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# A selective appraisal of the P&I insurance system with special reference to claims for personal injury, illness and loss of life

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**WORLD MARITIME UNIVERSITY**

Malmö, Sweden

**A SELECTIVE APPRAISAL OF THE P&I  
INSURANCE SYSTEM WITH SPECIAL  
REFERENCE TO CLAIMS FOR PERSONAL  
INJURY, ILLNESS AND LOSS OF LIFE**

By

**MYA THIDA LIN**

**The Union of Myanmar**

A dissertation submitted to the World Maritime University in partial  
fulfillment of the requirements for the award of the degree of

**MASTER OF SCIENCE**

**In**

**MARITIME AFFAIRS**

**(MARITIME LAW AND POLICY)**

2009

## DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the university.

(Signature) .....  .....

(Date) ..... *24 August 2009* .....

Supervised by: Professor P.K. Mukherjee  
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Mya Thida Lin  
August 2009  
Malmö  
Sweden

## ABSTRACT

Title of Dissertation: **A Selective Appraisal of the P&I Insurance System with Special Reference to Claims for Personal Injury, illness and loss of life**

Degree: **MSc**

The dissertation focuses on how the effectiveness of P&I insurance covers the needs of claims related to personal injuries, illness and loss of life against the impact of increasing claims consequential to accidents at sea and in shipboard work areas.

Death, injury and illness remain a major problem among seafarers, passengers, and other person related to the shipping industry. The consequences of these health problems, accidents and deaths have the potential for losses in mass productivity, loss of income for shipowners, seafarers and their families, the national economy and the high cost to the insurance industry, particularly the P&I Clubs. Third party liability claims amount to millions of dollars every year.

The majority of the clubs who are members International Group of P&I Clubs suffer the uncertain outcomes of investment income and underwriting losses so that free reserves fall across the industry through the payment of fixed and affordable amounts into a common indemnification fund.

The last chapter concludes that the human element is a crucial causative factor in casualties at sea and shipboard accidents in general. To minimize the impact of losses, it is imperative that not only shipowners but all others involved in the shipping and related industries including protection and indemnity associations and other insurers comply with their respective legal obligations. These may relate to regulatory requirements

pertaining to maritime safety or to employment, training and certification of crew. The legislated standards must be maintained, a part of which is the responsibility of shipowners to exercise greater care in the selection of crew, their training and updating of qualifications in pace with technological developments. Finally, shipboard personnel are admonished to observe the relevant regulatory requirements to ensure and uphold maritime safety in all its facets.

**KEYWORDS:** Personal Injuries, Illness, Loss of Life, P&I Insurance, Indemnification, Claims

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## **LIST OF ABBREVIATIONS**

Articles	Articles of Association
DOHSA	Death on the High Seas Act
EMSA	European Maritime Safety Agency
FD&D	Freight, Demurrage and Defence
H&M	Hull and Machinery insurance
IGA	International club Group Agreement
MOA	Memorandum of Association
ORVA	Oceanographic Research Vessels Act
P&I	Protection and Indemnity
PAL 1974	Carriage of Passengers and their Luggage by Sea 1974
RDC	Running Down clause
SG form	Ship and Goods
UK	United Kingdom

# CHAPTER 1

## INTRODUCTION

### 1.1 Background and Evolution of Marine Insurance

Since time immemorial, in every sphere of human endeavour, progress has been fraught with risk and uncertainty. The fortuitous element is virtually unavoidable despite the exercise of caution, especially in entrepreneurial activities which may yield positive, neutral or negative consequences<sup>1</sup>. Shipping has always been regarded as a maritime adventure and the participants, namely, the shipowner, cargo owner, charterer, financier, and even the crew are considered to be co-adventurers whose respective fortunes depend to a large extent on the vagaries of nature otherwise referred to as perils of the sea. The co-adventurers are therefore all at risk for which they need protection. This is achieved through the vehicle of the phenomenon known as insurance or assurance; and in the maritime context, it is particularised as marine insurance.

This dissertation is about one component of the marine insurance phenomenon, namely, protection and indemnity, otherwise referred to as P&I cover. Indeed, it is impossible to address all of the elements of P&I insurance in a work such as this. Therefore, one major aspect is selected for appraisal; and that is, claims pertaining to personal injuries, illness and death, all of which are third party claims. As a preliminary matter, it is to be noted that P&I claims largely deal with third party liability.

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<sup>1</sup>*Elements of Insurance*. The CII Tuition Service, A Division of the Education and Training Trust of the Chartered Insurance Institute, 1974, at p. 1, Para. 1.

Against the above general background, this dissertation in this introductory chapter, first elaborates on the notion of risk and provides a bird's eye view of the evolution of marine insurance within the framework of commercial maritime law.

Risks are divided into two categories; pure or speculative risks and fundamental or particular risks. Speculative risks engender some form of gain or the possibility of a loss. As a subset, a pure risk is one which as a consequence of an eventuality put the risk taker in a position where he suffers a loss or there is no loss. Pure risks are best dealt with through the mechanism of insurance whereas speculative risks are normally handled through commercial devices<sup>2</sup>. By contrast, fundamental and particular risks are truly fortuitous; in other words, the losses do not arise out of human interventions caused by individuals. Rather, they fall under the heading of natural phenomena such as *force majeure* circumstances otherwise known as act of God. At sea, these are typically characterised by tropical storms, tidal phenomena, lightening, abnormal sea conditions, etc. These are not eventualities for which an individual can be blamed or an allegation of negligence be pleaded. Thus, when a risk is of fundamental character, it is expected that society as a whole will undertake the bearing of that risk. This is the underlying rationale for the basic doctrine of "spreading of the risk" the seeds of which were sown from the times of the Roman civilisation going as far back as 50 B.C<sup>3</sup>.

Risks may be prevented by eliminating or reducing the causative factors. If these measures fail or they turn out to be ineffective or inadequate, attempts can be made to minimise or mitigate the loss. One, of course, is action taken before the fact; and the other, after the fact or *ex post facto*. The incidence of insurance, whether marine or otherwise, belongs to the former category. In other words, taking out insurance is a

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<sup>2</sup> *Ibid.*, at p. 3, Para. 8.

<sup>3</sup> Gold, Edgar. *Gard Handbook on P & I Insurance*. Fifth Edition: Assuranceforeningen Gard, 2002, at p. 60.

preventive measure, but there is a duty at law to mitigate damage once the loss or damage has occurred. Specifically in the law and practice of marine insurance this is known as sue and labour which is akin to the common law concept of duty of mitigation<sup>4</sup>.

Since the maritime business is regarded as an “adventure”, it can affect financial loss caused by a peril of the sea. Shipowners and cargo owners therefore concentrate more on insurance that can cover different risks. Marine insurance is a part of the multifaceted commercial interests on which depends much of the success of a maritime enterprise. Shipowners, charterers, P&I Clubs, brokers, technical and legal experts, shipbuilders, engineers, advisers, surveyors, classification societies and bankers, who are all players in the shipping field, are interdependent directly or indirectly on various factors and institutions. These include the Baltic Exchange, commodity markets, statutory and government bodies, the International Maritime Organization (IMO), Trinity House, etc. Thus, taking one element without taking account of other forces impinging on this element is risky and misleading. The purpose of marine insurance is to protect a maritime adventurer against loss by maritime perils.

The origins of marine insurance are “*veiled in antiquity and lost in obscurity*”<sup>5</sup>. It is apparent that under the principle of bottomry which is really a type of marine insurance has been available since ancient times<sup>6</sup>. A lender made advances to the shipowner before the maritime adventure commenced and through this mechanism, financed the voyage<sup>7</sup>. The primary elements of marine insurance early in the 12<sup>th</sup> century were already put in place by the merchants of the Hanseatic League who came from Northern Europe as

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<sup>4</sup> See R.J. Lambeth, *Templeman on Marine Insurance*, 6<sup>th</sup> Edition, London: Pitman Publishing Ltd., 1986, at pp. 377-390.

<sup>5</sup> *Supra*, footnote 3 at p. 60.

<sup>6</sup> Mukherjee, Proshanto K. *Maritime Legislation*: World Maritime University, 2002, at p. 11.

<sup>7</sup> *Supra*, footnote 3 at p. 60.

well as the merchants of the region of Lombardy in Italy<sup>8</sup>. The latter eventually established themselves in the city of London. In 1601, the first English statute on marine insurance was drafted as an Act by Sir Francis Bacon<sup>9</sup>. It not only focused especially on the Policies of Assurance used among Merchants but also illustrated the basic principles of marine insurance, which are still practiced today<sup>10</sup>. In subsequent years, the business of marine insurance continued to be conducted by the Lombard merchants.

In the seventeenth century, there were no insurance companies; the practice was for individuals called underwriters writing their names below words indicative of the extent of cover provided in marine insurance policies. This represented an individual commitment to guarantee cover for a commercial venture on a personal basis. Then the middle of the 17<sup>th</sup> Century saw the era of Lloyd's Coffee House which became an important gathering place for merchants in the city of London<sup>11</sup>. Indeed that district of London which was rebuilt after the great fire is still known as the "City". The Coffee House was a popular meeting place for potential seekers of marine insurance cover to find suitable underwriters<sup>12</sup>. Edward Lloyd the owner of the coffee house is the person whose surname provides the name for such venerable institutions as Lloyd's of London, the global insurance and financial institution and Lloyd's Register of Shipping, the first classification society which started as an outcrop of the Lloyd's insurance market. Edward Lloyd opened his coffee shop sometime before 1688 and encouraged the conduct of maritime business transactions by providing a host of services including the provision of writing material. The services included provision of shipping information which eventually culminated into the publication of a periodical known as Lloyd's

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<sup>8</sup> *Ibid.*, at p. 60.

<sup>9</sup> *Ibid.*, at p. 61.

<sup>10</sup> *Ibid.*, at p. 61.

<sup>11</sup> *Ibid.*, at p. 62.

<sup>12</sup> *Ibid.*, at pp. 62-63.

News. It was a reliable source of business-related information<sup>13</sup>. Subsequently, however, Edward Lloyd encountered some difficulties for publishing proceedings of the House of Lords that were imprecisely depicted<sup>14</sup>. The original location of the coffee shop was on Tower Street, but Lloyd moved it in 1691 to Lombard Street.

Lloyd's List was not actually published by Edward Lloyd, but there was a related publication that sprang from the coffee house in the 1730s. Most likely, Lloyd died on 15 February 1713. The publication gave notice of his death as some time between the dates 14-17 February. Twenty-one years after his death, Lloyd's News became the forerunner of Lloyd's list which is London's oldest daily newspaper. The business of shipping and insurance agreements continued after Lloyd's death in 1713, and eventually a formal organization evolved. In 1769, the place where the merchants and insurers usually met was endangered by gambling among the customers<sup>15</sup>. This was detrimental to Lloyd's reputation which provoked the setting up of the New Lloyd's. In 1771, there were some space problems in the new coffee house<sup>16</sup>. This led to the establishment of the First Committee of Lloyd's which was elected from among 79 merchants, underwriters, and brokers at the coffee house<sup>17</sup>. Each member of the Committee had to pay 100 pounds sterling into the Bank of England to obtain larger premises<sup>18</sup>.

Again in the next century, the private club characteristics of Lloyd's were moulded by restriction of membership. Subscriptions were introduced and the elected Committee's authority was increased<sup>19</sup>. By 1774, Lloyd's of London was out of the coffee house business entirely and stayed in the insurance business for good. In 1779, Lloyd's developed the hand-written standard form of insurance policies called the S.G. form, "S"

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<sup>13</sup> *Ibid.*, at p. 63.

<sup>14</sup> *Ibid.*, at p. 63.

<sup>15</sup> *Ibid.*, at p. 63.

<sup>16</sup> *Ibid.*, at p. 63.

<sup>17</sup> *Ibid.*, at p. 63.

<sup>18</sup> *Ibid.*, at p. 63.

<sup>19</sup> *Ibid.*, at p. 63.

being the abbreviation for “Ship”, and “G” for “Goods”<sup>20</sup>. It was also the very initial stage of the subsequent development of the Marine Insurance Act 1906. In 1871, by an Act of Parliament, Lloyd’s was incorporated, and again it was amended by the Lloyd’s Act in 1888, 1911, 1925 and 1951<sup>21</sup>. Lloyd's of London went on to become one of the most famous insurers in the world, expanding from maritime interests to all types of insurance by 1900.

There is no doubt that because of the global economic crisis, these are challenging times for the shipping industry. The results are in the form of falling freight rates, declining demand, owners being unable to secure finance and the threat of new building orders being cancelled. According to the remarks made by the Chairman of the North of England P&I Association which is one of the world’s premier P&I Clubs, the P&I industry has faced a difficult few months and many challenges are still to come. However, there is optimism in the air; severe claims are an indication of the challenges and difficulties faced by the shipping industry as a whole<sup>22</sup>.

In particular, the problems are of recruiting and retaining experienced seafarers and other skilled staff who are linked to the increase in incidents and accidents at sea. Moreover, seafaring has become an increasingly unpopular profession, increasing the difficulty of sourcing crew which has a knock-on effect in terms of casualties. Nowadays, the costs of personal claims are increasing and will continue to rise. As a consequence, the tendency to compel the shipping industry to compensate parties for losses, irrespective of fault on the part of the shipowner, is gaining momentum as the cost of P&I claims keeps rising. On the basis of the provisions of P&I Insurance, the object of this dissertation is to carry out a selective appraisal of the personal injury

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<sup>20</sup> *Ibid.*, at p. 63.

<sup>21</sup> Brown, Robert Henry. *Marine Insurance: Volume 1: Principles and Basic Practice*. Sixth Edition: London: Witherby, 1998.

<sup>22</sup> P&I, North. "Management Report Summary." 2009, at p. 3.

claims and the liabilities of P&I Clubs in terms of mutualisation in the International Group. The dissertation focuses on how the effectiveness of P&I provisions covers the needs of wide ranging claims related to personal injuries, illness and loss of life created by the cornerstone activities of modern society and to protect the uncertainty of potentially overwhelming financial losses by paying fixed and affordable amounts into a common indemnification fund.

The dissertation is divided into five chapters; the first chapter begins with the general introduction; and the second, the origins and development of hull and machinery as well as protection and indemnity insurance. In chapter three, the relevant marine insurance legislation and mandatory rules are discussed. The Marine Insurance Act 1906 is highlighted and the main part of the regime of the P&I rules pursuant to personal injury claims and other relevant provisions or rules within the scope of marine insurance are mentioned. The main element of this research is focused on P&I insurance in relation to personal injuries, illness and loss of life. Thus the work affords a wider scope in Chapter Four. Finally, there is a summary and the conclusion. In this last chapter, the most important viewpoints of the dissertation are summarized.

