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Liability of Parties on Claims on Imports in India: A Risk Assessment

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ABSTRACT

Waterways account for 95% of the trade in-coming to India. To address this, the importance of accountability and responsibility of all the stakeholders for successfully completing one Import operation is immense, as it includes extensive labour, logistics and financial burden. The present paper aims to assess the risk taken up by way of proactive steps by the three major players in an Import transaction, Port authorities, Insurance Companies and Financial Institutions. The focus will greatly be on the transactions that commence after the vessel has entered the territory of India and when such vessel carrying imports experiences a wreck within the coastal territory. During such period, obligatory burden pushes the stakeholders to proceed with the necessary requirement to Salvage the vessel, foremost by activating the acts of the Insurance Companies. In most cases, such vessels are abandoned by the Charterer, Shipowner and even the Insurance Companies, completely burdening the Port Authorities with the responsibility of wreck removal. The present law fails to address the evidence of a breach of due care by the Insurance giver largely as they seem to escape responsibility and the Shipowner's conduct periodically. This coerces the Port Authority to approach the financial institution for monetary assistance and claims on imports, adding an unnecessary financial burden on Banks.

Keywords: Port, Banks, Insurance Companies, Charterer, Shipowner, Vessels, Wreck removal.

I. INTRODUCTION

Marine insurance has given them the confidence to carry out their business freely without any fear of facing losses as they are protected by the insurance policies taken by them. The term risk has been defined as an uncertain event or set of circumstances which, should it occur, will have an effect on the achievement of objectives. The introduction of the concept of getting insurance against various perils enables individuals to take on risks that they would not take otherwise. The risk that is faced by the policyholders is shifted to the insurance companies, making them subject to various uncertainties and risks. The Insurance company on various

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occasion try to find a loop hole in the insurance policy provided to the policyholder and evade from their responsibility of paying for the damages suffered by them. When a voyage which has been insured is left unattended at the ports by its crew members and the ship owner or insurance company refuse to salvage it, the responsibility and the damages are suffered by the port authorities. The Port Authorities seek out to the banks for helping them in the process of salvation of the voyage. In the present paper, the risk that has been suffered by different authorities that are involved in the process are looked into.

(A) Statement of Problem

An import transaction via sea requires compliances of grave nature. Parties involved in such transactions are subjected to high risks and accountability dependent on factors which are mostly not in human control. With increasing imports, the liability of major players such as the Ports, Insurer and financial institutions also increases alongside, the unspoken perils. The Indian statutes have mandated the requirement of certain compliances to cover the claims on import, directing each party with specific duties; however, the checks and balances of such compliances in the practical scenario are contradictory.

This paper aims to target those areas of compliance requirement, which has been a burden affecting the effective working of a successful import. The present study will focus on the liability and assess the risk of each party for an import transaction.

(B) Relevance of the Study

The present study sheds light on the utmost important factor that has been preventing the overall growth of the Indian economy, in the sectors of Banking, Insurance, and statutory compliances. Though, our statute regulates certain aspects of Imports; however, the checks and balancing system of the same aren't being practiced in the present scenario.

This study will illustrate the problems faced, and responsibility incurred by each of the above-mentioned sectors, and will opt to facilitate suggestions on the compliance requirement, and mechanisms to strength the answer on claims on imports.

(C) Literature Review

1. Deepak P Singh, Concept of marine insurance under Marine Insurance Act, 1963, the hazards that ship owners, cargo owners, terminal handlers, and other shipping industry intermediaries may encounter are covered by marine insurance
2. The Challenges and Implications of Removing Shipwrecks in the 21st Century, the Nairobi International Convention on the removal of Wrecks came into force in the year 2015,

the main objective of bringing in the convention was to ensure that there is a legislation governing the removal of shipwreck located outside the territorial waters.

3. RBI Guidelines, Master Circulars (2000-2022) the MOF issues various guidelines from time to time to ensure that the policies are in accordance with the changing trends. The RBI has issued guidelines with respect to the Guarantee Schemes and co-acceptances, it includes how the banks can guarantee the amount to its customers

(D) Objectives of the study:

The present paper aims to through light on the following objectives:

1. To ascertain the risk on the Port Authority handling Wreck, Cost on the loss of Opportunity, and Claims on Imports.
2. To assess the liability of Insurance Companies towards handling any maritime accidents during an Import transaction.
3. To establish the legal void on the abandonment of a vessel during a wreck.
4. To highlight the financial risk on financial institutions in handling claims on Imports.

