Street, moved to Lombard Street around 1691 or 1692. This, together with the fact that its owner was responsible for the issuing of the weekly newspaper *'Lloyds News'*- furnishing commercial and shipping news - made it the place of resort for persons connected with the shipping business. In 1771, a Committee was elected to represent the underwriters and payment of a subscription, the first significant movement of underwriters themselves towards assumption of responsibility for the organisation of the market and in 1871 - via the first Lloyd's Act – it became a structured organisation regulated by a constitution.

The Growth and Evolution of the System and the Law of Marine Insurance.

Over a hundred years passed after the enactment of the 1601 Act, before any other statute related to marine insurance was adopted.

The Marine Insurance Act of 1745 was a breakthrough Act in that it prohibited the making of policies of marine insurance in the subject matter of which the assured had no interest. This was the first attempt to put an end to the practice of wagering disguised by marine policies whereby persons without interest in a vessel or its cargo would insure using a marine policy form. The 1745 Act required those procuring marine policies to be interested in the subject-matter, and similarly prohibited the practice of insuring on the basis of "policy proof of interest".[2] The Act of 1788 laid down that all policies made out in blank, were void and the Act of 1795, required all policies of marine insurance to be in writing and to be stamped. In 1894 *'The Marine Insurance Codification Bill'* was introduced in the House of Lords, by Lord Herschell, and it is its content - slightly altered - which provided the basis for the 1906 Act, namely *'An Act to Codify the Law Relating to Marine Insurance'*.

The early marine insurance legislation chiefly left it to the market and the Courts to develop the principles of marine insurance law which have been ultimately codified in the Marine Insurance Act 1906 (MIA 1906). The MIA 1906 is mainly a codification of around 200 years of judicial decisions and still nowadays there is no equivalent to it codification. The Act in many points is presumptuous in that its wording is binding and will operate in the absence of any contrary party agreement. More over, the marine insurance contracts which are underwritten in England are governed by the various sets of Standard Marine Clauses which frequently eliminate the power of the presumptions set by the Act. In addition, many post-Act decisions help refine the meaning of the Act.

The 1906 Act approved the use of the *Lloyd's S.G. (Ship and Goods)Form of Policy*, previously adopted by Lloyd's in 1779. The Institute of London Underwriters drafted clauses appended to the policies, in order to deal with certain area of inefficacy of the SG Policy. The clauses of 1982,1983 resulted in the SG Policy being abolished and replaced by a simpler wording which acts as a cover sheet for the relative Institute Clauses. The Institute Clauses have been revised many times, lastly in November 2003.[3]

Because of MIA 1906 section 4,[4] a later Statute was enacted, i.e. the *'Marine Insurance (Gambling Policies) Act 1909'*. The statutes are cited as *'The Marine Insurance Acts 1906, 1909'*. The later imposed certain criminal responsibilities on the parties to contracts of marine insurance effected by way of gaming or wagering on loss by maritime perils.[5]

[2] This Statute was finally repealed by the Marine Insurance Act 1906, the provisions of the earlier Act with regard to 'no interest' policies being re-enacted in Section 4 of the 1906 Act.

[3] A number of different forms of insurance are required to provide full cover for a marine adventure and these are nearly all available under Institute Clause wording. There are three main heads of cover: cargo, hulls and freight. As far as cargo is concerned, there are basic standard cargo wordings for marine risks (i.e. the Institute Cargo (A) Clauses covering all risks, while the (B) and (C) clauses cover specified risks) and for cargo in containers. In addition, there are different standard wordings for particular types of cargo. Hull and machinery insurance, is available on a time and voyage basis, either on a full risks or restricted risks basis, in respect of all losses or total loss only and including port risks if so required. Freight is insurable on a time or voyage basis, generally on more or less the same terms as hull insurance. These three categories of marine insurance exclude war and strikes risks, although such risks are separately insurable under wordings identical to marine cover but which exclude marine risks and replace them with war and strikes risks. {See p.xxxviii, Merkin, R.: *Marine Insurance Legislation* , LLP 2000}.

[4] Which lacked repressing gambling on loss - by maritime perils - and imposed no penalties on those who were parties to such contracts.

[5] See pp. 30-35 Dover, V.: *A Handbook to Marine Insurance*, 1957.

The Generating Factors of the Marine Insurance Act 1906 and the Policy Reasoning behind it.

The sources and policy reasons behind the enactment of the Marine Insurance Act 1906 can only be traced if one carefully examines the Parliamentary Debates that lead to the passing of the Bill. During its second reading it was stressed, by the Earl of Halsbury, that the Bill was of an extreme importance very seriously affecting an enormous business. Similarly, the Attorney General pointed out that the codifying Bill would constitute a great convenience to the mercantile community which would want to have this branch of law put into a comprehensive and intelligible form, given that the law, as it stood at that time, was primarily found in cases in the law reports and, as a result of that, it was not always easily accessible or understood by the ordinary layman. The Bill, proposed to state the whole of the existing law so that the mercantile community would know exactly which liabilities it had. It was a Bill demanded by all involved in the mercantile community and its' passing was the most valuable measure to be appreciated by this community.

It is apparent that the passing of the Bill and the enactment of the MIA 1906 was an urgent need, imposed by the needs and problems of the day, and especially those of the mercantile community which desperately sought to codify - in the form of a legislation - marine insurance which was so closely related to their commercial businesses yet so ineffectively legally framed. Commercial needs, usage and customs also imposed the need for the creation of a piece of legislation regulating marine insurance. The mercantile community needed to be reassured that the undertaken risks to be insured were such that they could be legally protected. Also, the flourish of gaming and wagering contracts during this era increasingly evoked the need for legal protection, and the way to achieve that was through the passing of an Act that would render contracts with illegal content void. In a similar way, other problematic points of the marine insurance practice.[6]

General Conclusive Remarks.

In England, the MIA 1906 is said to have primarily codified the then existing cases. Many think of it nowadays as out of date, however, it is remarkable the extent to which it has covered various legal issues in connection with marine insurance law and practice. Moreover, its' combination with the Institute Clauses render it additionally stronger.

Many have supported the idea of abolishing the MIA 1906 in light of the establishment of a new modern code. Codification has never been an easy task and considering the fact that the MIA 1906 has mostly achieved to establish clarity at the time of its enactment and that there is no guarantee that the new statute will accomplish to fully extinguish uncertainty, we conclude that perfection in a statute is not achievable and in that sense it would not be wise to simply abolish the MIA 1906 and replace it by another code of similar imperfection in certain aspects. Moreover, the actual operation of Act in terms of the market involved has been rather satisfactory given that many of the factual questions raised are solved by reference to market evidence and also due to the fact that Courts have played a major role in clarifying things not stated in the Act.

More specifically, the role of the judiciary has been major and crucial in clarifying what the Act may have failed to achieve. Essentially, Courts have managed to develop and reapply code principles to novel situations by applying the law in a way which is flexible and

[6] Such as the lack of good faith and the way to deal with it, valuation and the measure of indemnity, as well as subrogation issues, urged the enactment of the Marine Insurance Act 1906.

reflects the market trends. Also, Courts have often resorted to common law in order to interpret the new meanings embodied in the constantly changing wording which the market uses in its Institute Clauses and this by itself has also brought a light of novelty.

English courts have managed through their rulings to produce results which are by definition flexible and it is in that sense that they have managed to modernise marine insurance law.