## CHAPTER 2

### ORIGINS AND DEVELOPMENT OF P&I INSURANCE

#### 2.1 Different Types of Marine Insurance

The most important types of insurance in the marine insurance market are Hull and Machinery (H&M) insurance, loss of hire insurance, Protection and Indemnity (P&I) Insurance, Defence Cover or Freight, Demurrage and Defence (FD&D) cover, War Risk and Strike insurance.

##### 2.1.1 Hull and Machinery (H&M) Insurance

Hull and machinery insurance covers the ship itself that comprises both hull and machinery including on board equipment such as propulsion and auxiliary machinery, cargo handling and navigation equipment, spare parts, bunkers and lubrication oil<sup>23</sup>. Supplies and other engine and deck machinery intended for consumption are normally excluded<sup>24</sup>. Here the term “on board” means that the object must be on board for an indefinite or prolonged period of time<sup>25</sup>. For instance, a fork lifts truck that is hired and used during loading or discharging for a short time period, cannot be covered under H&M even though it is on board<sup>26</sup>. In addition, H&M insurance covers three different types of losses such as total loss of the ship, damage to the ship and  $\frac{3}{4}$  (75%) of the owners’ liability for damage to another ship as a result of collision or striking by the ship including salvage and repair works<sup>27</sup>. The remaining  $\frac{1}{4}$  (25%) is covered which is wider

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<sup>23</sup> *Supra*, footnote 3 at p. 77.

<sup>24</sup> *Ibid.*, at pp. 77-78.

<sup>25</sup> *Ibid.*, at p. 78.

<sup>26</sup> *Ibid.*, at p. 78.

<sup>27</sup> *Ibid.*, at pp. 78-79.

in scope than H&M cover. This will be addressed later in the dissertation as part of the discussion on P&I insurance.

### **2.1.2 Loss of Hire Insurance**

This is a relatively new type of cover which emerged in the last 20 to 30 years since the end of World War II<sup>28</sup>. It covers the shipowner's loss of income as a result of the ship being off hire or otherwise suffering a loss of operational time regardless of whether that period is short or long<sup>29</sup>. But not all situations will be within that cover; and the coverage is restricted to loss of hire as a result of damage to the ship, which can be covered under H&M insurance<sup>30</sup>. For example, loss of hire insurance will compensate the owner's loss of income during the period of repair for hull damage following a collision with another ship, but an off-hire period under a time charterparty, resulting from ordinary maintenance work will not be compensated<sup>31</sup>. Recovery under a loss of hire insurance is subject to a deductible period amounting to a certain number of days<sup>32</sup>.

### **2.1.3 Protection and Indemnity (P&I) Insurance**

P&I insurance covers shipowners against third party liabilities<sup>33</sup>. These are not covered under hull and machinery policies. The original purpose of P&I insurance was to protect ship owners against liability with regard to personal injury and death, and the one-fourth collision damage liability not covered by hull and machinery insurance and/or mutual hull clubs and excess collision liability, that is, the liability in excess of the sum insured

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<sup>28</sup> *Ibid.*, at p. 79.

<sup>29</sup> *Ibid.*, at p. 79.

<sup>30</sup> *Ibid.*, at p. 80.

<sup>31</sup> *Ibid.*, at pp. 79-80.

<sup>32</sup> *Ibid.*, at p. 80.

<sup>33</sup> CLub, The American. "A New World of P&I Insurance." Review of Reviewed Item., no., [http://www.american-club.com/go.cfm/p\\_i\\_and\\_fd\\_d\\_services](http://www.american-club.com/go.cfm/p_i_and_fd_d_services).

in the hull policy<sup>34</sup>. On the other hand, the modern P&I policy provides cover for a wide range of liabilities and losses a shipowner may incur, including liabilities arising from the carriage of cargo, pollution liability, liability for loss of life and injury to crew members,<sup>35</sup> passengers and others, such as stevedores, liability for damage to fixed or floating objects, and liability as a result of collision with another ship<sup>36</sup>.

#### **2.1.4 Defence Cover or Freight, Demurrage and Defence (FD&D) Cover**

The Defence cover or Freight, Demurrage and Defence (FD&D) cover provides the owner insurance against legal costs<sup>37</sup> related to these subject matters through the service and expertise of the in-house team of lawyers of the P&I Club<sup>38</sup>. Others are professionals who handle Defence cases on a daily basis, are handled by the club's correspondents around the world by providing technical support and assistance<sup>39</sup>. Finally, this cover indemnifies other costs incurred regarding certain types of disputes arising out of the operation of the ship<sup>40</sup>.

#### **2.1.5 War Risk and Strike Insurance**

The term “marine insurance” includes both marine perils and war risk perils<sup>41</sup>. In this case, marine perils cover all the risks with the exception of classic war perils that include capture at sea, confiscation and other similar interventions by a state power<sup>42</sup>. The war risks insurance is quite different from other insurance that can provide cover if the vessel finds itself in a war zone or other areas of hostility since the normal H&M and P&I

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<sup>34</sup> *Supra*, footnote 3 at p. 81.

<sup>35</sup> *Supra*, footnote 33.

<sup>36</sup> *Supra*, footnote 3 at p. 81.

<sup>37</sup> *Supra*, footnote 33.

<sup>38</sup> *Supra*, footnote 3 at p. 81.

<sup>39</sup> *Ibid.*, at p. 81.

<sup>40</sup> *Ibid.*, at p. 81.

<sup>41</sup> *Ibid.*, at p. 81.

<sup>42</sup> *Ibid.*, at p. 82.

insurances are likely to be suspended<sup>43</sup>. Under the strike insurance, it can cover the insurance of losses including damage to the insured's own ship, damage to other's property or personal injury or death as a consequence of strike at ports or during the voyage.

## **2.2 Background to the Development of P&I Insurance**

In the early 18<sup>th</sup> century, the concept of mutuality in marine insurance was established in the United Kingdom (UK) by the establishment of mutual hull clubs by a number of shipowners who formed alliances in ports other than London. The South Sea Company incorporated in 1710 had a charter which granted it monopoly in the South Seas trade which encompassed South America.<sup>44</sup> Subsequently, when it transpired that the company was not going to turn a profit as anticipated, it came up with an innovative scheme to transform the entire national debt of England into a single redeemable obligation to the company at a fairly low interest rate<sup>45</sup>. In return, the company would get a monopoly on all British foreign trade outside of Europe. When the Government accepted this proposition, there was a significant rise in the market value of the company's shares within five months<sup>46</sup>. In strict legal terms, the hull clubs operated unlawfully but they were good for business as they provided insurance coverage for their members on the basis of each member of the club underwriting a share of the total risks of the ships entered in the club<sup>47</sup>. The next event in this episode was the enactment of the so called Bubble Act<sup>48</sup> which was necessitated by the realisation that the raising of

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<sup>43</sup> *Ibid.*, at p. 82.

<sup>44</sup> Gold, Edgar. *Canadian Maritime Law. Introductory Materials*. Revised Ninth Edition. Halifax: Dalhousie University., 1996, at p. 163.

<sup>45</sup> *Ibid.*, at p. 163.

<sup>46</sup> *Supra*, footnote 3 at p. 64.

<sup>47</sup> *Ibid.*, at p. 65.

<sup>48</sup> An Act to restrain the extravagant and unwarrantable practice of raising money by voluntary subscriptions for carrying on projects dangerous to the trade and subjects of the kingdom, 6 Geo. I. c. 18.

revenue through voluntary subscriptions was too extravagant and not consistent with sound trade practice. Under this Act, a company without a charter was prohibited having the effect of creating monopolies held by chartered companies.

Under the *Bubble Act*, two insurance companies called the Royal Exchange Assurance and the London Assurance were granted an absolute monopoly on marine insurance.<sup>49</sup> However, Lloyd's underwriters gave pressure to those companies so that they finally acquired limited monopoly to the extent that the rights of private persons to liberally practice marine insurance were not affected<sup>50</sup>. As the private insurers' businesses boomed speedily, and the companies only offered cover of a very restricted nature and repudiated underwriting any risks if they were not the safest<sup>51</sup>. In 1809, about half of the marine risks started to be insured in Great Britain. However, the two chartered companies together only acquired pecuniary benefits to the tune of 4% of the total marine risks underwritten. The remainder were taken on by individual underwriters<sup>52</sup>.

At that time, the commission earned by brokers was relatively steep while the average premium for an underwriter was 25% of the insured value of the ship<sup>53</sup>. In 1810, the British Government appointed a Select Committee of Parliament to enquire into the state of marine insurance in Great Britain. It transpired from the report submitted that during winter, the principal underwriters moved away from the Lloyd's market because they thought the risks were higher in that season, although they cited reasons that were rather superficial in nature. The upshot was that premiums increased due to lack of competition and individual underwriters were often unable to meet their legal commitments. Of

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<sup>49</sup> *Supra*, footnote 3 at p. 64.

<sup>50</sup> *Ibid.*, at p. 64.

<sup>51</sup> *Ibid.*, at p. 64.

<sup>52</sup> *Ibid.*, at p. 64.

<sup>53</sup> *Supra*, footnote 44 at p. 164.

course, among the assureds there were those who were quite prepared to pay the higher premiums and insure with the companies.

The companies as well as the Lloyds underwriter working the London market created for themselves market practices that were conducive to the trade carried on from and to the port of London. This posed serious difficulties and detriment for the market players in other British ports. As a result, shipowners found it expedient to form groups which came to be known as hull clubs. These associations provided insurance coverage despite the statutory prohibition, they operated on the basis of mutuality, that is, each shipowner member of a club underwrote an agreed share of the total risk pertaining to his ships. Eventually in 1826, the Companies Act was enacted to constitute a legal framework for the creation and operation of mutual clubs.

Following the recommendation in the report of the Parliamentary Select Committee, the Government withdrew the monopoly given to the two companies in 1824<sup>54</sup>. Subsequently, several other marine insurance companies were established which operated on the basis of mutuality as well as on conventional non-mutuality principles. While the Lloyds underwriters were in a position to offer good competitive rates, a number of deductions were not included in their hull policies which the mutual clubs provided. Furthermore, Lloyds offered convenient organisational and other facilities which shipowners found to be attractive. On the mutual club side, some good owners faced payments through the system of calls which arose from the acts of delinquent members who constantly presented claims. In time, the better ships remained insured at Lloyd's while the hull clubs were lumped with the residual risks that Lloyd's underwriters refused to cover. The position of the hull clubs thus went into decline.

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<sup>54</sup> *Ibid.*, at p. 164.

Against this background of protection and indemnity insurance, the notions of “Protection” and “Indemnity” are now discussed separately in the following text.

### 2.2.1 ‘P’ - Protection

The subject of marine insurance falls within the scope of contract law; however, it is a highly specialised area which has evolved and matured over several centuries through market practices, legislation and standardisation of clauses in policies. Historically, it is on record that the first policy on marine insurance was issued in Italy in the 14th century in Italy<sup>55</sup>. Initially, insurance cover was only available for the ship and its cargo. This practice prevailed from the early times well into the 1800s. As indicated above, the mid-19<sup>th</sup> century saw the decline of the hull clubs<sup>56</sup>. It was during this period that shipowners faced a torrent of liabilities which were contemporaneous with changes in the socio-economic climate of the industrial world together with advancements in engineering and technology. In shipping, these changes were manifested through the increase in the sizes and values of ships and their cargo not to mention the innovations and complexities in ship design<sup>57</sup>.

As a matter legal policy and principle, the English Marine Insurance Act of 1745 prohibited shipowners from insuring against liability in any amount higher than the value of the ship<sup>58</sup>. However, the situation was altered by a decision of the English Court in a landmark collision case known as ‘*de Vaux v. Salvador*’<sup>59</sup>. The court ruled in this case that an ordinary policy against perils of the sea did not cover damage done to

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<sup>55</sup> Group, COSCO. "The Story of 'P&I Club' " Review of Reviewed Item., no., <http://www.cosco.com/en/knowledgebase/detail.jsp?docId=5631>.

<sup>56</sup> *Ibid.*,

<sup>57</sup> Christopher Hill, Bill Robertson and Steven J. Hazelwood. *Introduction to P&I*. 2<sup>nd</sup> Edition, 1996, at pp. 5-6.

<sup>58</sup> *Ibid.*, at p. 6.

<sup>59</sup> (1836), 5 L.J. (K.B.) 134.

another vessel by collision<sup>60</sup>. It exposed shipowners insured under traditional hull policies to potential liabilities in large amounts against which they were not insured<sup>61</sup>.

Shipowners being unable to bear these potential liabilities on their own sought the agreement of their hull underwriters to alter their hull policies to accommodate full coverage for collision liability. The hull underwriters declined to comply with the whole proposition but were willing to provide three quarters or 75% of cover for collision liability in respect of both ship and cargo. The change was facilitated by the insertion of the so-called “running down clause” (3/4 RDC) in regular hull policies. The remaining one quarter (25%) was left to be absorbed by the shipowners effectively making them self-insurers<sup>62</sup>. There was concern among hull underwriters that without this arrangement masters and crew would not be sufficiently diligent and prudent in the handling and navigation of their ships.

In responding to the judgement in the case mentioned above, underwriters took the position that shipowners would have an incentive to ensure greater care with regard to navigational safety if something less than full coverage was provided. This arrangement would be particularly effective in instances where the master was a part-owner of the ship which was often the case. However, from the shipowner’s perspective this was not an entirely satisfactory situation because even the one-fourth share of liability was a considerable financial burden<sup>63</sup>. They were therefore prompted to seek “protection” through some other means in the interest of commercial viability.

This clause was not immediately adopted into common use, because many underwriters feared that this protection would result in negligence on the part of masters and owners and cause an increasing number of collisions. In 1854, Lloyd’s unsuccessfully lobbied

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<sup>60</sup> *Supra*, footnote 57 at p. 65.

<sup>61</sup> *Ibid.*, at p. 65.

<sup>62</sup> *Supra*, footnote 55.

<sup>63</sup> *Ibid.*,

for legislation prohibiting the insurance of collision liability. The formation of the early protection clubs was essentially in response to the need for shipowners to cover the residual portion of collision liability. In due course, as shipowners were confronted with increasing third party liability issues, the role of the clubs intensified resulting in an expanded portfolio.

In 1845, a limitation of liability statute was enacted; however, the statute assumed that all vessels were worth £15 per ton, while many ships were worth much less than this amount, with the consequence that shipowners still found themselves paying claims in excess of the value of their own vessels<sup>64</sup>. A year after this limitation statute and following the enactment of Lord Campbell's *Fatal Accidents Act*<sup>65</sup>, for the first time dependants could sue for damages for the death of relatives caused by the negligence of shipowners<sup>66</sup>. This Act provided for compensation payable not only to injured crew members but also their dependants. The ambit of the statute extended to persons who lost their lives "by the wrongful act, neglect or default of another person". All persons in the above.mentioned categories were entitled to obtain compensation from shipowners. By that time British vessels were full of emigrants going to Australia and the United States<sup>67</sup>. As a consequence, the potential liability of shipowners increased considerably<sup>68</sup>.