(E) Hypothesis

The present study aims to affirm the ideology of the risk borne by the banks, ports and insurance that's aggravated due to the lack of compliance. Furthermore, the study will examine the veiled reasons that exacerbates the situation of Marine Casualty.

(F) Research Questions

This paper will validate the hypothesis will the help of the below-mentioned research questions.

1. What does Marine Insurance cover on imports? Does the cover on insurance satisfy the objective of such protection?
2. To what extent do Ports become obligatory to handle import wrecks? Is the present statutory compliance assessing the Ports in reducing their financial risk?
3. What is the risk management of banks in the process of redeeming the ports for the losses suffered by them?

II. ANALYSIS

Research Question 1: What does marine insurance cover on imports? Does the cover on insurance satisfy the objective of such protection?

The Marine Insurance Act, 1963 governs maritime insurance in India. P&I Club, Hull and

Machinery, and Cargo are the three types of marine insurance. Hull and machinery insurance is intended to protect the shipowner's investment. It is essentially a property insurance coverage that insures both the ship and its gear and equipment. P&I stands for Protection and Indemnity. Third-party duties and expenses incurred as a result of owning or running ships as principals are covered by P&I insurance. It is a sort of insurance that protects a shipowner from his or her legal obligations to third parties. Typically, P&I insurance is obtained by enrolling the ship in a mutual insurance group called as a "club." Shipowners are among those who belong to such organisations. The majority of the marine insurance industry operates on a global scale and is governed by national and international laws at all times. The International Commercial Terms, or "INCOTERMS," created by the International Chambers of Commerce, Paris, and several provisions published by the Institute of London Underwriters (ILU) serve as guidelines for the Marine Insurance Act, 1963, Section 74⁴, which governs it in India.

Marine Insurance Coverage

The normal course of transit is covered by a basic marine insurance policy. After the goods are discharged, the policy is still in effect for up to 60 days. As soon as the items are transported in the vessel to the ultimate discharge port, they are insured. Common areas of coverage for marine insurance include:

- Fire, explosion, stranding, and sinking
- loss during cargo loading or unloading
- Total loss protection
- Lightning or an earthquake
- Unexpected administrative costs
- Throwing away or washing ashore
- Accident, collision, flipping, and derailment
- Natural disaster

CASE STUDY: MV MARINE TRUST – 01⁵

On March 24, 2022, a Bangladeshi cargo ship sunk at the Kolkata Port immediately after commodities were loaded onto its deck. Following the disaster, a few containers slipped off the

⁴ Section 74 of Marine Insurance Act, 1963: Liabilities to third parties

⁵ Niyogi, S., 2022. Bangladeshi Cargo Ship Capsizes At Kolkata Port | Kolkata News - Times of India. [online] The Times of India. Available at: <<https://timesofindia.indiatimes.com/city/kolkata/bangladeshi-cargo-ship-capsizes-at-kolkata-port/articleshow/90429340.cms>> [Accessed 25 March 2022].

deck and into the ocean. Post the disaster, the Shipowner abandoned the vessel. To present, no oil spills have been reported; nevertheless, such a spill could occur if the Salvage operators are delayed. Soon after, when Port authorities looked into Salvage Operators and Insurance coverage, it was understood that the Vessel wasn't covered with either of H&M nor P&I Club insurance. Due to the insurance not being covered, Gill Marines, the Salvor denied to salvage the vessel, reducing the Port to incur severe loses.

Here, in this case study the vessel doesn't have P& I insurance which is mandatory for entering the Indian territory, that being the case, the entry of the vessel in the Indian territory points out the highly questionable measures being taken with regards to the execution of such compliances.

Research Question 2: To what extent do ports become obligatory to handle import wrecks? Is the present statutory compliance assessing the ports in reducing their financial risk?

