بهدف التخريب أو الإبتزاز، وكانت سكوتلانديارد قد أعلنت عن إنشاء وحدة جديدة مهمتها مكافحة فيروسات الكمبيوتر تتكون من المتخصصين في مجال أمن الكمبيوتر، وقد جاء في أول تقرير عن هذه الوحدة الجديدة في شهر يناير ١٩٩١ أن [١]:

١. الطرق التي يتبعها مبرمجو الفيروسات تتميز بالذكاء والتطور وتعتمد علي استعمال المودم (جهاز وسيط بين التليفون والكمبيوتر) وأنهم يستفيدون مما يقرب من ٥٠ ألف نظام تبادل (وهو ما يعرف بلوحة البيانات) داخل الحاسبات.
٢. يعتمد المبرمجون علي أسلوب المقايضة إذ لا يستطيع أي منهم تحميل أي برنامج فيروس ما لم يقم بإرسال فيروس من إعداده من خلال الشبكة .
٣. تختلف طبيعة الفيروسات المتبادلة عبر شبكات تبادل المعلومات، فمنها البسيط ومنها المتطور الذي يمتلك " أسين " وفي حالة إكتشاف أحدهما والتخلص منه ينشط الآخر ويبدأ في العمل.
٤. وفي ذات الوقت تم رصد بعض المعلومات عبر الشبكة تتحدث عن أحد المبرمجين المحترفين في بلغاريا يعمل علي تطوير فيروس ذي مئات الملايين من النسخ بحيث يستحيل اكتشافه بالطرق المتبعة حالياً.

وقد أصدرت الوحدة توصياتها للجهات المختصة في بريطانيا في شأن فيروسات وأمن الكمبيوتر بالإضافة الي القوانين الضرورية الرادعة، كما نادت الجهات المختصة بعقد مؤتمر دولي لمكافحة الفيروسات والذي عقد في سبتمبر ١٩٩١ في جزيرة " جيرزي " البريطانية، وقد تطرق الي سبل مكافحة الفيروسات.

وعلي الرغم مما تقدم فان الرغبة في استقرار حركة التعامل ومحاولة إخفاء أسلوب ارتكاب الجريمة حتي لا يتم تقليدها من جانب الآخرين يدفع المجني عليه الي الإحجام عن مساعدة السلطات المختصة في اثبات الجريمة أو في الكشف عنها، وحتي في حالة الإبلاغ فان المجني عليه لا يتعاون مع جهات التحقيق خوفاً مما يترتب علي ذلك من دعاية مضادة وضياع لثقة المساهمين [٢].

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(١) د. أسامة محمد محي الدين عوض ، جرائم الكمبيوتر والجرائم الأخرى في مجال تكنولوجيا المعلومات ، بحث مقدم للمؤتمر السادس للجمعية المصرية للقانون الجنائي ، القاهرة ٢٥ – ١٩٩٣/١٠/٢٨ ، مشكلات المسئولية الجنائية في مجال الإضرار بالبيئة – الجرائم الواقعة في مجال تكنولوجيا المعلومات ، منشورات دار النهضة العربية ، ١٩٩٣ ، ص ٤٢٩ - ٤٣٠ .

(٢) د. زكي أمين حسونة ، جرائم الكمبيوتر والجرائم الأخري في مجال تكنولوجيا المعلومات ، بحث مقدم للمؤتمر السادس للجمعية المصرية للقانون الجنائي ، القاهرة ٢٥ – ١٩٩٣/١٠/٢٨ ، مشكلات المسئولية الجنائية في مجال الإضرار بالبيئة – الجرائم الواقعة في مجال تكنولوجيا المعلومات ، منشورات دار النهضة العربية ، ١٩٩٣ ، ص ٤٧٧

الفرع الثاني
سلطة القاضي الجنائي في تقدير الدليل

الدليل بوجه عام :

يعرف فقهاء القانون الدليل بأنه " الوسيلة التي يستعين بها القاضي للوصول إلي الحقيقة التي ينشدها، والمقصود بالحقيقة في هذا السياق هو كل ما يتعلق بالوقائع المعروضة علي القاضي لإعمال حكم القانون عليها [١]. ويعرف البعض الآخر الدليل بأنه " الواقعة التي يستمد منها القاضي البرهان علي اقتناعه بالحكم الذي ينتهي إليه [٢]. وهو أيضاً الوسيلة الإثباتية المشروعة التي تسهم في تحقيق حالة اليقين لدي القاضي بطريقة سائغة يطمئن إليها [٣] . كما أن الدليل هو النشاط الإجرائي الحال والمباشر من أجل الحصول علي اليقين القضائي وفقاً لمبدأ الحقيقة المادية، وذلك عن طريق بحث أو تأكيد الإتهام أو نفيه [٤]. وهو الوسيلة المتحصلة بالطرق المشروعة لتقديمها للقاضي لتحقيق حالة اليقين لديه والحكم بموجبها [٥].

الدليل الإلكتروني Digital Electronic :

هو الدليل المأخوذ من أجهزة الحاسب الآلي ويكون في شكل مجالات أو نبضات مغناطيسية أو كهربائية، ممكن تجميعها وتحليلها باستخدام برامج وتطبيقات وتكنولوجيا خاصة، ويتم تقديمها في شكل دليل يمكن اعتماده أمام القضاء [٦]. ويتميز الدليل الرقمي عن غيره من أدلة الإثبات الجنائي للأسباب الآتية [٧]:

١. الأدلة الرقميَّة تتكون من دوائر وحقول مغناطيسيَّة ونبضات كهربائيَّة غير ملموسة، ولا يدركها الرجل العادي بالحواس الطبيعية للإنسان.

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(١) د. أحمد فتحي سرور ، الوسيط في قانون الإجراءات الجنائية ، الطبعة الثانية ، دار النهضة العربية ، القاهرة ، سنة ١٩٨١ ، ص ٤١٨

(٢) د. مأمون سلامة ، الإجراءات الجنائية في التشريع المصري ، دار الفكر العربي ، القاهرة ، سنة ١٩٧٧

(٣) د. عبدالحافظ عبدالهادي عابد ، الإثبات الجنائي بالقرائن ، رسالة دكتوراه مقدمة لكلية الحقوق جامعة القاهرة ، سنة ١٩٨٩ ، ص ١٩٨

(٤) د. أحمد ضياء الدين محمد خليل ، قواعد الإجراءات الجنائية ومبادئها في القانون المصري ، مطبعة كلية الشرطة ، القاهرة ، سنة ٢٠٠٤ ، ص ٣١٦

(٥) د. محمد عبيد سعيد ، مشروعية الدليل في المجالين الجنائي والتأديبي ، دراسة مقارنة ، بالتطبيق علي تشريعات دولة الإمارات العربية المتحدة ، رسالة دكتوراه في علوم الشرطة ، أكاديمية الشرطة ، القاهرة ، ص ١٣٦

(٦) د. ممدوح عبد الحميد عبد المطلب، البحث والتحقيق الجنائي الرقمي في جرائم الحاسب الآلي والإنترنت، دار الكتب القانونية، المحلة الكبرى، سنة ٢٠٠٦م، ص ٨٨ .

(٧) د. محمد الأمين البشري، التحقيق في الجرائم المستحدثة، جامعة نايف العربية للعلوم الأمنية، الرياض، ط١، ٢٠٠٤ ، ص ٢٣٥، ٢٣٦.

٢. الأدلة الرقميَّة ليست أقل مادية من الأدلة المادية فحسب؛ بل تصل إلى درجة التخيليّة في شكلها وحجمها ومكان تواجدها غير المعين.
٣. يمكن استخراج نسخ من الأدلة الجنائيَّة الرقميَّة مطابقة للأصل ولها ذات القيمة العلمية والحجية الثبوتية الذي لا يتوفر في أنواع الأدلة الأخرى.
٤. يمكن التعرف على الأدلة الرقميَّة المزوَّرة، أو التي جرى تحريفها بمضاهاتها مع الأدلة الأصلية بالقدر الذي لا يدع مجالاً للشك.
٥. من السهل إتلاف الأدلة الجنائيَّة الرقميَّة، ولكن في حالة محوها، أو إتلافها يمكن استرجاعها من ذاكرة الحاسب الآلي.
٦. علاوة على تواجد الأدلة الرقميَّة في مسرح الجريمة التقليدي، يمكن تواجدها أيضاً في مسرح أو مكان الجريمة الافتراضي Virtual Scene of Crime.
٧. تتميز الأدلة الجنائيَّة الرقميَّة عن غيرها من أنواع الأدلة بسرعة حركتها عبر شبكات الاتصالات.
٨. إذا حاول المتهمون إتلاف الأدلة الرقميَّة يمكن الاحتفاظ بنسخٍ منها في أماكن آمنة. علماً بأن للنسخ في هذه الحالة قيمة الأصل.

وينبغي التمييز بين أمرين: **الأول:** القيمة العلميَّة القاطعة للدليل، **والثاني:** الظروف والملابسات التي وُجد فيها هذا الدليل. فتقدير القاضي لا يتناول الأمر الأول، وذلك لأن قيمة الدليل تقوم على أسس علميَّة دقيقة، ولا حرية للقاضي في مناقشة الحقائق العلميَّة الثابتة. أما الظروف والملابسات التي وجد فيها هذا الدليل؛ فإنها تدخل في نطاق تقديره الذاتي؛ فهذا من طبيعة عمله. وترتيباً على ذلك، فإنه إذا كانت الأدلة الرقميَّة تخضع لحرية القاضي في الاقتناع؛ فليس معنى ذلك أن يُنازِع القاضي في قيمة ما يتمتع به الدليل الرقمي من قوة استدلالية قد استقرَّت بالنسبة له، وتأكَّدت من الناحية العلميَّة، ولكن تقديره يكون للظروف والملابسات التي أحاطت به؛ بحيث يكون في مقدوره أن يطرح مثل هذا الدليل ـ رغم قطعيته من الناحية العلميَّة ـ وذلك عندما يجد أن وجوده لا يتسق منطقياً مع ظروف الواقعة وملابساتها [1]. ولذا فإن رأي الخبير لا يعدو أن يكون عنصراً من عناصر الإثبات يخضع لتقدير القاضي؛ فله أن يأخذ به أو لا يأخذ به حسب اقتناعه وتقديره.

(1)Voir: Levy-Bruhl (Henri): La preuve judiciaire, étude de sociologie juridique, Marcel Rivière, Paris, 1964, p. 25.

ويعترف القانون للقاضي الجنائي بسلطة واسعة في قبول الدليل وتقديمه، وقيده من حيث القواعد التي تحدد كيفية الحصول عليه والشروط المتطلبة فيه ومخالفة هذه القواعد والشروط قد تهدر قيمة الدليل فيستحيل علي القاضي أن يستند اليه في قضائه، وإن كان مقتنعا بما يستخلص منه، ويعني ذلك أن مخالفة هذه القواعد تصيب عمل القاضي بالخلل وتصف قضائه بالبطلان[١]. ويقوم القاضي في سبيل تقصي ثبوت الجرائم باختيار أي طريقة من طرق الإثبات للكشف عن الحقيقة فيأخذ منها ما تطمئن به عقيدته، كما أن للقاضي وهو يحاكم المتهم يجب أن يكون مطلق الحرية غير مقيد بشيء مما يتضمنه حكم صادر في ذات الواقعة علي متهم آخر [٢] .

