

A Study on the Principles of P&I Insurance

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Table of Contents

1 Introduction	2
2 Legal Sources	3
3 A Brief Introduction on the legal character of P&I Insurance	4
3.1 Background introduction	4
3.2 The legal character of P&I Insurance Contract as one kind of Insurance Contracts ..	5
3.2.1 What is an insurance contract?	6
3.2.2 The nature of P&I Insurance	7
3.2.3 The contractual parties of P&I Insurance	8
3.2.4 The cover scope of P&I Insurance	9
4 The Mutuality Principle of P&I Insurance	11
4.1 Brief introduction	11
4.2 In respect of the organization of insurance	12
4.2.1 It is the members themselves to share the losses	12
4.2.2 The fund of the club	13
4.2.3 The Committees of P&I Club	16
4.3 In respect of the Membership regulation	19
4.4 In respect of the club discretion	22
4.5 The duties of disclosure	24
4.6 The duties of warranties	28
4.7 The Omnibus rule	30
5 The insurable interest principle	33
6 The indemnity principle	35
7 Conclusion	38
Bibliography	39

1 Introduction

The topic of this thesis is the principles of P&I Insurance. I choose this topic because P&I Insurance are different from other kinds of insurance and I feel it interesting to explore the differences especially in its principles.

In my thesis, I will firstly present a brief introduction about the legal character of P&I Insurance. The purpose here is to build a basic foundation for the other parts.

After the brief introduction, I will begin to discuss the main topic that is the principles of P&I Insurance. I will start with the mutuality principle which amounts to the most important principle in P&I Insurance and differs greatly from the other kinds of marine insurances, because the mutuality gives the member a dual status as both the assured and the insurer. After discussing about the mutuality, I would describe the insurable interest principle and the last one to be discussed is the indemnity principle. The insurable interest refers to the interest subject matter under the insurance contract and is also the pre-condition of the validity of any kind of insurance. And the indemnity principle means that the insurance can only indemnify the assured against the liabilities or losses, the sum of compensation may not exceed the actual losses the assured has suffered.

I will also try to make some comparisons in respect of the regulations and situations between Norway and UK, where it is necessary. For the regulations in Norway, I will refer to the statutes and rules of Gard and SKULD, while for the regulations in UK, I will take those of UK Club for example.

2 Legal Sources

ACT of 16 June 1989 No. 69: Act relating to Insurance Contracts

The Norwegian Insurance Contract Act of 1989 (ICA)

The English Marine Insurance Act 1906, Section 21

SKULD Statutes and Rules List of Correspondents 2007

Lloyd's Report

UK Club Rules

The Norwegian Insurance Activity Act

Gard Statutes and Rules

3 A Brief Introduction on the legal character of P&I Insurance

3.1 Background introduction

Protection & Indemnity Insurance (P&I Insurance) developed from the old Hull Clubs in England in the eighteenth century. While the old Hull Clubs mainly covered the hull damages and losses, P&I Insurance dealt with various kinds of liabilities, first and foremost the third party liabilities and the rest part of collision liabilities excluded by the Hull Clubs. From the historian point of view, it was “the unsatisfactory state of the marine insurance market, particularly for those shipowners of the provinces, led to grounds of shipowners at various outlying ports association together to insure their hull risks between themselves on a mutual basis¹”. It means that the hull insurance as a starting point is insurance against material damage and loss, but not liability insurance. However, it has by tradition covered collision liability, and in UK it covers three-fourths collision liabilities. About one century later, with the increase of liabilities arising from shipping activities which were unfortunately excluded by the hull clubs, it was the result of an urgent need for shipowners to seek some new mechanism to protect their potential liabilities in their business activities (mainly referring to the shipping activities). Then P&I Clubs came into the world. At that time, the P&I Club was only acting as a simple organization and not as a legal entity, for the shipowners to gather and preventing them from incurring the liabilities in the marine casualties, since the hull insurance market only provided three-fourths of collision liabilities, leaving the other one-fourth part uncovered. And thus the uncovered part might cost the shipowners a lot due to the increase of the collision accidents in the nineteenth century.

However, as a matter of fact, the club did not have a legal status at all, which indicated that

¹ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 4.

once disputes arose concerning the compensation, the members might not be entitled to claim to the club directly, but could only make claims towards his or her fellow members one by one. Very obviously, this might cause a lot of uncertainties when the other members refused to compensate the incurred member. The same rationale could apply to the situation under which there was some member that failed to pay his or her calls. The club still had no right to make a claim towards the member, but could only bring a suit against the member by the name of the whole members.

Nowadays, things have changed a lot with the development of P&I Insurance, and P&I Club has become one kind of mutual insurance with its own legal capacity. As one kind of liability insurance, modern P&I Insurance not only covers the part of collision liabilities which had once been excluded by the hull insurers but also includes liabilities relating to cargo claims, liabilities relating to personal injury, oil pollution liabilities, as well as some costs and expenses arising from the relevant casualties, for example the defense expenses etc. This means that P&I Insurance has strengthened its cover and become more functional.

In addition, “the modern P&I associations are now generally incorporated and although the club remains as a mutual association, members contract with a corporation rather than with their fellow “partners” or members. Members do not enforce rights *inter se* but enforce rights through the corporate entity of the club.”² This means that the organization of such a kind of insurance is usually in form of mutual association, the so-called P&I Club. P&I Insurance Contract is an agreement between the P&I Clubs and the shipowners, operators or charter-parties etc, all of whom have an insurable interest in their insured vessel.

3.2 The legal character of P&I Insurance Contract as one kind of Insurance Contracts

² Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 15.

3.2.1 What is an insurance contract?

Generally, “insurance is a form of risk management primarily used to hedge against the risk of a contingent loss. Insurance is defined as the equitable transfer of the risk of a loss, from one entity to another, in exchange for a premium³”. This definition does not deviate from the concept of insurance in Norway far away.

Under the English law, there is currently no statutory definition of insurance. According to the work of a joint scoping paper by the English Law Commission and the Scottish Law Commission on the Insurance Contract Law, this is based on the reason that “The danger of definitions is that, being sharply inclusive, they may also be damagingly exclusive. Unrestrained by definition the courts can accommodate new products, perhaps new kinds of investment or financial reinsurance.⁴” And according to the English law, “a contract of insurance is any contract whereby one party assumes the risk of an uncertain event, which is not within his control, happening at a future time, in which event the other party has an interest, and under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs.⁵” This concept is also established under the case of *Department of Trade v. St. Christopher Motorists’ Association* [1974] in *Lloyd’s Rep.* 17, “where Templeman J. took the view that a contract of insurance was one under which the assured secured for himself, by the payment of a premium, some benefit usually but not necessarily the payment of a sum of money on the occurrence of an uncertain event.⁶”

Having established the basic knowledge in respect of the concept of insurance and insurance contract, next I will analyse the nature of P&I Insurance compared with the ordinary insurance.

³ <http://en.wikipedia.org/wiki/Insurance>

⁴ M A Clarke, *The Law of Insurance Contracts* (4th ed 2002) p 1.

⁵ Semple Piggot Rochez, *Insurance Law*, www.spr-law.com.

⁶ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 59, see footnote 2.