Port logistics alone accounts for over 90% of Export/Import (EXIM) trade by volume and 72% by value. The financial year 2015 accounted for over one billion tons of cargo across 200 ports. Over 2021-22, India's major ports handled 719.38 million metric tonnes (MMT), a 6.94% increase over the previous year's number of 672.68 MMT. Over 95% of the country's export-import (EXIM) cargo is handled by the 13 major ports, with Navi Mumbai's Jawaharlal Nehru Port Trust (JNPT) accounting for more than half of the cargo volumes. The Inland Waterways Authority of India (IWAI) also recorded a 25% increase in goods handled through national waterways, with 105 MMT of traffic. This highlights the increased risk handled by the Port trust on a periodical upfront. The present research points out the details of liability, risks, and rights of the ports under the Major Ports Act 1963.

The clearance of stranded wreck ships has been a time-consuming and costly process. Shipowners, insurers, and contractors all concur that the cost of such procedures has increased in recent years, and in some cases dramatically.

Abandonment of Vessel

According to the FIATA (Federation of Freight Forwarders Association), abandoned cargo is "freight that the consignee (importer) has indicated no intention to take delivery of after a reasonable period." It also covers situations in which the consignee cannot be recognised or traced. The Merchant Shipping Act of 1908 defines wreck as an abandoned vessel. It varies greatly from country to country. In India, goods that sit unclaimed for more than 30 days are considered abandoned. This time limit can be extended to 90 days in several other countries.

Commodities that have been uncleared for 30 days in a Customs area (i.e., a major or minor port, CFS, ICD, etc.) may be disposed of, according to the Customs Department. Commodities that have been uncleared in port (read Major Port) for more than 60 days may be disposed of, according to the Major Port Trusts Act of 1963. The Tariff Authority for Major Ports (TAMP) allows abandoned items to be auctioned after 75 days.

Unprecedented responsibility of Port authority for Salvage and Wreck Removal

According to Section 116 of the Major Port Trusts Act, the owners or master of a vessel are completely liable for any loss or damage caused by the vessel. The ship's owner or master's liability for port damages is restricted. Foreign-registered ships entering Indian ports must now have adequate third-party liability insurance against marine claims such as oil pollution and wreck disposal. Such third-party liability risks must be insured through the London-based International Group of Protection and Indemnity Clubs (IG Clubs) or another government-approved insurance provider, according to new laws that went into force this month. Even unpaid premiums to such P&I clubs are required to enter the Indian coastline⁶.

In the Case Study of Capsizing of Marine Trust Vessel, Kolkata Port Trust had suffered losses in Crores because of the abandonment of the vessel by the Shipowner, or Charterer. To add more to the responsibility, the vessel was not insured which is again a mandate. The present statute provides the mandate however, the procedural aspects of the same are not laid down, including the liability of the salvor, who disregarded his duty to conduct the salvage operation. Under the Marine Insurance Act, 1963, salvage operations are also covered⁷; however, in the event where there is no insurance forefront, the financial liability bears upon the Ports to incur such costs. The treatment of wrecks in national and international standards speaks very little about the shipowner's obligation. As a result, the International Maritime Organization identified international legal disparities in wreck management and advocated a standard legal framework through the 2007 IMO Convention on the Removal of Wrecks⁸, which was agreed during a conference in Nairobi, Kenya. With this legislation, the registered owner of the ship is obligated under this convention to report the wreck as soon as possible; the owner will be responsible for identifying, marking, and removing the wreck. Require the owner to have mandatory insurance in place to pay liabilities stemming from a wreck (Article 12), and take immediate action against insurers when state authorities provide the same as risky. The Directorate General of Shipping, Ministry of Shipping, has recommended amending the Merchant Shipping Act, 1958, to

⁶ Liverpool & London S. P. I Asson v. M. V. Sea Success, Appeal (civil) 5665 of 2002

⁷ Chrisomar Corporation v Mjr Steels Private Limited, Civil Appeal No. 1930 of 2008

⁸ Nairobi International Convention on the Removal of Wrecks 2015, IMO, (entered into force 14th April 2015)

incorporate the Nairobi Wreck Removal Convention 2007. The modifications make the registered owner of the ship obligated to pay for the costs of locating, marking, and removing the wreck at the time of marine causality.⁹

Ports right to claim dues, if any

In the event that harbour dues or other dues are not paid, the Port Trust has the power to pursue payment from the shipowner or its insurer. A marine res or property may be subject to a privileged claim under the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act of 2017 for services rendered to or damage incurred by it. The Major Ports Act of 1963's Section 51 grants the Board a lien on the goods for both the amount of rates due. The selling expenses in payment of the liens and claims exempt from the priority of the Board's lien under Section 52. The goods have been landed, and the lien for freight or charges supersedes the lien of The Board, which was established by by-laws to carry out the rights granted by Section 95 of the Act. Unquestionably, the ship-owner is the consignor's bailee and is responsible for delivering the cargo to the consignee or a transferee in line with the terms of the bill of lading.