وعلي ذلك فالسلطة الواسعة التي خولها المشرع للقاضي الجنائي في الإثبات تلقي عليه عبئاً ثقيلاً أكثر من الملقاة علي عاتق القاضي المدني الذي تكون سلطته في الإثبات محدودة بقيود قانونية، والقاضي الجنائي دوره إيجابي في الإثبات، فلا يجوز له أن يقنع بفحص الأدلة التي يقدمها إليه أطراف الدعوي، وإنما يتعين عليه أن يتحرى بنفسه أدلة الدعوي، فهو يتحرى الحقيقة الموضوعية في كل نطاقها وفي أدني صورها إلي الواقع، وذلك علي عكس القاضي المدني الذي يلزم جانب الحياد بين أطراف الدعوى، ويتخذ لنفسه دوراً أقل ايجابية ويقتصر علي فحص ما يقمه اليه الأطراف من أدلة ليقدرها ويبني عليها حُكمه، ومن ثم فهو يتحرى الحقيقة الشكلية في حدود الصورة التي يعرضها عليه الأطراف من أدله، وذلك بالإضافة الي تفسير الفرق بين دوري القاضي الجنائي والقاضي المدني باختلافهما من حيث مدي السلطة في الإثبات، فانه يفسر هذا الفرق كذلك تعلق الدعوي الجنائية بالنظام العام مما يفرض علي القاضي الجنائي أن يتحرى الحقيقة بنفسه وأن يتخذ لنفسه دوراً إيجابياً ؛ أما الدعوي المدنية فتتعلق بنزاع بين مصالح خاصة ومن ثم يقتصر دور القاضي علي فحص الصورة التي ارتضي أطراف الدعوي ضمناً عرضها عليه، وقد أكدت الدور الإيجابي للقاضي الجنائي المادة (٢٩١) من قانون الإجراءات الجنائية في قولها " للمحكمة أن تأمر ولو من تلقاء نفسها أثناء نظر الدعوى بتقديم أي دليل تراه لازماً لظهور الحقيقة " [٣]، ولا

(١) د. سليمان أحمد محمد فضل ، المواجهة التشريعية والأمنية للجرائم الناشئة عن استخدام شبكة المعلومات الدولية (الإنترنت) ، رسالة دكتوراه في علوم الشرطة ، مقدمة الي أكاديمية الشرطة ، القاهرة ، سنة ٢٠٠٧ ، ص

(٢) الطعن رقم ٤٢٩١ ، سنة ٦٦ ق ، جلسة ١٩٩٨/٣/٨

(٣) د. محمود نجيب حسني ، شرح قانون الإجراءات الجنائية ، دار النهضة العربية ، القاهرة ، الطبعة الثانية ، سنة ١٩٨٧ ، رقم ٤٥٨ ، ص ٤١٦ ، ٤١٧

يجوز لمحكمة النقض أن تناقش اقتناع القاضي، فتقول أنه ما كان يجوز له أن يقتنع بدليل معين، أو أنه كان يجوز له أن يقتنع بدليل معين، أو أنه كان يتعين عليه أن يقتنع بدليل معين [١].

المطلب الثاني

مدي قبول الأدلة المستخرجة من الحاسب الآلي

تمهيد وتقسيم:

استقرَّت التشريعات الحديثة على اختلاف نظمها في الإثبات على قبول الدليل الرقمي في مجال الإثبات أمام المحاكم الجنائيَّة؛ وذلك لما يمثله من قيمة ثبوتية في مجال الجرائم الإلكترونية، وسوف نوضح الموقف في بعض الدول كالتالي:

في فرنسا : والتي تأخذ فرنسا بنظام حرية الإثبات، فقد أخذ المشرع الفرنسي بالأدلة الناشئة عن الآلة، مثل الرادارات، والأجهزة السينمائية، وأجهزة التصوير، وأشرطة التسجيل، وأجهزة التنصُّت، واعتمدها دليلاً من أدلة الإثبات الجنائي، واستقرَّ عليها القضاء الفرنسي مع إحاطتها بمجموعة من الضمانات كأن يتم الحصول عليها بطريقة مشروعة، ونزيهة، وأن يُخوَّل لأطراف الخصومة الجنائية حق مناقشتها حضورياً[٢]. فقد قضت محكمة النقض أن أشرطة التسجيل الممغنطة التي يكون لها قيمة دلائل الإثبات، يمكن أن تكون صالحة للتقديم أمام القضاء الجنائي"[٣]. وعندما أصدر المشرع الفرنسي القانون رقم٢٣٠/٢٠٠٠ الصادر في ١٣ مارس سنة ٢٠٠٠م، بشأن الإثبات في مجال تكنولوجيا المعلومات والتوقيع الإلكتروني[٤] (والذي تم بموجبه تعديل المواد من ١٣١٦ حتى ١٣٤٠ من القانون المدني الفرنسي) فقد توسَّع المشرع الفرنسي في مفهوم الكتابة لتشمل الكتابة التقليديَّة والإلكترونيَّة؛ حيث نص في المادة ١٣١٦ من القانون المدني Code civil على أن الأدلة الكتابيَّة هي الأدلة التي تتخذ شكلاً كتابياً سواء أكانت من حروف، أو أرقام، أو على شكل إشارات، أو

(١) نقض ١٩ مارس سنة ١٩٣١ ، مجموعة القواعد القانونية ص

(2) Francillon (Jacques), les crimes informatiques et d'autres crimes dans le domaine de la technologie informatique en france, R.I.D.P,1993, p. 308.

(3) Cass. Crim., 28 avril 1987, Bull. crim. 1987 n173, p. 462

(4) Loi n° 2000-230 du 13 mars 2000 portant adaptation du droit de la preuve aux technologies de l'information et relative à la signature électronique

رموز، مخصَّصة لمعنى واضح، أيًّا كانت الدعامة التي تُستخدم في إنشائها، أو الوسيط الذي تنتقل عبره"[١].

ويتبين من ذلك أن المشرع الفرنسي توسع في مفهوم الكتابة المعدة للإثبات لتشمل كل أنواعها؛ فهو بذلك يعترف للكتابة المعتمدة عبر دعامات إلكترونيَّة بنفس الحجيَّة التي للكتابة عبر دعامات مادية. وهو ما قررته المادة (١/١٣١٦) من ذات القانون والتي تنص علي أنه " يُعتد بالكتابة المتخذة شكلاً إلكترونياً كدليل شأنها في ذلك شأن الكتابة على دعامة ورقية، شريطة أن يكون في الإمكان بالضرورة تحديد هويَّة الشخص الذي صدرت منه، وأن تُعد وتُحفظ في ظروف من طبيعتها ضمان سلامتها" [٢]. فالعبرة تكون في قدرة تلك الطريقة على إنشاء الكتابة، ونقلها بما يحفظ كمالها، ويجعلها ذات دلالة تعبيرية واضحة. كما تضمنت المادة (٣/١٣١٦) من القانون ذاته، أن الكتابة على محتوى إلكتروني لها نفس القوة في الإثبات كالكتابة على محتوى ورقي[٣]. وبذلك يكون المشرع الفرنسي قد نص صراحةً على القيمة القانونية للمستند الإلكتروني في الإثبات بلا أي تفرقة مع مثيله الورقي. وتأتي أهمية هذا التعديل التشريعي والحكم الذي أورده وانعكاسه على قانون العقوبات من أن أي تزوير يقع على محرَّر إلكتروني إنما هو تزوير في مفهومه التقليدي.

في الولايات المتحدة الأمريكية: وهي تأخذ بنظام الإثبات المُقيَّد، فقد تضمَّنت قواعد الإثبات الفيدرالي نصاً صريحاً، يسمح بالاعتداد بالأدلة الإلكترونيَّة؛ وقد نصت القاعدة رقم (١٠٠٢) من القانون الفيدرالي على أن الأصل العام هو أن حجيَّة الكتابة، أو التسجيل، أو الصورة، بشرط تقديم الأصل إلا إذا نص على خلاف ذلك. وقد أوردت الفقرة (د) من القاعدة رقم (١٠٠١) استثناءً يتضمن قبول الدليل الرقمي باعتباره مستنداً أصلياً طالما أن البيانات

(1) Art 1316 " La preuve littérale, ou preuve par écrit, résulte d'une suite de lettres, de caractères, de chiffres ou de tous autres signes ou symboles dotés d'une signification intelligible, quels que soient leur support et leurs modalités de transmission. Modifié par Loi n°2000-230 du 13 mars 2000 - art. 1 JORF 14 mars 2000

(2) Art 1316-1 " L'écrit sous forme électronique est admis en preuve au même titre que l'écrit sur support papier, sous réserve que puisse être dûment identifiée la personne dont il émane et qu'il soit établi et conservé dans des conditions de nature à en garantir l'intégrité " . Créé par Loi n°2000-230 du 13 mars 2000 - art. 1 JORF 14 mars 2000

(3) Art 1316-3 " L'écrit sur support électronique a la même force probante que l'écrit sur support papier ". Créé par Loi n°2000-230 du 13 mars 2000 - art. 3 JORF 14 mars 2000

كانت مطبوعة أو مُخرجة بأي شكلٍ آخر مقروء بالعين المجردة، وتعبر عن البيانات المُخزّنة إلكترونياً بشكل دقيق"[١].

كما أجاز القانون الفيدرالي الأمريكي الصادر في ٣٠ يونيه سنة ٢٠٠٠م، بشأن التجارة الإلكترونية' والذي تم تنفيذه ابتداءً من أول أكتوبر سنة ٢٠٠٠م، استخدام الأصوات في إجراء التوقيع الإلكتروني، وتوسَّع في مفهوم المحرّر ليشمل المحررات الإلكترونيَّة؛ حيث منح الحجيَّة القانونية للأصوات المسجَّلة على شرائط أو دعائم إلكترونية . وفي ولاية كاليفورنيا نصت المادة (١٥٠٠/٥) من قانون الإثبات، والمُعدَّلة سنة ١٩٨٣م، على أن "المعلومات أو البرامج المسجّلة إلكترونياً، أو نُسخ أيهما، لا يجب وصفها أو معاملتها على أنها غير مقبولة بمقتضى قاعدة "أفضل الأدلة"[٢]، وفي ولاية أيوا Iowa جاءت المادة (٧١٦ أ/١٦) من القانون الجديد سنة ١٩٨٤، بقاعدة إثبات جديدة تقضي بأنه " في أحوال الاتهام بمقتضى هذا الفصل، تكون مخرجات الحاسب مقبولة كدليل على الكيان المنطقي، أو البرنامج، أو البيانات التي يحتويها حاسب، أو البيانات التي تؤخذ منه؛ بغض النظر عن تطبيق قاعدة إثبات تقضي بخلاف ذلك[٣].

في إنجلترا: فقد اعتمد المشرع الإنجليزي الدليل الإلكتروني كدليل من أدلة الإثبات الجنائي، بموجب قانون البوليس والإثبات الجنائي (PACE)[٤] الصادر سنة ١٩٨٤م، والذي تم العمل به في يناير ١٩٨٦م، وإن اقتضى الأمر توافر بعض الشروط؛ حيث نصَّت المادة ٦٩ على أنه " في أيّ إجراءات، لا يكون البيان المتضمَّن في مستند إلكتروني دليلاً على أيّ واقعة واردة فيه، إلا إذا تبيَّن:

١. عدم وجود أسباب معقولة للاعتقاد بأن البيان يفتقر إلى الدقة بسبب الاستخدام غير المناسب أو الخاطئ للحاسوب.

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(1) (d)"… For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information " .

(٢) مؤدى قاعدة الدليل الأفضل "أنه لا يجوز قبول أقوال شخص عن فحوى محرر طالما كان ممكناً الحصول على المحرر نفسه، كما لا يجوز قبول نسخه أو صورة لمحرر إذا كان من الممكن الحصول على الأصل".

(٣) د. هشام محمد فريد رستم، الجوانب الإجرائية للجرائم المعلوماتية، دراسة مقارنة، مكتبة الآلات الحديثة، أسيوط، ط١، سنة ١٩٩٤م، ص ١٨٣، ١٨٤.