A year after the Fatal Accidents Act, another statute, the Harbours, Docks and Piers Clauses Act 1947 was enacted which allowed port authorities to recover for damages to port works and installations whether or not caused by negligence of the shipowner<sup>69</sup>. Again in 1880, the Employers' Liability Act marked the first of a line of statutes

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<sup>64</sup> *Supra*, footnote 57 at p. 6.

<sup>65</sup> (1846), 9 & 10 Vict., c. 93.

<sup>66</sup> Club, UK P&I. "History of the P&I Club." Review of Reviewed Item., no., [http://www.ukpandi.Com/ukpandi/Infopool.nsf/HTML/About\\_ClubHistory](http://www.ukpandi.Com/ukpandi/Infopool.nsf/HTML/About_ClubHistory).

<sup>67</sup> *Ibid.*,

<sup>68</sup> *Supra*, footnote 57 at p. 6.

<sup>69</sup> *Ibid.*, at p. 6.

providing for payments by employers including shipowners, to workmen including crew members, injured in the course of their employment<sup>70</sup>. It can be seen that shipowners' liabilities increased dramatically in the mid-19<sup>th</sup> century and they began to find protection through insurance cover. While looking for such protection, shipowners found that a framework for cheap and efficient group protection already existed in the hull clubs. Thus, the old hull clubs transformed themselves into "protection clubs", and new associations were formed in an attempt to alleviate some of the burdens being imposed on the shipowners by this increased liability. To give an example, it is clearly seen that because of the formation of the early protection clubs, the one-fourth collision liability which the property insurance market would not cover<sup>71</sup>, could be covered by the clubs. On the other hand, other potential liabilities arising in respect of claims for loss of life and personal injury and also for excess liability over and above the sum insured for damage done and received in a collision was covered by the clubs<sup>72</sup>.

One of the first clubs to specialise in protecting risks was established through the efforts of one Peter Tindall, an insurance broker and a former manager of mutual hull insurance clubs<sup>73</sup>. In order to provide the shipowners with a solution to lighten those new burdens, Peter Tindall and his partners were the first to conceive the idea of a protection club known as the Shipowners' Mutual Protection Society which commenced operation in Topsham, Devon, on the same day as the introduction of the Merchant Shipping Act 1854, namely, on 1 May 1855<sup>74</sup>. The risks covered by the first such club were somewhat limited. Liability cover was only available for loss of life, personal injury, property damage and the one quarter collision liability not otherwise covered by the hull policies. The operational framework and the general system was the same as in the already established hull clubs.

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<sup>70</sup> *Ibid.*, at p. 6.

<sup>71</sup> *Ibid.*, at p. 7.

<sup>72</sup> *Supra*, footnote 66.

<sup>73</sup> *Ibid.*,

<sup>74</sup> *Supra*, footnote 57 at p. 7.

The enactment in 1854 of the *Merchant Shipping Act*<sup>75</sup>, provided for limitation of liability of shipowners in respect of loss of life and personal injury liability but shipowners were not in a conducive financial position to cover the large amounts typical of collision liability risks<sup>76</sup>. At any rate, the amount coverable by insurance was limited to the insured value of the vessel. Thus, if the vessel was lost because of a collision at sea and the assured incurred liability for damage done to the other ship, the shipowner could recover hardly anything and even sustain a financial loss which could be quite considerable.

### 2.2.2 'I' - Indemnity

When protection clubs were first introduced, cargo claims were not of great consequence to shipowners<sup>77</sup>. They were able to take advantage of an anomaly in the law under which they could exonerate themselves from liability for cargo damage. Through the application of the doctrine of freedom of contract, shipowners inserted included exception clauses in the contract of carriage which enabled them to escape liability for loss of or damage to cargo, regardless of causation<sup>78</sup>. As such, loss of cargo was excluded from the risks covered by the Rules of the protection clubs<sup>79</sup>.

The sinking of *The Westenhope* in 1870 instigated a change in this position. The court decision involving this collision resulted in another important milestone in the historical evolution of P&I Insurance<sup>80</sup>. In this case, the vessel laden with cargo was bound for Cape Town but took a deviation to Port Elizabeth following which she was lost off the coast *en route* to Cape Town with her cargo. The court held that the exceptions in the carriage contract did not cover deviation and the carrier was therefore liable for the total

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<sup>75</sup> 17 & 18 Vict., c. 104.

<sup>76</sup> *Supra*, footnote 55.

<sup>77</sup> *Ibid.*,

<sup>78</sup> *Ibid.*,

<sup>79</sup> *Ibid.*,

<sup>80</sup> *Supra*, footnote 3 at p. 67.

value of the cargo<sup>81</sup>. As mentioned above, at the time P&I insurance did not cover liability for cargo loss or damage. However, in this case, the shipowner who was a member of the North of England Protection Club attempted to recover from the club by appealing to the Directors but did not succeed on the grounds that it was a loss not contemplated by the club rules.

Soon after these unfortunate events, another vessel called *Emily* was lost together with her cargo following a stranding and the cargo owners recovered their full losses from the shipowner on the grounds that this was not a loss by “peril of the sea” just because of the negligent navigation<sup>82</sup>. In the forms of bills of lading which were commonly used for the simplest nature and sought to protect shipowners only against the very restricted list of marine perils under common law, which did not include negligent navigation<sup>83</sup>.

In the wake of these incidents, shipowners became panicky over their potential liabilities to cargo interests where deviation or negligent navigation was involved. These were risks not covered by the existing systems of insurance. Certain shipowners entered in the North of England Protection Association approached an underwriter in Newcastle by the name J. Stanley Metcalfe suggesting the creation of an indemnity clause to cover shipowners against the additional risks. This came to be known as “indemnity” cover. The name of the club was changed to reflect this new concept. In 1866, indemnity cover was started by the Shipowners’ Mutual Protection Society. The club extended its cover under the indemnity clause to include loss, shortage or damage to cargo carried on board a member’s vessel and. The cover also operated to indemnify owners against fines for infringements of port, health or local by-laws or regulations<sup>84</sup>.

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<sup>81</sup> *Supra*, footnote 57 at pp. 7-8.

<sup>82</sup> *Ibid.*, at p. 8.

<sup>83</sup> *Ibid.*, at p. 8.

<sup>84</sup> *Ibid.*, at p. 8.

### 2.2.3 'P&I' – Protection Plus Indemnity

The doctrine of indemnity is central to marine insurance law and practice. It is defined as “compensation for wrong done, or trouble, expense, or loss incurred”<sup>85</sup>. Under this definition, indemnity is seen to provide a kind of “protection” to shipowners. Thus, there is a basic similarity in the functions of the Indemnity Club and Protection Club, the only difference being the scope of the risks covered. After the protection societies amended their rules to provide indemnity cover, they became known as protection and indemnity (P&I) clubs<sup>86</sup>. This is exemplified by the first P&I Club which integrated the two components in 1886 as described above. From the perspective of shipowners who constitute the members of these clubs, the combination represents savings in costs as well as efficiency in operation especially with regard to the handling of claims.

In 1893, cargo liability insurance was additionally reinforced by the United States Harter Act when the right of shipowners to rely on exclusion clauses in their bills of lading requiring them to exercise due diligence to make their ships seaworthy was outlawed. In 1924, the Hague Rules were adopted which became the universal regime for carriage of goods by sea under bills of lading all over the commercial world of the times. At the same time, the various P&I clubs started offering defence cover, as club managers perceived the requirement to provide insurance to shipowners not only for legal costs, but also provide advisory and claims handling services for P&I and non-P&I matters<sup>87</sup>.

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<sup>85</sup> See Mozley & Whiteley's Law Dictionary.

<sup>86</sup> Hazelwood, Steven, P&I Clubs: *Law and Practice*, 3<sup>rd</sup> Edition. London: Lloyd's Press, 2000 at p. 7.

<sup>87</sup> *Supra*, footnote 3 at pp. 67-68.

## CHAPTER 3

### THE REGIME OF P&I INSURANCE

#### 3.1 Constitution of a P&I Club

Originally P&I clubs were established as unincorporated associations with their members having the dual role of insurers and insured that has led to problems of *locus standi*<sup>88</sup>. In response, P&I clubs integrated themselves by having a legal structure separate from their members. Today's P&I clubs are all corporations. A question then arises as to whether they should still be called "clubs". Incorporation was foreseeable; the clubs required the simple ability to sue (and be sued), even though the latter development has now exposed them to the risk of direct legal action by third parties<sup>89</sup>. For example, the insurance business in the United Kingdom is regulated by the Insurance Companies Act 1982 and this statute obliges any person desirous of carrying on insurance business in the UK to be either:

- (a) a registered society, or
- (b) a body corporate<sup>90</sup>.

On the other hand, all the clubs are incorporated companies, i.e. limited companies with no share capital. The reason is that they are fundamentally non-profit making and it is not suitable for companies limited by shares to be other than profit making. It is limited by undertaking to subscribe to a specific sum in the event of the company going into liquidation. This perception of guarantee is based upon a shared system that each member has an obligation to refund the damages suffered by any one of them and

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<sup>88</sup> *Ibid.*, at p. 98.

<sup>89</sup> *Supra*, footnote 57 at p. 9.

<sup>90</sup> *Ibid.*, at pp. 9-10.

compensate, on a mutual basis, each other's claims. In addition, mutual members, i.e., those who pay *fixed* premiums even though they are not members, were accepted as "special entries". They also have to undertake to make contributions to the assets of the company but not beyond a specified amount<sup>91</sup>.

In the United Kingdom, the establishment of insurance companies is also governed by the Insurance Companies Act 1982 and it is a breach of that Act to enter into a contract of insurance without having the required authority to continue insurance business<sup>92</sup>. As a result, if such a company failed, and there was a breach of the Act, it meant that the party who had been insured could not enforce the contract. The offending insurer was not allowed to hold on to the premium which he may have received. Having said to "continue business", there are some transactions of insurance business which include:

- (a) undertaking decisions
- (b) keeping accounts
- (c) receipt of premium payments and
- (d) notification of claims and payment of claims<sup>93</sup>.

Similarly, the constitution of the P&I club is also laid down in the Memorandum of Association (MOA) and Articles of Association (Articles)<sup>94</sup>. The supreme body of a P&I club is its general meeting<sup>95</sup>. It is always held once a year but there are some special meetings between times if any matters are so important like interim meetings<sup>96</sup>. Regarding voting rights, it is usually included in the articles of association, and that right is linked with the "sum insured", i.e. the entered gross tonnage and also dependent on

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<sup>91</sup> *Ibid.*, at p. 10.

<sup>92</sup> *Ibid.*, at p. 10.

<sup>93</sup> *Ibid.*, at p. 10.

<sup>94</sup> *Ibid.*, at p. 11.

<sup>95</sup> *Ibid.*, at p. 12.

<sup>96</sup> *Ibid.*, at p. 12.

the premium rating and the level of calls to be calculated<sup>97</sup>. In most clubs, the voting is graded to prevent unreasonable domination by small groups of members with large tonnages. One way of grading is to provide;

- one vote to a member with an entered tonnage of between 20,000 gross registered tonnes
- two votes for an entered tonnage of between 20,000 and 50,000 gross registered tonnes
- three votes for an entered tonnage of between 50,000 and 100,000 gross registered tonnes
- four votes for an entered tonnage of between 100,000 and 200,000 gross registered tonnes
- for each extra 200,000 one extra vote<sup>98</sup>.

But according to the rules in most clubs, a firm of managing owners which represents several ships, and are owned by them, should not have more votes<sup>99</sup>. Even if it is an entered ship and something happens to it like it is lost or missing, the voting rights are still continued until the next ordinary meeting. On the other hand, there are no voting rights basically if the entries for the entered ship are less than one year, which is a special arrangement and have to be agreed beforehand<sup>100</sup>. However, they have the entire overall conduct of that club in their hands through voting ability in general meetings<sup>101</sup>. Not only with the shipowners but also with charterers, the necessity of insurance for less than one year is clearly seen as far more common and in reality, many voyage charterers take out insurance for what is customarily the minimum period, i.e., two months or 1/6<sup>th</sup>

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<sup>97</sup> *Ibid.*, at p. 12.

<sup>98</sup> *Ibid.*, at p. 12.

<sup>99</sup> *Ibid.*, at p. 12.

<sup>100</sup> *Ibid.*, at p. 12.

<sup>101</sup> *Ibid.*, at p. 12.

of the annual premium or call<sup>102</sup>. Actually, fixing a minimum premium or call is not adequate to cover the administrative costs of running an association even for short haul voyages, such as for one week, because the charges are based on a daily rate<sup>103</sup>.

According to the articles of association, members are bound as soon as they enter into a contract of insurance. Also it has been determined that it is not for the contemplation of the liability of the parties to the contract as to how the articles of association becoming the articles of the company are adopted with proper formality. Moreover, any deformity in the procedure by which the articles are changed would not detract from their binding force that is really consistent with general principles of company law<sup>104</sup>. The shipowners are the Members of the Club, but they are also the owners of the Club; i.e., the Club is controlled by the shipowners. The term “Board of Directors” is more technically accurate in view of the fact that the members of such committees are directors within the meaning of the Companies Act 1985<sup>105</sup>. Members, through an elected Board of non-executive Directors, are elected for terms of three years. They have discretionary power on a wide range of Club issues as Directors. The qualifications for appointment as a “committee man” are as follows;

- (a) under 70 years of age
- (b) with a minimum of tonnage under his or her company’s ownership actually entered in the club<sup>106</sup>.

All members of the club must be eligible to sit on the committee<sup>107</sup>. In a large club, it would be common for the committee of members to be drawn from all categories of

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<sup>102</sup> *Ibid.*, at p. 12.

<sup>103</sup> *Ibid.*, at p. 12.

<sup>104</sup> *Ibid.*, at pp. 11-12.

<sup>105</sup> *Ibid.*, at p. 13.

<sup>106</sup> *Ibid.*, at p. 13.

<sup>107</sup> *Ibid.*, at p. 13.

membership, for instance, owners of tankers, tramps and liner vessels<sup>108</sup>. Directors normally represent Members with the largest tonnage or a particular geographical area. Moreover, it would also be customary for a third of the committee to be pensioned off in turn and present themselves for re-election<sup>109</sup>.

### 3.2 Definitions and Terminology

There is a distinction between marine insurance and non-marine insurance. According to the Marine Insurance Act 1906, marine insurance is defined as follows:

“A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to a marine adventure”<sup>110</sup>.