Delivery to the Board is not the same as delivery to the consignee or such person since delivery is to be made upon presentation of the bill of lading, and the Act makes no provision making the Board an agent of the consignee for the purpose of accepting delivery. The Board's responsibility does not emerge until it takes possession of the products¹⁰. The Board's responsibility does not emerge until it takes possession of the products. Furthermore, Section 61 of the main Port Trust Act of 1963 provided his client the right to sell the cargo lying in the port premises two months after it arrived in the port zone, in order to recuperate unpaid rent. The port authorities have the absolute (statutory) power to seize and detain a vessel until the payments owed to them for extending port facilities and services to the vessel are paid.¹¹

Research Question 3: What is the risk management of banks in the process of redeeming the ports for the losses suffered by them?

Finance is an essential requirement for all trade or commerce-related activities. In India, banking sector is said to be the backbone of the economy. The term banking can be defined as an establishment for custody of money, which it pays out on customer's order.¹²

⁹ Vol II, Directorate General of Shipping, 02.05.2014 -F. No. MSL-9(27),2000

¹⁰ Trustees of Board of Port of Madras v. K. P. V. Shiek Mohamad 1995 (52) ECC 6, 1996 (82) ELT 174 SC, (1997) 10 SCC 285 a

¹¹ Board of Trustees, Port of Mumbai v. Indian Oil Corporation, 1998

¹² OXFORD Dictionary

Relationship between banker and customer

The main functions of the bank are accepting deposits and providing loans to its customer. The banks share the relationship of the guarantor as well as of an indemnifier with the customers.

- The bankers share the relationship of a guarantor and guarantee with its customers by issuing a letter of credit in favour of the importers, providing a financial strength to them. Letter of Credit is a facility provided to facilitate the customer in the international trade. The guarantee of bank is an undertaking to pay the amount i.e., principal amount in case of non-performance or breach of contract. The contract of guarantee is to secure the compliance with the contract.

- The banker also shares a relationship of an indemnifier and indemnified with the customers. In a marine insurance when the ships are left unattended by the shipowners at the port berth, the port authorities reach out to the insurance company to redeem the losses that are being suffered by them. In case, the insurance companies don't compensate the port in such case the banks come into the picture and they will compensate the ports for any loss that has been suffered by them due to any breach of contract that happened on the part of the insurance company.

Guidelines by The Reserve Bank of India with respect to the insurance of vessels

The MOF in India, to consolidate and amend the laws governing foreign exchange by facilitating external trade, and payments and promoting the orderly development as well as the maintenance of the foreign exchange market in India enacted The Foreign Exchange Management Act, 1999. The Government of India & Ministry of Finance gave effect to the provisions of the Act and drafted the Foreign Exchange Management (Current Account transactions) Rules 2000 under Section 5 read with Section 46 of the Act. Further, the Reserve Bank of India has also made Regulations and issued Notifications under various provisions of the Act.

As per Section 10, the Reserve Bank can authorize any person to deal in foreign exchange, they are issued a licence by the Reserve Bank of India, all the directions issued by the RBI in the circulars are applicable to the authorised dealers and are hence are governed by the provisions of Memorandum FLM/RLM. GIC can accept premiums from importers after receiving a certificate from them stating that the insurance charges on the shipment in question are borne by the importer and the premium amount of insurance premium will be endorsed on the import license in due course.¹³ The RBI has laid that if the importers are unable to retire documents

¹³ Chapter 15 ,RBI DOCS INSURANCE, 15A.4, 15A.6

received under letter of credit and goods arrive at the docks, in such scenario the dealers have authorised permission to extend the insurance cover and remit the insurance premium.¹⁴

In Master Direction-Import of Goods and Services under General guidelines for imports it is provided that banks can make payment to third parties for import of goods, provided some conditions are fulfilled, they are:

- A tripartite agreement should be there.
- Bank should be satisfied with the bonafides of the transaction¹⁵

Tie up of Insurance Companies with banks to cover the losses.