3.2.2 The nature of P&I Insurance

Under the Norwegian law, as we have mentioned above, ICA authorizes P&I insurance to be one kind of liability insurance based on its rules in Section 1-1 the sentence that “insurance against liability for damages or costs⁷”. In a Norwegian sense, the P&I Insurance does not comply with the traditional liability insurance strictly, “for it also covers loss, damage and expenses incurred by the assured.⁸” Following this argument, P&I Insurance has a wider range of cover compared with the liability insurance of traditional sense. As a general rule, the scope of cover in ordinary liability insurance might be expressed clearly in the conditions and terms in the underlying insurance contract, while in P&I Insurance, the scope of cover might not be specified clearly. The liability cover in the P&I insurance has the same nature to the ordinary liability insurance. However, the cover for costs and expenses qualifies as insurance against costs, and it is this part of cover that might not be specified clearly in the insurance contract.

However, the English law divides insurance in respect of liabilities towards third parties into two forms, the liability insurance and the indemnify insurance.⁹ The most significant difference between the two kinds of insurance is that liability insurance covers liability against a third party, whereas indemnity insurance cover the assureds payment to the same third party. Liability insurance compensates the assureds for any damages the assureds might incur by the express cover in their contracts, while the indemnity insurance might only compensate the assureds to the extent that the assureds actually incur, and the insurers under indemnity insurance would not pay anything before the assureds have discharged his liabilities. Then P&I Insurance amounts to the indemnity insurance under the English law. As to this problem, I will discuss it in more detail in the latter part of this work. Based on the above mentioned comments, and together with the legal entity authorized to modern P&I clubs, at least under the English law, the contract between the members and the club qualifies as an insurance contract irrelevant there exist some arguments against this point (which we

⁷ The Norwegian Insurance Contract Act of 1989 (ICA), Section 1-1

⁸ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset Scandinavian Maritime Law, the Norwegian perspective, 2nd ed. Page 533.

⁹ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 165.

would discuss below).

3.2.3 The contractual parties of P&I Insurance

Compared with other commercial insurance in the insurance market, P&I Insurance seems not like the other kinds of insurance. It is due to the mutuality principle that the relationship between the insurer and the assured has a special character. It also makes sense that P&I Club is just to supply a platform for its members to carry on their mutual insurance activities. But one important point that we must keep in mind is that, it is the Club as one contractual party of P&I Insurance contract and the members as the other party under P&I Insurance contract.

However, in England there exist some arguments as to whether a member does obtain a contract of insurance with the club, because they think “the club does not entitle a member to any indemnity but only to contributions from other members towards the member’s losses as well as the manner in which the claims are settled.”¹⁰,

To solve this problem, I would like to explain some relevant documents in P&I Insurance. First and foremost is the application form. Under the English law, the application form of the entry seems like a proposal of insurance. And according to the Marine Insurance Act 1906 Section 21, “a contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer...”¹¹ Moreover, in the case of *Container Transport International Inc. & Reliance Group Inc. v. Oceanus Mutual Underwriting Association Ltd.* [1982] 2 Lloyd’s Rep. 178 at p. 183, it was confirmed by the judge that “the issue of a Certificate of Entry may be regarded as ‘corresponding, in the case of a club, to the issue of a policy’”¹²

¹⁰ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 59.

¹¹ The Marine Insurance Act 1906, Section 21.

¹² Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 48.

As we have mentioned before, once the shipowner applies for a P&I Insurance, he will not only ask for the insurance cover but also for becoming a member of such a club, which is different from the normal procedure in the other commercial insurances. Generally speaking, P&I clubs don't issue policy to their members, instead they usually issue a certificate of entry after they have decided to receive the application from the prospective members. And the rules in Gard and SKULD in respect of the entry application and the certificate of entry, which can be deemed as the agreement between the club and the member, indicate that there is no difference upon this point in Norway. And we can see that in P&I Insurance, the agreement between the members and the clubs is not the only content to constitute the insurance contracts, the other documents such as the club rules, the bye-laws and the memorandum etc are also the content of the insurance contract under P&I Insurance.

From the above discussion we can draw the conclusion that, the club and the member are the two contractual parties of the P&I insurance contract. Even though the compensation is the contribution of the fellow members, we can not presume that the P&I insurance contract is signed between the members. Rather, the contract is signed between the club and its member. And it is due to the mutuality principle that the relationship between the insurer and the assured has a special character under P&I Insurance.

3.2.4 The cover scope of P&I Insurance

Following from the above, let us focus on another aspect, the cover scope of P&I Insurance. I have described the concept of insurance and the concept of insurance contract in the beginning of this chapter. It is not difficult for us at least to reach a common agreement that, insurance by its true nature refers to the transfer of any risk against a premium. Such risks cover a wide range, and usually refer to losses of property or other kinds of damages etc. In addition, the risks must be unexpected, which means that it is uncertain whether a risk might materialize or when a risk might occur. P&I Insurance mainly supplies safeguards to the shipowners for the unexpected liabilities such as collision liabilities, oil pollution liabilities

and some other contractual liabilities etc. they incur in a certain contractual period. Moreover, the items of liability risks covered by modern P&I Insurance varies from club to club according to the rules stipulated by the clubs in respect of the cover, and it is not strange that the cover might even includes certain kinds of fines and defence fees (the so-called “defence cover”). For example, the Association of SKULD, writes in his rules 27.1 that “the Association shall cover the member’s reasonable costs for necessary legal assistance in relation to disputes which are directly connected with the operation of the entered vessel ...¹³”

¹³ SKULD Statutes and Rules List of Correspondents 2007, Rule 27.1.

4 The Mutuality Principle of P&I Insurance

4.1 Brief introduction

While the old mutual clubs reflected their mutuality only in the form of the dependence between the members when relative risks arose, the modern P&I Clubs show much more character in their mutuality. And as a matter of fact, the mutuality also amounts to the most significant principle of P&I Insurance. “It is often stated that members of P&I Clubs have a dual role as both assureds and insurers”.¹⁴ Under P&I Insurance, the members of P&I Clubs (club membership is usually made up of shipowners, corporate and individual, managing owners, ships’ operators and charter-parties¹⁵) are given both the assured and insurer status. “Under such a regime each member was both an assured-as to his own vessels entered in the club-and an insurer-in the proportion of his entered vessels in the club for the interests of each of his fellow members.¹⁶ On one hand, once one of the club members incurred damages or liabilities due to their operations in marine activities, the other members of the club will indemnify him as the insurers; on the other hand, if some other member incurs the damages or liabilities, then the former incurred one will be the insurer under such a situation, and indemnify the latter incurred one in the same way. That is how the P&I Club as a mutual association works. The mutuality is also a special character different from the commercial insurance.

In the following sections of this chapter, I will analyse how the mutuality affects P&I Insurance in five aspects.

¹⁴ *The Lion Mutual Marine Insurance Association Limited v. Tucker* (1883) 12 Q.B.D. 176 at pp. 187, 188 per Brett M.R.; *Williams v. The British Marine Mutual Insurance Company* (1887) 3 T.L.R. 314; The standard Steamship owners’ Protection and Indemnity Association (Bermuda) Ltd. V. Gann and Another [1992] 2 Lloyd’s Rep. 528 especially p. 533 per Hirst J.

¹⁵ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 100.

¹⁶ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 99.

4.2 In respect of the organization of insurance

The mutuality of P&I Insurance means that the members of the club are both acting on the assureds and insurers under such a kind of insurance. The members could be the shipowners, the charter-parties, or the ship-operators etc, and then insure their vessels by means of mutual aid. Put it in another way, P&I Insurance is not profit-making, all the money raised is from the members and will be used for the members as well.