At this point, it is important to note that the term “maritime adventure” under the Marine Insurance Act 1906 refers to adventures existing when the ship or the goods are exposed to maritime perils, which will be briefly discussed in the later part of this work, of how it is applicable in terms of the Act<sup>111</sup>. According to the risk, it is contemplated that the death (or injury or illness) of a particular person upon the occurrence of which the insurer is obliged to pay a stipulated sum of money<sup>112</sup>. Similar to all insurance contracts, a marine insurance contract is formulated in the form of a marine insurance policy, which includes the agreement between insurer and insured, and is also construed by ordinary principles of contract law<sup>113</sup>.

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<sup>108</sup> *Ibid.*, at p. 13.

<sup>109</sup> *Ibid.*, at p. 13.

<sup>110</sup> “English Marine Insurance Act 1906 - an Act to Codify the Law Relating to Marine Insurance.” England, 1st December 1906.

<sup>111</sup> *Ibid.*,

<sup>112</sup> *Black's Law Dictionary*, 6<sup>th</sup> Edition. St. Paul, Minn.: West Publishing, 1990, p. 805.

<sup>113</sup> *Supra*, footnote 3 at p. 73.

By contrast, marine insurance policies look like regular commercial documents giving effect to the intention of the parties. They also include the technical and geographical terms which are specially used in their commercial sense to be understood by shipowners, shippers and insurers basically. It is also very important to understand some of the terminology used in marine insurance. Such insurance is divided into two main categories; i.e., first, there is cargo carried wholly or partly by sea, and second, insurance of the ship itself. Protection and indemnity (P&I) falls in the second category<sup>114</sup>.

### **3.3 Basic Principles and Features of Marine Insurance Applicable to P&I Insurance**

As insurers, P&I clubs issue general insurance provisions covering the basic principles related to risks covered, claims settlement procedures, and the payment of premiums<sup>115</sup> as P&I clubs do not generally operate with traditional insurance contracts. For instance, the P&I insurance provisions are set out in the club's rules, with specific terms and conditions, applicable to each member, set out in the certificate of entry.

There are some other clubs which are established as mutual associations with separate legal identities. For example, Norwegian clubs are established as mutual associations in accordance with Norwegian law<sup>116</sup>. Most of the P&I mutual clubs are incorporated under the Companies Act applicable to their jurisdiction as mutual benefit societies exclusive of share capital<sup>117</sup>.

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<sup>114</sup> *Ibid.*, at pp. 74-75.

<sup>115</sup> *Ibid.*, at p. 98.

<sup>116</sup> Insurance Activity Act, Ch.4.

<sup>117</sup> *Supra*, footnote 57 at p. 13.

### 3.3.1 'Club' - Mutual, Non-Profit Making

Pursuant to section 85 (1) of the Marine Insurance Act 1906, the definition of “mutual insurance” is as follows - “Where two or more persons mutually agreed to insure each other against marine losses there is said to be a mutual insurance”<sup>118</sup>. It reflects the position prior to the incorporation of the clubs when the old hull clubs were loose associations<sup>119</sup>. The only justification for the word “mutual” in the title “mutual insurance associations” is that definitely two or more people are part of the insurance practice, that they are committed to furnish funds to pay claims for which they and/or their fellow members are legally responsible and that all losses are settled with by or with members’ money<sup>120</sup>. But it is not on a mutual profit making basis, i.e. no profits are made in any case. This is the significant feature which sets a club apart from a “market” insurer. It is fair to the P&I club member who is the assured and insurer at the same time.

This special form of insurance was first created to provide hull insurance in the early 18th century. As mentioned in the last chapter, only two companies were allowed through legislation to provide marine insurance. These were the Royal Exchange Assurance Company and the London Assurance Company<sup>121</sup>. The monopolistic situation deprived the insurance market of the benefit of competence resulting in significant increases in premiums for shipowners who were unable to afford them. As discussed earlier, this eventually led to the creation of the clubs or associations and the P&I system<sup>122</sup>. The concept of the club is, of course, fundamentally different from that

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<sup>118</sup> Marine Insurance Act 1906, section 85 (1).

<sup>119</sup> *Supra*, footnote 57 at p. 11.

<sup>120</sup> *Ibid.*, at p. 10.

<sup>121</sup> *Supra*, footnote 55.

<sup>122</sup> *Ibid.*,

of the companies offering insurance on a commercial basis. Furthermore, the notion of mutuality translates into an equitable sharing of risks and attendant liabilities<sup>123</sup>.

The P&I system is sound in terms of fairness so that subsidisation by one or a group of members for the benefit of other members is avoided. Under the system Club managers adjust members' contributions or calls to ensure mutual compatibility. The adjustment is based on a variety of parameters including the type of vessel, the trading area, and in the case of cruise ships or passenger ships, even the economic capabilities of the passengers usually reflected by their geographical origins.

Aside from mutuality, P&I Clubs are also distinguished by their non-profit characteristic. Members are only required to pay calls adequate to meet the claims, the reinsurance costs and the actual operational and administrative costs. While the club does not turn a profit, the other side of the coin is that it cannot afford to suffer a loss either. This neutrality or evenness is maintained by controlling its revenue intake from premiums so as to perpetually keep a balance between profit and loss.

An explanation of the underwriting mechanics of a typical P&I Club is beyond the scope of this work. If a thumbnail sketch were to be provided, the following brief description would suffice. At the start of each policy year, the managers make an initial assessment of the revenue to be derived from premiums to be paid by the members. If the managers fail to collect enough premium, it may result in a premium deficit for purposes of underwriting. If the deficit is substantial, members will be required to pay an extra premium referred to as an "excess supplementary call".

It is imperative from the point of view of good management that club managers take into account all the relevant factors to make a reasonably accurate forecast so that excess supplementary calls can be avoided if possible or minimised. It must be recognised,

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<sup>123</sup>*Ibid.*,

however, that in the shipping industry there are numerous variables in the equation; risks that are unpredictable and unforeseen. Excess supplementary calls therefore may not always be avoidable. The indicators are in the arithmetic. If the sum of premium and investment income exceeds the total annual cost, the excess is deposited into the Club's free reserve fund which is used to cover future unpredicted deficits. The possibility of excess supplementary calls is inversely proportional to the amounts in the free reserve fund. The state of the free reserve fund of a club is thus a strong indication of the financial viability and status of a club.

There are at present 16 P&I Clubs, of which 13 are the members of International Club Group Agreement (IGA), and the remainders are non-IGA members as listed in the tables in Appendices I and II. The first mutual liabilities company is the Shipowners' Mutual Protection Society which was founded in 1855. Starting from that time, there were some other associations which started offering P&I cover to their members<sup>124</sup>.

Demutualization is a concept peculiar to P&I insurance. It concerns the change in the makeup and corresponding legal status of a club or association when it decides to move away from the concept of mutuality constituting a single vote per member into the domain of a corporate entity limited by shares characterised by a single vote per share. Typically clubs operate on the basis of consensus in the decision-making process which is not the case with companies<sup>125</sup>. The corporate model provides several advantages. Through a change of legal status the entity can provide the requisite services to its client constituency of members and brokers in a competitive way by maximising the value of equity shares and generating profits by servicing their needs efficiently<sup>126</sup>. Also, costs and investments can be kept limited to whatever financing is agreed by the members.

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<sup>124</sup> See Drewry Report on Marine Insurance, See also tables in Appendices 1 and 2.

<sup>125</sup> Akhtar, Shamshad. "Demutualization of Asian Stock Exchanges — Critical Issues and Challenges." Review of Reviewed Item., no., [http://www.adb.org/documents/books/demutualization\\_stock\\_exchanges/chapter\\_01.pdf](http://www.adb.org/documents/books/demutualization_stock_exchanges/chapter_01.pdf), at p. 4.

<sup>126</sup> *Ibid.*, at pp. 5-6.

This changeover concept has over the years engendered numerous structural reorganisations involving mergers and corporate alliances in the security markets<sup>127</sup>. The financial objectives of such reorganisations include attempts to take advantage of economies of scale and also have better market access and penetration<sup>128</sup>. In terms of the wider picture of global trade such changes do have an impact on the marine insurance market as a whole.

### **3.3.2 Mutuality to Demutualization**

The structural transformation described above consists of three components. First, there is a change in the ownership structure, secondly, a change in legal status, and third, alteration of the organisational and management modality<sup>129</sup>. In all cases, adequate safeguards must be in place to ensure that there is effective governance. A sound effectuation of the demutualization process, that is, adoption of a corporate structure, affords more dependability and better control of the affairs of the organisation<sup>130</sup>. In the face of competition the corporate structure allows the organisation to develop strategies that are more functional<sup>131</sup>.

### **3.3.3 Fixed Premium Insurance**

As referred to the Table in Appendix 2, there are some P&I clubs which provide insurance with a fixed premium. The main purpose of fixed premium insurance is operating for making profit and its commercial insurance provided by insurance companies. The premium is fixed that is to provide the insurance cover based on a contract between insurers and insured. According to the contract, the insurer retains the

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<sup>127</sup> *Ibid.*, at p. 6.

<sup>128</sup> *Ibid.*, at p. 6.

<sup>129</sup> *Ibid.*, at p. 8.

<sup>130</sup> *Ibid.*, at p. 13.

<sup>131</sup> *Ibid.*, at p. 13.

component of risk by charging the insured a fixed premium derived from the expected value of losses. Regarding risks, the risk is either assumed or reinsured or hedged or securitised (or also combinations of all these actions) in opposition to the payment of premium. Also, the shareholders and financial investors must be compensated for the risk premium<sup>132</sup>.

There are some responsibilities in the operation of fixed premium especially to those who are involved as the players, such as underwriters, reinsurers and agents. The characteristic of the operation of underwriters in the fixed premium market is that there is no direct link between the insured and the insurer. It depends on the intermediary to finalise the policy, but the brokers play a critical role in finalising the insurance contract. For the reinsurers, there is no distinction between the reinsurers whether or not in the fixed premium market and mutual market that will be discussed in details in the next sub-topic. The fixed premium insurers activate on an international range either throughout their own offices or agents. The fees for the agents canvass for the business of the insurer that is based on the amount of premium generated through his / her efforts. The agents usually work for more than one insurance company offering multiple products to suit the needs to the satisfaction of the customers.

### **3.3.4 Reinsurance**

The real concept for reinsurance is that the bigger the volume the better are the reinsurance rates offered by the reinsurers. Looking at the background of developing the reinsurance system, it is apparent that the *Amoco Cadiz* (1979) and the *Torrey Canyon* (1989) catastrophes made shipowners and others in maritime industries nervous to say

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<sup>132</sup> Looberge, H. & Schlesinger, H. (2001). *Research paper on optimal catastrophe insurance with multiple catastrophes*. Retrieved July 11, 2001 from: Looberge, H. & Schlesinger, H. (2001). <http://www.fame.ch:8080/research>.

the least<sup>133</sup>. That was also linked to the club requiring reinsurance to be more secure and to offer its members unlimited cover. Even if the value is huge, it can be paid immediately<sup>134</sup>. Under the mutual system, the club has the influence to call upon its members to contribute up to unlimited extent so that it “passes the hat round”<sup>135</sup>. Some clubs suffered a demise because of the unexpectedly high supplementary calls. As a result, reinsurance was achieved on a mutual basis, i.e. by associating the clubs together to have insurance at the minimum cost and the retention amount of US\$5 million<sup>136</sup> for any one claim.

However, unlimited cover is not successful by means of the pooling agreement alone. This is because there is a ceiling or limit upon it for any one claim of US\$30 million<sup>137</sup>. Besides, the additional reinsurance can be obtained in the open market with reinsurers of high quality, led by Lloyd’s with a purchasing power of a minimum of 93% of the world tonnage by entering one or other of the group clubs. It was the first largest reinsurance contract in the world that commenced in 1951<sup>138</sup>.

Reinsurance under the pooling system has two objectives;

- (1) providing club members with unlimited cover at minimal cost and
- (2) providing the greatest security possible for the membership as a whole<sup>139</sup>.

Moreover, because of the lack of any profit element in the P&I system, the “first layer” of reinsurance is almost free of charge to the assureds<sup>140</sup>. No cost is incurred until the loss is actually paid out under the pooling agreement and due to the huge global spread of tonnage entered in the Group clubs, the premium for the “second layer”, the excess

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<sup>133</sup> *Supra*, footnote 57 at p. 129.

<sup>134</sup> *Ibid.*, at p. 129.

<sup>135</sup> *Ibid.*, at p. 129.

<sup>136</sup> *Ibid.*, at p. 129.

<sup>137</sup> R., RAVICHANDRAN. "Emerging Trends in Marine Insurance. Is There a Trend Towards Demutualisation of Mutual Clubs?" World Maritime University, 2001, at p. 28.

<sup>138</sup> *Supra*, footnote 57 at p.130.

<sup>139</sup> *Ibid.*, at p. 131.

<sup>140</sup> *Ibid.*, at p. 131.

loss contract with Lloyd's is brought to the very lowest level<sup>141</sup>. It is the international flavour of the clubs which provides this strength, and it is the lack of ability to obtain a widely diversified portfolio which is the main obstacle to the establishment by developing countries of national or regional P&I clubs<sup>142</sup>.

Approximately 90% of the world's tonnage of 400 million gross registered tonnages of ocean-going vessels was entered in the clubs of the International Group; one claim can be increased throughout almost the whole tonnage of the world<sup>143</sup>. In addition, the size of the International Group and the spread of risks is the surplus reinsurance premium which is more constructive than any individual owner can purchase on his own<sup>144</sup>. This is the achievement of the Group system for the widest possible geographical spread of membership. The risks that are covered by the clubs should also be similar and the club rules must be consistent. Furthermore, the regular discussions between managers of the clubs in the pool are held in order to have agreement on policy decisions regarding new risks or amendments to existing cover including consideration among the boards of directors of the pool clubs for consideration and ratification<sup>145</sup>.

One question arises regarding the acceptable loss ratio that covers the claims percentage. In this regard, the percentage in relation to premium is an acceptable level of claims. Actually, there is no simple answer because it varies between clubs, ships, fleets, etc., however the premium should not cover claims, and it should also pay for:

- (1) IG Group Re-insurance, and other possible schemes that each individual Club has taken up for their retention and/or overspill exposure.

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<sup>141</sup> *Ibid.*, at p. 131.

<sup>142</sup> *Ibid.*, at p. 131.

<sup>143</sup> *Ibid.*, at pp. 131-132.

<sup>144</sup> *Ibid.*, at p. 132.

<sup>145</sup> *Ibid.*, at p. 132.