(4) Police and Criminal Evidence Act 1984

٢. أن الحاسوب كان يعمل في جميع الأحوال بصورةٍ سليمة، وإذا لم يكن كذلك، فإنه لم يثبت أن هناك جزءاً منه لم يكن يعمل فيه بصورةٍ سليمة، أو كان عدم انتظامه ناتجاً عن عيبٍ لم يكن مؤثراً في استخراج المستند أو دقة محتوياته.
٣. الوفاء بأيّ شروط متعلقة بالمستند محددة طبقاً لقواعد المحاكمة(المتعلقة بالطريقة أو بالكيفية التي يجب أن تُقدم بها المعلومات الخاصة بالبيان المستخرج عن طريق الحاسوب)[١].

في دولة شيلي: والتي تأخذ بنظام الإثبات المختلط، فقد حدَّدت المادة (٤٥٧) من قانون الإجراءات الجنائيَّة، طرق الإثبات المقبولة أمام المحاكم الجنائيَّة على سبيل الحصر، وذكرت من بين تلك الطرق المستندات العامَّة والخاصَّة. وقد استقر الفقه الجنائي الشيلي على أن الأدلة الرقميَّة؛ كالتصوير الفوتوغرافي photography، والتصوير بالأقمار الصناعيَّة Photostat، والتصوير بالأشعة radiography، والهاتف اللاسلكي radiotelephony، وتسجيل الصوت sound recording، وجميع تسجيلات الصوت والصورة، كل ذلك يُعد من قبيل المستندات بالمعنى الواسع لهذا المصطلح؛ وبالتالي دخولها من بين طرق الإثبات المقبولة أمام المحاكم الجنائيَّة؛ وذلك لأن التقدم الفني قد تجاوز المفهوم التقليدي traditional concept للمستند؛ فلم يعد مجرد ورقة مكتوبة written paper، بل يسمح بالحصول على وسائل أخرى من التسجيلات التي تمثل فكرة thought أو حقيقة fact، والتي قد تكون أكثر دقة وثقة من المستند الورقي[٢].

في مصر: يمكن قبول الدليل الرقمي كدليل إثبات؛ استناداً إلى مبدأ الإثبات الحر الذي أخذ به المشرع المصري؛ حيث تنص المادة ٣٠٢ من قانون الإجراءات الجنائيَّة على أنه "يحكم القاضي في الدعوى حسب العقيدة التي تكوَّنت لديه بكامل حريته..."[٣]. كما تنص المادة ٢٩١ إجراءات على أن "للمحكمة أن تأمر ولو من تلقاء نفسها أثناء نظر الدعوى بتقديم أي

(1) Sieber (Ulrich), ibid, p.111.

(2) Kunsemuller (Carlos), computer crimes and other crimes against information technology in chile, R.I.D.P.1993, p.257-258.

(٣) يقابل هذا النص المادة ٤٢٧ من قانون الإجراءات الفرنسي Code de procédure pénale، والتي تنص على أنه "باستثناء الحالات التي ينص فيها القانون على خلاف ذلك، تثبت الجرائم بكافة طرق الإثبات، ويحكم القاضي وفقاً لاقتناعه الخاص".

Art 427 : Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d'après son intime conviction".

دليل تراه لازماً لظهور الحقيقة"[١]. وعبَّرت محكمة النقض عن هذا المبدأ بقولها:" الأصل في المحاكمات الجنائيَّة هو اقتناع القاضي بناءً على الأدلة المطروحة عليه؛ فله أن يُكوِّن عقيدته من أي دليل أو قرينة يرتاح إليها إلا إذا قيَّده القانون بدليل معيَّن ينص عليه"[٢].

وبصدور قانون تنظيم التوقيع الإلكتروني رقم ١٥ لسنة ٢٠٠٤م، **فقد توسَّع المشرع المصري في مفهوم المحرَّر؛ حيث شمل فضلاً عن المحررات التقليديَّة المكتوبة . تلك المحرَّرات الإلكترونيَّة. فقد عرَّف المحرر الإلكتروني في المادة (١/ب) بأنه** "رسالة تتضمن معلومات تنشأ، أو تدمج، أو تُخزَّن، أو ترسل، أو تستقبل – كلياً أو جزئياً – بوسيلة الكترونية، أو رقمية، أو ضوئية، أو بأيّ وسيلة أخرى مشابهة". كما عرّف الكتابة الإلكترونية في المادة (١/أ) بأنها "كل حروف، أو أرقام، أو رموز، أو أي علامات أخرى، تثبت على دعامة الكترونيّة، أو رقميّة، أو ضوئيّة، أو أيّ وسيلة أخرى مشابهة، وتعطي دلالة قابلة للإدراك ". وعرَّف التوقيع الإلكتروني في المادة (١/جـ) بأنه "ما يُوضع على محرر إلكتروني ويتخذ شكل حروف، أو أرقام، أو رموز، أو إشارات، أو غيرها، ويكون له طابع متفرد يسمح بتحديد شخص المُوقِّع ويميِّزه عن غيره".

وقد اعترف المشرع بحجيَّة التوقيع الإلكتروني في الإثبات إذا ما توافرت فيه الشروط المنصوص عليها في هذا القانون والضوابط الفنيّة والتقنية التي تحددها اللائحة التنفيذية لهذا القانون؛ حيث نصَّت المادة ١٤ من ذات القانون على أنه " للتوقيع الإلكتروني في نطاق المعاملات المدنية والتجارية والإدارية ذات الحجيَّة المقررة للتوقيعات في أحكام قانون الإثبات في المواد المدنية والتجارية، إذا روعي في إنشائه وإتمامه الشروط المنصوص عليها في هذا القانون، والضوابط الفنيّة والتقنيّة التي تحددها اللائحة التنفيذية لهذا القانون".

كما قرر المشرع أن للمحرر الإلكتروني ذات حجية المحرر التقليدي في الإثبات؛ حيث نص في المادة ١٥ من قانون التوقيع الإلكتروني على أن " للكتابة الإلكترونية وللمحرَّرات الإلكترونية – في نطاق المعاملات المدنيّة والتجاريّة والإداريّة – ذات الحجيّة المقرّرة للكتابة والمحرَّرات الرسمية والعرفية في أحكام قانون الإثبات في المواد المدنية

(١) يقابل هذا النص المادة ٨١ من قانون الإجراءات الفرنسي والتي تنص على أنه "لقاضي التحقيق أن يأمر بجمع المعلومات التي يراها مفيدة في كشف الحقيقة".

Art 81 :" Le juge d'instruction procède, conformément à la loi, à tous les actes d'information qu'il juge utiles à la manifestation de la vérité ".

(٢) نقض ١٩٩٦/٤/١٧ ، مجموعة أحكام النقض ، س٤٧ رقم ٧٤ ص ٥٢٦ ، نقض ١٩٩٨/١/١٨ مجموعة الأحكام س ٤٩ رقم ١٥ ص ١٠٠ ، نقض ١٩٩٨/١١/١٠ مجموعة الأحكام س ٤٩ رقم ١٧٣ ص ١٢٤٨.

والتجارية، متى استوفت الشروط المنصوص عليها في هذا القانون وفقا للضوابط الفنيّة والتقنيّة التي تحددها اللائحة التنفيذية لهذا القانون. بل أكثر من ذلك؛ فقد اعترف المشرع بحجيَّة صورة المحرّر الإلكتروني، وذلك بالمادة ١٦ من ذات القانون؛ والتي تنص على أن "الصورة المنسوخة على الورق من المحرَّر الإلكتروني الرسمي حجة على الكافة بالقدر الذي تكون فيها مطابقة لأصل هذا المحرَّر، وذلك مادام المحرر الإلكتروني الرسمي والتوقيع الإلكتروني موجودين على الدعامة الإلكترونية". وبالنسبة للشروط الواجب توافرها لحجيَّة التوقيع والكتابة والمحررات الإلكترونيّة، نص المشرع في المادة ١٨ من ذات القانون على أنه " يتمتع التوقيع الإلكتروني والكتابة الإلكترونيَّة والمحررات الإلكترونيَّة بالحجية في الإثبات إذا ما توافرت فيها الشروط التالية: (أ) ارتباط التوقيع الإلكتروني بالمُوقِّع وحده دون غيره. (ب) سيطرة المُوقِّع وحده دون غيره على الوسيط الإلكتروني. (جـ) إمكانيَّة كشف أو تعديل أو تبديل في بيانات المحرر الإلكتروني أو التوقيع الإلكتروني، وتحدد اللائحة التنفيذيّة لهذا القانون الضوابط الفنيّة والتقنيّة اللازمة لذلك".

ولم يضع المشرع حصراً للوسائل الإلكترونيَّة التي يتم بها تسجيل أو إرسال أو استقبال البيانات، كما هو وارد بالمادة (١/ب) – السابق الإشارة إليها . من قانون التوقيع الإلكتروني؛ وبالتالي تكتسب تلك المخرجات ذات الحجيَّة المقرَّرة للمحرَّر الإلكتروني على النحو السابق. وهذا ما ذهبت إليه محكمة النقض؛ حيث قضت بأنه " إذا كان قد قُدِّم إلى المحكمة دليل وهو شريط التسجيل؛ فقد كان عليها أن تتولى تحقيقه، والاستماع إليه، وإبداء رأيها فيه، أما وقد نكلت عن ذلك؛ فإنها تكون قد أغفلت عنصراً جوهرياً من عناصر دفاع الطاعنة، ودليلاً من أدلة الإثبات"[(١)]. وسنتناول مدى قبول الأدلة المستخرجة من الحاسب الآلي في فرعين:

الفرع الأول: المخرجات الكمبيوترية

الفرع الثاني: شروط قبول الأدلة الإلكترونية كأدلة إثبات

(١) نقض ١٩٦٨/٥/٦ مجموعة أحكام محكمة النقض س ١٩ رقم ٢١٧٦ ص ٥١٤.

الفرع الأول

المخرجات الكمبيوترية

المخرجات الكمبيوترية إما أن تكون مخرجات ورقية يتم إنتاجها عن طريق الطابعات أو الراسم، وإما أن تكون مخرجات لا ورقية أو إلكترونية كالأشرطة والأقراص الممغنطة واسطوانات الفيديو والأقراص الضوئية وغيرها من الأشكال الإلكترونية غير التقليدية، وهناك مخرج ثالث يتمثل في عرض مخرجات المعالجة بواسطة الكمبيوتر علي الشاشة الخاصة به وسوف نتناول المخرجات الكمبيوترية والتي تنقسم إلي ثلاثة أنواع كالتالي[١]:

أولاً: المخرجات الورقية:

تعد مخرجات الكمبيوتر الذي تسجل فيه المعلومات علي الورق أحد الأشكال الرئيسية التي تأخذها هذه المخرجات، ويستخدم في ذلك الطابعات، والطابعة عبارة عن جهاز يقوم بإنتاج نسخ مطبوعة من البيانات، مثل التقارير والشيكات، وقوائم البيانات والبرامج التي يحتاج اليها المستخدمون، وتلك البيانات أو البرامج قد تكون مخزنة بالكمبيوتر أو تكون متاحة علي شبكة الإنترنت. ويستخدم الراسم أيضاً في طباعة الرسومات بدرجات وضوح مختلفة علي الورق .

ثانياً: المخرجات الإلكترونية:

أ. الأشرطة المغناطيسية: Magnetic tape:

والشريط المغناطيسي عبارة عن شريط بلاستيك مغطي بمادة معدنية قابلة للمغنطة ويبلغ عرضه من ربع الي نصف بوصه، والفكرة التي يبني عليها تسجيل البيانات علي الشريط المغناطيسي مماثلة لتلك التي يبني عليها تسجيل الأحاديث علي شريط التسجيل الصوتي، ويستخدم هذا الشريط المغناطيسي في تخزين البرامج والملفات المتتالية أي التي يلزم لقراءة البيانات فيها قراءة الشريط من بدايته، وتنظم المعلومات علي الشريط علي شكل وحدات خاصة تسمي كل واحدة منها حزمة، وحجم الحزمة يحدده مستخدم الجهاز لذا تعامل الحزمة كوحدة متكاملة وذلك عند تخزينها أو إخراجها من الشريط.