4.2.1 It is the members themselves to share the losses

The operational principle of P&I Clubs is to balance all the calls received from the members and the liabilities the members incur in each policy year. Such regulations can be found in the rules of most P&I Clubs. For example, SKULD has rules concerning this point in Rule 4.2.1, stating that “The Association shall in each policy year determine a full ETC for each entered vessel, which shall constitute the full annual payable premium for that vessel, subject to any supplementary, overspill or release calls which may from time to time be determined by the Association as set out below.¹⁷” And UK Club also writes in its Rule 19 that “The Owners who have entered ships for insurance in the Association in respect of any policy year (not being a policy year closed in accordance with Rule 25) otherwise than on terms that a fixed premium shall be payable in respect of such ship, shall provide by way of Calls to be levied from such Owners all funds which in the opinion of the Directors are required...¹⁸” Moreover, if during the policy year, there are some members that cease to be insured by the insured or cancel their insurance contracts, then under such circumstances, the clubs may entitle to ask them to pay for the so-called release calls. For example, SKULD stipulates in its Rule 4.4 that “where cover ceases or the entry is terminated for any one vessel, the Association may determine a release call for open policy years based on the anticipated calls

¹⁷ SKULD Statutes and Rules List of Correspondents, Rule 4.2.1.

¹⁸ See UK Club, Rule 19 (A) first paragraph.

for those years and such other factors as the Association considers relevant.¹⁹” And UK Club also sets in its Rule 33 upon the cancellation of the insurance that “Upon the cancellation of an Owner’s insurance..., the Managers may assess as at the date of the cancellation of insurance the amount which seems to the Managers in their discretion to represent the likely liability of the Owner for Supplementary Premiums and for Mutual Premiums falling due after such date in respect of such ship.²⁰”

So as have been discussed above, the fixed premiums, the supplementary calls, overspill calls, together with the release calls indicate that P&I Club would not operate on borrowing, and would not allow his members to default on their payments of the calls listed above, for such kind of behavior will prejudice the other members interests, even more damage the operation of the club. So the payment by the members is very important to P&I Clubs, and the clubs also take strict measures to the member in arrears. For example, the club will refuse to provide guarantee, or decline the settlement of claim, even more cancel the insurance contracts in the case that the member fails to pay his member fee in time. From the point of my view, this character fully shows that P&I Clubs concern tightly with the interests of their members, which also indicates its great difference from the ordinary commercial insurances. In short, P&I Insurance, as a mutual insurance, its true nature is “insurance at cost”²¹.”There is no element of profit for external capital providers.²²” In P&I Insurance, it is not the individual member but all the members that are deemed as a whole. Therefore, the concept of “insurance at cost” is based on the whole members. The calls from the whole members constitute the cost for payment of all the risks in a certain policy year. And besides the cost, the club will not charge more from its members.

4.2.2 The fund of the club

¹⁹ See SKULD Statutes and Rules List of Correspondents, Rule 4.4.

²⁰ See UK Club, Rule 33 (A) first paragraph.

²¹ Gard Handbook on P&I Insurance, 5th Edition, page 99.

²² Gard Handbook on P&I Insurance, 5th Edition, page 99.

The club fund plays a very important role in the operation of P&I Insurance, and it is usually collected by levying calls from the members. Under the English law, it is expressed as that “a premium is the price for which an insurer undertakes his liabilities.”²³ The “calls” are used in P&I Insurance instead of the “premiums”, which is described as a “family likeness to premiums”²⁴. However, the nature of premium here was described by Wills J. in terms that²⁵ “It is clear that the ‘premiums’ mentioned in [Club Rules] are not premiums in the ordinary sense of the word, and that the foundation of the contract is not the payment of a premium, but an agreement that each member should bear his aliquot share of the losses of the year covered by the policy.” In the Norwegian sense, the “call” and the “premium” are just two ways to finance losses. However, what is worthy to be mentioned here is the way in which the funds of insurance companies or P&I Clubs to be collected. There exists a bit differences regarding the premiums between commercial insurance and P&I Insurance. While the premiums of the commercial insurance are usually fixed in advance, the calls in P&I Insurance can not always be determined before hand, and will usually be required to supplement later. For example, the rules concerning the calls in SKULD 2007 4.1.2 regulates that, “the premiums determined by the Association and payable by the member may include annual calls, supplementary calls, overspill calls, release calls, fixed premiums and additional insurance premiums.”²⁶ And there is no exception in the rules of UK Club, it provides in its Rule 21, 22 in respect of the supplementary calls and overspill calls etc.

Put it another way, the losses arising from the accidents of certain members are shared by the other members of the club. Although the strategy of the club is not profit oriented, most clubs have accumulated large sum of capital for reserves²⁷. In such cases, the clubs are then capable of making additional allocation for the members who suffer the losses, especially in the catastrophe cases. For example, in some circumstances, the clubs utilize their funds for the overspill calls for the members, so that the members can benefit from it, since the

²³ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 143.

²⁴ Cornish Mutual Assurance Company Limited V. Commissioners of Inland Revenue [1926] A.C. 281 at page 286, per Viscount Cave L.C. See also Thomas V. Evans (Richard) & Co. [1927] 1 K.B. 33 at page 52.

²⁵ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 144.

²⁶ SKULD Statutes and Rules List of Correspondents, Rule 4.1.2.

²⁷ SKULD Statutes and Rules List of Correspondents, Rule 4.9.1.

overspill calls usually cost a huge sum of money.

The committee of the club is usually authorized a wide discretion to decide on the reserves affairs as they consider fit, this is confirmed in the rules of both SKULD Rule 4.9 and UK Club Rule 24.

Moreover, the funds might not only be used to indemnify the members, but also for the management and investment expenses and they will be returned to the members at later time. For example, SKULD provides in its Rule 4.8 that “if there is a surplus at the final closing of a policy year, the General Meeting may distribute all or part of that surplus among the members in proportion to the net annual calls paid for that policy year²⁸” Though as we have discussed in the previous chapter that P&I Clubs are non-profit making associations, most clubs will use some available parts of the fund to do some investments, and the profits from such investments will then allocate to the members. For example, in the rules of UK Club, it writes in Rule 26 that “The funds of the Association may (subject to the general supervision of the Directions) be invested by the Managers by means of the purchase of such stocks, shares, bonds, debentures or other securities or the purchase personal property, or by means of being deposited in such accounts as the Managers may think fit. The funds of the Association may also be invested by such other method as the Directors may approve”. The operation of incomes and expenses in P&I Clubs seems similar with that of the ordinary commercial insurance companies. What makes it different is that the income from the investments is paid back directly to the members, or is reserved by the club for future use. The individual strategy may differ from club to club according to the different club policies, yet the purpose behind the strategy is to benefit the members rather than making profit. Thus from the point of this view, such regulation does not contradicts with the principle of non profit making for P&I Clubs.

In conclusion, the detailed institution of the club funds may differ from one club to another based on the different rules of each P&I Club, but the principle of such funds is the same,

²⁸ SKULD Statutues and Rules List of Correspondents, Rule 4.8.1.,

that is for the interests of all the members even though the use of the funds may be decided by the committees of the club in its own initiative.

4.2.3 The Committees of P&I Club.

Most modern P&I Clubs are organized as legal entities. In this section, I would take a further step to analyse the function of the committee and the board of the P&I Club. By the study on the committee and the board, we can have a better understanding on the mutuality principle of the P&I Club.

