

Determining the Responsibility of the Insurance Company in Transporting International Goods

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Abstract

The paper deals with a complete analysis of the liability of the insurer in the international carriage of goods. The paper lays down the international instruments that govern the field and to what extent they affect the liability of the insurer. The paper also analyzes the conflict of laws issues related to the international insurance. The paper further does a study of the concepts related to the international insurance of carriage of goods and liability of the insurer. The focus has been on the common law principles.

Aim and Objectives

The paper analyzes the extent of liability of the insurance company. It would give a critical analysis of the liability and limitation of liability of the insurance company under different heads. The paper has targeted different instruments like international conventions, municipal laws and most importantly principles of common law on this subject.

Scope:

Due to the paucity of time and space the researchers have limited the scope of the paper to the liability of insurance company in general sense. There is also a lacuna in International Law on this particular aspect of insurer's liability thus more attention is paid to common law principles and the Marine Insurance Act, 1906. The author has referred to case laws from different jurisdictions to give a wider prospective but has not done a comparative study of different legal regimes.

PROBLEM STATEMENT:

The International legal existing setup is not in itself equipped to deal with issues in determining the liability of the insurance company for the transport of international goods when the ship sank for a reason beyond the control of the captain.

RESEARCH Methodology:

The methodology adopted in the research for this paper involves a thorough reading and analysis of the liability of insurer in the international carriage of goods. The study is thus based primarily on a doctrinal-qualitative approach. Based on the research, co-relations have been drawn with the position of the law in other jurisdictions.

DOI: 10.7176/IAGS/92-03

Publication date: December 31st 2021

Introduction

A person, in his normal course of life, is fundamentally exposed to unlimited perils to his interests. The causes of such perils are plenty such as nature's own doings and more arising out of economic activities. Such risks are inevitable and have to be tackled in a systematic method.¹ The nature and the instincts of the man has enabled him to conceive appropriate means to tackle such kinds of risks. One such means is the apparatus of *insurance*, which may be applied between two parties by way of a contract.

In law and economics, insurance is a form of risk control primarily used to hedge against the risk of a contingent, uncertain loss.² "*Insurance*" is the equitable transfer of the risk of a loss, from one entity to another, in exchange for payment.³ A contract of insurance would be a contract wherein one party (the insurer) promises in return for a money consideration to pay to the other party (the insured) money or money's worth on the happening of an uncertain event more or less adverse to the interest of the insured.⁴

Insurance is also defined as "a contract whereby, for specified consideration, one party undertakes to compensate the other for a loss relating to a particular subject as a result of the occurrence of designated hazards".⁵ In *Clarke v Clarke*⁶ it was defined as "A contract by which one party undertakes, in consideration for a payment (called a premium), to secure the other against pecuniary loss, by payment of a sum of money in the event of the death or disablement of a person." Therefore an individual seeks to reduce the *potential risk* by

¹Principles of Insurance Law, M. S Srinivasan, 7th edition, 2002, [LexisNexis ButterWorths](http://www.lexisnexis.com/butterworths/), at pg 1.

²An introduction to insurance by Fernwood Business College. <http://www.fbc.edu.za/insurance.html> (last accessed : 13.11.2021).

³*Id.*

⁴This definition was given in the case of *Prudential Ins. Co. v Inland Revenue Commerce*. (1904) 2 KB 84, 95.

⁵The Legal Dictionary, <http://legal-dictionary.thefreedictionary.com/insurance> (last accessed: 13.11.2021).

⁶(1993) 84 BCLR 2d 98.

entering into a contract of insurance; this can be called the main purpose of the contract of insurance.