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(١) د. هلالي عبداللاه أحمد ، حجية المخرجات الكمبيوترية في المواد الجنائية ، دراسة مقارنة ، بدون دار نشر ، سنة ١٩٩٨ ، ص ١٦ وما بعدها

ب. الأقراص المغناطيسية : Magnetic Disks:

تعتبر الأقراص المغناطيسية من أفضل أنواع الوسائط التي يمكن استخدامها للتخزين المباشر أو العشوائي التي تتميز بقدرتها الإستيعابية العالية وسرعة تداول المعلومات المخزنة عليها، ومن أهم خواص الأقراص المغناطيسية إمكانية القراءة أو التسجيل عليها وكذلك إمكانية تغيير أو تعديل أي ملف مسجل عليها دون حاجة الي ملف جديد إذ يتم تعديل السجل وهو في موضعه. وهناك أنواع عديدة من الأقراص أهمها:

١. القرص المرن: Floppy Disk:

وهو من أشهر وسائط تخزين البيانات، وينتشر استخدامه في الحاسبات الصغيرة والمتوسطة لسهولة استخدامه وتداوله، وتوجد فتحة كبيرة في القرص تسمي فتحة القراءة والكتابة، وهي التي تصل من خلالها رأس القراءة والكتابة بوحدة إدارة الأقراص لتلامس سطح القرص المغناطيسي، حيث تتم عملية الكتابة أو القراءة بمعني اختزان المعلومات واسترجاعها، ويمكن مسح البيانات من القرص وإعادة تخزينها عدة مرات دون أن يفقد هذا القرص كفاءته، كما توجد فتحة جانبية تسمي فتحة الحماية من الكتابة، وفي حالة تغطية هذه الفتحة بورق لاصق لا يمكن كتابة أو تسجيل أي معلومات علي القرص .

٢. القرص الصلب: Hard Disk:

وهو عبارة عن قرص معدني رقيق ومغطي بمادة قابلة للمغنطة، وطبقة التغطية المغناطيسية علي هذا القرص تتم علي سطح صلب يتم صنعه من سبائك الألومنيوم لذلك سُمي بالقرص الصلب، ومن خواص هذا النوع السعة التخزينية، وسرعة تسجيل واسترجاع البيانات التي تفوق سرعة الأقراص المرنة، كما يتميز القرص الصلب أيضاً بعدم إمكانية تحريكه من مكانه، ولذلك يطلق عليه القرص الثابت .

٣. قرص الخرطوش أو قرص الكارتريدج Cartridge – Disk

هو قرص يجمع بين خصائص القرص الصلب من حيث كبر حجم السعة التخزينية وبين القرص المرن في إمكانية تغييره من مكانه بقرص آخر.

٤. قرص الليزر :

ويعد إنتاج أقراص الليزر الضوئية من أهم نظم تكنولوجيا المعلومات في مجال حفظ واسترجاع المعلومات لما تتمتع به هذه النوعية من كثافة عالية في تسجيل المعلومات وقراءتها بأشعة الليزر(١).

٥. المصغرات الفيليمية (Computer out microfilm (com :

تعتبر مخرجات الكمبيوتر علي الميكروفيلم COM شكلاً مختلفاً من تكنولوجيا المخرجات الذي تسجل فيه المعلومات علي المصغرات الفيليمية المختلفة بدلاً من تسجيلها علي الورق، وهي عبارة عن أفلام فوتوغرافية يتم استخدامها في تصوير صفحات البيانات مع تصغيرها لدرجة متناهية في الصغر عن طريق جهاز تحويل للبيانات المسجلة علي الأشرطة والأقراص الممغنطة تتراوح سرعته من عشرة آلاف الي أربعين ألف سطر في الدقيقة الواحدة، وتتنوع سعة مخرجات الكمبيوتر علي الميكروفيلم طبقاً لأنواع المصغرات الفيليمية ومعدلات تصغيرها .

ثالثاً: مخرجات معروضة بواسطة الشاشة أو وحدة العرض المرئي:

وتسمي بوحدة العرض المرئي Video display unit وتعد من أهم أجزاء الحاسب استخداماً، فيتم عن طريقها استعراض أي بيانات أو معلومات تكتب علي لوحة المفاتيح بواسطة المستخدم، كما يتم استعراض البيانات التي يتم إدخالها أو المعلومات الناتجة عن معالجة البيانات في وحدة المعالجة المركزية، وكذلك التعليمات الموجهة للمستخدم بواسطة البرامج التطبيقية، وكذلك كافة المعلومات والبيانات والبرامج والأفلام المتاحة عبر شبكة الإنترنت .

الفرع الثاني

شروط قبول الأدلة الإلكترونية كأدلة إثبات

الأدلة الإلكترونية قد تكون مخرجات ورقية تستخرج من الطابعات المتصلة بالحاسب الآلي، أو تكون مخرجات غير ورقية كالأشرطة والأقراص الممغنطة وأسطوانات الفيديو وغيرها من الأشكال الإلكترونية غير التقليدية، والتي تقوم بعرض البيانات المعالجة الكترونياً علي شاشة الحاسب الآلي(٢)، ويبطل الدليل إذا تم الحصول عليه بالمخالفة لأحكام القانون،

(١) د. محمد السعيد خشبة ، مقدمة في الحاسبات الإلكترونية ، القاهرة ، سنة ١٩٨٤ ، ص ٩٩

(٢) د. هلالي عبد اللاه أحمد، حجية المخرجات الكمبيوترية في الإثبات الجنائي ، ط١ ، دار النهضة العربية ، القاهرة ، سنة ١٩٩٧م ، ص ١٤، ٢٢

ومن ثم بطلان الآثار المترتبة عليه، ولا يصح الاستناد علي الدليل الباطل لإدانة المتهم حتي ولو كان هو الدليل الوحيد .

إن قبول القاضي الجنائي للأدلة المستخرجة من الوسائل الإلكترونية كأساس تقوم عليه الحقيقة في الدعوى الجنائيَّة، سواء أكان الحكم الصادر فيها بالإدانة أم بالبراءة ؛ فهناك ضوابط معينة تحكم الأدلة الناتجة عن الحاسب الآلي يلتزم بها القضاة لحماية حقوق الأطراف، حيث تدور هذه الضوابط حول أصل البراءة وما يتفرع منها من نتائج وآثار، وما يستتبع ذلك من توافر شروط معينة في المخرجات الكمبيوترية حتي يمكن الحكم بالإدانة، ذلك أنه لا محل لدحض قرينة البراءة وافتراض عكسها إلا عندما يصل اقتناع القاضي الي حد الجزم واليقين، وعليه يلزم أن تتوافر في تلك الأدلة الشروط الآتية:

الشرط الأول: يقينية الدليل:

يُشترط في الأدلة المستخرجة من الحاسوب والإنترنت أن تكون يقينية، أي غير قابلة للشك حتى يمكن الحكم بالإدانة، فلا مجال لدحض قرينة البراءة وافتراض عكسها إلا عندما يصل اقتناع القاضي إلى حد الجزم واليقين، ويمكن التوصل إلى ذلك من خلال ما يعرض من الأدلة الإلكترونية، والمصغرات الفيلمية، وغيرها من الأشكال الإلكترونية التي تتوافر عن طريق الوصول المباشر، أم كانت مجرد عرض لهذه المخرجات المعالجة بواسطة الحاسوب على الشاشة الخاصة به أو على الطرفيات، وهكذا يستطيع القاضي من خلال ما يعرض عليه من مخرجات إلكترونية، وما ينطبع في ذهنه من تصورات واحتمالات بالنسبة لها، أن يحدد قوتها الاستدلالية على صدق نسبة الجريمة المعلوماتية إلى شخص معين من عدمه. وحتى يصيب القاضي الحقيقة المؤكَّدة في حكمه سواء بالإدانة أو البراءة لابد أن يبني حكمه على الجزم واليقين لا على الشك والاحتمال. ويُقصد باليقين " تلك الحالة النفسيَّة والذهنيَّة التي تتكوَّن لدى القاضي نتيجة لمسببات موضوعيَّة، هي الأدلة التي تؤثر في ضميره، وتجعله يعتقد ويتأكد من صحة حدوث واقعة لم تحدث تحت عينيه، حدوثاً يتطابق ولو على نحوٍ ما مع شكل اكتمالها في الواقع إبان وقوعها"[١]. وقد قضت محكمة النقض في العديد من أحكامها علي أن جوهر الأحكام الجنائيَّة يتمثَّل في ضرورة الوصول إلى مرحلة الجزم واليقين بثبوت التهمة؛ ومن ثَمَّ لزوم الحكم بالإدانة. فلا تثريب إذن على المحكمة إذا ما

(١) د. أحمد ضياء الدين خليل، قواعد الإجراءات الجنائية ومبادئها في القانون المصري، المرجع سابق، ص ٢٩٥

أقامت قضاءها على ما اقتنعت به من أدلة، ما دام قضاؤها في هذا الشأن كان مبنياً عن عقيدة استقرت في وجدانها عن جزم ويقين(١).

ويتم الوصول إلى ذلك عن طريق ما تستنتجه وسائل الإدراك المختلفة للقاضي من خلال ما يُعرض عليه من أدلة مُستخرَجة من الحاسب الآلي، أو الشبكات المتصل بها، سواء أكانت مخرجات ورقيَّة يتم إنتاجها عن طريق الطابعة Printer أو الراسم Plotter، أم كانت مخرجات غير ورقيَّة أو إلكترونيَّة كالمحادثات Conversations، والرسائل الإلكترونية Electronic messages، والتسجيلات Recordings، أو أيّ بيانات أخرى مثبتة على دعائم إلكترونيَّة بالحاسب الآلي، والتي يمكن أن تتوافر عن طريق الوصول المباشر ؛ حيث يقوم المستخدم بإدخال البيانات والحصول على المخرجات في نفس الوقت، أو عن طريق عرض المخرجات المعالجة إلكترونياً على شاشة الحاسب الآلي .

ويستطيع القاضي التوصل إلى يقينية الأدلة عن طريق نوعين من المعرفة:

أولهما: المعرفة الحسيَّة التي تدركها الحواس من خلال معاينة هذه الأدلة وتفحصها، وثانيهما: المعرفة العقليَّة التي يقوم بها القاضي عن طريق التحليل والاستنتاج، من خلال الربط بين هذه الأدلة والملابسات التي أحاطت بها؛ فإذا لم ينته القاضي إلى الجزم بنسبة الفعل أو الجريمة إلى المتهم، كان من المتعيَّن عليه أن يقضي بالبراءة؛ فالشك يجب أن يستفيد منه المتهم (٢).

ويشترط قانون البوليس والإثبات في بريطانيا لسنة ١٩٨٤م، حتى تتحقق يقينية الأدلة الإلكترونية أن تكون البيانات دقيقة وناتجة عن الحاسوب بصورة سليمة (٣)، أما في كندا، فإن الرأي السائد في الفقه هو اعتبار مخرجات الحاسوب من أفضل الأدلة، لذا فإنها تحقق اليقين المنشود في الأحكام الجنائية.