According to the Norwegian law²⁹, P&I Clubs are established as mutual associations. To qualify as the corporations with separate legal identities, the P&I Clubs in Norway should have a corporate structure including the documents of statutes and rules, “which represent and regulate the contract of insurance between the club and the member.”³⁰

And as a general rule, the General Meeting of the club is the highest authority. The votes in the General Meetings are calculated on the total entered gross tonnage with a certain limitation.³¹ Furthermore, the P&I Associations in Norway are subject to the Insurance Activity Act, Chapter 5, which stipulates that the associations should set a Committee and an Executive Committee under the Norwegian law as a mandatory rule. For example, the rules in respect of the Committee are provided in Gard Statute 5.2 (3) that “The Committee shall consist of up to 30 members elected by the General Meeting. Every year the six members who have the longest period of service, reckoned in accordance with Article 8.3, shall retire, but may be re-elected.”³² On the other hand, the Executive Committee is set to deal with the daily affairs of the club, which is also stipulated in Gard Statutes, Article 6. And it is responsible to the Committee.

²⁹ Insurance Activity Act, Chapter 4.

³⁰ Gard Handbook on P&I Insurance 5th Edition, page 98.

³¹ SKULD Statutes and Rules List of Correspondents, Statute 1.2.7.

³² Gard Statutes and Rules, Rule 5.2 (3).

Another question concerning here is the constitution of the Committee. According to the rules of Gard mentioned above, the Committee consists of members elected by the General Meetings, which means that the Committee can act on behalf of the interests of all the members.

This point can be confirmed after looking into the main duties of the Committee, which ranges from the determination on the rules of the club, the establishment of general principles for the administration of the funds of the club, responsibility to all the recommendations presented by the Executive Committee, to several important proposals which should be submitted to the General Meetings³³. Put it another way, the Committee is responsible for all the details in respect of the interests of the club, and the members of the Committee represent all the members of the club, and they are responsible for deciding the overall policy for the club³⁴. For example, according to Gard Statutes and Rules, it provides in Article 5.2 that “the Committee shall on the recommendation of the Executive Committee, decide on the levy of deferred calls, supplementary calls and overspill calls or the repayment of excess advance calls, deferred calls, supplementary calls and overspill calls.³⁵” Since the Committee has a powerful function in relation to the club affairs, and the constitution of the Committee is elected by the General Meeting constituted by the members themselves, we have no doubt that the Committee will in most cases make decisions in favor of the members.

Under the English law, the situation may be a bit different especially in respect of the constitution of the club. Modern P&I associations in UK are generally registered companies limited by guarantee with no share capital. According to the English law, there are two kinds of limited companies, one of which is limited by shares and the other one is limited by guarantee³⁶. The company of the former kind is profit making while the company the latter one is non profit making. And the limitation by guarantee means that “each member of the

³³ Gard Statutes and Rules, Rule 5.2 (2).

³⁴ Gard Handbook on P&I Insurance, 5th, page 102.

³⁵ Gard Statutes and Rules, Rule 5.2 (4).

³⁶ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 16.

company guarantees to subscribe up to a specified sum in the event of the company going into liquidation during the time he is a member or within 12 months afterwards.³⁷ It is regulated by the Companies Act 1985, and its insurance business is subject to the Insurance Companies Act 1982³⁸. The relations between members and their club are generally laid down in the Articles of Association which provide for the government of the club. The Articles usually provide that the General Meeting is the highest organ of the club and the business is to be conducted by directors who are elected by the General Meeting. The committee of directors is then bound to conduct the business as stipulated in the Articles of Association³⁹. The Articles here are similar with the Statutes in Gard, which mainly concern the organizational affairs. And “the “committee” should perhaps be more accurately described as the board of directors under the English law”, which should be subject to the Companies Act 1985⁴⁰. From the Articles in the UK Club, the duties and responsibilities do not vary greatly from those set in Gard or SKULD, but there is no Executive Committee set in the organization of the club under the English law. The institution of the Committee of the club is more or less similar with that in Norway, at least it is also made up of the members of the club. This was confirmed by Lord Romilly M.R. by holding a rule of a mutual marine association arising from the case of *Branford v. Howard*⁴¹. In that case, there was a rule in respect of the notice to the members, and it regulated that even if the notice had been given to the member directly, the same written notice should also be sent to the member’s place by post, irrelevant whether the written notice could reach or not. Then Lord Romilly M.R. held that rule should also apply to notices sent by the member to the directors for the change of circumstances of the assured member. “The reason for deciding this was the simple fact that the rule referred generally to ‘members’ and that directors were, of course, also ‘members’.”⁴²

³⁷ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 16.

³⁸ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 15.

³⁹ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 17.

⁴⁰ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 20.

⁴¹ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 20.

⁴² Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 20.

4.3 In respect of the Membership regulation.

The concept of “member” under the Norwegian law is defined by the rules in Gard, which refers to “an owner, operator or charterer (including a bareboat or demise charterer) of a ship entered in the Association who according to the Statutes and these Rules is entitled to membership of the Association, provided that, where the context allows, the term 'Member' shall, in these Rules, include a Co-assured and an Affiliate.⁴³” As a general rule in the practice of P&I Insurance, the membership of a P&I Club is usually by virtue of the entry of a vessel to the club. And the entry regulation is stipulated in Gard Rule 3 that “Application for an entry of a ship may be made by any owner, operator, charterer (including a bareboat or demise charterer) or other insurer of that ship, and the entry shall be on the basis of either an Owner's Entry or a Charterer's Entry.⁴⁴” Put it another way, to seek protection and indemnity from a P&I Club, one must first become the member of it by means of entering his or her vessel to the club.

However, as a general rule, the clubs might set certain conditions of entry for all their prospective members. For example, In SKULD Rule 1.1.2, it writes that “The Association may, in its absolute discretion, accept the application subject to specified conditions or restrictions, or reject the application, without providing any reasons.⁴⁵” It is not hard for us to conclude that, the purpose of setting entry criterion is to ensure all the members that are registered in the clubs have an approximately uniform ship condition, economic scale as well as other relevant aspects. In such a case, the well qualified members of the clubs would not suffer economic losses due to the enrolment of the less capable fellow members. Some clubs even demand the members to have the similar quality of management with each other. For example, when one member’s organization of the higher officer has been changed, he must inform such change to the Club so the Club can evaluate the management ability of that member.

⁴³ Gard Statutes and Rules, Rule 1.

⁴⁴ Gard Statutes and Rules, Rule 3 (1).

⁴⁵ SKULD Statutes and Rules List of Correspondents, Rule 1.1.2.

Besides this, the mutuality also indicates that the members of the same club act and response consistently. This means that one member's decision must be approved by his fellow members when such a decision might affect the common interest of the club. For example, if there is some member who wants to transfer his membership, then he must be approved by the club at first. Similar regulations concerning this point can be found both in the rules of Gard, which says that "The Member shall not assign or otherwise transfer its rights under its contract of insurance with the Association or otherwise arising pursuant to these Rules, save as provided in Rule 89.2. The Association may, in its absolute discretion, consent to an assignment or transfer by of a Member of its rights as referred to in Rule 89.1, subject to such terms and conditions as the Association deems fit and subject to the Association's right to deduct from any sum due or to become due from the Association to any assignee or transferee of the Member's rights such amount as the Association may estimate to be sufficient to discharge any existing or anticipated liability of the Member to the Association."⁴⁶

Under the English law, the regulation seems more or less similar as the Norwegian's, but there is a bit differences regarding the recognition of the membership according to the English law, which may be a bit stricter. Generally speaking, according to the English law, it is only the Shipowners or bareboat charterers who have the similar status as the shipowners can get the membership of the club. Since the P&I Club mainly provides its members with protection and indemnity in respect of the operation and management of vessels, the liabilities arising from which usually account to the shipowners or the ship operators. Then under such a situation, it seems that only the shipowners or the ship operators are qualified as a member to seek protection and indemnity from the clubs. The person other than the shipowners and the ship operators, who have the rights towards the insurable interests, for example the voyage charterers and the maritime mortgagees, might still be protected or indemnified by the clubs under some circumstances, but they can not be authorized the full membership.