Marine Cargo Insurance is governed by the Marine Insurance Act, 1963. The term marine insurance can be defined as ‘an agreement whereby the insurer undertakes to indemnify the assured in the manner and to the extent thereby agreed to against losses incidental to marine adventure.’¹⁶

To provide the customers with wide range of bank assurance services PNB has entered into corporate agency tie-up with other Insurance companies.

- Oriental Insurance Co. Ltd. (OICL (General Insurance)
- Bajaj Allianz General Insurance Co. Ltd. (BAGIC (General Insurance)
- Chola MS General Insurance Co. Ltd. (CHOLAL (General Insurance)

All General Insurance partners offer an array of products. It includes Fidelity Guarantee Policy which is specifically designed for PNB customers.

How does the bank operate as a guarantor for the parties to tripartite contract?

As per 2004, banks are required to give guarantees in such a manner that outstanding unsecured guarantees and total outstanding unsecured advances does not exceed 15% of outstanding advances. The limit that the banks were obligated to follow has now been removed and the banks are entitled to fix their own limits on unsecured exposures. The banks have to ensure that when they provide financial guarantee, the customer must be in position to reimburse the bank in case bank has to pay on their behalf, they should exercise due caution and ensure that bank has experience, capacity and means to comply with the contract.¹⁷ In October 1991, High Level

¹⁴ *ibid*

¹⁵ Master Direction – Import of Goods and Services (Updated as on May 31, 2022) RBI/FED/2016-17/12 FED Master Direction No. 17/2016-17

¹⁶ Section 3, Marine Insurance Act, 1963, Act No. of 1963

¹⁷ Master Circular - Guarantees and Co-acceptances, RBI/2021-22/121 DOR.STR.REC.66/13.07.010/2021-22

Committee was formed under the chairmanship of Shri A. Ghosh who recommended that the bank guarantees should be issued in serially numbered security forms and the beneficiaries should verify the genuineness of guarantee with the issuing bank.¹⁸

III. CONCLUSION

The risk on part of all three parties are immense; however, due to the less detailed on part of the proactive measures taken by the parties, the accountability is less, especially on part of the Insurer and the Charterer. The present statute, does not provide for a check and balance method, with regard to the compensation payable to the Ports, mandatory requirement for Insurance, and evidence as to the direct involvement of the financial institution to indemnify the Insurance company and the Port authorities when either party incurs damages,

When the vessel crashed during its own operation, it is the shipowner's, manager's, or character's sole responsibility and liability to execute the salvage operations and removal of the wreck, which includes any containers lost at sea or fallen off the vessel's deck due to capsizing. In the event of non-payment to the port, the Port Trust reserves the authority to arrest and sell the vessel at public auction to satisfy its financial obligations. In that instance, the Port may charge the shipowner, management, or charterer separately for 75 days and no longer. However, in between the times when the port has received no money it has to depend on the financial institution.

Findings & Suggestions:

- The governing statute on Marine Insurance is silent on facts of losses incurred by the ports. Foremost, the losses which the statute aims to mitigate by way of arresting and selling of the vessel is practically incapable to suffice the concerned authorities with adequate financial assistance.
- To help formulate the concerned authorities to work on the financial structure to incur losses, a consolidated fund of a unified nature can be induced.
- In the present scenario, it was found that the evidential value of information passed between the parties, does not have a revised mechanism to be recorded.
- The compliance with regard to the border checking of mandatory insurance license has been proven to be incompetent in the present study; hence, an efficient check on such authorization is essential to mitigate instances of marine casualty.

¹⁸ Shri A. Ghosh ,Ghosh Committee Report, October 1991

- The banking sector acts as a guarantor for the port authorities as well as the ship owners covering the losses that are suffered by them. There is no legislation that governs the procedure in which the banks will loan out the money to the authorities.
- RBI has laid guidelines that deal with FOREX but there are no guidelines dealing only with the procedure of covering the losses suffered by banks.
- There are redressal forums provided by the IRDAI, NAIC is one such forum where all the disputes dealing with insurance companies are dealt with, with the view to reduce the cost of litigation and save the time.
- IRDAI provides that the way of carrying out the proceedings are not formal as a result of which the Indian Evidence Act is not applicable for the evidences

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