The law of insurance, though appears to be a branch of contract law, is treated as a different branch of law all together.¹ In *Prudential Insurance Co. v. IRC*² Channel J. stated that the contract of insurance have to have the payment of sum, periodical or lump sum, made by one party (policyholder) as consideration to other, and the other party in return agrees to indemnify the policyholder against any loss caused by an event that is adverse to the interest of the policyholder. It is a contract of indemnity³ and it is necessary to have an insurable interest in the contract otherwise the contract becomes a wagering agreement and thus void.⁴

The business of insurance has grown over the period of time and in this era of globalization it has taken a totally new look.⁵ International carriage of goods is an area where insurance is very essential, there is always a risk of damage or loss of goods, or even delay that might cause loss.⁶The seller and the buyer either can get insured depending on the terms of their contract and sometime also for personal satisfaction.⁷

The paper analyses different aspects related to the liability of the insurance company in the international carriage contracts. The paper first will deal with the application of principles of conflict of laws and how these concepts affect the liability of the insurer. The second part of the paper deals with the instruments governing the insurance law. The third part deals with liability of the insurance company in the contract of insurance, this will cover concepts like duty of utmost good faith (*Uberrimae Fidei*), loss etc.; this part will also focus on different instruments like Marine Insurance Act, 1906.

Since the topic is very vast thus a detailed analysis of many head under the paper is not possible, though the author has tried to give a fair treatment to each concept. Due to this reason a comparative analyses of different legal regimes was not possible under this paper

The nature of such contract is similar to other insurance contracts, with a slight divergence in the case of Marine Insurance (the most important type of insurance in international carriage of goods is marine insurance).

2. Conflict of Laws and International Insurance Law:

Since the paper deals with international insurance transactions therefore it is important to give a brief reference to the rules of conflict of law governing issues like jurisdiction, choice of law and enforcement. In broad prospective the jurisdictional issue is dealt under following heads: Brussels Convention⁸ for members of European Union, Lugano Convention⁹ for members of European Free Trade Association (EFTA) and common law principles for the rest.¹⁰

Insurer, who is, domiciled in any of the Member State may be sued in either of the following jurisdictions: in the court of Member State in which he is domiciled, a Member State where policyholder is domiciled, or if it relates to a co-insurer then the Member State in which the case is filed against the other insurer.¹¹

The parties have been given autonomy to decide the jurisdiction according to their own convenience, this can be incorporated in their contract and in such cases they will have exclusive jurisdiction, but the same should not be hit by doctrine of public policy.¹²

The Member State's Court will apply *lex fori* in deciding whether it is a contractual issue or otherwise.¹³

3. Instrument Governing Insurance:

Different Insurance Law regimes take different legal approaches though the general principles are the same.¹⁴ Various efforts have been made to unify and bring in uniformity in the legal setup; like, on 6th, November, 1978 the Committee on Invisibles and Financing related to Trade adopted 9(VII)¹⁵ resolution based on

¹ Professor Andrew McGee, *The Modern Law of Insurance*, 3rd ed. 2011, LexisNexis Publications, p. 3.

² [1904] 2 KB 658.

³ Susan Hodges, *Law of Marine Insurance*, 3rd ed. 2005, Cavendish Publishing Ltd., p. 1.: see also *Rickards v. Forestal Land, Timber and Railways Co.*[1941] 3 All ER 62 p. 76.

⁴ *Id.* P.3.

⁵ Jason C.T. Chuah, *Law of International Trade: Cross Border Commercial Transactions*, 4th ed. 2011, Sweet & Maxwell South Asia Edition, p. 420.

⁶ *Id.* p. 403.

⁷ *Id.*

⁸ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968; can be accessed at: <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm> last accessed on 16.11.2021 at 06:00 p.m.

⁹ Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1988; can be accessed at: <http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm> last accessed on 16.11.2021 at 06:00 p.m.

¹⁰ *Supra* note 7 p. 669.

¹¹ *Supra* note 7 p. 671.

¹² *Id.* P. 675.

¹³ *Huntington v. Attrill*, 146 U.S. 657 (1892).

¹⁴ *Legal and Documentary Aspects of the Marine Insurance Contract*, United Nation Conference On Trade and Development, Geneva, Reported by UNCTAD, TD/B/C.4/ISL/27/Rev. 1; available at http://unctad.org/en/PublicationsLibrary/c4isl27rev1_en.pdf last accessed on 18.11.2021 at 04:00 p.m.