⁴⁶ Gard Statutes and Rules, Rule 89.

Moreover from the point of English view, the deprivation of the insurance protection does not necessarily mean the deprivation of the membership. This point was indicated in the case of *North-Eastern 100A Steamship Insurance Association v. Red "S" Steamship Company*⁴⁷. In such a case, the shipowner Red "S" Steamship Company, as the defendant failed to give the notice within a reasonable time to the club in respect of its mortgage of the entered vessel, thus breaching the club rules which could result in depriving the insurance protection. Even though, the cancellation on the insurance by the club did not affect the membership of the defendant, which meant the breach only terminate the insurance of the vessel but not the membership and the defendant's obligations as a member of the club. The defendant was still liable to pay the calls and the other contributions. The decision made by Channel J. illustrated that "the fact that a shipowner entering a club, although technically perhaps no longer having the dual capacity of an assured and an insurer, does assume the dual roles of an assured and a member and these two roles involve the individual in distinct rights and obligations which can survive independently of each other."⁴⁸ Furthermore, sometimes even the "former members" are liable to the club due to the affairs in respect of the payment of calls⁴⁹.

As to the assignment of P&I Insurance membership, the clubs also do not allow the member to assign his or her membership without the content by the club, though the Marine Insurance Act 1906 stipulated that a marine policy is assignable unless it contains terms expressly prohibiting its assignment.⁵⁰ Since most P&I Clubs have the similar rules in respect of the assignment of membership like that in SKULD and in UK Club. For example, SKULD writes in its Rule 42.4 that "in no circumstances, shall any assignee or mortgagee have a greater right than the member."⁵¹ And UK Club stipulates in its Rule 29 (B) that "shall forthwith cease to be insured by the Association in respect of any ship entered by him or on his behalf upon the happening of any of the following events in relation to such ship

⁴⁷ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 103.

⁴⁸ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 103.

⁴⁹ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 104.

⁵⁰ The Marine Insurance 1906, Section 50 (1).

⁵¹ SKULD Statutes and Rules List of Correspondents, Rule 42.4.

upon the Owner parting with or assigning the whole or any part of his interest in the ship whether by bill of sale or other formal document or agreement or in any other way whatsoever.⁵² The only reason for this kind of rule is just to prevent the situation that “the benefits afforded by membership of a P&I Club should not extend beyond the named member and that clubs should not be liable to claims by persons who are not members of the club.”⁵³ This rule was also confirmed in the case of *Court Line Ltd v. Canadian Transport Company Ltd.* (1939), and has been said that “no other person is to be thrust upon the club as one of its members or assureds without its consent.”⁵⁴ It is based on the reason that the club is only liable to its members who pay the calls for the club, if the member assigns his or her membership to some other person (the third person), who has no liabilities towards the club, the club might get troubles if it still supplies protection and indemnity to the “other person”, because the “other person” would not pay the calls to the club, which means the club might not get a set-off from the “other person” to balance what in case the club might have compensated to the “other person” under the assignment by the member.⁵⁵ Assignment without any content by the club will prejudice the mutuality of the club, since the mutuality is based on the dependence among all the members, and only the members can benefit from the club.

4.4 In respect of the club discretion.

The discretion by the club means that in cases when the casualty is outside the expressed scope of cover or there happens some other problem that might contradict with the statutes and the rules of the club, the club will decide on it in its own initiative. As a matter of fact, there are a lot of matters that fall within the scope of discretions by the club, such as the assignment of the membership and the omnibus rule etc. which we will take them for examples to discuss below. And the statutes and rules usually authorize the club a powerful discretion. The reason for such discretion is to protect its members as a mutual “family”

⁵² UK Clubs, Rule 29 (B).

⁵³ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 106.

⁵⁴ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 107.

⁵⁵ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 107.

from casualties that happens to one member but under the mutual insurance becomes a so called “mutual risk”, if the club decides that the casualty is suited to be carried as a mutual risk. For example, Gard provides that “Subject always to the provisions of Rule 2.4, the Association may in its absolute discretion exercise powers conferred in the Statutes to pay compensation in respect of a liability, loss, cost or expense which is not otherwise covered under these Rules⁵⁶ in its Rule 2.5. And under the Norwegian law, the rules of P&I Clubs usually authorize the directors or managers to exercise the discretion⁵⁷”.

Under the English law, “club Rules relating to entry, membership, settlement of claims, club cover, exceptions, calls, investments and other topics are all to be subject to decision, often discretionary, vested in the organs of management of the club. A typical Club Rule-book has discretion ‘peppered all over the club’s Rules.’⁵⁸”

Generally speaking, the most representative matters that usually fall within the scope of the club’s discretion are for example the assignment of membership as what we have mentioned above, and the Omnibus provision which we will discuss in detail in the last section of this chapter. In a Norwegian sense, the club might usually accept the claims which can be deemed as a mutual risk other than the matters concern the members’ own business, and also exclude certain specialized operations⁵⁹. I understand the underlying point in this way, the pre-condition for acceptance of a claim by the club’s discretion is that the risk should aim at a common target which is qualified by a normal standard that even other members might suffer such a event in respect of the ordinary operations with the entered vessels. It means that the club would reject the claims of risks other than the normal risks. And on these occasions the club might “exercise a quasi-judicial role on behalf of the Club Membership⁶⁰”.

⁵⁶ Gard Statutes and Rules, Rule 2.5.

⁵⁷ Gard Handbook on P&I Insurance, 5th Edition, page 99.

⁵⁸ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 30.

⁵⁹ Gard Handbook on P&I Insurance, 5th Edition, page 100.

⁶⁰ <http://www.simsl.com/the-current-pi-market.html>.

4.5 The duties of disclosure

In P&I Insurance, it is more important for the insurers to obtain the information about the member than in other marine insurances. For example, besides the ship condition, the information about the solvency of the shipowner is also required by the club.

Under the English law, the duties of disclosure should in principle be subject to the Marine Insurance Act 1906. For example, UK Club expresses in its Rule 5(L) that the “These Rules and all contracts of insurance made by the Association shall be subject to and incorporate the provisions of the Marine Insurance Act, 1906...” And according to the English Marine Insurance Act 1906, it provides in Section 17 that “a contract of marine insurance is a contract based on the utmost good faith, and if the utmost good faith be not observed by the either party, the contract may be avoided by the other party.” It further stipulates in Section 18 in details in respect of the duty of disclosure, which provides that “Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract”, and the insurer would depend on such information making decision on the underlying insurance contract as well as the premium.⁶¹

Compared with the rules in relation to the duties of disclosure that are stipulated under the Norwegian law, even though the P&I Clubs have fairly similar conditions, some parts of the regulation will be different due to their different background law, and here the duty of disclosure is a good example. Under the Norwegian law, according the Norwegian Marine Insurance Plan 1996, the person effecting the marine insurance contract should “at the time the contract is concluded, make full and correct disclosure of all circumstances that are material to the insurer when deciding whether and on what conditions he is prepared to

⁶¹ The English Marine Insurance Act 1906, Section 18.

accept the insurance.⁶²” However, the plan does not mention the duty of disclosure under a new situation.

In short, the duty of disclosure is very important in marine insurance.