- (2) Contribution to pool Claims. Depending on the Club this item varies; an estimate is 30 cents per GT.
- (3) Claims handling cost.
- (4) Administration and acquisition costs.

An acceptable ratio can be generally calculated for any specific fleet with any specific Club. Depending on the tonnage, claims allowed can range from 10% on the low side to as much as 75% on the high side over the break even point.

### **3.3.5 Settlement of Disputes**

Any matters which usually come under the province of the committee are set out in order of what can be considered to be of descending consequence: To settle disputes, the first priority is to be sure of approving the claims<sup>146</sup>. Managers of any association have settlement authority for smaller value claims because it would not be possible to have the committee review every single claim apart from the size which is of concern to the association<sup>147</sup>. If there is a claim to settle, the reports on every claim would be required to be placed before the committee at its next convenient meeting for its consideration and approval before settlement can be finally made<sup>148</sup>.

Secondly, if any dispute arises between a member and the club it will be reviewed first in the committee before it goes to arbitration<sup>149</sup>. That procedure is defined in the club rules in the following manner, “if any difference or dispute between a member and the association touching any loss, claim or demand made by the member shall arise out of or in connection with these rules or any by-law thereunder, such difference or dispute shall

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<sup>146</sup> *Ibid.*, at p. 13.

<sup>147</sup> *Ibid.*, at p. 13.

<sup>148</sup> *Ibid.*, at p. 13.

<sup>149</sup> *Ibid.*, at p. 13.

in the first instance be referred to and adjudicated by the committee, such reference and adjudication shall be on written submissions only”<sup>150</sup>. Here the word “submissions” means a belief that the referral of the dispute to the committee is in the manner of an arbitration, even though it is not in the nature of an arbitration but is only a referral of the dispute, describing the full facts of the circumstances<sup>151</sup>. The parties in dispute are the member on the one hand and the club’s managers, who have presumably rejected the member’s claims or whatever are the issues under consideration alternatively, on the other. In practical terms, the member himself does not normally appear before the committee nor is represented before them at that time; nor does he present his personal submissions which is a slight difference from a procedural point of view between a referral of a dispute and the submission to the committee of a member’s claim under the omnibus rule (i.e. for all, for everyone)<sup>152</sup>. A duplicate of the report to the committee of the dispute will be sent, as a matter of courtesy, to the member before the committee meeting. However, the contents are not for discussion, but only for information.

If the member’s claims are rejected by the committee, then the member may continue to the next stage of dispute resolution, namely, arbitration according to the relevant sub-rule of the club rules. It is stated that “if the member does not accept the decision of the committee, or if the committee shall fail to make any award within three months of the reference to it, the difference or dispute shall then be referred to arbitration in London”<sup>153</sup>. Each club has a sub-rule requiring members to avoid commencing any form of litigation other than arbitration. It means that after detailing the procedures for arbitration in a variety of further subsections, a concluding sub-rule prohibits a member from retaining any action, suit or other legal proceedings in opposition to the association than other actions consistent with the procedures laid down in the rules. The proceedings

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<sup>150</sup> *Ibid.*, at pp. 13-14.

<sup>151</sup> *Ibid.*, at p. 14.

<sup>152</sup> *Ibid.*, at pp. 14-15. This is discussed in Chapter 4 of the dissertation.

<sup>153</sup> *Ibid.*, at pp. 13-14.

may simply begin, other than the arbitration proceedings provided for, so as to put into effect an award under such arbitration and then only for such sum, if any, as the award may direct to be paid by the association<sup>154</sup>.

The sub-rule, that a member is excluded from taking any form of legal action unless and until he has got an award according to the arbitration procedure set up in the rules, is named after the case in which its validity has been tested and is known as the *Scott v. Avery* provision<sup>155</sup>. There is another way of taking legal action. If any individual member recovers unpaid and overdue calls, the club can arrest the member's ship. In the United Kingdom, however, this is not possible because under the Supreme Court Act 1981 recovery of unpaid insurance premiums is not regarded as a maritime claim for a ship can be arrested<sup>156</sup>.

One case involved in which the member's ship was arrested the now defunct Oceanus Club, which covered the plaintiffs' ships for P&I risks<sup>157</sup>. The dispute was related to supplementary and release calls. According to the club rules, the plaintiffs notified the club that they were going to continue to arbitration but three months later, the plaintiffs' ships were arrested in Aruba. In this case, the High Court granted the plaintiffs an interlocutory or a preliminary injunction up to the next afternoon before taking any further steps in the Aruba courts and finally, commencing or prosecuting proceedings pursuant to the club's arbitration rules. The court held in this case that the arrest action by the club was exclusively for obtaining security and also that the balance of convenience test favoured a refusal of the interlocutory relief because there was no suggestion that the club could not satisfy any award of damages. The Club could perceive an obvious danger as damages awarded against the plaintiffs could be useless if

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<sup>154</sup> *Ibid.*, at p. 14.

<sup>155</sup> *Ibid.*, at p. 15.

<sup>156</sup> *Ibid.*, at p. 15.

<sup>157</sup> *Ibid.*, at p. 15.

they could dispose of their ship and distribute the assets any time they pleased, leaving nothing to satisfy the club's claim<sup>158</sup>.

The second case, involved the vessel *John W. Hill*, which was entered for protection and indemnity risks with the London P&I Club. Mortgagees were named as loss payee under the policy<sup>159</sup>. The vessel went aground up river in Venezuela and cargo needed to be discharged to refloat her, but the vessel was damaged in her physical condition during the process. Even though general average was declared, the cargo owners refused to contribute their share in the amount of \$155,000 so the mortgagee claimed from the P&I Club. The club refused to pay the liability saying that it was not included in the rules, and applied to the United States courts which had been invoked by the plaintiff mortgagees for a dismissal or a stay of proceedings<sup>160</sup>. In this case, the court held on the first point that a contract for marine insurance was within the admiralty jurisdiction of the court, and for the second point, that the plaintiff mortgagees had acquired no greater rights than the assured and were bound by the conditions of the contract of insurance between the club and the member<sup>161</sup>. Thus, the club's petition to stay court action was granted.

### **3.3.6 Significant Features of Marine Insurance Applicable to P&I Insurance**

There are some specific features of marine insurance that apply to P&I insurance to cover liabilities arising out of the operation of an ocean going vessel that trades worldwide. The insurer is exposed to liabilities and losses arising out of many different accidents, a wide range of different jurisdictions and various legal regimes. Thus, marine

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<sup>158</sup> *Ibid.*, at pp. 15-16.

<sup>159</sup> *Ibid.*, at p. 16.

<sup>160</sup> *Ibid.*, at p. 16.

<sup>161</sup> *Ibid.*, at p. 16.

insurance is a part of international maritime law<sup>162</sup>. It is important, therefore, for assessment of the insurer's risk and claims in relation to the management and operation of the ship, to clearly understand and appreciate a host of foreign legal regimes together with international rules and conventions that govern a shipowner's liability.

The most significant and the earliest example of the reaction of maritime law to shipping disasters is the *Titanic* that led to the development of The SOLAS Convention<sup>163</sup>. Since then, there have been many disastrous incidents that have led to new international legislation. Support from the shipping industry, especially P&I insurers, has been instrumental in the development of such new legislation, predominantly in terms of liability coverage. For example, the flooding and capsizing of the ro-ro ferry *Herald of Free Enterprise* at Zeebrugge in March 1987, resulting in the loss almost 200 lives, led to initiatives<sup>164</sup> that nearly tripled the compensation payable to passengers<sup>165</sup>. The grounding of the tanker *Torrey Canyon* near the United Kingdom coast in March 1967, resulted in the adoption of the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC '69)<sup>166</sup>.

An additional special feature of marine insurance is that the main part of the business is underwritten through the four top markets based in the UK, Japan, France and Scandinavia, especially Norway<sup>167</sup>. That is how standard terms and conditions have been developed and widely accepted. The Norwegian Marine Insurance Plan (The Plan)

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<sup>162</sup> *Supra*, footnote 1 at p. 75.

<sup>163</sup> International Convention on the Safety of Life at Sea (SOLAS). The current SOLAS convention is SOLAS 1974, which entered into force in 1980 and which superseded SOLAS 1960.

<sup>164</sup> The 1990 Protocol to the Athens Convention. The main aim of the Protocol is to raise the amount of compensation available in the event of deaths or injury at 175,000 SDR (around US\$224,000).

<sup>165</sup> Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, Athens, 1974.

<sup>166</sup> Gold, Edgar. *Gard Handbook on Marine Pollution*, 2<sup>nd</sup> Edition: Arendal: Gard, 1998, pp. 31-32. CLC '69 changed the traditional damage liability base from one of proven fault or negligence to one of strict liability. Besides increasing the shipowners' liability it also introduced a system of certification making insurance compulsory.

<sup>167</sup> *Supra*, footnote 1 at p. 76.

of 1996, and the London Institute Clauses are prime examples<sup>168</sup>. Furthermore, various P&I underwriters' rules have been established on the basis of a general platform for the scope of the cover called the Pooling Agreement, which constitutes the legal basis for the P&I clubs' claims-sharing arrangements and collective purchases in market reinsurance.

To sum up, marine insurance is a subject of special legislation under English law whereby a contract of marine insurance is governed by the Marine Insurance Act 1906<sup>169</sup>. The marine insurance industry is thus international in scope, with the major interested parties operating on a global basis. As a result of the similarity of the benchmark insurance products and the accessibility of the products, competition amongst the various insurers primarily focuses on premium price and service to customers and members, rather than on the terms and conditions determining the scope of the variety of covers. With P&I insurance there is also a specific amount of restraint on competition in terms of premium price – or premium rating, which is the expression used by mutual clubs, when a ship is transferred from one club to another<sup>170</sup>.

### **3.4 Marine Insurance Legislation with respect to P&I Insurance**

There is no uniform, international marine insurance legislation in the form of a treaty<sup>171</sup>. UNCTAD made an unsuccessful attempt some years ago to create an international convention for marine insurance. The business of marine insurance is dominated by the London market and English law and practice. This has been the case for many years. Also, the marine insurance industry has been able to generate a commercial system so extensively accepted, well known and self-regulated that there is no need for

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<sup>168</sup> *Ibid.*, at p. 76.

<sup>169</sup> *Ibid.*, at p. 76.

<sup>170</sup> The International Group of P&I Clubs Agreement.

<sup>171</sup> *Supra*, footnote 1 at p. 88.

international convention law<sup>172</sup>. Significant numbers of standard terms are inserted in marine insurance policies which are universally accepted. If there are disputes, these terms permit courts and arbitration tribunals to focus especially on possible breaches or other instances of non-compliance.

Since 1601, the United Kingdom's marine insurance legislation has set the basic principles which remain largely unchanged<sup>173</sup>. Even though later statutes such as the Marine Insurance Act 1745 which prohibited the placing of marine insurance for a subject matter in which the insured had no interest updated and revised the 1601 Act, until the Marine Insurance Act 1906 is the one that is used in all common law jurisdictions around the world<sup>174</sup>. No serious attempt was made to codify the law relating to marine insurance until this legislation was enacted. Since there had been little litigation on marine insurance, the shipping community thought that the law had to be confirmed and revised to ensure continuous, smooth marine insurance operations. Finally, it was achieved through the 1906 statute, which became one of the most important pieces of maritime legislation worldwide.

### **3.4.1 Legality of Indemnity Insurance**

There were some conceptual doubts with regard to marine insurance legislation in the formative years regarding the financial protection afforded to the assured. In 1741, the Admiralty in England made a minute recording the number of vessels in their wartime fleet that insisted on breaking away and racing forward to obtain cargo for the market

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<sup>172</sup> *Ibid.*, at p. 88.

<sup>173</sup> *Ibid.*, at p. 88.

<sup>174</sup> The Marine Insurance Act 1906 is an official name an Act to codify the law relating to Marine Insurance that was created primarily due to the efforts of Judge Sir M D Chalmers in collaboration with underwriter Sir Douglas Owen, and based on a bill entitled "Marine Insurance Codification Bill" introduced in the British House of Lords in 1894.

ahead of those who were both their companions and competitors<sup>175</sup>. Ships' masters obtained knowledge of better prices; the vessel and cargo were fully insured by calculating the risk of breaking convoy. The mechanism of insurance gained acceptance and respectability because of the development of liability and indemnity insurance since it was designed to compensate assureds regarding the consequences of their wrongdoing that should be viewed with suspicion.

Actually, P&I clubs cover shipowners for various types of costs and expenses which arise absolutely without fault. Examples are expenses of stowaways, quarantine expenses, repatriation costs and others. The majority cover is in order to indemnify members for the liabilities they have incurred by virtue of their fault or the fault of their servants<sup>176</sup>. For this reason, a member usually seeks indemnity for liability which he has incurred and discharged arising from his fault. Thus arises the question of legality. Early in the 19<sup>th</sup> century, it was contrary to public policy to consent to a person attempting to insure against the consequences of his own negligence or that of his servants<sup>177</sup>. In *Delanoy v. Robson*, it was held that - "It would be an illegal insurance to insure against what might be the consequences of the wrongful acts of the assured."<sup>178</sup> Again, this principle was explained in *Burrows v. Rhodes* by Kennedy J. He held it was settled law that if an act is deliberately unlawful, or the doer of it knows it to be unlawful... he cannot retain an action for contribution or for indemnity against the liability which results therefrom. An express provision of indemnity to him for the commission of such act is null and void<sup>179</sup>.

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<sup>175</sup> *Supra*, footnote 57 at p. 62.

<sup>176</sup> *Ibid.*, at p. 62.

<sup>177</sup> *Ibid.*, at p. 62.

<sup>178</sup> *Ibid.*, at p. 62.

<sup>179</sup> *Ibid.*, at p. 62.

Furthermore, if, where the carelessness was on the part of the assureds' servants, Benecket stated in 1824 that damages which were suffered by a ship and her cargo by accident, i.e., without fault of either side, had to be particular average under the civil law, as well as by the law of England<sup>180</sup>, which considers such an injury a peril of the sea. The underwriters are liable; if it cannot be proved that the loss was attributable to the negligence of the master or crew of the ship insured<sup>181</sup>. Until the end of the 19<sup>th</sup> century, there were still some doubts as to the efficacy of marine insurance. It was argued in an article by Captain A G Fround, Secretary of the Shipmasters' Society of London, that a good deal of the recklessness and apathy shown by shipowners and speculators is to be accounted for by the prospect of insuring in full against loss of ship, cargo, and even unsecured freight. In fact, unlimited insurance has done much in devaluing life at sea<sup>182</sup>.