ونصت بعض القوانين الأمريكية، على أن النسخ المستخرجة من البيانات التي يحتويها الحاسوب تُعد من أفضل الأدلة المتاحة لإثبات هذه البيانات، وبالتالي يتحقق مبدأ اليقين لهذه الأدلة، وتنص القواعد الفيدرالية على أن " الشرط الأساسي للتوثيق أو التحقق من صحة أو صدق الدليل، كشرط مسبق لقبوله، هو أن يفي ببينة كافية لأن تدعم اكتشاف (أو

(١) نقض ١٩٧٨/٢/٢٠ ، مجموعة أحكام النقض، س ٢٩ رقم ٢٩ ص ١٦٧٧.

(٢) د. هلالي عبد اللاه أحمد، المرجع السابق، ص ٩١.

(3)Naughan Bevan and Ken Lidstone – Aguide to the Police and Criminal Evidence Act 1984- Bulterworthe – London – 1985- P.497.

الوصول) إلى الأمور التي تتصل بالموضوع بما يؤيد الادعاءات أو المطالبة المدعي بها"[١].

ويقرر الفقه الياباني قبول الأدلة المستخرجة من الحاسوب التي تم تحويلها إلى الصورة المرئية سواء كانت هي الأصل أم كانت نسخًا مستخرجة عن هذا الأصل، وذلك استنادًا على الاستثناءات التشريعية المنصوص عليها في المادة (٣٢٣) من قانون الإجراءات الجنائية الياباني ففي هذه الحالة يتحقق اليقين الذي يبنى عليه الحكم الجنائي، كما يمكن أن يتحقق اليقين لهذه المخرجات أيضًا من خلال التقارير التي يقدمها الخبراء. وفي تشيلي ينص أحد القوانين الخاصة بالحاسوب على قبول السجلات الممغنطة للحاسوب وكذلك النسخ الناتجة عنها، ومعنى ذلك أن هذه السجلات وصورها تحقق اليقين المنشود لإصدار الأحكام الجنائية، كما يتحقق هذا اليقين أيضًا عن طريق تقارير الخبراء الصادرة في عناصر معالجة البيانات (المادة ٢٢١ من قانون أصول المحاكمات الجزائية التشيلي)[٢].

الشرط الثاني: مناقشة الدليل في الجلسة:

ويعني مبدأ وجوب مناقشة الدليل الجنائي بصفة عامة أن القاضي لا يمكن أن يؤسس اقتناعه إلا على العناصر الإثباتية التي طرحت في جلسات المحاكمة وخضعت لحرية مناقشة أطراف الدعوى[٣]، وهذا يعني أن الأدلة المتحصلة من جرائم الحاسوب والإنترنت سواء كانت مطبوعة أم بيانات معروضة على شاشة الحاسوب، أم كانت بيانات مدرجة في حاملات البيانات، أم اتخذت شكل أشرطة وأقراص ممغنطة أو ضوئية أو مصغرات فيلميه، كل هذه ستكون محلاً للمناقشة عند الأخذ بها كأدلة إثبات أمام المحكمة، وعلى ذلك فإن كل دليل يتم الحصول عليه من خلال بيئة تكنولوجيا المعلومات، يجب أن يعرض في الجلسة ليس من خلال ملف الدعوى في التحقيق الابتدائي، لكن بصفة مباشرة أمام القاضي، وهذه الأحكام تنطبق على كافة الأدلة المتولدة عن الحاسبات الحواسيب، وأيضًا بالنسبة لشهود الجرائم المعلوماتية الذين يكون قد سبق أن سمعت أقوالهم في التحقيق الابتدائي، فإنه يجب أن يعيدوا أقوالهم مرة أخرى من جديد أمام المحكمة، كذلك فإن خبراء الأنظمة المعلوماتية

(١) د. سعيد عبد اللطيف حسن، مصدر سابق ، ص ١٥٩.

(٢) د. هلالي عبداللاه أحمد ، حجية المخرجات الكمبيوترية في المواد الجنائية ، المرجع السابق ، ص ٩٦.

(٣) قرار محكمة النقض المصرية في ١٩٨٦/١١/٢٠م – رقم ١٧٩ – المبادئ القانونية – ص ٩٤٣.

على اختلاف تخصصاتهم[١]، ينبغي أن يمثلوا أمام المحاكم لمناقشتهم، أو مناقشة تقاريرهم التي خلصوا إليها لإظهار الحقيقة وكشفًا للحق.

فمن المستقر عليه عدم قبول الشهادة السمعية أمام المحاكم الجنائية، إلا في حالات استثنائية مشددة، ويرجع عدم قبولها الي استحالة استجواب ومناقشة الشاهد الأصلي بواسطة المحكمة والدفاع، ولاستثناءات الشهادة السماعية علاقة بمناقشة حجية الأدلة الجنائية الرقمية. ومثالاً لذلك ما نصت عليه القواعد الإتحادية للشهادة في الولايات المتحدة الأمريكية من السجلات والبيانات المنظمة بدقة تعد أدلة مقبولة أمام المحاكم الجنائية استثناء للشهادة السماعية. وعليه تعد التقارير والمعلومات والبيانات المحفوظة في أي شكل، وكذا الوقائع والأحداث والآراء ونتائج التحاليل المنقولة بواسطة أشخاص ذوي معرفة وخبرة في نطاق الأنشطة والممارسات المنظمة أدلة مقبولة أمام المحاكم الجنائية لكونها بيانات أكثر دقة ومحفوظة بأسلوب علمي يختلف عن غيرها من الأدلة السماعية، وينطبق ذلك علي الأدلة الجنائية الرقمية لكونها معدة بعمليات حسابية دقيقة لا يتطرق اليها الشك ويتم حفظها آلياً بأسلوب علمي [٢] .

وتُعتبر قاعدة وجوب طرح الدليل في الجلسة نتيجة منطقية لمبدأ شفهية الإجراءات الذي يستوجب ضرورة اتصال القاضي بكافة وقائع الدعوى، ومناقشة مختلف أدلتها، ووسائل الإثبات الأخرى المعروضة عليه، الأمر الذي يستلزم لتحقيق تلك الشفهية وجوب طرح كافة الأدلة المعروضة على القاضي في جلسات المحاكمة ليستمد منها في النهاية يقينه واقتناعه[٣]. وقد عبَّرت محكمة النقض عن هذا المبدأ بقولها: "إن أساس المحاكمة الجنائيّة هو حرية القاضي في تكوين عقيدته من التحقيق الشفوي الذي يجريه بنفسه، والذي يديره ويوجهه الوجهة التي يراها موصِّلة للحقيقة، وأن التحقيقات الأولية السابقة على المحاكمة لا تُعتبر إلا تمهيداً لذلك التحقيق الشفهي، وأنها بهذا الاعتبار لا تخرج عن كونها من عناصر الدعوى المعروضة على القاضي، يأخذ بها إذا اطمأن إليها، ويطرحها إذا لم يصدقها، ويترتب على إغفال مبدأ مناقشة الأدلة بطلان إجراءات المحاكمة، لما في الإغفال من إهدار

(١) د. محمد فهمي طلبه وآخرون، دائرة المعارف الحاسب الإلكتروني ، مجموعة كتب دلتا ، مطابع المكتب المصري الحديث – القاهرة – ١٩٩١م– ص ٣١ وما بعدها.

(٢) د. محمد أمين البشري ، الأدلة الجنائية الرقمية ، مفهومها ودورها في الإثبات ، المجلة العربية للدراسات الأمنية والتدريب ، المجلد ١٧ ، العدد ٣٨ ، ص ١٢٨ ، ١٢٩

(٣) د. أحمد ضياء الدين خليل، المرجع السابق، ص ٢٠٢.

لحق الدفاع لحرمانه من الإلمام بالأدلة المقدَّمة ضده[١]. كما قضت بأنه "يجب ألا تبني المحكمة حكمها إلا على العناصر والأدلة المستمدة من أوراق الدعوى المطروحة أمامها؛ فإن اعتمدت على دليل استقته من أوراق قضية أخرى لم تكن مضمومة للدعوى التي تنظرها للفصل فيها، ولا مطروحة على بساط البحث وتحت نظر الخصوم؛ فإن حكمها يكون باطلاً[٢].

وحتى تكون للقاضي الهيمنة على الدعوى الجنائيَّة في الجرائم المتعلقة بالحاسب الآلي؛ فلابد أن يكون مُدَّرباً تدريباً فنياً كافياً على كيفية التعامل مع الأدلة الإلكترونيَّة الناشئة عن تلك الحواسيب الآلية؛ لأن هذه الأدلة تكون محلاً للمناقشة الحضوريَّة بين الأطراف عند الأخذ بها كأدلة إثبات في الدعوى الجنائيَّة. وهذا التأهيل يضمن نجاح مهمة القاضي الذي تُناط به مناقشة هذه الأدلة.

الشرط الثالث: مشروعية الدليل:

ويعني مبدأ مشروعية الدليل الجنائي ضرورة اتفاق الإجراء مع القواعد القانونيَّة والأنظمة الثابتة في وجدان المجتمع المتحضر. فقاعدة مشروعية الدليل الجنائي لا تقتصر فقط على مجرد المطابقة مع القاعدة القانونيَّة التي ينص عليها المشرع؛ بل يجب أيضاً مراعاة إعلانات حقوق الإنسان، والمواثيق والاتفاقيات الدولية، وقواعد النظام العام وحسن الآداب السائدة في المجتمع، بالإضافة إلى المبادئ التي استقرت عليها محكمة النقض[٣]. لذلك يتعيَّن على القاضي الجنائي ألا يثبت توافر سلطة الدولة في عقاب المتهم إلا من خلال إجراءات مشروعة تُحترم فيها الحريات، وتؤمَّن فيها الضمانات التي رسمها القانون[٤]. فالمشكلة ليست في قيمة الأدلة في الإثبات بقدر ما هي تتعلق باحترام الحريَّة الشخصيَّة وعدم الافتئات عليها في سبيل الحصول على أدلة إثبات، ويتطلب التوفيق بين الأمرين عدم تغليب جانب على آخر. ولذلك أجاز القانون المساس بالحرية الشخصيَّة في حدود مُعيَّنة من أجل الوصول إلى كشف الحقيقة، ولكنه أحاط هذا المساس بضمانات معينة يجب احترامها حتى لا يتغلب جانب سلطة العقاب على جانب احترام الحريَّة [٥]. وكما تقول محكمة

(١) نقض ١٩٨٠/٣/٦ مجموعة أحكام النقض ، س ٣١ ، رقم ٦٢ ، ص ٣٢٨.

(٢) نقض ١٩٩١/١٠/٣١، مجموعة أحكام النقض س ٤٢، رقم ١٥١ ، ص ١٠٨٤.

(٣) د. هلالي عبد اللاه أحمد، المرجع السابق، ص ١١٨.

(٤) د. جميل عبد الباقي الصغير، أدلة الإثبات الجنائي والتكنولوجيا الحديثة، مرجع سابق، ص ١٦.

(٥) د. أحمد فتحي سرور، الوسيط في قانون الإجراءات الجنائية، مكتبة رجال القضاء، سنة ١٩٨٠، ص ٣٤٤ وما بعدها.