As to speak of the duty of disclosure in P&I Insurance, first and foremost is concerning at the processing when the prospective members are deciding to enter the club. The SKULD writes in its Rule 28.1 that “the member shall, make full and correct disclosure to the Association, before the contract of insurance is concluded, of every circumstance, which is known to the member or any agent effecting the insurance on his behalf, or which, in the ordinary course of business, ought to be known by the member or agent, and which would influence the Association in deciding whether and on what terms to provide cover.” And under the English law, the application form of UK Club gives “an example of an express provision dealing with the duty of disclosure when effecting entry would be as follows: ‘The particulars given by an applicant owner in any Application form together with any other particulars or information given in the course of applying for insurance or negotiating changes in the terms of insurance to the managers of the Association shall, if the entry of the relevant ship be accepted, be deemed to form the basis of the contract of insurance between the owner and the Association and it shall be a condition precedent of such insurance that all such particulars and information were true so far as the Owner knew or could with reasonable diligence have ascertained.’”⁶³ And this regulation may be deemed as a supplementary towards P&I Insurance according to the rules of MIA. That is because the rules under MIA may not suit the nature of P&I Insurance and apply to such a kind of insurance totally⁶⁴. However, the relative regulations regarding the duties of disclosure are not deemed exactly the same as that in the ordinary marine insurance, in that the P&I Clubs have formed a different way and procedure in their long term practice, which are based on the peculiarity of P&I Insurance itself.

⁶² The Norwegian Marine Insurance Plan 1996, Version 2007, Section 3.1.

⁶³ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 40.

⁶⁴ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 41.

It seems that the English law is stricter on the point of the duty of disclosure. As a matter of fact, in the case of marine insurance, as a generally principle of English law, means that “the assured must provide the insurer with all material circumstances and it is not for the underwriter to ask for them⁶⁵”. One important thing to mention is that according to the English law, the prospective member has not discharged his duty of disclosure yet by merely completing the Entry Form, which was established in the case of *C.T.I. v. Oceanus*, “where Stephenson L.J. decided that marine insurance in general and mutual marine insurance in particular, was ‘not submitting questions in a proposal form to the insured’”⁶⁶ Besides the information given on the Entry Form, it further requires the member after entering the club to make the entered vessel available for inspection by the fellow members in the same club.⁶⁷ The exposure of the information provided by the member to the most possible extent can meet the needs of the international spread of membership in the larger clubs⁶⁸. In those cases, the mutuality might concern more tightly, since in P&I Insurance, members act as a dual capacity as both the assured and the insurer.

Moreover, the most significant difference in P&I Insurance is that the P&I Clubs do not usually use the policy as the insurance contract. Since we have explained the term of “material facts” in the beginning of this chapter, we know that “material facts” mainly refer to the circumstances on which the insurers might depend to decide whether or not to undertake such risks (put it another way that is to enter into the marine insurance contract with the assureds). In the ordinary insurance, the “material facts” are usually included in the policy. However, in P&I Insurance, the clubs require the members to provide far more information than this, but not merely the content of the entry form. Under the English law, “in view of the dual capacity of a club member, as an insurer and assured, an applicant shipowner may be under a duty to disclose a more extensive range of circumstances; circumstances material to the existing membership relating to the desirability of having the applicant as a fellow member rather than merely as a risk-incurring assured, for example,

⁶⁵ *C.T.I. v. Oceanus* [1984] 1 Lloyd’s Rep. 476, at p. 529, per Stephenson L.J.

⁶⁶ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 42.

⁶⁷ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 42.

⁶⁸ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 43.

details of his solvency⁶⁹”, other than basic information merely about the entered vessels. Since in the ordinary marine insurance, the insurers can only depend on the information regarding the insured vessels, and they do not need further information concerning the other circumstances, and the interests of the insurers will not be damaged as long as the information concerning the insured vessel provided by the assureds is correct and complete. However, P&I Insurance does not work in the same way. Because the operation of the club depends on the mutuality among all the members of the club, then the financial statement of the individual member means a lot to the other members as well as to the club itself. As we have mentioned above, the members of the clubs are both the assureds and the insurers. If one of the members is insolvent, then the part of the calls he might have paid will no longer be available, thus affecting the interests of the other members directly. And in practice, most clubs have stipulated in their rules in respect of the situations when some member ceases his or her contract or terminates his or her entry in the club as we have discussed above, that under such a circumstance, the member should give the club notice without undue delay and have to pay the release calls, all of which are the measures used by the club to protect its members’ interests.

In addition to the duties of disclosure on the assureds, the P&I Clubs also have the same duty of disclosure to their members, this kind of duty thus can be deemed as a mutual duty. And it is specially stipulated under the English law, which also differs from that of Norway. “That the duty of disclosure is a mutual obligation is well illustrated in the locus classicus provided by Lord Mansfield in *Carter v. Boehm* where the learned jurist said: ‘...Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.’”⁷⁰ For example, in the case concerning a dispute between Greek shipowners and a P&I Club, the plaintiff claimed the club based on its non disclosure about the entry terms of the other members, “which upset the whole concept of mutuality under which they assumed their ships to have been entered⁷¹”.

If the rules of MIA require the disclosure obligation on the insurer of ordinary marine

⁶⁹ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 41.

⁷⁰ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 43.

⁷¹ Steven J. Hazelwood, *P&I CLUBS LAW AND PRACTICE*, Second Edition, page 44.

insurance in general, then they require the P&I Club such a kind of duty in particular. The point here is that the clubs should let the candidate member know the basic statements of the other members. The rationale of this requirement is the same as what we have discussed above in 3.2.3 concerning the comparability of the members and is well explaining how important for the clubs as well as the members knowing well about the statements of the other members. So the disclosure provided by the clubs is also very important since the member can assess the strength of the club from this point to decide whether or not enter this club, thus make the member himself better protected.

4.6 The duties of warranties

In general, the member should perform many obligations under P&I Insurance contract. But not all the obligations qualify as warranties in P&I Insurance. Breach of most obligations will only result in loss or reduction of reimbursement from the club. Only breach of such obligations that are referred to the interests of other members, or even threaten the club can be deemed as warranties. According to the English Marine Insurance Act 1906, “an insurer may avoid liability in cases of non-compliance with warranties regardless of whether the assured’s failure has had any bearing on his loss⁷²”. And the rules regarding warranties may differ from club to club,

As to the definition about “warranty”, according to the English law, the term of “warranty” is defined in the Marine Insurance Act 1906 Section 33(1) that “a warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.” Moreover, under the English law, warranty is divided into two kinds as the express warranty and the implied warranty. The express warranty is regulated in the same Act Section 35(2) that “an express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the

⁷² Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 75.

policy.”

I will take the “payment of calls” for example to describe the express warranties. Since according to the Norwegian law, it is not customary to characterize this duty as a warranty. It is a fundamental requirement for the liability, but not related to the duties and omissions of the assured, I will discuss this duty under the English law.

In relation to P&I Insurance contracts, the first and foremost liability for the member is to pay for the calls. The calls constitute the fund of the club, which is the base of P&I Insurance. So the payment of calls should be deemed as the basic warranty by the member with no doubt. And generally, the P&I Club will stipulate such regulations clearly in its rules. For example, UK Club provides in its Rule 31 (A) that “Where an Owner has failed to pay, either in whole or in part, any amount due from him to the Association, the Managers may give him notice in writing requiring him to pay such amount by any date specified in such notice, not being less than seven days from the date on which such notice is given. If the Owner fails to make such a payment in full on or before the date so specified, the insurance of the Owner (whether the insurance is current on such date or has ceased by virtue of paragraphs (A), (B), or (C) of Rule 29 or in accordance with any other provisions of these Rules) in respect of any and all ships referred to in such notice and entered in the Association by him or on his behalf shall be cancelled forthwith without further notice or other formality.”