¹⁵ See Official Record of the Trade and Development Board, Seventh Special Session, Supplement No. 2, (TD/B/590); the report contained

recommendation contained in the study of the UNCTAD on Marine Cargo Insurance concerning the placement of risk in the local markets of developing countries.¹

Though there are several international instruments which have clauses which govern the field of insurance. Convention on the Contract for the International Carriage of Goods by Road (CMR) - (Geneva, 19 May 1956), United Nations (UN)² states that consignment note can contain the instruction of the sender regarding the insurance,³ and further that any provision in the contract that is in contravention with the present international instrument will be null and void but this will not vitiate the whole contract.⁴

The above mentioned Convention is again modified⁵ and used by European Union; and the said provision is contained in Article 23(2). The Montreal Convention, 1999⁶ goes further, it states that the state parties shall make the insurer to have adequate cover for their liability under this Convention.⁷

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010⁸ makes it compulsory for the carrier of the hazardous substance to get insurance of the carriage.⁹

But none of the above instruments speak anything specific about the liability if the insurer or how the contract of insurance has to be made or executed.

But the limitation in these studies done by the UNCTAD is that they only concern the developing economies and not the others, thus the problem of uniformity remains unsolved. This is the reason that people are pointing towards developing a international regime that can bring in uniformity into the insurance filed, as cargo or more specifically marine insurance is truly international in nature, but it has to be kept in mind that any such international instrument has to be considerate and flexible to divergent economies as it will be applicable on all sorts of economies across the spectrum.¹⁰

The paper has considered the England's Marine Insurance Act, 1906 in a great detail, because across the globe in common law countries the common law principles, applicable to insurance contract, are same and the Act is a codification of these principles.

4. Liability of Insurance Company

4.1 *Uberrimae Fidei*:

The contract of insurance is based on utmost good faith from both the parties, since the contract is based on an uncertain event it becomes important for both the parties to have sufficient information to give a sound consent; thus the information given by both the parties must be in utmost good faith.¹¹

Most contracts are governed by the maxim 'caveat emptor' or 'let the buyer beware'. Insurance, however, is governed by the doctrine of utmost good faith.¹² The Insurance contracts demand a higher standard to good faith as compared to ordinary contracts.¹³ A person seeking insurance is bound to disclose all material facts relating to the risk involved, the duty falls on both the insurer and the insured.¹⁴ Lord MANSFIELD stated the principle of utmost good faith in *Carter v. Bohem*,¹⁵ thus: since the contract of insurance is based on a uncertain event and the factors on which the probability of happening of that event depends are known more to the assured than the insurance company and therefore to achieve equal footing before acceptance it becomes necessary for assured to tell everything to the insurance company.

In *Bell v. Lever Bros Ltd.* Lord ATKIN observed that: the duty of utmost good faith does not arise out of the contract but exists even before the contract is made.

specifics of how developing countries should promote insuring large risk in the local insurance market for the growth of both economy of those markets as well as the insurance industry.

¹ *Id.* P. 40.

² Available at http://www.jus.uio.no/lm/un_cmr.road.carriage.contract.convention.1956/doc.html last accessed on 18.11.2021 at 05:30 p.m.

³ *Id.* at Article 6(2)(e).

⁴ *Id.* at Article 41(2).

⁵ Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) Done at Geneva on 1 March 1973 available at http://www.unece.org/fileadmin/DAM/trans/conventn/CVR_e.pdf last accessed on 18.11.2021 at 07:20 p.m.

⁶ Convention for the Unification of Certain Rules for International Carriage by Air Signed at Montreal on 28 May 1999 (the Montreal Convention, 1999), available at http://dgca.nic.in/int_conv/Chap_XXI.pdf last accessed on 18/11/2021 at 07:00 p.m.

⁷ *Id.* at p. 50.

⁸ The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010,(Consolidated text of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, and the Protocol of 2010 to the Convention) available at <http://www.imo.org/OurWork/Legal/HNS/Documents/HNS%20Consolidated%20text.pdf> last accessed on 18.11.2021 at 08:00 p.m.

⁹ *Id.* at Article 12.

¹⁰ *Id.* P. 41.

¹¹ *Supra* note 11 p. 403.