But the general view was that there should be compensation or reward if there was negligence. This view persisted to some extent till the running down clause was introduced which was the first attempt to insure against liabilities. In 1850 and 1854, it was opposed by many insurers and the underwriters from Lloyd's petitioned the Board of Trade to forbid the use of the clause<sup>183</sup>. Even though it failed, the demand that the assured should bear one-fourth of collision liabilities under the running down clause was an effort to ensure the shipowners' persistence in having protection for their interest and some concern for its preservation. Considerable attention has been devoted to the legality and morality of liability insurance. Attitudes have altered regarding liability insurance in general insurance and marine insurance in particular. It is fair to say that the

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<sup>180</sup> *Buller v. Fisher*, 1800.

<sup>181</sup> *Supra*, footnote 57 at p. 63.

<sup>182</sup> *Ibid.*, at p. 63.

<sup>183</sup> *Ibid.*, at p. 63.

notion of outlawing liability insurance has disappeared. This is supported by the growing concept of a system of compulsory marine liability insurance<sup>184</sup>.

The P&I cover is now fully recognised as entirely legitimate. Section 506 of the Merchant Shipping Act 1894 recognised the legality of insurance for shipowners regarding their liability to pay damages for loss of life, injury or damage in the circumstances listed in section 503 of the Act. The Marine Insurance Act 1906 also recognises the right of a shipowner to insure against his liabilities to third parties<sup>185</sup>. According to Section 3(1), it provides that every lawful maritime adventure may be the subject of a contract of marine insurance, and sub-section (2) provides that there is a maritime adventure where, *inter alia*,

“(c) Any liability to third party may be incurred by the owner of, or any other person interested in or responsible for, insurable property, by reason of maritime perils”<sup>186</sup>.

In this provision, the definition of “maritime perils” as follows:

“Maritime perils” means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detentions of princess and peoples, jettison, barratry, and any other perils, either of the like kind, or which may be designated by the policy”<sup>187</sup>. The phrase “any other perils, either of the like kind, or which may be designated by the policy”, would cover liability insurance if the word “peril” is construed as “risk” for incurring a liability to another person related to the precise object or under a certain obligation.

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<sup>184</sup> *Ibid.*, at p. 63.

<sup>185</sup> *Ibid.*, at pp. 63-64.

<sup>186</sup> Marine Insurance Act 1906, section 3(1).

<sup>187</sup> *Supra*, footnote 57 at p. 64.

Marine liability insurance is recognised in the 1906 Act where the measure of indemnity is addressed in the following words:

“Where the assured has affected insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability”<sup>188</sup>.

English courts dealing with maritime claims have since many years documented the legitimacy of hull underwriters covering liabilities with regard to running down clauses and for general average contributions and salvage in addition to other liabilities to which a shipowner’s interest in his vessel may be exposed. In addition, the legitimacy of insurance cover for a shipowner’s liability for cargo carried on board his vessel was already settled and the shipowner could insure against his liabilities as a carrier.

The member of a P&I Club is essentially the owner of the ship in which he has an interest. However, over the years the categories of persons who may apply and can be acknowledged for membership has widened to, for example, charterers, operators, managers and mortgagees even group affiliate members. Whoever these people may be, one common factor is that they have to be able to show an insurable interest, which is an indispensable statutory requirement pursuant to the Marine Insurance Act 1906. In section 5, it is provided that -

“(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property,

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<sup>188</sup> Marine Insurance Act 1906, section 74.

or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof”<sup>189</sup>.

It is an interesting point as to how a shipbuilder or a ship repairer has an interest in a maritime adventure, since a ship in dock or lying beside a repair yard is hardly engaged in an adventure, but possibly that is covered by the extra words “or to *any* insurable property at risk”<sup>190</sup>. One of the criteria for being a P&I Club member is that he may be liable for which he seeks protection or indemnity. In the United Kingdom, the definition of ownership is clarified by the merchant shipping Statutes. Every ship is notionally divided into 64 parts or shares. In this case, owners include co-owners, whether they are individuals or corporate persons.

### **3.5 P&I Club Rules Relating to Persons**

A P&I Club necessarily comprises a corporate structure, which includes documents such as Statutes and Rules that signify and regulate the contract of insurance between the club and the member. Club rules and the scope of the club cover should not only be almost the same in character but should also be given similar or consistent interpretation by the clubs of the International Group<sup>191</sup>. In this regard, the interpretation of “rules” in statutes means “the Rules of the Association for P&I and Defence cover for ships and other floating structures or the Rules of the Association for P&I cover of mobile offshore units, as the case may be”<sup>192</sup>.

Before commencing commentary on each specified risk covered under P&I rules, it is important to highlight the nature of P&I cover. Firstly, a member can get the benefit of

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<sup>189</sup> *Ibid.*, at section 5.

<sup>190</sup> *Supra*, footnote 57 at p. 17.

<sup>191</sup> *Supra*, footnote 86 at p. 132.

<sup>192</sup> Gard. *Statutes and Rules*, 2009 at p. 33.

cover provided under the P&I class where there has been loss, damage, liability or expense arising in respect of his interest in an entered ship, where such loss, etc. is attributable to the events occurring during the period of entry of that particular “entered ship” in the club or in connection with the operation of the particular ship<sup>193</sup>. Under P&I cover, there are varieties of claims relating to cargo loss and damage, oil pollution, personal injury to passengers, crew and others, wreck removal, damage to fixed and floating objects, collision risks and special compensation to salvors. Among them, emphasis is placed on the P&I claims relating to injuries, illness and loss of life suffered by individuals. A detailed analysis of these types of claims is carried out in the following chapter.

A shipowner’s liability for personal injury, illness or death of persons on board his vessel goes well beyond any contractual provisions, such as crew contracts or collective bargaining agreements. One of the main liabilities facing a shipowner is a claim including negligence which is a particularly complex field. However, even though the international legal system may be able to take some steps forward in unifying the law regarding passengers, generally, the individual claims remain a complex patchwork of legislation and principles derived from the common law.

P & I Club Rules cover the following risks under personal injury;

1. liability to persons other than seamen
2. injury in death to seamen
3. illness and any subsequent repatriation and substitute expenses
4. loss of and damage to seaman’s effects
5. stowaways and refugees
6. life salvage

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<sup>193</sup> *Supra*, footnote 57 at pp. 64-65.

Among these rules, emphasis is placed on analysing the issues relating to loss of life, personal injury and illness in relative detail.

## CHAPTER 4

### P&I INSURANCE IN RELATION TO PERSONAL INJURIES, ILLNESS AND LOSS OF LIFE

P&I insurance covers a member's liability for third party loss of life, personal injury or illness which occurs out of some negligent act on board of or in relation to the entered ship. It may also arise out of indemnity owed to owners of a dock or dry-dock including port authorities<sup>194</sup>. The typical P&I club rule covers death, personal injuries or illness to crew members and others such as passengers, stevedores, pilots, surveyors, and visitors to the ship but not to wives of crewmembers who may be on the ship<sup>195</sup>. Such people are covered under the seaman's rule because of the definition of seaman which includes any relative of the seaman carried on board<sup>196</sup>. Therefore, unidentified personnel should not be allowed on board at any time unless accompanied by a designated crew member<sup>197</sup>.

A shipowner, his manager or operator may conclude individual employment contracts directly with the individual crew member and that contract is a private document on terms agreed by the parties<sup>198</sup>. Therefore, costs or expenses incurred due to the terms or contract of employment arising directly from them which would not otherwise have been incurred would only be recoverable if the terms of employment had received the prior approval of the club managers<sup>199</sup>. The contract of service with the employer is important for every seaman in case of certain nationalities for dealing with liability for death or injury because it normally happens with seamen especially Asian seamen

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<sup>194</sup> *A Guide to P&I Cover*. The Standard P&I Club, at p. 4.

<sup>195</sup> *Ibid.*, at p. 4.

<sup>196</sup> *Ibid.*, at p. 4.

<sup>197</sup> Thorp, Michael. *An Introduction to Marine Protection & Indemnity Insurance; for Masters and Senior Officers*: Skuld, 2000, at p. 31.

<sup>198</sup> *Supra*, footnote 3 at p. 238.

<sup>199</sup> *Supra*, footnote 57 at p. 65.

working on foreign flag ships. As a result of the certainty of contractual benefits, a crewmember or his dependants can have the right to claim damages, subject to certain prohibitions. In any event, however, these provisions are important because it is still vital that any contractual benefit paid by the member they can be applied to reduce any claim which the crewmember may have in damages<sup>200</sup>.

A shipowner has to take reasonable care to ensure that the ship is safe for anyone who goes on board. Also general maritime law codified in statute obliges a shipowner to provide his seamen with a seaworthy vessel and a shipowner can be liable for any condition which results in an injury on board his vessel even if he neither knew nor should have known of the existence of his condition<sup>201</sup>. The reason is that any person injured on board such as crew, stevedores, pilots or passengers may allege that the ship was unsafe. Also, the injured person could come to a decision to sue the ship and her owners and demand huge sums of money as compensation<sup>202</sup>.

But under the normal rules regarding negligence, American courts have held that a shipowner does not owe a duty to warn an experienced pilot of the obvious dangers of boarding a vessel in rough seas which poses a major risk of injury to pilots boarding and leaving a ship<sup>203</sup>. About the construction of pilot ladders and injured surveyors, there are detailed regulations in the 1974 SOLAS Convention, and relevant ILO instruments. The best way that a Master can help the shipowner is to be sure that he did everything in his power to prevent injury and illness on board his ship because this work is closely related to the company's policy on safety management and to the implementation of the International Safety Management Code<sup>204</sup>. Claims for personal injury can be brought in

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<sup>200</sup> *Supra*, footnote 194 at p. 11.

<sup>201</sup> *Ibid.* at p. 16.

<sup>202</sup> *Supra*, footnote 197 at p. 30.

<sup>203</sup> *Supra*, footnote 194 at p. 4.

<sup>204</sup> *Supra*, footnote 197 at p. 30.

the United States for up to three years after the incident because it is possible that a crewmember can forget what has happened to give detailed information to his lawyer immediately after the accident<sup>205</sup>. Therefore, it is very important for ship's officers to carry out a proper investigation of any accident to be reported since its occurrence, so that the Club correspondent can be advised and he is able to make full investigation on whether the third party returns to work in the weeks and months after the ship leaves and can give adequate warning of a probable claim to the Club and the owner.

#### **4.1 Analysis of Provisions Relating to Claims for Personal Injuries, Illness and Loss of Life**

Under United States Law, the two most expensive claims for the clubs are cargo and personal injury claims. Under the P&I Rules, the definition of 'seaman' includes 'any person ... engaged or employed in any capacity in connection with the business of any entered ship as part of such ship's compliment ... and includes any relative of a seaman ... whom an owner has agreed to maintain or carry on board an entered ship ... and includes any person engaged under articles of agreement for nominal pay'<sup>206</sup>. But in the United States, the Jones Act which is a Federal Act enacted in 1921, gave a cause of action to crew members, initially on American vessels, to sue their employers for injuries for 'pecuniary' damages<sup>207</sup> suffered in the course of their employment<sup>208</sup>. The Jones Act does not define who is a seaman but the term can include waiters, musicians and bartenders who are entitled to workers' compensation benefits. However, a lecturer who agreed to give talks to passengers in exchange for a free passage is not considered a seaman<sup>209</sup>. Also, according to the Jones Act, a person cannot be a seaman if the vessel, including a submersible drilling barge but excluding permanently fixed drilling rigs and

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<sup>205</sup> *Supra*, footnote 194 at p. 5.

<sup>206</sup> *Ibid.*, at p. 11.

<sup>207</sup> *Ibid.*, at p. 15.

<sup>208</sup> *Supra*, footnote 57 at p. 65.

<sup>209</sup> *Supra*, footnote 194 at p. 15.

production platforms, is not ‘in navigation’. In such cases, workers on such excluded structures are not entitled to claim damages against their employer but are entitled to workers’ compensation<sup>210</sup>.

The basis of liability under the Jones Act is the establishment of negligence against the employer. The slightest degree of negligence is persuasive enough for liability to be injured by a court and also attendant damages for loss or injury can be assessed. A seaman can get trial by jury<sup>211</sup> which is retained even if there are claims under other statutes such as the Death on the High Seas Act (DOHSA) and the Jones Act<sup>212</sup> as well as under the common law or general maritime law<sup>213</sup>.

There was a high value serious personal injury case involving a third officer of an American flag vessel who was persecuted on board by the rest of the crew<sup>214</sup>. He took one of the ship’s life-rafts in the early morning when the ship was 1,000 miles east of the Bahamas and disappeared into the night after he lowered himself onto the raft over the stern of the ship. Nobody noticed his disappearance except one crew member who was a watch keeper; but he was also in doubt. When the officer was discovered missing the next day, the master turned the ship about and retraced his tracks but was unable to find him. Two days later, he was picked up by a passing vessel and brought to Cardiff in the UK. Fortunately, he was found to be in good physical and psychological shape and was hospitalised in his home state of California. He then brought an action against the owners of his vessel for damages for nervous shock and/or mental suffering caused by

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<sup>210</sup> *Ibid.*, at p. 16.

<sup>211</sup> *Supra*, footnote 57 at p. 65.

<sup>212</sup> Scientific personnel serving aboard US Coast Guard designated oceanographic research vessels (e.g. seismic survey vessels) may be liable to claim under the Oceanographic Research Vessels Act (ORVA) 1965. Such crew members are still considered as seamen and are entitled to the warranty of a seaworthy vessel and to maintenance and cure; however, they are deprived by ORVA of any Jones Act negligence remedy for injury and death.

<sup>213</sup> *Supra*, footnote 194 at p. 16.

<sup>214</sup> *Supra*, footnote 57 at p. 66.

his alleged treatment while on board the ship<sup>215</sup>. The managers of the owner's club engaged Californian lawyers to investigate the matter. Various crew members were interviewed, including the master who asserted that he did not keep him on long watches and provided him with tranquilisers from the ship's medical box. The rest of the crew were told to protect him as far as possible. The man was unable to get a job and could not work any more because of his bad experience. Within two days, whether he would have been rescued or not, drifting out of the sea lanes had caused irreparable damages to his mental state (i.e. persecution mania)<sup>216</sup>. Even though this unfortunate event occurred, the committee of the owner's P&I club were not willing to meet the US\$ 700,000 demand to settle this claim and prepared a defence for presentation to the California District Court<sup>217</sup>. At the end of seven days of trial, the jury brought in an award in favour of the seaman in the amount of US\$ 1,650,000 which was a considerable amount of money in the early 1980s<sup>218</sup>.

According to the 2008/2009 P&I Rules, the liability of the Association regarding all claims which arise out of one event must not exceed in respect of liability to passengers and seamen the amount of US\$ 3 billion<sup>219</sup>. Under the same rule, the liability of the Association in respect of all claims which arise out of one event must not exceed with regard to liability to passengers in the amount of US\$ 2 billion<sup>220</sup>. The meaning of "passenger" under the rules is "a person carried on board a Ship under a contract of carriage or who, with the consent of the carrier, is accompanying a vehicle or live animals covered by a contract for the carriage of goods"<sup>221</sup>. It means that the liability of

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<sup>215</sup> *Ibid.*, at p. 67.