However, even though such a duty constitutes a warranty under the club rules, the club might decide whether or not provide cover for the member in breach of the warranty in their own discretion. For example, UK Club provides in its Rule 31 that “The Directors may in their discretion and upon such terms as they think fit, including but not restricted to terms as to payment of contributions, premiums or other sums, admit either in whole or in part any claim in respect of any ship entered by an Owner for which the Association is under no liability by virtue of paragraph (A) or (B) of this Rule, whether such claim has arisen before or arises after the date of cessation or the date of cancellation as the case may be, or remit wholly or

partly any payment of contribution, premiums or other sums due to the Association.⁷³ This rule obviously shows that under the strict English law where nothing can be excused upon non-compliance of warranty, the P&I Club aims to protect its member in breach of the warranty due to force majeure in cases when they think fit, This is also how P&I Insurance greatly differs from the other marine insurances due to its mutuality.

4.7 The Omnibus rule.

As we have mentioned the omnibus rule when we talked about the discretion by the club, in this section, I would like to discuss something more about this rule. A distinguishing feature that P&I Insurance processes is that there exists an omnibus rule which provides compensation for the losses that are not explicitly listed on the contract between the members and the club. As a matter of fact most P&I Clubs will include an omnibus rule in their rules. For example, SKULD provides in its Rule 46 that “the Association may cover, in its absolute discretion, the member’s liability, loss, expense or costs which would not otherwise be covered under the Rules, to the extent that the Association considers that such cover would be appropriate and consistent with the purpose of the Association⁷⁴”. Under this rule, when certain loss incurs to the club member, and such a loss is not clearly covered in the insurance contract, the club can by its own discretion make the decision on whether he should compensate the member’s loss. Further, the extent of such compensation also falls within the club’s absolute discretion.

Compared with the commercial insurance, I understand the omnibus rule in this way: under the commercial insurance, the target for the commercial insurer is to make profit, and the insurer will usually express clearly the cover of the risks in the insurance contract. If the assured incurs casualties fall out of the scope of the contractual cover, the insurer would of course not like to be liable for the losses for his own sake. But under P&I Insurance, the club

⁷³ UK Club Rules, Rule 31.

⁷⁴ SKULD Statutes and Rules List of Correspondents, Rule 46.

aims to protect and indemnify its members when they incur casualties. Although the club will express a clear cover in its rules, it will also accept to be liable in some certain cases which fall out of the scope of the insurance. This is no doubt based on the spirit of mutuality. The club will not consider the profit; instead it only cares about what can protect its members while not prejudice the other members' interests, aiming to balance the twos. However, the decision in relation to the omnibus rule should be weighed on a prudent consideration and should be decided on the individual basis as well. The decision of compensating a member on the foundation of the omnibus rule should be made very carefully, because too many compensations of this kind can cause chaos to the club. After all, such a kind of compensation is not listed clearly in the insurance contract.

Under the omnibus rule, any member who suffers a kind of losses that falls outside of the scope of the club cover can still make a claim to the club as long as he perceives his losses as within the same category to those that are explicitly covered by the club. When such a kind of a compensation claim is made, the committee of the club will investigate on this individual case and no previous cases will be referred to.⁷⁵ This is because that the creation of the precedent is tried to be avoided by the Committee of the club, so that no future claim of a similar nature can be guaranteed a success. Otherwise if the losses of a similar nature can refer to its precedents, then the compensation based on the omnibus rule can change into the standard one. Here, it can totally illustrate the power of the free discretion of the club, because the claim under the omnibus rule can not be deemed as within the standard risk cover scope. The decision whether the compensation is or is not to be made lies entirely on the discretion of the Committee, and the member can not resolve to the precedents when advancing the claim under the omnibus rule.

The existence of the omnibus rule authorizes both the Committee and the members of the Clubs a flexible discretion. It is reasonable enough for us to understand that the club will tend to make a decision in favor of the members who suffer losses in certain conditions, even though the losses are not covered by the insurance contract between the club and the member.

⁷⁵ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 205.

For example, “expenses incurred in sending back a pilot to his home port after overcarriage or expenses arising out of crew’s regulation of duty where the circumstances are beyond the owner’s control⁷⁶”. This is because the decision-making department of the club is consisted of the fellow members who are mostly possible the shipowners like the other ordinary members. They will usually stand by the member’s side and take into consideration of the incurred member’s interest.

However, up to now a lot of novel covers have been added to the standard cover under P&I Insurance. The reason of this increment is that the number of the cases with a similar nature has accumulated to the certain amount. Therefore this kind of compensation, which originally refers to omnibus rule, is no longer an exceptional one from the club’s point of view⁷⁷. This shows that the club realizes such a cover is really necessary. Based on the interests of the member, the club would adjust its rules and policies to meet the changing needs of the member. For example, various kinds of expenses in respect of the crews have been added to the standard covering scope⁷⁸.

In conclusion, realizing that the shipowner’s liability can not always be defined exactly, and the type of liability is always increasing, the club authorizes the Committee a wide right of discretion. Under such discretion, even the losses that are not covered in the insurance contract could be compensated, as long as these losses fall within the club’s general cover area. The Omnibus rule indicates that, rather than a profit making insurance company, P&I Club is an association whose highest priority is to protect his member’s interests. Under such a rule, the Committee can take immediate reaction in responses to the member’s claim, especially when new type of risk arises, or the exceptional event occurs.

⁷⁶ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 205.

⁷⁷ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 206.

⁷⁸ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 305.

5 The insurable interest principle

The insurable interest refers to definite legal pecuniary value. According to the English Marine Insurance Act 1906 Section 5 (2), “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, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.”⁷⁹ Furthermore, it coincides with the basic rule of the general insurance that without the insurable interest, there exist no valid insurance contractual relationship. This rule is also confirmed in the Norwegian Marine Insurance Plan 1996 Section 2.1 that “a contract concerning insurance which does not relate to any interest is void.”⁸⁰ Moreover, the interests which are illegal, not currently available or can not be reasonably expected fall out of the scope of the insurable interests. In marine insurance, there is no exception in respect of the insurable interest. Based on the above rule, it is obvious that “if he (the assured) is not ‘interested’ in the adventure or the property at risk, then any marine insurance contract he may have effected is reduced to a mere wager, and is not a contract of indemnity⁸¹”. And that also means the assureds at least should have had the interests insurable at the time he incurs the marine perils and suffers losses of his interests.

The most common subject matters with insurable interests under marine insurance are the vessels and cargoes as the property of the shipowners and cargo owners. This point is also agreed by the Norwegian law, the Norwegian Marine Insurance Plan 1996 provides the definition in respect of “loss” which can be covered under marine insurance in its Section 1.1 (d) that “it means financial loss of any kind, including total loss, damage, loss of earnings,

⁷⁹ The English Marine Insurance Act 1906, Section 5 (2).

⁸⁰ The Norwegian Marine Insurance Plan 1996, Version 2007, Section 2-1.

⁸¹ Harold A Turner, ACII The Principles of Marine Insurance, Seventh Edition, page 22.

costs and liability⁸²,” Besides these, the interests which might arise from the freight, the salary of the crews and the third party liabilities can also be protected in marine insurance. From the point of this view, the costs of liabilities arising under P&I Insurance qualify as such insurable interests.