¹² http://www.herbertsmith.com/NR/rdonlyres/92C43C3F-082A-4B30-9B0E-41C27C91DF89/0/Pt_1.pdf (Last accessed at 19.11/2021).

¹³ *Laidlaw v. Organ*, 2 Wheat 98; See also *Turner v. Green* (1895) 2 Ch. 205.

¹⁴ *P. Sarojam v. Life Insurance Corporation of India*, AIR 1986 Ker 201. It is however necessary that the facts must be relevant and material to the risk involved.

¹⁵ (1766) 3 Burr 1905.

Therefore it is fundamental principle of Insurance Law that utmost good faith be observed by the contracting parties, that is expressed by saying that it is a contract of good faith –*uberrima fides*.¹ Good faith forbids either party from disclosing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary. Just as the insured has a duty to disclose, it is the duty of the insurers and their agents to disclose, all material facts within their knowledge, since obligation of disclosure applies to them equally with the insured.²

This duty, though peculiar to the assured, is sometimes applicable to the insurer as well.³ In the case of *CGU Insurance v. AMP Financial Planning*⁴, the court held that the failure of performance of duty to disclose on the part of the insurer will vitiate the contract in certain circumstances; when the failure hits the subject matter.

The insurer can avoid the contract on the grounds that the assured has failed to perform his duty of disclosure. This is a remedy of equity and, has been codified and put under Section 17 of the Marine Insurance Act 1906.⁵ The relevant factor to be considered under such circumstances is whether the disclosure related to a “material” fact; if yes then failure of disclosing such a fact would open the doors for the insurer to avoid the contract.⁶ In *Container Transport International Inc. v. Oceanus Mutual Underwriting Association*⁷ the court held that the test should be whether the disclosure would impact the decision of the insurer in taking risk and not exactly effect the ultimate decision, plus test to be applied on hypothetical insurer and not any particular insurer. But the same was overruled in *Berger & Light Diffusers Ltd. v. Pollock*⁸ in this case court made it clear that the test is not to be applied on any hypothetical insurer but on the actual insurer. This decision was right as it removed the double subjectivity that existed because of *Container Transport*.⁹, it is necessary that the test is applied to the actual insurer so that in circumstances can be considered and then only one can reach on an appropriate decision whether the disclosure would have impacted the decision of the insurer.

The law as it stands today was laid down in the case of *Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.*¹⁰ this case overruled the *Container Transport*¹¹, the court declared that the correct test is whether the disclosure would have induced the insurer into the decision and not particular like: whether the disclosure would have made the insurer to take or deny the risk or alter the premium; the Court was interpreting the Marine Insurance Act 1906 and thus declared that the insurer mentioned under Section 18 of the Act is hypothetical insurer, the Court was probably not correct in ascertaining this point as this leads to double subjectivity: first who is a hypothetical insurer and second how he would have acted? This was further modified by the Court in *St. Paul Fire v. Mc Connell Dowell*¹², the court held that proving materiality would lead to presumption of inducement.

A recent development has created some confusion regarding the international application of the common law principles laid down in *Pan Atlantica*¹³ case; in an appeal from New Zealand the Privy Council in the case of, *Far Eastern Shipping Co. Ltd. v. Scales Trading Ltd. & Geo H Scale Ltd.*¹⁴, held that in case of Trade Guarantee Agreement contained a clause of full disclosure then the assured cannot argue that there was no inducement, not matter how immaterial the fact was. However the case is not binding in England and Wales but the same casts cloud over the applicability *Pan Atlantic*¹⁵ case.

This is a mainly a pre-contractual duty but applies to a lesser degree after the conclusion of the contract as well.¹⁶ However assured does not need to disclose everything after the contract is made as the degree of the duty drops down once the contract is made.¹⁷ The scope of this post contractual duty is limited to cases of repudiatory breach and fraudulent claims.¹⁸

In *Strive Shipping Corp. v. Hellenic Mutual War Risk Association*¹⁹, the assured did not disclose that its owner was alleged complicit in the fraudulent sinking of the ship, this was a case of non-disclosure and scuttling; such type of information is certainly material and needs to be disclosed but since it was a criminal allegation and

¹*Rozanes v. Bowen*, (1928) 32 LILR 98, 102.