<sup>216</sup> *Ibid.*, at p. 67.

<sup>217</sup> *Ibid.*, at p. 67.

<sup>218</sup> *Ibid.*, at p. 67.

<sup>219</sup> *P&I Rules*. The North of England Protection and Indemnity Association Limited, 2008/2009, at p. 47.

<sup>220</sup> *Ibid.*, at p. 47.

<sup>221</sup> *Ibid.*, at p. 46.

the aggregate of both claims in respect of liability to passengers has been limited to US\$ 2 billion with the balance of US\$ 1 billion being limited for the liability to seamen.

Crew members are indemnified through compensation or damages for which shipowners are liable to pay as a consequence of injury, illness or death of a seaman for the duration of his service period on board or during the periods of proceeding to or from the entered vessel<sup>222</sup>. Such liability arises from three principles sources, namely, contract, statute and common law<sup>223</sup>. There are some recoverable funds such as expenses of hospital, medical, maintenance (i.e. accommodation and subsistence) and funeral. Cover is also afforded for expenditures<sup>224</sup>, such as, evacuation<sup>225</sup> from ship to shore with helicopter, or other air transportation from a small local hospital to a larger central hospital. But for medical expenses, the Club recommends that the shipowners require all their seagoing employees to take a full medical screening examination because those expenses are not covered under the Club Rules<sup>226</sup>.

Other benefits for a member in terms of what he can get from his club are in relation to his crew, compensation for the loss of employment resulting from the loss or wreck of a vessel (called shipwreck unemployment indemnity), wages of a crew member for the duration of hospitalisation or treatment abroad or while awaiting or during repatriation, and reimbursement of expenses incurred in sending substitute crew abroad or repatriating a substitute engaged abroad<sup>227</sup>. According to the Rules under P&I cover, the Association covers the liability to pay compensation or damages in relation to the injury

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<sup>222</sup> *Supra*, footnote 57 at p. 65.

<sup>223</sup> *Supra*, footnote 3 at p. 238.

<sup>224</sup> *Ibid.*, at p. 257.

<sup>225</sup> The member may decide to divert the ship to a non-scheduled port to secure treatment of a seriously ill or injured crew member on board or in order to search the missing person from ship or while awaiting such a person to save at sea. Certain costs and expenses incurred thereby are subject to cover under Rule 31 of P&I Cover in Chapter 1 (Diversion Expenses).

<sup>226</sup> *Supra*, footnote 194 at p. 11.

<sup>227</sup> *Supra*, footnote 57 at p. 68.

to, or illness or death of, a member of the crew<sup>228</sup>. Furthermore, there are some liabilities to pay damages or compensation for loss of or damage to the personal effects of any seamen of an entered ship<sup>229</sup>.

Contracts always deal with relative compensation for different degrees of disability. The Club usually approves a clause which provides to a seaman, whose disability is assessed at 50% or more, to be entitled to 100% compensation. If the seaman is 50% disabled but he can only return to sea at a lower rank, he is entitled to a 50% enhancement on his disability rating<sup>230</sup>. In such case of assessment, to agree on the degree of disability, there are always two doctors or at least it is done by a neutral doctor, and is based on the most favourable medical reports<sup>231</sup>. If there is some dispute or disagreement between the doctors, the Club needs an amendment to submit the matter to a third doctor whose decision is binding.

In addition, repatriation expenses of an injured or ill seaman can also be recovered if the reason for the repatriation is not that the man himself is sick or requires home treatment, but that he must attend to his wife or child, or in the case of a single man, a parent who has fallen ill. According to the P&I Rules, such repatriation and substitution expenses essentially incurred as a result of the death, personal injury, illness or desertion of any seaman of an entered ship are recoverable. If such expenses are incurred for any other reason the Managers may in their absolute discretion consent to the whole or any part thereof as they deem equitable save that cover shall not extend to expenses arising as a consequence of:

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<sup>228</sup> *Supra*, footnote 192 at p. 88.

<sup>229</sup> Professional, Informa. *The International Marine Law and Insurance Guide*. 5<sup>th</sup> Edition: London: Informa Professional, 2003, p. 23.

<sup>230</sup> *Ibid.*, at p. 11.

<sup>231</sup> *Ibid.*, at p. 11.

- (i) the expiry of a Seamen's period of service on the Entered Ship either in accordance with the terms of a crew agreement or other contract of service or employment or by mutual consent of the parties to it (i.e. those terms shall have been previously approved by the Managers in writing);
- (ii) the sale of an Entered Ship<sup>232</sup>.

Moreover, the member has the right to be indemnified regarding liabilities, costs and expenses in respect of seamen otherwise recoverable relating to or arising from death, personal injury or illness but incurred:

- (i) prior to the commencement of, or following the lesser of, the period of Entry of the Ship and arising out of the Member's interest in taking or giving delivery of the Entered Ship under a contract of sale, notwithstanding that at the relevant time the Member cannot comply with<sup>233</sup>
  - (a) if the membership who is the owner, owner in partnership, owner holding separate shares in severalty, part owner, trustee, or demise charterer of the Entered Ship, or a manager or operator having control of the operation and employment of the Entered Ship (being such control as is customarily exercised by a shipowner, or any other person in possession and control of the Entered Ship), or
  - (b) the charterer (other than by demise) of the Entered Ship<sup>234</sup>, and affiliated to or associated with the Senior Member or any joint member except where the Senior Member or that joint member is wholly owned by the charterer or where both are under common ownership, that the Senior Member or that joint member either owns at least 50 % of the shares in and voting rights of the charterer or can

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<sup>232</sup> *Ibid.*, at pp. 23-24.

<sup>233</sup> *Ibid.*, at p. 24.

<sup>234</sup> *Ibid.*, at p. 8.

- procure that the charterer is managed and operated in accordance with the wishes of the Senior Member or that joint member, or
- (c) a mortgagee of the Entered Ship, or
  - (d) any person or persons to become a joint member, the Senior Member and each joint member warrants that the joint member is, in relation to the Entered Ship or interested in the operation, management or manning of the Entered Ship, or the holding company or the beneficial owner of the Senior Member or any joint member<sup>235</sup>.
- (ii) during a period when the Seaman is on leave and the Entered Ship is the last Ship on which the seaman served prior to his death, personal injury or illness<sup>236</sup>.

On the other hand, clubs will only reimburse for liabilities for loss or damage to personal effects of crew but not for cash, negotiable instruments, precious stones or objects of a rare or valuable nature if there is no prior agreement between the member and managers or without the manager's prior written approval<sup>237</sup>.

With regard to liabilities in respect of passengers, P&I cover is available for liabilities in five specific areas, namely, damages or compensation for loss of life, personal injury or illness of passengers, damage to or loss of effects of passengers, compensation to, and the return or forwarding of, passengers where a casualty occurs, delay in the carriage of passengers and their effects and the costs and expenses arising out of an order for the deportation of a passenger<sup>238</sup>.

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<sup>235</sup> *Ibid.*, at pp. 12-13.

<sup>236</sup> *Ibid.*, at p. 24.

<sup>237</sup> *Supra*, footnote 57 at p. 68.

<sup>238</sup> *Supra*, footnote 3 at p. 285.

Broadly speaking, the Club covers damages or compensation regarding any passengers on board an entered ship arising as a consequence of a casualty to the entered ship, including the cost of forwarding such passenger to his destination or return to the port of embarkation and of maintenance of such passenger ashore. In this regard, “casualty” means an incident involving either:

- (i) collision, stranding, explosion, fire or any other cause affecting the physical condition of the vessel so as to render it incapable of safe navigation to its intended destination<sup>239</sup>; or
- (ii) a threat to the life, health or safety of passengers<sup>240</sup>.

By contrast, there is no liability to passengers in any case regarding death or personal injury by reason of carriage of passengers by air<sup>241</sup> except where such liability occurs:

- (i) during the repatriation by air of injured and sick Passengers or of Passengers following a casualty to the Entered Ship, or
- (ii) during shore excursions from the Entered Ship<sup>242</sup>.

However, the Association assumes no liability regarding the contractual liability of a Member for death or injury to a passenger while ashore on an excursion from the entered ship in circumstances where either:

- (i) a separate contract has been entered into by the Passenger from the excursion, whether or not with the Member, or
- (ii) the Member has waived any or all of his rights of recourse against any sub-contractor or other third party in respect of the excursion<sup>243</sup>.

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<sup>239</sup> *Supra*, footnote 192 at p. 90.

<sup>240</sup> *Supra*, footnote 229 at p. 25.

<sup>241</sup> The liability to passengers transported to and from vessels by air is not included regardless of whether such carriage occurs before or after the cruise or during an excursion.

<sup>242</sup> *Supra*, footnote 219 at p. 25.

<sup>243</sup> *Ibid.*, at p. 25.

In the case of liability to a passenger, the passage ticket is important to relieve the Member of liability, costs and expenses to the maximum extent permitted under the appropriate law whether their passage ticket complies with the rules or not. P&I insurance is very difficult to understand because several contracts must be checked before one can establish whether or not an incurred expense is recoverable by the owner such as costs of medical treatment passengers who have been ill or injured on board. That is why it is always better for the Master of a vessel to check on the conditions of carriage as set out in the ticket and read through the rule regarding what P&I insurance cover is there<sup>244</sup>.

The Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (PAL 1974) has been ratified by many countries<sup>245</sup>. Under this convention, the carrier can limit his liability for death or personal injury to a passenger to SDR 46,666. Germany and the Scandinavian countries have introduced legislation in line with the Protocol of 1996 of this Convention with higher limits up to SDR 175,000 for death or personal injury of the passengers<sup>246</sup>. Where the Athens Convention and the global limit of liability are applicable under the relevant national law, the claims can be up to the maximum limit for an individual passenger who will be covered by the Club, but not where the relevant national law does not provide for an individual passenger limitation figure and the Club has consented in advance to the waiving of the global limit. The purpose of the Athens Convention is to consolidate and harmonise two earlier international conventions regarding passengers and luggage<sup>247</sup>. The limitation figure is SDR 175,000 per passenger according to the 1996 Protocol regarding claims for personal injury and loss of life but internationally it is not yet in force<sup>248</sup>. Members

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<sup>244</sup> *Supra*, footnote 197 at pp. 33-34.

<sup>245</sup> *Supra*, footnote 194 at p. 6.

<sup>246</sup> *Ibid.*, at pp. 6-7.

<sup>247</sup> *Supra*, footnote 3 at p. 270.

<sup>248</sup> *Supra*, footnote 194 at p. 7.

should therefore discuss this with the Managers. The IMO is trying to boost considerably the limits by amending and permitting Athens Convention claimants to take direct action against the shipowner's insurer. But since the Protocol is not yet in force, it is unlikely that the clubs will comply with the requirements particularly on direct action<sup>249</sup>.

The majority of all cruise passengers are of United States nationality, and others are Germans and British. At the same time, the Far East has begun to develop a cruise market. However, the most important geographical areas are the Caribbean, the US West Coast and the Mediterranean. Most passengers' ships are ferries and not cruise ships. It is evident that the passengers on board are not familiar with ship arrangements and ship problems. It is very likely that they can get injured accidentally so that the liability to the injured passenger is a matter of concern for the owner and the clubs. In the United States, the law also does not allow limitation of liability by contract for claims of negligence for the personal injury or death of passengers<sup>250</sup>. Shipowners have a responsibility for taking due care under the circumstances. The owners of passenger ships are strictly liable for all passenger negligence claims including assault by crewmembers on passengers<sup>251</sup>. Most passenger tickets have a twelve month time limit in the United States; domestic ferries have special limits of liability which must be agreed by the Managers<sup>252</sup>.

When a passenger is seriously ill or dies on a cruise ship, there is always the risk of a claim for medical malpractice. But in the United States, a cruise operator does not have liability for the negligence of a doctor in his treatment of a passenger because the doctor

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<sup>249</sup> *Ibid.*, at p. 7.

<sup>250</sup> *Supra*, footnote 3 at p. 273.

<sup>251</sup> *Supra*, footnote 194 at p. 7.

<sup>252</sup> *Ibid.*, at pp. 7-8.

is not an employee; he is only a sub-contractor<sup>253</sup>. However, the shipowner has to show that he used great care in choosing a doctor, and that he had checked all the credentials and his prior work experience. If both the shipowner and the doctor are sued, the doctor has to show that the injury did not happen because of his negligence but because of the lack of provision of proper equipment on board and failure to provide adequate medical facilities. In such case, the cruise operator will be liable<sup>254</sup>. This can have a disastrous effect on the handling of a claim. So, the cruise operator has to make sure to indemnify the ship's doctor for providing the medical facilities even if the doctor is an independent contractor. It is better for the members to discuss such issues with the Club. It is very important for the passengers to note that they have the right to sue for any claim only within six months of suffering injury by giving a written notice. It takes one year to file and serve the writ within one further month<sup>255</sup>. But liabilities for emotional distress, mental suffering or psychological injury are not included in the Club's cover<sup>256</sup>.

Death or injury of stevedores or longshoremen or other waterside workers is dealt with by a separate rule which defines the category of persons "engaged to handle the cargo of the entered vessel". These can be recovered as liabilities, costs and expenses as a result of an act, neglect or default on board or in relation to the insured vessel or regarding the cargo handling<sup>257</sup>. The Club covers members for their liabilities for loss of life or personal injury or illness to stevedores, or any other person, arising out of the handling of cargo of an entered ship, or as a result of the negligence of persons employed solely for that purpose, from the time the cargo is received for shipment on the quay or wharf until final delivery from the quay or wharf at the port of discharge<sup>258</sup>. Until 1992, the clubs covered liability arising under any indemnity given by the member to the

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<sup>253</sup> *Ibid.*, at p. 9.

<sup>254</sup> *Ibid.*, at p. 9.

<sup>255</sup> *Ibid.*, at p. 10.

<sup>256</sup> *Ibid.*, at p. 10.

<sup>257</sup> *Supra*, footnote 57 at p. 66.

<sup>258</sup> *Supra*, footnote 194 at p. 24.

stevedore employer, if such an indemnity was approved by the Managers, but it was declined after 20<sup>th</sup> February 1992 because of the protected nature of claims associated with such indemnities<sup>259</sup>.