The insurable interest in P&I Insurance first and foremost is the interest in avoiding costs of liabilities. Since P&I Insurance mainly covers the liabilities incurred from a marine adventure. From an economic point of view, the insurable interest should refer to “a thing to some one advantage may arise or prejudice happen from the circumstances which may attend it⁸³”. Then in the activities of shipping, if one incurs liabilities arising from a marine adventure, he is likely to suffer losses as he might need to pay for his liabilities; On the other hand, if he can complete the shipping without any liabilities, he will benefit from that. This indicates that any one who may incur any liability in the course of marine adventure has the insurable interest.

Moreover, the rules of P&I Clubs in respect of the cessation of cover or the assignments of the insurance embody the insurable interest principle as well. For example, SKULD provides in its Rule 3.1 that “the insurance cover shall cease immediately where the entered vessel becomes a total loss, or is accepted by the hull underwriters or deemed by the Association as being constructive, compromised or arranged total loss, except in respect of liability arising out of the casualty which gives rise to the total loss” or “the vessel is missing for ten days from the date she was last heard of.” Under this circumstance, the vessel is subject to loss or missing, then the insured interest as the potential liability that connects to the lost or missing vessel might no longer exist, even though the liability connected a wreck may still be an interest if the liability is by virtue of the casualty that results in the loss or missing. The club stipulates that in such a case, the P&I Insurance contract with the member will immediately cease. That can totally indicate the principle of “no interest, no insurance”.

⁸² The Norwegian Marine Insurance Plan 1996, Section 1.1 (d).

⁸³ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 98.

6 The indemnity principle

“An Indemnity is a sum paid by A to B by way of compensation for a particular loss suffered by B. The indemnifying party (A) may or may not be responsible for the loss suffered by the indemnified party (B).⁸⁴” This means that, even A is not the party who causes the loss of B, A is still responsible for compensating the loss of B. Indemnity as an important principle is very fundamental in marine insurance, and many other important principles under marine insurance such as contribution, subrogation and abandonment are derived from the indemnity principle. In fact, the insured interests are usually damaged or even totally lost after meeting the marine perils. Then the insurers might merely compensate the assureds by means of monetary payment, the sum of which also will not exceed the actual value of the incurred losses or damages.

P&I Insurance is actually a contract of indemnity, which will indemnify the assured against incurred liabilities. This is similar with the concept defined by the English Marine Insurance Act 1906 that “a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby by agreed⁸⁵” There exists no possibility for the members to gain extra interest other than what they have insured through P&I Insurance. Otherwise, it will contradict with the virtue of P&I Insurance, which aims to protect the members and indemnify them when they incur certain perils. The “pay to be paid” principle explains well in respect of this point “Typical of Club Rules covering this point is the following wording: ‘Unless the committee in its discretion otherwise decides it is a condition precedent of a member’s right to recover from the club in respect of any liabilities, costs or expenses that he shall first have discharged or paid the same.⁸⁶’” And the point to be made here is that the indemnity principle implies that the cover relates to the assured's expenses, whereas in

⁸⁴ <http://en.wikipedia.org/wiki/Indemnity>

⁸⁵ The English Marine Insurance Act 1906, Section 1.

⁸⁶ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 323.

ordinary liability insurance also aims at protecting the victim.

However, as a special principle under P&I Insurance, the “pay to be paid” clause has been challenged in the recent years, especially in the cases involving the direct claim by the third party. Generally, it gives the third party a right to claim the insurer directly once the interests of the third party are prejudiced by the assureds under the laws of many countries. This rule aims to protect the interests of the third party, because the third party may be easier to seek reimbursements from the insurer than from the assured based on the reason that the insurance company as the insurer is usually financially sound. And it seems sometimes the only way for the third party to realize his or her rights and benefits especially under the situation that the assured is insolvent or under other circumstance that he or she has no ability to reimburse, is to let the third party claim to the insurer directly. This rule is also confirmed under the Norwegian law, which is set in the Norwegian Insurance Contract Act of 1989 (ICA) Section 7-7 first paragraph that “When the insurance covers the liability of the Insured for compensation, the injured party may claim compensation directly from the Insurers. The Insurers and the Insured are under duty to inform the injured party upon request whether liability cover exists.” Then the problem may arise if this regulation contradicts with the “pay to be paid” principle under P&I Insurance? However, the ICA is not mandatory in marine insurance, and it has also set a lot of rules in respect of the situations except from where the direct action can happen. For example, ICA stipulates in its rules Section 1-3 that “with the exception of liability cover according to section 7-8 the provisions may nevertheless be contracted out of for insurance relating to commercial business...⁸⁷”, and sets a scope of the exceptional situations. Moreover, since I have mentioned before the clubs usually have their own discretion to deal with such problems, the clubs will also take into full consideration to individual case.

Under the English law, the Third Parties (Rights Against Insurers) Act 1930 established “a general system of statutory subrogation in supporting the view that insurance proceeds should be considered to be for the benefit of the injured party rather than for the protection of

⁸⁷ ACT of 16 June 1989 No. 69: Act relating to Insurance Contracts, Section 1-3.

the assured.”⁸⁸ By such a way, the injured third party can claim against the insurer of the tortfeasor directly. This point might contradict with the concept of indemnity insurance, here is P&I Insurance under the English law. And as we have mentioned above, the indemnity insurance refers to the insurance “which places an obligation upon the insurer to reimburse or indemnify an assured only to the extent that the assured has incurred and discharged his liability⁸⁹”. Put it another way, in a third party’s case, the insurer of the tortfeasor will not get involved until the tortfeasor has paid the injured third party.

Moreover, the “pay to be paid” clause in P&I Insurance also supports the concept of indemnity insurance under the English law. Then one question might arise in relation to the validity of such a “pay to be paid” clause. However, “The House of Lords decision in *The ‘Fanti’* and *The ‘Padre Island’* upholding this rule, effectively excludes direct action claims by third parties against clubs which have clear pay to be paid rules⁹⁰”. And the former arguments purported that “pay to be paid” clause might deviated the equitable principle was also rejected by the Lordships for the reason that “this equitable principle can not operate, however, in the face of an express contractual provision to the contrary.”⁹¹

Anyhow, the ambition of P&I Insurance is to indemnify the assured after he or she incurred damages and let him or her recover and return to the circumstance before the occasion. Normally the clubs will set regulations regarding the situation in reinsurance. And in such a case, the club might have the right to refuse to compensate the members if the members can gain the same compensation from the other insurers.

⁸⁸ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 275.

⁸⁹ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 165.

⁹⁰ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 283.

⁹¹ Steven J. Hazelwood, P&I CLUBS LAW AND PRACTICE, Second Edition, page 286.

7 Conclusion

In this thesis, I mainly discuss the three most important principles of the P&I Insurance, namely mutuality principle, insurable interest principle and indemnity principle.

As a comparatively new kind of marine insurance, the P&I Insurance possess a special character which is its mutuality. Compared to the common commercial insurance, P&I Insurance is not a profit making one. Such nature of P&I Insurance is due to its mutuality principle. I divided the mutuality into the following sub titles: the relationship among the members, the club fund, the committee of the club, and the membership regulation.

Besides the mutuality principle, P&I Insurance also possess some other principles such as insurable interest principle and indemnity principle.

Insurable interest principle is the pre-condition of the P&I Insurance, while indemnity insurance principle sufficiently demonstrates the true nature of the P&I Insurance, which is to protect and indemnify its members.

To sum up, as a comparatively new kind of marine insurance, P&I Insurance is receiving increasingly attention in the insurance field, especially in the case of catastrophe, such as oil pollution. P&I Insurance has demonstrated its advantage and indeed it can provide protection to the shipowners against unexpected losses.

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