²*Union India Insurance Co. Ltd. V. MKJ Corp.* (1998) 92 Comp Cases 331(333).

³*Supra* note 11 p. 412.

⁴ [2007] H.C.A. 36.

⁵ *Supra* note 11 p. 412.

⁶ *Id.*

⁷ [1984] 1 Lylod's Rep. 476 CA.

⁸ [1973] 2 Lloyd's Rep. 442.

⁹ *Supra* note 44.

¹⁰ [1995] 1 A.C. 501.

¹¹ *Supra* note 44.

¹² [1996] All E.R. 96.

¹³ *Supra* note 47.

¹⁴ [2001] All E.R. (Comm) 319.

¹⁵ *Supra* note 47.

¹⁶ Simone Schnitzer, *Understanding International Trade Law*, First Indian Reprint 2007, Universal Law Publishing Co. Pvt. Ltd.

¹⁷ *Niger Co. Ltd. v. Guardian Assurance Co. Ltd.* [1919] Vol. 1 L.L.Rep. 641.

¹⁸ *The Star Sea and K/S Merc-Scandia XXXXII v. Certain Llyod's Underwriters*

¹⁹ [2002] EWHC 203.

needed a higher standard of proof thus it was held that non-disclosure would not repudiate the contract. It is thus seen that in such cases it becomes the duty of the court to strike a balance between assureds' right of dignity etc. and insurer's right to weigh the risk.¹

4.2 Misrepresentation:

The non-disclosure will lead to insurer being able to avoid the contract; this is a settled law. But apart from this in cases of misrepresentation also the same yardstick is applied.²Section 20 of the Marine Insurance Act 1906 captures this principle; it covers two situations: first of misrepresentation of "material facts", which has the same fate as non-disclosure and the second, misrepresentation of "expectation of belief", these disclosures are unimpeachable as long as they are made in good faith.³In *Redall v. Combined Insurance Co.*⁴ It was held that in case of misrepresentation the claim of good faith will only survive if it has some factual basis.

On the other hand is the damage is caused by negligent the general law is that it could lead to rescission of contract, but Marine Insurance Act, 1906 is silent on this issue.⁵

4.3 Causation:

It is a general principle that the insurer will be liable only for the damages caused by the insured perils and not for damage caused by any other means.⁶In addition to this the judicial mindset over a period of time has been that, since it is practically very difficult to draw a exact connection between an event and the damage caused, thus the courts will look in to the immediate or the proximate cause.⁷It is a issue of question of facts.⁸

Probably the most appropriate distinction is made in *Leyland Shipping v. Norwich Union*⁹, in this case a ship was torpedoed and taken to outer harbour but a leak sprang after hitting the quarry, then it was berthed; but its bulkhead gave away and sank. The assured claimed under policy forwarding the argument that the average loss was caused by torpedo but total loss was caused by the action of waves. The Court gave the distinction between *causa sine qua non*, the background circumstances and *causa causans*, operating cause. The Court stated that since after being torpedoed it was under the danger of being sunk and thus it is the operative cause. The Court further stated that the proximate cause is not the nearest cause in the time frame but depends upon the effectiveness of the particular cause.

The judicial mind has been very accurate in determining the proximate cause, in *Green v. Elmslie*¹⁰ the ship was insured against capture and the ship was driven to French coast to protect it from storm, where it was captured; the insurer to avoid the contract argued that the damage was caused due to storm and not capture, but the court held that the damage was caused due to capture as had the ship been taken to any other coast it would have been safe.

As stated earlier the insurer is only liable for damages caused due to peril and nothing else, thus even if the damage is caused due to action taken or act done to avoid the peril the insurer will not be liable for the same.¹¹This might seem to be very logical and in line with the basic principle but its application might lead to absurd and illogical end; as in *Becker Gray & Co v. London Assurance*¹² to avoid the damage the form storm the ship was driven to a coast where the danger of capture was apparent and the ship was thus captured, the question was whether the resultant total loss was caused by the sovereign restraint, but the Court held that it was caused by the decision and action of the master of the ship to take it to that coast. Professor Andrew McGee has criticised this rule in his commentary¹³: "it may fairly be said that this is a settled and rather arbitrary rule of insurance law, rather than a strictly logical application of ordinary principle of causation."