In the United States, a longshoreman cannot sue his employers for damages unless he can prove it was negligence on the part of the shipowner, but he is entitled to obtain workers' compensation benefits from his employers in the case of a work related injury<sup>260</sup>. Shipowners have to warn stevedores of any hazards on the ship or relating to its equipment in cargo operation. Once the stevedore has started working, the shipowner has no responsibilities for keeping a person on duty for inspection, supervision or correcting any dangerous condition during loading or discharging. However, if the shipowner notices that the ship's gear malfunctions and it is in dangerous condition, he may intervene and stop the work. If the stevedores notice malfunction of the ship's gear, it must be reported to the ship's officer. The obligation to repair rests with the ship and the lack of repair must be undertaken by the shipowner under the relevant health and safety regulations<sup>261</sup>. Therefore, the master or chief officer must confirm with the stevedore by signing a document that the ship's gear is in good condition before handing over.

Liability concerning wives and children of masters and officers or crew members is relevant for P&I insurance. This started in the post World War II era when many shipowners allowed crew to take their wives and /or children to accompany them especially on long-haul voyages<sup>262</sup>. Owners insisted on a dependent wife signing a "hold harmless" agreement or take out some form of personal accident insurance to cover herself, and her children. As time went by, this custom of the trade became so that the

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<sup>259</sup> *Ibid.*, at p. 24.

<sup>260</sup> *Ibid.*, at p. 24.

<sup>261</sup> *Ibid.*, at p. 24.

<sup>262</sup> *Supra*, footnote 229 at p. 69.

clubs offered their owner members' families cover similar to the officers or crewmen themselves, i.e. hospital, medical, funeral expenses and repatriation expenses including serious illness during the voyage<sup>263</sup>.

The Club also covers collision liabilities for death, injury or illness of any person arising out of the negligence on board of or regarding the entered ship whether the Club has one-fourth or four-fourths or none of the collision risk. Under the Brussels Collision Convention 1910, claims for loss of life and personal injury are decided in a different way to property claims<sup>264</sup>. What it means is that colliding ships are fully liable for personal injury where both ships are to blame, where liability of either or both of the ships in collision is limited by law. It is settled on the principle of apportionment of liability<sup>265</sup>. The apportionment depends on the degree of fault. For non-convention states, the liability is also normally apportioned on the basis of fault and the degree of fault.

Under the 1957 Limitation Convention, one claim alone for personal injury or loss of life is up to 3,100 gold francs per limitation ton, and for the property damage claims solely, the limitation is 1,000 gold francs per ton<sup>266</sup>. However, if both claims occur at the same time, the limitation is 3,100 gold francs per ton of which 2,100 gold francs are available for loss of life or personal injury claims and 1,000 gold francs for property damage even though it may not be sufficient to pay the personal injury claims in full. The gold francs can be converted into SDRs.

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<sup>263</sup> *Ibid.*, at pp. 69-70.

<sup>264</sup> *Supra*, footnote 194 at p. 27.

<sup>265</sup> *Supra*, footnote 229 at p. 28.

<sup>266</sup> *Supra*, footnote 194 at p. 27.

The 1976 Limitation Convention has a separate limitation regime for personal injury claims except passenger claims. The limitation varies according to the ships' tonnage as illustrated below:

<b>Tonnage</b>	<b>Personal Injury</b>
Up to 500 gt	SDR 333,000
From 500 – 3,000 gt	Add SDR 500 per gt
From 3,000 – 30,000gt	Add SDR 333 per gt
From 30,000 – 70,000gt	Add SDR 250 per gt
From 70,000 gt	SDR 167 per gt <sup>267</sup>

A Protocol revising the 1976 Convention was passed and accepted by ten states at a diplomatic conference in London in 1996. It increases the new figures for personal injury excluding passengers as follows:

<b>Tonnage</b>	<b>Personal Injury</b>
Up to 2,000 gt	SDR 2m
From 2,001 – 30,000gt	Add SDR 800 per gt
From 30,001 – 70,000gt	Add SDR 600 per gt
From 70,000 gt	Add SDR 400 per gt <sup>268</sup>

To sum up, as per the P&I rules, the liability to pay damages or compensation for death, personal injury or illness of any person is limited to liability arising out of a negligent act or omission on board, or in relation to, an entered ship or in relation to the handling of her cargo from the time of receipt of that cargo from the shipper or precarrier at the port of shipment until delivery of that cargo to consignee or onward carrier at the port of

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<sup>267</sup> *Ibid.*, at p. 28.

<sup>268</sup> *Ibid.*, at p. 28.

discharge<sup>269</sup>. But liability for loss of life, injury or illness to a pre-delivery crew sent to a ship intended to be entered in the Club does not give rise to third party liability arising out of their presence on the ship<sup>270</sup>. Moreover, there is no liability under the terms of any contract, for example, indemnity or guarantee, but it may be covered if the terms of contracts, indemnity or guarantee have been approved by the Managers in writing and the Member has paid, or agreed to pay, such additional premium as may be required by the Association and (unless the Managers have otherwise agreed in writing) that the provisions of any other applicable Rule, or section have been satisfied, or the Directors in their absolute discretion decide that the Member should be reimbursed<sup>271</sup>.

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<sup>269</sup> *Supra*, footnote 229 at pp. 25-26.

<sup>270</sup> *Supra*, footnote 194 at p. 12.

<sup>271</sup> *Supra*, footnote 229 at pp. 26-34.

## CHAPTER 5

### SUMMARY AND CONCLUSION

Claims involving personal injury or death of a crew member are complex and frequently have the potential for very high awards and even punitive damages. For this reason it is extremely important that members need to report as soon as incidents occur to the relevant P&I club because the time limit for claims depends on the laws of different jurisdictions as discussed in the previous chapter<sup>272</sup>. At any rate, employers should keep all records regarding incidents, all payments made to crew members or other persons for a minimum of three years after the accident whether or not the claim is pending.

The European Maritime Safety Agency (EMSA) based in Lisbon released its second annual Maritime Accident Review in June 16, 2009. It is interesting to note the statistical data provided in the review details of which are excerpted and appended in Appendix 3.

It needs no reiteration that insurance has a vital role to play in accidents, and whenever third party liability is involved in shipping, there are legal and practical implications for the P&I Clubs. As can be gleaned from the foregoing chapters of this dissertation, shipowners gain numerous advantages from being members of P&I clubs, shipowners can obtain many advantages. It is noteworthy in this context that at present there are only a handful of insurers outside the P&I Club system who offer the same insurance coverage, primarily dealing with third party liabilities. The predominance of the clubs in this field of insurance coverage in shipping is attributable to a host of advantages offered by them in comparison with what is made available by commercial providers in the insurance market place. These can be identified by the following factors:

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<sup>272</sup> *Supra*, footnote 3 at p. 242.

- P&I Clubs are controlled by their members who are all shipowners. They therefore have the incentive to provide insurance facilities conducive to the precise needs of the members;
- P&I Clubs are non-profit organizations. Premiums exacted from members are used to cover the third party risks faced by the, and in addition, only the necessary administrative costs. Thus, premiums charged are only at the minimum necessary level;
- Where there are inordinately high claim which can affect the overall financial position of a club, additional calls can be made on their members As such, P&I Club are in a position to offer to members cover with relatively high limits. As third party liabilities are virtually unpredictable in several instances (which is absent in the domain of hull and machinery insurance), this potential flexibility of high end indemnification is a major advantage from the perspective of shipowner member;
- P&I clubs can and do provide letters of undertaking and security in the form of bonds in relation to ship arrests at minimum costs which are recognized globally;
- The scope of P&I cover is not limited to risks listed in the published rules of a club. The so-called omnibus rule provides for indemnification in certain circumstances of loss or damage even if the risk in question falls outside the scope of the rules. In these situations managers and directors have discretionary power to decide whether or not the claim is to be admitted;
- P&I Clubs engage well qualified and experienced claim handlers. They provide advisory services to members free of extra charge and assist them on various issues regardless of whether they fall under the cover provided by the club. Members also benefit from the worldwide network of

correspondents with which the club is associated. This is of particular significance where assistance is required in areas that are quite remote from the mainstream of claims activities<sup>273</sup>.

To summarise the main points of this dissertation it is most noteworthy that the P&I is 150 years old since the establishment of the first protection club. As may be expected, many of the elements of P&I insurance that existed in the early years have changed and the modern club is not quite the same in structure or in operation as it used to be in the evolving years. Be that as it may, it is important to note that the spirit of the P&I concept has remained unchanged despite the market and commercial pressures which the clubs have faced over the decades. The clubs continue to provide their members with comprehensive risk cover and efficient service. The technological dimension of shipping has advanced in leaps and bounds, both in terms of navigation as well as engineering; even so, a sea voyage remains a maritime adventure fraught with uncertainties and subject to the vagaries of nature. In that unforgiving environment, marine insurance is as indispensable to shipping as it ever was since its inception. A prudent shipowner should always seek the advice and assistance of his P&I Club for whenever there is an incident or accident. Undoubtedly that will go a long way towards avoiding or mitigating his losses<sup>274</sup>.

In conclusion, based on the findings elaborated in this dissertation it can be stated from perspective of this writer that claims arise from various and different types of accidents such as collisions, groundings and sinkings, in different conditions including adverse weather conditions and other instances of force majeure. After the incidents are assessed, the consequences of tragedy, in many cases, are found to be attributable to human error as a consequence of; *inter alia*, fatigue or unqualified crew or breach of basic operating procedures on board. Regardless of the considerable incentives and quantum of damages

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<sup>273</sup> *Supra*, footnote 55.

<sup>274</sup> *Ibid.*,

paid by the P&I clubs or other insurers or compensation funds; and regardless of any other factors, loss of life, permanent disability or serious illness are all incidents of tragedy. All seafarers are admonished to observe all statutory requirements relating to maritime safety as well as supplementary sources of advice and guidance. Shipowners also need to pay sufficient attention to the selection, training and supervision of crew. As long as shipowners value their shipboard human resources as much as they value their commercial interests the all in the shipping industry including those involved in the protection and indemnity business will be the ultimate beneficiaries.

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## APPENDICES

### Appendix 1 THE IGA CLUBS

SERIAL NO.	DOMICILE	NAME OF THE CLUB	SHORT NAME
1.	Gothenburg	Sveriges Angfartygs Assurans Forening	Swedish Club
2.	London	The Britannia Steam Ship Insurance Association Limited	Britannia Club
3.	London	The London Steamship Owners Mutual Insurance Association Ltd	London Club
4.	London	The Shipowners Mutual P&I Association	Shipowners Club
5.	London	The Standard Steamship Owners P&I Association Ltd	Standard Club
6.	London	The Steamship Mutual Underwriting Association (Bermuda) Ltd	Steamship Mutual
7.	London	The United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd	UK Club
8.	London	The West Of England Shipowners Mutual Insurance Association (Luxembourg)	W Of E Club
9.	New Castle	*The North Of England P&I Association	N Of E Club
10.	New York	American Steamship Owners Mutual P&I Association. Inc	American Club
11.	Oslo	Assurance Foreningen Gard	Gard
12.	Oslo	Assurance Foreningen Skuld	Skuld
13.	Tokyo	The Japan Shipowners Mutual P&I Association	Japan Club

\*Merged with the New Castle P&I association & Liverpool & London club

Source: Newsletter - Marine." Review of Reviewed Item., no. (2003), <http://www.fairwater.se/admin/filer/0301Newswinter.pdf> and Drewry Report on Marine Insurance, 1998. p. 47.

## Appendix 2 The Non-IGA P&I Insurers

SERIAL NO.	DOMICILE	NAME OF THE CLUB	Fixed/Mutual
1.	Brussels	Ocean Marine Mutual P&I Association Limited	Mutual*
2.	Florida	Southern Seas Agencies Limited	Fixed
3.	London	British Marine Mutual Association Limited	Mutual*
4.	London	The Charterers Mutual Assurance Association Limited	Mutual*
5.	London	Dragon Protection And Indemnity	Fixed
6.	London	HIH Marine Insurance Services	Fixed
7.	London	Lloyds And Companies (Various Markets)	Fixed
8.	London	Osprey Underwriting Agency	Fixed
9.	London	Terra Nova Insurance Company Limited	Fixed
10.	Rostock	Deutsche Versicherungs-Und Ruckversicherungs – G (Darag) With Gerling – Konzern AG	Fixed

\* Demutualised in 1998 & 1999 and have become fixed premium operator.

Source: Newsletter - Marine." Review of Reviewed Item., no. (2003), <http://www.fairwater.se/admin/filer/0301Newswinter.pdf> and Drewry Report on Marine Insurance, 1998. p. 47.

### **Appendix 3 EMSA Annual Maritime Accident Review**

(Excerpts from the EMSA Annual Maritime Accident Review, June 16, 2009)

This year's issue of the review, which covers the year 2008 shows that 754 vessels were involved in 670 accidents (sinking, collisions, groundings, fires/explosions and other significant accidents) in and around EU waters during 2008. This compares with 762 vessels involved in 715 accidents in 2007, and 535 vessels involved in 505 accidents in 2006. Again in 2008, 82 seafarers are reported to have lost their lives on ships operating in and around EU waters, the same figure as in 2007, up from 76 in 2006.<sup>275</sup> Other key findings according to the review are that, even though accidental pollution has considerably decreased in recent years, loss of life, and the number and cost of accidents remain significantly higher than they were 3-5 years ago.

Moreover, while an overall decrease in accidents was reported in comparison to 2007, monthly patterns reveal that the lower 2008 toll of fatalities is explained by a slump in maritime traffic in December, attributable to the economic recession. Besides, accidents in EU waters led to huge costs and significant loss of life. The weather, geography and other factors also play a role in accidents. These findings are consistent with a comparable, recent global reduction in accidents, and it is also noted by other maritime organisations. Hitherto, prior to the fall-off in the number of vessel accidents at the end of 2008, statistics showed that a ship was twice as likely to be involved in a serious grounding, collision or contact accident in 2008 as compared to five years before. Additionally, estimates also suggested that the costs of these accidents had doubled.

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<sup>275</sup> (EMSA), European Maritime Safety Agency. "EMSA Maritime Accident Review 2008." Retrieved June 16, 2009), from [https://extranet.emsa.europa.eu/index.php?option=com\\_docman&task=catview&gid=159&Itemid=193](https://extranet.emsa.europa.eu/index.php?option=com_docman&task=catview&gid=159&Itemid=193).

However, even taking into account the slump, both the safety and cost situations have worsened significantly in recent years. According to the findings, the worst months for loss of life in 2008 were January (18), September (12) and December (18), with the reason for the extraordinarily high September figure being the loss of the general cargo ship Tolstoy in the Black Sea off Romania. The summer months normally account for a high share of collisions and contacts, with the main reason for this being that the number of tourist ferry sailings is at its height. Almost 37% of the 82 lives reported as lost on vessels in and around EU waters in 2008 involved fishing vessels, while around 25% were on general cargo ships.