النقض: "لا يضير العدالة إفلات مجرم من العقاب بقدر ما يضيرها الافتئات على حريات الناس والقبض عليهم بدون وجه حق"[١]. ومن أمثلة الطرق غير المشروعة التي يمكن أن تُستخدم في الحصول على الأدلة الجنائيَّة، ومن بينها الأدلة الإلكترونيَّة: استخدام التعذيب أو الإكراه المادي أو المعنوي في مواجهة المتهم المعلوماتي من أجل فك شفرة لنظام من النظم المعلوماتيَّة، أو الوصول إلى دائرة حل التشفير، أو الوصول إلى ملفات البيانات المخزونة، أو أعمال التحريض على ارتكاب الجريمة من قبل رجال الضبطيَّة القضائيَّة كالتحريض على الغش أو التزوير المعلوماتي، والتجسُّس المعلوماتي، والتنصُّت، والمراقبة الإليكترونيَّة عن بعد دون مُسوِّغ قانوني مشروع، أو استخدام التدليس أو الغش أو الخديعة في الحصول على الأدلة الإلكترونية[٢]. ويترتب على بطلان الإجراء امتداد البطلان إلى الإجراءات اللاحقة عليه إذا كانت هذه الإجراءات ترتبت عليه مباشرة. وقد صرَّح المشرع المصري بذلك؛ فقرر أن بطلان الإجراء يتناول جميع الآثار التي تترتب عليه مباشرة (م ٣٣٦ إ . ج)[٣]. ففي إيطاليا نصت المادة ١٩١ من قانون سنة ١٩٨٩ على "عدم صلاحية الدليل الباطل للاستعمال ."وهذا يفيد رفض الدليل غير المشروع سواء أكان هذا الدليل ينتمي إلى الأدلة التقليدية أم انه ينتمي إلى الأدلة المتحصلة من الحاسب الآلي [٤].

ولقد تضمن قانون الشرطة والإثبات الجنائي الإنكليزي لعام ١٩٨٤م، تحديد الشروط الواجب توافرها في مخرجات الحاسوب لكي تقبل أمام القضاء، وتضمن كذلك توجيهات في كيفية تقدير قيم أو وزن البيان المستخرج عن طريق الحاسوب، فأوصت المادة (١١) منه[٥]، بمراعاة كل الظروف عند تقييم البيانات الصادرة عن الحاسوب المقبولة في الإثبات طبقًا للمادة (٦٩) من القانون نفسه، وبوجه خاص مراعاة (المعاصرة) أي ما إذا كانت المعلومات المتعلقة بأمر قد تم تزويد الحاسوب بها في وقت معاصر لهذا الأمر أم لا، وكذلك مسألة ما

(١) نقض ١٩٨٦/٣/١٩ مجموعة أحكام النقض ، س ٣٧ رقم ٨٧ ص ٤٢٨.

(٢) د. هلالي عبد اللاه أحمد، المرجع السابق، ص ١٢٤ وما بعدها. د. جميل عبد الباقي الصغير ، أدلة الإثبات الجنائي والتكنولوجيا الحديثة ،(أجهزة الرادار ، الحاسبات الآلية ، البصمة الوراثية) ، دراسة مقارنة ، دار النهضة العربية ، القاهرة ، سنة ٢٠٠١ ، ص ١١٢.

(٣) تنص المادة ٣٣٦ من قانون الإجراءات الجنائية على أنه "إذا تقرر بطلان أي إجراء فإنه يتناول جميع الآثار التي تترتب عليه مباشرة، ولزم إعادته متى أمكن ذلك".

(٤) د. هلالي عبد اللاه أحمد، المرجع السابق، ص ١٢٧ . د. علي محمود علي حمودة ، بحث مقدم للمؤتمر العلمي الأول حول الجوانب القانونية والأمنية للعمليات الإلكترونية ، الإمارات العربية المتحدة أكاديمية شرطة دبي ، مركز البحوث والدراسات ، العدد رقم(١) ، خلال الفترة من ٢٦ – ٢٨ نيسان سنة ٢٠٠٣

www.f-law.net/law/showthread.php? 52860-%d8%a7%d9

5-Police and Criminal Evidence Act 1984- Op – Cit-P.28.

إذا كان أي شخص من المتصلين على أي نحو بإخراج البيانات من الحاسوب لديه دافع لإخفاء الوقائع أو تشويهها، وقد نصت المادة (٦٩) على ثلاثة شروط أساسية هي[١]:

١. يجب ألا يوجد أساس معقول للاعتقاد أن البيان الخاطئ أو غير دقيق، بسبب الاستعمال الخاطئ (الاستعمال غير الملائم للظروف أو للغرض الذي يستخدم من أجله الحاسوب).
٢. يجب أن تكون جميع المكونات المادية للحاسوب كانت تعمل بدقة وعلى نحو متوافق.
٣. الوفاء بأيّ شروط متعلقة بالمستند محددة طبقاً لقواعد المحاكمة (المتعلقة بالطريقة أو بالكيفية التي يجب أن تُقدم بها المعلومات الخاصة بالبيان المستخرج عن طريق الحاسوب)[٢].

المطلب الثالث

حجية المخرجات الكمبيوترية

الحُجَّة[٣] (Argument) " هي الاستدلال على صدق الدعوى أو كذبها، وهي مرادفة للدليل". ويمكن القول بأن حجيَّة الأدلة الرقميَّة هي " قيمة ما تتمتع به المخرجات الكمبيوترية بأنواعها المختلفة من قوة استدلاليَّة على صدق نسبة الفعل الإجرامي إلى شخص معيَّن أو كذبه.

إنَّ حجية المخرجات المتحصلة من الحاسوب، هي قوتها الاستدلالية على صدق نسبة الفعل إلى شخص معين أو كذبه، أو هي قيمة ما يتمتع به المخرج المتحصل من الكمبيوتر، بأنواعه المختلفة الورقية والإلكترونية ؛ من قوة استدلالية في كشف الحقيقة[٤].وقد اختلفت أنظمة الإثبات في تقديرها لحجية المخرجات الكمبيوترية، ولذلك سوف نعرض لحجية المخرجات الكمبيوترية في بعض الأنظمة القانونية في الفروع الآتية:

الفرع الأول : حجية المخرجات الكمبيوترية في القوانين اللاتينية

الفرع الثاني : حجية المخرجات الكمبيوترية في القوانين الأنجلوسكسونية

الفرع الثالث : حجية المخرجات الكمبيوترية في النظام المختلط

1-Police and Criminal Evidence Act 1984- Op – Cit-P.25..

(2) Sieber (Ulrich), ibid, p.111.

(٣) د. هلالي عبد اللاه أحمد، حجية المخرجات الكمبيوترية في المواد الجنائية، دراسة مقارنة، دار النهضة العربية، القاهرة، ط٢، سنة ٢٠٠٨م مرجع سابق، ص ٢٢.

(٤) د. هلالي عبد الاه أحمد- حجية المخرجات الكمبيوترية- مصدر سابق- ص٢٢.

الفرع الأول

حجية المخرجات الكمبيوترية في القوانين اللاتينية

القوانين ذات الصياغة اللاتينية هي مجموعة النظم التي تنتمي أصول قواعدها للقانون الروماني القديم، حيث تتشابه تلك القوانين في الإصلاحات القانونية وأسلوب الصياغة، ومصادر القانون فيها واحدة وأصولها العامة متحدة وتقسيماتها متقاربة، ومن أمثلة ذلك القوانين الفرنسية والإيطالية والإسبانية وأمريكا اللاتينية والقانون المصري [١].

ويعد نظام الإثبات الحر أو نظام الأدلة المعنوية هو السائد في هذه النوعية من القوانين، ويتمركز هذا النظام حول سلطة القاضي الجنائي في قبول أي دليل يمكن أن يتولد عنه اقتناعه علي نحو تكون فيه جميع طرق الإثبات في المواد الجنائية من حيث المبدأ مقبولة فضلا عن كونها سواء، فالأدلة وفقاً له غير محددة فيما عدا الحالات التي يفرض فيها القانون وسيلة معينة للإثبات، متساوية في قيمتها، ليس لأحدها سمو علي الآخر بمقتضي القانون، ولجميع الأطراف الحرية في تقديم الأدلة التي يشاؤون تقديمها، وللقاضي أن يتصدى للبحث عن الأدلة من تلقاء نفسه، يكمل بأعمال العقل والمنطق الأدلة التي يقدمها الأطراف وأن يقدر بحسب اقتناعه قيمة كل دليل [٢].

وهكذا يتميز نظام الأدلة المعنوية بالدور الفعال للقاضي حيال الدليل، ويبدو هذا الدور من ناحية حرية القاضي في الإستعانة بكافة طرق الإثبات للبحث عن الحقيقة والكشف عنها[٣]. ويجد هذا النظام تبريره في مسائل عديدة من بينها أن الإثبات يرد علي وقائع مادية أو نفسية تتعلق بالجريمة والمجرم [٤] .

ويكون للقاضي القيام بأي إجراء يلزم للوصول الي الحقيقة والفصل في الدعوي كالمعاينة لمكان الحادث وندب الخبراء وسماع الشهود (م٢٧٧، م٢٩٠ إ ج، م ٣٢٥ : ٣٤٢ إ ج م) ولهذا نصت المادة ٣٩١ علي أن للمحكمة أن تأمر ولو من تلقاء نفسها أثناء نظر الدعوي بتقديم أي دليل تراه لازماً لظهور الحقيقة، ويحكم القاضي في الدعوي حسب العقيدة التي تكونت لديه بكامل حريته (م ٣٠٢، م ٤٢٧ إ ج م) [٥] .

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(١) د. حمدي عبدالرحمن ، المدخل لدراسة القانون المقارن ، مذكرات لطلبة دبلوم القانون المقارن ، كلية الحقوق جامعة عين شمس ، سنة ١٩٧٣ ، ص ٢٥ وما بعدها . د. هلالي عبد اللاه أحمد، حجية المخرجات الكمبيوترية في المواد الجنائية ، المرجع السابق ، ص ٢٩

(٢) د. محمود مصطفي ، الإثبات في المواد الجنائية في القانون المقارن ، دار النهضة العربية ، القاهرة ، ج ٢ ، ط ١ ، سنة ١٩٧٨ ، ص ٧

(٣) د. هلالي عبد اللاه أحمد، حجية المخرجات الكمبيوترية في المواد الجنائية ، المرجع السابق ، ص ٣٠

(٤) د. محمد زكي أبوعامر ، الإثبات في المواد الجنائية ، المرجع السابق ، ص ١٠٦

(٥) د. مأمون محمد سلامة ، قانون الإجراءات الجنائية معلقاً عليه بالفقه وأحكام القضاء ، مكتبة رجال القضاء ، سنة ١٩٨٠ ، ص ٨٨٦

ومن ناحية أخري فان القاضي الجنائي حر في وزن وتقدير كل دليل طُرح أمامه، فمبدأ حرية القاضي في الإقتناع تعني أن يقدر القاضي بكامل حريته قيمة الأدلة المعروضة عليه تقديراً منطقياً مسبباً، وبالتالي لا تثير حجية الأدلة الإلكترونية أية صعوبات لمدى حرية تقديم هذه الأدلة لإثبات جرائم الحاسوب والإنترنت، ولا لمدى حرية القاضي الجنائي في تقدير هذه الأدلة ذات الطبيعة الخاصة باعتبارها أدلة إثبات في المواد الجنائية، ففي فرنسا نجد أن مشكلة حجية المخرجات المتحصلة من الحاسوب على مستوى القانون الجنائي ليست ملحة أو عاجلة في نظر الفقهاء، فالأساس هو حرية القاضي في تقدير هذه الأدلة، ويقوم الفقه الفرنسي بدراسة هذه الحجية تحت نطاق قبول الأدلة الناشئة عن الآلة أو الأدلة العلمية مثل أجهزة التصوير وأشرطة التسجيل وأجهزة التنصت [١]، فقد قضت محكمة النقض الفرنسية: (أن أشرطة التسجيل الممغنطة التي تكون لها قيمة دلائل الإثبات يمكن أن تكون صالحة للتقديم أمام القضاء الجنائي) وكذلك الحال بالنسبة لكل من ألمانيا وتركيا ولوكسمبورج واليونان والبرازيل[٢]، وكل هذه الدول تخضع الأدلة الإلكترونية لحرية القاضي في الاقتناع الذاتي، بحيث تكون بمقدوره أن يطرح مثل هذه الأدلة– رغم قطعيتها من الناحية العلمية– ذلك عندما يجد أن الدليل الإلكتروني لا يتفق منطقيًا مع ظروف الواقعة وملابساتها.