The burden of proof is initially on the assured to show that the damage is caused by the insured peril and once this burden is discharged it is for the insurer to rebut the same.¹⁴

¹ *Supra* note 11 p. 420.

² *Supra* note 9 p.92.

³ *Supra* note 11 p. 423.

⁴ [2005] EWHC 678.

⁵ *Supra* note 11 p. 424.

⁶ *Supra* note 7 p. 255

⁷ *Id.* P 257; see also J.C.T. Chuah's comment (*Supra* note 5 p. 443), cites *Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport* [1918] A.C. 350 to state that it is not any metaphysical or scientific principle that is used to determine the exact cause but according to the facts of each case and inquiry conducted in each case it is the judicial mind that will decide the causation.

⁸ *Supra* note 11 p. 445.

⁹ [1918] A.C. 350.

¹⁰ (1974) Peak 278, 178 ER 156.

¹¹ *Supra* note 7 p. 261.

¹² [1918] A.C. 101.

¹³ *Supra* note 7 p. 262.

¹⁴ *Id.* P. 256.

4.4 Losses Excluded:

It is a general principle that if the loss is caused by the wilful misconduct of the assured then in that case insurer cannot be held liable for the said loss even if it is covered under the policy.¹ The basic rationale behind this principle was rightly pointed out by Salmon J in *Slattery v. Mance*,² that one can take advantage out of his or her own wrong. Another remarkable and fine reasoning was provided by Collins LJ in *Trinder, Andreson & Co v. Thames Marine Insurance Co.*³ that since the loss is caused by an deliberate act it drives out the element of risk and accident from the scene, which are essentials for the contract of the insurance.

It is important to understand what is “wilful” to establish a wilful misconduct on the part of the assured and save insurer for being liable. One can find the most expansive discussion on the issue by the judgment of McPherson J in *Wood v. Associated National Insurance Co. Ltd.*⁴ In this case it was observed that in almost all the case the defence of wilful misconduct is countered by the contention that the loss is caused by the peril without any misconduct by the assured and it is very difficult to give a strict definition for the term “wilful misconduct”, it will rather depend on the facts of the individual cases and also on the onus of proofing the same.

The general defence given by the assured is *dolus circuitus non purgatur*, meaning Fraud is not purged by circuit.⁵ It was explained by Mr. Justice Willes in *Thompson v. Hopper*⁶ in the following words:

*“Dolus.. stands for dolu malus, and cannot mean simply anything which may lead to the damage of another... if dolus, in the sense in which it is used in the maxim, can exist independent of evil intention, it cannot so exist without either the violation of some legal duty, independent of contract, or the breach of a contract, express or implied between the parties.”*⁷

In the *Trinder Case*⁸, Lord Justice Collins observed that nothing short of “*dolus*” in its true meaning will liberate the insurer from liability and also that though a standard of proof of the highest criminal standard is not required but the standard to prove the wilful misconduct must be above the normal.

The judiciary has not been very liberal in holding the wilful misconduct on the part of assured and have drawn the line in number of cases, for example in the case of *Papadimitriou v. Henderson*,⁹ the court held that the mere fact that despite the existence of the danger or the peril the assured decided to move forward will not constitute the wilful misconduct on the part of the assured, as the insurance is taken because of these dangers and perils and bringing this action under wilful misconduct will defeat the entire purpose of the insurance contracts.

