Evolution of Marine Insurance Law

AAA seminar celebrating years 150 of the Association

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Rocks do not evolve. Living mechanisms evolve.

Marine Insurance Law is a living mechanism.

Like every living creature marine insurance has evolved from its birth to the present day. The famous Marine Insurance Act of 1906 constitutes the alphabet, the platform, the canonical rules, the basic solid guidelines on which this construction is based. It is by no means perfect, neither easily comprehensible, it is sometimes confusing and, in some points, draconian, however, it remains the law and has served the industry for over a century and continues to do so.

The Act has not changed for over a century until the Insurance Act of 2015. What has changed, is our perception of the practice of the law. This is evolution. Our practice has evolved on how to apply the Act. We have evolved on how to draft and interpret new tools that aim to serve the business needs of our time. The change in our perception is the evolution.

For the purpose of this presentation I have identified two main directions of evolution.

The first direction is the evolution of our understanding of the Act itself.

The other direction is the response to the changing environment and the expansion of new tools we invent and attach to the policies. Tools that aim to satisfy the insurance needs of a changing shipping world.

Let's see the evolution of new tools in a changing environment.

At the time of the sails the main marine peril was "perils of the sea". Even the negligence of the master was operating through perils of the sea. Ships were relatively simple structures and any latent defects were of minor importance. The mechanisation of the vessel in the late 19th century revealed the need for a revision of the marine policies. The famous Inchmaree case of 1887 was the spark that initiated a major revolution in the marine insurance policies and produced the homonymous named clause which many of you are familiar with.

The inclusion of the Inchmaree clause in the policies for engine propelled vessel was just the beginning of a long process of learning how to apply it. Do you think that that was an easy process, or that it came with a step to step instruction manual like an IKEA product? … Well that wasn't the case … It took almost a century for the marine insurance practitioners to fully comprehend the application of the clause.

In 1906 at the case of the vessel Zealandia it was demonstrated that only the consequential damage caused by a latent defect is recoverable.

Later in 1911 with the vessel Mermaid it was shown that there is no cover under the clause for the discovery of a latent defect, only for the consequential damage.

1937 marks the beginning of the "part theory" saga with the vessel JALAVIJAYA. In this case the court decided that the latently defective part (the shaft) was not covered but the consequential damage to the propeller was covered under the policy.

The "part theory" was terminated in 1997 with the famous "NUKILA" case where it was established by the judge that the "part theory" was an artificial device and has no application to the clause.

You see it took over a century to learn how to properly apply clauses that we introduced, when at the same time the ship's machinery had evolved, from reciprocating steam engines, to nuclear reactors …

Another example of altering environmental factors is the heightened concern on marine pollution in the later half of the 20th century.

No one had thought before the TORREY CANYON that a ship can be intentionally destroyed in order to minimise an environmental disaster. Insurance cover, for consent to the destruction of the subject matter insured, was unthinkable.

Again, the measures to prevent pollution forced the general average rules to change. In 1994, the new XI(d) Rule was introduced to the York Antwerp Rules, which allows the cost of measures to prevent pollution at a port of refuge in general average. Certainly this was not a concern in 1924 !

In the early times of salvage there was no issue preventing marine pollution. The worldwide concern, in the later half of the 20th century, about the destruction of the marine environment from polluting vessels lead in 1989 to Art. 14 of the International Convention for Salvage. Art. 14 was later better quantified with the scopic clause. Finally, it was not until 2019, when the scopic clause was tested against the provisions of the law on constructive total loss which were already 113 years old.

The most rapidly changing technology of the 20th century was the means of communication and exchange of information.

The Act was drafted at the time of the good old Morse code. Underwriting was a difficult task based on a small fraction of information related to the risk. Hence, the Act had to be draconian in relation to warranties, disclosure of information and required absolute good faith.

In today's flood of information, the underwriter cannot claim to be so ignorant when the information can be made available with only few "clicks". This leads to the Insurance Act of 2015 and the complete revision of issues such as warranties, non-disclosure and fraudulent claims.

Turning quickly to the second direction of evolution. This branch of development has to do with our perception concerning the application of the good old words of the Act.

The Act provides cover when "proximately caused by a peril insured".

It was in 1918 at the IKARIA case where the word "proximately caused" was adequately defined. But the story was not over yet … In 1973 in the Wayne Tank case the definition of the proximate cause was debated in occasions where there were two concurrent causes of equal efficiency and one excluded. The story continues in 1987 with the Miss Jay Jay which involved two proximate concurrent causes, and none excluded. If you think that this area has been clarified look at The Cendor MOPU in 2011 where the proximate cause and inherent vice issues was again revisited at the Supreme Court.

A more technical example is the calculation of the indemnity for unrepaired damages.

In 1882 Pitman's formula, a method for the calculation of the unrepaired damage claims, was put forward. In 1906 the Act is introduced but does not make any clarification to this point other than the general statement in s. 69.

Pitman' formula was neither approved nor rejected in the Act.

The issue was still outstanding in 1949 at the Irvine vs Hine. Competing methods were presented in the court but no firm decision was taken. In the Medina Princess of 1965, the same issue arises without any firm conclusion about the method of calculation but at least it was clarified at which point in time the estimation must be made.

A century after the Pitman's formula was introduced the issue was still unsettled. In the Catariba case in 1987, the measure of indemnity for unrepaired damages of successive unrepaired losses arose and was debated.

All the above examples are a mixture of two elements, 1) evolution of our perception of how to apply the law and 2) the drafting and application of clauses to respond to the ever-changing needs of insurance in shipping.

New challenges lie ahead with cyber-attacks, arctic voyages and autonomous vessels.

By the way, have we thought of the challenges of a general average or a salvage operation in the arctic regions?

Evolution is learning from mistakes and marine insurance evolves as every other living being.

Thank, you !

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