ويتقيد القاضي في ممارسته لحريته في الاقتناع وتكوين عقيدته بقيود خاصة أملتها اعتبارات تتعلق بضمان حق المتهم في الدفاع من ناحية، وبمنع التحكم الذي قد يؤدي إليه هذا المبدأ من ناحية أخري وأهم هذه القيود [٣] :

١. أن تكون عقيدة القاضي واقتناعه قد استمد من أدلة طرحت بالجلسة، فلا يسوغ للقاضي أن يستند في حكمه إلي دليل ليس له أصل في الأوراق، ولم يحققه في الجلسة طالما كان ذلك ممكناً.
٢. أن يكون اقتناع القاضي مبنياً علي دليل مستمد من إجراء صحيح، فلا يجوز الإستناد الي دليل مستمد من إجراء باطل.

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(1) francolin (jacques): les crimes informatiques et D autres crimes dans le domaine de la technologie informatiques en France , 1993, p 308

(٢) د. هلالي عبد اللاه أحمد، حجية المخرجات الكمبيوترية في المواد الجنائية، المرجع السابق، ص ٤٢ وما بعدها

(٣) د. مأمون محمد سلامة ، قانون الإجراءات الجنائية معلقاً عليه بالفقه وأحكام القضاء ، المرجع السابق ، ص ٨٥٦ وما بعدها

٣. يجب أن يكون إقتناع القاضي مبنياً علي أدلة مستساغة عقلاً، فينبغي أن يكون ما انتهي اليه القاضي في تكوين عقيدته هو أمر يمكن الوصول اليه من الثابت في الأوراق وما طرح من أدلة بالجلسة، وذلك وفقاً لمقتضيات العقل والمنطق .

٤. يجب أن يكون اقتناع القاضي مبنياً علي اليقين، فالقاعدة أن المتهم برئ حتي تثبت إدانته، فالأحكام لا تبني علي الشك وإنما علي اليقين فالشك دائما يفسر لصالح المتهم، ويكفي أن تتشكك المحكمة في صحة إسناد التهمة كي تقضي بالبراءة متي أحاطت بالدعوي عن بصر وبصيرة.

٥. لا يجوز أن يؤسس القاضي اقتناعه بناء علي قرينة واحدة أو استدلال واحد، فهي لا ترقي الي مرتبة الأدلة، فيجب أن يكون إلي جانبها دليل أو أدلة متعددة .

وهناك عدة أسباب تبرر الأخذ بمبدأ حرية الإثبات والإقتناع، منها ظهور الأدلة العلمية وتقدمها، مثل تلك المستمدة من الطب الشرعي والتحاليل، وتحقيق الشخصية ومضاهاة الخطوط وغيرها، وهي لا تقبل بطبيعتها إخضاع القاضي لأي قيود بشأنها بل ينبغي أن يترك الأمر في تقديرها لمحض اقتناعه، خاصة وأنها كثيراً ما تتضارب مع باقي أدلة الدعوي، وذلك فضلاً عن احتمال تضارب آراء المختصين في شأنها [١] .

وإذا كان مبدأ الإثبات المعنوي يشمل كل جهات القضاء الجنائي، فإنه يمتد أيضاً إلي كل مراحل الدعوى الجنائية، سواء في مرحلة التحقيق الإبتدائي أو التحقيق النهائي . وهكذا فإن المبدأ كما يطبق أمام جهات التحقيق النهائي فإنه يطبق أيضاً أمام قضاء التحقيق والإحالة . وبعبارة أخري فإن مبدأ الإثبات المعنوي يطبق أمام أعضاء النيابة العامة وقضاة التحقيق ومستشاري الإحالة، فهم يقدرون مدي كفاية الأدلة للإتهام دون الخضوع لقواعد معينة ولا لرقابة محكمة النقض، ولكنهم يخضعون في ذلك لرقابة ضمائرهم واقتناعهم الذاتي فحسب. لأن الغاية من مرحلتي التحقيق الإبتدائي والنهائي هي ضمان تأكيد أساس العدالة في الأحكام بتأسيس المبادئ التي يجب أن ترشد القضاة عند تقدير عناصر الإثبات والبحث عن الحقيقة، وقد يصدر قضاة التحقيق قرارات تؤسس علي مدى اقتناعهم الشخصي، هذا وإن كان قضاة التحقيق لا يقدرون الإثبات إلا من ناحية مدي كفايتها للإتهام إلا أنه لا يشترط في هذه الأدلة أن تصل إلي مرتبة اليقين والتي يجب أن ينبني عليها الحكم بالإدانة[٢].

(١) د. رؤوف عبيد ، مبادئ الإجراءات الجنائية في القانون المصري ، دار الفكر العربي ، الطبعة ١٤ ، القاهرة ، سنة ١٩٨٢ ، ص ٦٧١

(٢) د. هلالي عبد اللاه أحمد ، حجية المخرجات الكمبيوترية في المواد الجنائية ، المرجع السابق ، ص ٤١.

الفرع الثاني

حجية المخرجات الكمبيوترية في القوانين الأنجلوسكسونية

يقصد بالقوانين ذات الصياغة الأنجلو سكسونية تلك النظم القانونية التي تعتنق النظام الإنجليزي وتدور في فلكه، ويعد نظام الإثبات القانوني أو المقيد هو السائد في هذه القوانين، وفي هذا النظام يحدد المشرع أدلة الإثبات ويقدر قيمتها الإقناعية، ومقتضي ذلك أن يتقيد القاضي في حكمه بالإدانة أو بالبراءة بأنواع معينة من الأدلة أو بعدد منها طبقاً لما يرسمه التشريع المطبق، دون أن يأبه في ذلك بمدي اقتناع القاضي بصحة ثبوت الواقعة أو عدم ثبوتها . ويترتب علي ذلك أنه إذا توافرت أدلة الإدانة بشروطها التي يحددها القانون التزم القاضي أن يدين المتهم ولو كان غير مقتنع بإدانته، وإذا لم تتوافر الأدلة فلا يجوز له أن يحكم بالإدانة بل يحكم باستبعاد الدليل، حتي لو اقتنع بأن المتهم مدان، فهو لا يستطيع أن يتحرى الحقيقة بطرق أخري لم ينص عليها المشرع ولا أن يطلب إكمال أدلة ناقصة، بل عليه أن يلتزم بما حدده المشرع [١].

وبالنسبة لحجية المخرجات الكمبيوترية في إنجلترا، فقد صدر قانون إساءة استخدام الحاسب الآلي الصادر ٢٩ يونيو سنة١٩٩٠، والذي لم يتناول الأدلة الناتجة عنه، والسبب في ذلك يرجع إلي وجود قانون البوليس والإثبات الجنائي الصادر سنة ١٩٨٤، المعمول به من أول يناير سنة ١٩٨٦ الذي حل محل قانون الإثبات الجنائي لسنة ١٩٦٥ والذي حوى تنظيمًا محددًا لمسألة قبول مخرجات الحاسوب والإنترنت، كأدلة إثبات في المواد الجنائية[٢]، حيث نظمت المادة ٦٩ منه مسألة قبول المخرجات الكمبيوترية في الإثبات الجنائي والتي بمقتضاها لا تقبل هذه المخرجات كدليل إثبات إذا لم يستكمل بإختبارات الثقة المنصوص عليها في هذه المادة، وتتبلور هذه الإختبارات أو الشرائط في ضرورة عدم وجود سبب معقول يدعو إلي الاعتقاد بأن المخرج الكمبيوتري غير دقيق أو أن بياناته غير سليمه . كما يجب أن يكون الحاسب الناتج منه هذا المخرج يعمل بكفاءة وبصورة سليمة [٣].

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(١) د. هلالي عبد اللاه أحمد، حجية المخرجات الكمبيوترية في المواد الجنائية ، المرجع السابق ، ص ٤٩

(٢) لقد صدر تشريع الإثبات بالحاسوب في إنكلترا عام ١٩٨٣م، وقد ركز بصفة أساسية على قبول مخرجات الحاسوب كدليل لإثبات أية حقيقة مسجلة فيه والتي تزود بشهادة شفوية تكون مقبولة والتي يتم تقديرها من قبل المحكمة المختصة- انظر د. سعيد عبد اللطيف حسن- مصدر سابق- ص ١٩٤.

(٣) هلالي عبداللاه أحمد ، حجية المخرجات الكمبيوترية في المواد الجنائية ، المرجع السابق ، ص ٥٤

وفي الولايات المتحدة الأمريكية فقد تناولت بعض القوانين حجية المخرجات الكمبيوترية، ومن ذلك علي سبيل المثال ما نص عليه قانون الحاسب الآلي لسنة ١٩٨٤ الصادر في ولاية أيوا من أن مخرجات الحاسب الآلي تكون مقبولة بوصفها أدلة إثبات بالنسبة للبرامج والبيانات المخزونة فيه (م ١٦/١٧٦)، كما يتضح من قانون الإثبات الصادر في سنة ١٩٨٣ في ولاية كاليفورنيا من أن النسخ المستخرجة من البيانات التي يحتويها الحاسب تكون مقبولة بوصفها أفضل أدلة إثبات للبرامج والبيانات المخزنة فيه(١).

وتنص قواعد الإثبات الفيدرالية الأمريكية، على أن النسخة المطابقة للأصل لها ذات حجية الأصل، أيًا كانت الطريقة أو الوسيلة المستخدمة في النسخ، كالطباعة، والتصوير، والتسجيل الميكانيكي، والتسجيل الإلكتروني، بما يسمح بقبول مخرجات الحاسوب في الإثبات، والغالب الأعم في القضاء الأمريكي أنه يُعول على قبول دليل السجلات المحتفظ بها على الحاسوب(٢).

وفي كندا، يمكن قبول السجلات الناجمة عن الحاسوب، إذا توافرت شروط معينة، وتنص المادة (٢٩) من قانون الإثبات الكندي على عدد من الشروط التي يجب توافرها قبل عمل صورة من السجل الذي يضاف إلى الأدلة، ومن هذه الشروط أن تكون الصورة حقيقية من المدخل الأصلي، وقد قضت محكمة استئناف أونتاريو الكندية في قضية مكميلان (MC Mullen)، بانه يشترط لكي تكون سجلات الحاسوب مقبولة بوصفها نسخًا حقيقية من السجلات الإلكترونية، أن تكون محتوية على وصف كامل لنظام حفظ السجلات السائد في المؤسسات المالية، كما يمكن أن يتضمن ذلك وصفًا للإجراءات والعمليات المتعلقة بإدخال البيانات وتخزينها واسترجاعها، حتى يتبين أن المخرج المتحصل من الحاسوب موثوق به بشكل كافٍ(٣).

(١) د. أحمد أبو القاسم أحمد ، الدليل المادي ودوره في الإثبات في الفقه الجنائي الإسلامي ، دراسة مقارنة ، رسالة دكتوراه ، كلية الحقوق جامعة الزقازيق ، سنة ١٩٩٠ ، ص ٥٣

(٢) د. سعيد عبد اللطيف حسن، المرجع السابق، ص ١٦٥.

(٣) د. هلالي عبد اللاه احمد، حجية المخرجات الكمبيوترية في المواد الجنائية، المرجع السابق، ص٥٦ وما بعدها.

الفرع الثالث

حجية المخرجات الكمبيوترية في النظام المختلط

يقصد بالقوانين ذات الصبغة المختلطة بأنها التي تجمع بين النظامين النظام اللاتيني والنظام الأنجلوسكسونى، وبالتالي تتبع نظاماً وسطاً بين الإثبات الحر والإثبات المقيد، ووفقاً لهذا النظام يتولي القانون تحديد الأدلة المقبول في الإثبات الجنائي تاركاً للقاضي في نطاق الأدلة القانونية التي يقبلها حرية تقدير قيمتها الإثباتية [١].