The burden of proof in these cases differ according to the claims of the plaintiff but normally it is the defendant, insurer, who claims “wilful misconduct” on the part of the plaintiff, assured, so it is the defendant who has the burden to prove that the loss was caused by the wilful misconduct of the assured.¹⁰

The other loss that is excluded from the liability of the insurer is the loss due to the delay caused by the assured, even if the delay is cause of the peril insured against, unless the policy otherwise provides for.¹¹

The concept was probably recognized for the first time in a very old case of *Tatham v. Hodgson*¹², in this case the cargo slave who were insured died because of insufficient supplies caused due to delay, even though the delay was caused because of bad weather condition, a peril insured against, the court refused to hold the insurer liable and held the proximate cause was mortality.¹³

This rule has been followed in numerous cases, in *Pink v. Fleming*¹⁴ the loss was caused by delay and the delay was the result of bad weather condition, again it was a peril insured against, but the court did not consider it and did not hold the insurer liable. Though is the policy provides for a blanket cover then even in the cases of the delay the insurer will be liable, like in case of *Schloss Brothers v. Stevens*,¹⁵

In addition to this, the insurer is also not liable for the “ordinary wear and tear”.¹⁶ The explanation to this rule was very simply and appropriately put by Lord Justice Donaldson of the Court of Appeal in the *Soya GmbH Mains Kommanditgesellschaft v White*, in the following words:

“No ship can navigate the oceans for any length of time, even under most favourable circumstances, without

¹ *Supra* note 9 p. 221.

² [1962] 1 All ER 525 at p 526.

³ [1989] 2 QB 114 at p. 127.

⁴ (1985) 1 Qd R 297.

⁵ *Supra* note 9 p. 222.

⁶ In the Exchequer Chamber, (1985)EI B1 & EI 1038 at p. 1047.

⁷ The same has held again by the *Trinder Case.*(*Supra* note 52).

⁸ *Supra* note 58.

⁹ (1939) 64 Li L Rep 345.

¹⁰ *Supra* note 11 p. 229; for detailed discussion see also Lord Denning’s observations in *Probatina Shipping Co Ltd v. Sun Life Insurance Office Ltd, The Sageorge* [1974] 1 Lloyd’s Rep 369, CA.

¹¹ *Supra* note 9 p. 230.

¹² (1796) 6 Term Rep 656.

¹³ Susan Hodges in his book (*Supra* note 9) has observed that since the judgment was a result of consideration of public policy, that if the insurer are held liable people will carry less supplies on their ships for slaves, and thus cannot be held to be the origin of this rule.

¹⁴ (1980) 25 QBD 396, CA.

¹⁵ [1906] 2 KB 665.

¹⁶ *Supra* note 9 p. 231.

suffering a certain degree of decay and diminution in the value, which is generally compromised under the term wear and tear; for this, however considerable, if it arises merely from the ordinary operation of the usual casualties of the voyage, the underwriter is never liable: he is only liable when the damage sustained is something beyond this, and has been caused by the direct and violent operation of one of the perils insured against.”¹

Apart from this the insurer is also not liable for the damages caused because to the inherent vice of the subject matter.²

5. Conclusion:

It is clear that in this era of globalization is a routine to transfer good from one part of the world to the other, and thus this importance of international insurance cannot be understated. The detailed analysis of the topic provides us with some very important observations. There are very few international instruments governing the field and even they are not exhaustive. Though the common law has evolved to a very large extent on this topic; but the same is not applicable to civil law countries and even in common law countries enforceability is an issue. There are various municipal laws and more or less they are on the same line but degree of variance among them gives rise to problems.

At The same time, it is also very clear that the field of the international insurance throws various challenges: jurisdictional issues, enforcement issues and more importantly the absence of uniformity in the application of law of insurance on these transactions.

In these conditions, it becomes difficult for the parties to know and determine each other’s liability. This problems proves to be fatal for the completely insurance business as a whole; as when there insurer is not aware about the extent of his liability or is uncertain regarding the same, it becomes very difficult for him to function under this type of market. Thus if the insurer withdraw from the international markets then it will not be easy for other business to run smoothly without insurance as the stakes generally are very high.

The common law principles on the topic have evolved a lot and have covered almost all possible aspects of insurance of carriage. Thus the an international instrument on the line of the common law principles can be very useful; but at the same time this cannot be a strict common law codification, the international instrument has to give breathing space to other legal regimes and their principles on the subject as well, only then can this instrument achieve its real goal.

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¹ Supra note 76.

² Supra note 9 p. 235; see also for detailed discussion *Bradely v. Federal Steam Navigation Co*, (1927), 27 LI L Rep 221 at p 395.

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