ووفقاً لهذا النظام قد يحدد أيضاً القانون أدلة معينة لإثبات بعض الوقائع دون البعض الآخر، أو يشترط في الدليل شروطاً في بعض الأحوال، أو يعطي القاضي الحرية في تقدير الأدلة القانونية [٢]. وأظهر نموذج للإثبات المختلط هو الذي اقترحه روبسبير Robespierre في الجمعية التأسيسية الفرنسية في اجتماعها المنعقد في ٤ يناير سنة ١٧٩١، وكان اقتراحه من شقين: الأول: أنه لا يحكم بإدانة متهم إذا لم تقم عليه الأدلة التي حددها القانون . والثاني: أنه لا يحكم بإدانة متهم مع قيام الأدلة القانونية إذا لم تتحقق قناعة القاضي .

ومن أمثلة القوانين ذات النظام المختلط القانون الياباني الذي حدد وسائل الإثبات ومن ناحية أخري أخذ بقاعدة الإقتناع الذاتي للقاضي، فأدلة الإثبات ليست إذن حرة، وقد حصر المشرع الياباني طرق الإثبات المقبولة في (أقوال المتهم- أقوال الشهود- القرائن- الخبرة) ويقرر الفقه الياباني بأن السجلات الإلكترونية مغناطيسية وتكون غير مرئية في حد ذاتها، ولذلك لا يمكن أن تستخدم كدليل في المحكمة، إلا اذا تم تحويلها الي صورة مرئية ومقروءة عن طريق مخرجات الطابعة لمثل هذه السجلات، وفي مثل هذه الحالة يتم قبول هذه الأدلة الناتجة عن الحاسب سواء كانت هي الأصل أم كانت نسخة من هذا الأصل . كذلك أنه وإن كان قانون الإجراءات الجنائية الياباني يستبعد الشهادة السماعية كقاعدة عامة إلا أن هناك استثناءات علي ذلك نصت عليها المادة ٣٢٣ إ ج التي تقرر قبول ثلاثة أنواع من السجلات كأدلة إثبات في المواد الجنائية وهي [٣] :

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(1) Spencer (jhon) : le droit anglais "la prevue en procedure penale compare association international de droit penal . 1992 p.83.

انظر: د. سليمان أحمد محمد فضل، المرجع السابق ،ص ٣٦٦

(٢) د. هلالي عبداللاه أحمد ، حجية المخرجات الكمبيوترية في المواد الجنائية، المرجع السابق ، ص ٥٩

(٣) نفس المرجع السابق ، ص ٦٢ ، ٦٣

١. نسخة copy من السجل العائلي للفرد، أو نسخة من أصل موثوق، أو أي مستندات رسمية يكون من واجب الموظف العام التصديق عليها.
٢. دفتر الحساب أو سجل السفر أو المستندات الأخرى التي تعد لتنظيم السير المعتاد للأعمال التجارية.
٣. أية مستندات أخري غير مذكورة في البندين السابقين، إذا تم إعدادها تحت ظروف تضفي مصداقية خاصة علي توليد الحقيقة المتضمنة في مسألة معينة .

وبالإضافة لهذا الاستثناء السابق يمكن طباعة المخرجات الكمبيوترية وقبولها أثناء فترة المحاكمة من خلال شهادات الخبراء .

وقد واكب المشرع الشيلي التطورات العلمية الحديث عندما نص في المادة (١١٣) من قانون الإجراءات الجنائية على إمكانية استخدام الأفلام السينمائية، والحاكي(الفونوجراف)، والنظم الأخرى الخاصة بإنتاج الصورة، والصوت، والاختزال، وبصفة عامة أية وسائل أخرى، قد تكون ملائمة، ووثيقة الصلة، وتفضي إلى استخلاص المصداقية، يمكن أن تكون مقبولة كدليل إثبات[١]، كما يرى الفقه الشيلي، أن الدليل الناتج عن الحاسوب والإنترنت، يمكن أن يكون مقبولاً في المحكمة، كدليل كتابي أو مستندي، مثله مثل النظم الحديثة الأخرى لجمع وتسجيل المعلومات، وحجة الفقه الشيلي تستهدف توسيع مظلة الوسائل العلمية الحديثة في الإثبات، لتغطي العناصر الإثباتية الناتجة عن جرائم المعلوماتية[٢]. فطرق الإثبات في قانون الإجراءات الجنائية الشيلي قد تم حصرها في المادة ٤٧٥ منه في (شهادة الشهود- تقارير الخبراء-المعاينة -الشخصية للقاضي- المستندات الرسمية والعرفية-الإعتراف- القرائن أو الأدلة الظرفية).

وطبقاً للمادة ٤٥٦ مكرر من ذات القانون، لا يجوز إدانة أي شخص بجريمة ما لم تتوصل المحكمة المختصة من خلال الوسائل القانونية للإثبات الي اقتناع بأن الفعل المستوجب للعقاب قد ارتكب، وأن الشخص المدان كانت له مساهمة في هذا الفعل يعاقب عليها القانون [٣].

(١) د. هلالي عبد اللاه أحمد، حجية المخرجات الكمبيوترية في المواد الجنائية، المرجع السابق، ص ٦٤-٦٦.

(٢) د. عفيفي كامل عفيفي ، جرائم الكمبيوتر وحقوق المؤلف والمصنفات الفنية ودور الشرطة والقانون ، دراسة مقارنة ، ص ٣٧٣ ، ٣٧٤.
د. هلالي عبد اللاه أحمد- حجية المخرجات الكمبيوترية -المصدر السابق- ص ٦٤ وما بعدها

(٣) د. هشام محمد فريد رستم ، الجوانب الإجرائية للجرائم المعلوماتية ، دراسة مقارنة ، مكتبة الآلات الحديثة ، أسيوط ، سنة ١٩٩٤ ، ص ١٦٢

وبالنسبة لحجية المخرجات الكمبيوترية في مصر، فقد خلا التشريع الإجرائي من التعرض لحجية المخرجات الكمبيوترية، إلا أنه يمكن الإستناد إلي المخرجات الكمبيوترية في إثبات أو نفي الجريمة، وتكون لها قوة القرائن في الإثبات، وذلك في إطار تبني المشرع المصري لمبدأ الإثبات الحر، وقد نصت المادة (٣٠٢ إ ج)علي أنه " يحكم القاضي في الدعوي حسب العقيدة التي تكونت لديه بكامل حريته"، كما نصت المادة (٢٩١ إ ج) علي أنه للمحكمة أن تأمر ولو من تلقاء نفسها أثناء نظر الدعوي بتقديم أي دليل تراه لازماً لظهور الحقيقة، ويترتب علي ذلك أنه يكون للمحكمة الإستناد إلي المخرجات الكمبيوترية لإثبات الجريمة أو نفيها [١].

رأي الباحث:

لما كان المستقر عليه أن للقاضي سلطة واسعة في تقدير الأدلة واستنباط القرائن وما تحمله من دلالات بشرط أن الدليل يكون ثابت يقينياً، ومرتبط بالواقعة الرئيسية ومنسجماً مع تسلسل الأحداث، وبالتالي ينطبق ذلك علي الأدلة الإلكترونية باعتبارها أحد أقسام الأدلة المادية العلمية بل أكثر منها حجية في الإثبات لأنها مُحكمة بقواعد علمية وحسابية قاطعة لا تقبل التأويل، ولكونها أيضاً معالجة بوسائل التقنية المعلوماتية التي تستخدم في الجرائم المستحدثة . ورغم عدم توافر التشريعات الموضوعية والشكلية التي تنظم التعامل مع الحاسب الآلي وتقنية المعلومات، فلم تواجه المحاكم الجنائية مشاكل في تعاملها مع الأدلة الجنائية الإلكترونية، للأسباب التالية[٢]:

١. الثقة التي اكتسبها الحاسوب والإنترنت والكفاءة التي حققتها النظم الحديثة للمعلوماتية في مختلف المجالات.
٢. ارتباط الأدلة الجنائية الإلكترونية وآثارها بالجريمة موضوع المحاكمة.
٣. وضوح الأدلة الإلكترونية، ودقتها في إثبات العلاقة بين الجاني والمجني عليه، أو بين الجاني والسلوك الإجرامي.
٤. إمكانية تعقب آثار الأدلة الإلكترونية والوصول إلى مصادرها بدقة.
٥. قيام الأدلة الإلكترونية على نظريات حسابية مؤكدة لا يتطرق إليها الشك مما يقوي من يقينية الأدلة الإلكترونية.

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(١) د. علاء عبدالباسط خلاف ، الحماية الجنائية لوسائل الاتصال الحديثة ، رسالة دكتوراه مقدمة لكلية الحقوق جامعة القاهرة فرع بني سويف ، سنة ٢٠٠٢ ، ص ٤٥١

(٢) د. محمد الأمين البشري، المرجع السابق ، ص١٢٧ ، ١٢٨

٦. الأدلة الجنائية الإلكترونية يدعمها- عادة- رأي خبير- وللخبرة في المواد الجنائية دورها في الكشف عن الأدلة وفحصها وتقييمها وعرضها أمام المحاكم وفق شروط وقواعد نظمها القانون وأقرها القضاء.

ويمكن باستخدام الحاسب الآلي والإنترنت، والاتصال المعلوماتي، أن يتم استخدام الفيديو لتسجيل عمليات القبض والتفتيش وضبط الأدلة والآثار الأخرى الناجمة عن الجريمة، كما يمكن استخدامها أيضاً في عمل المعاينات اللازمة لمسرح الجريمة، بشرط مشروعية الدليل المستمد من المراقبة والتسجيل .

كما أضاف علم التصوير للإثبات الجنائي قيمة علمية بما له من أثر في نقل صورة صادقة للأماكن والأدلة إلى كل من يعنيه الأمر، اعتمادًا على آلة التصوير والأفلام التي لا تعرف الكذب، بيد أنه لا يمكن إنكار الآثار السلبية والخطيرة التي تنشأ عن استخدام هذه الوسائل، لما قد يحدثه في الحياة الخاصة إذا لم توضع له الضوابط الكافية(١).

ويمكن أن يكون الدليل الناشئ عن الحاسب مقبولاً في مجال الإثبات الجنائي إستناداً إلي تقرير يقدمه خبير بشأن البيانات المعالجة آلياً، كما يمكن النظر إلي المعاينة التي تجريها المحكمة بمعاونة الخبراء علي أنها وسيلة إثبات لموضوعات أو عناصر في نظام المعالجة الآلية للبيانات يمكن أن تقوم علي أساسها المسئولية الجنائية (٢).

كما أن القوة الإثباتية للتسجيلات الصوتية المُسجلة إلكترونيًا تكمن في أن تسجيل الصوت إلكترونيًا لا يحتمل الخطأ، ويصعب التلاعب به، ويمكن للخبراء اكتشاف أي تلاعب بوسائل تقنية عالية الكفاءة، ومن ثم يمكن القول بأن التسجيل الصوتي الممغنط يمكن أن تكون له حجة دامغة في الإثبات(٣).

أما البريد الإلكتروني، فعند إرسال رسالة من خلاله، فيمكن لهذه الرسالة أن تكون معلومات من أي نوع، مشتملة على الصوت والفيديو، أو تحويلات بنكية، فبإمكان متلقي الرسالة التأكد من أنها مرسلة من الشخص الذي أرسلها، وتحديد وقت إرسالها، وأنها لم تتعرض لأي تلاعب، وأن الآخرين لا يستطيعون فك شفرتها، وبالتالي يمكن استخدام هذه المعلومات كحجة في الإثبات الجنائي(٤).

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(١) د. عبد الحافظ عبد الهادي عابد ، الإثبات الجنائي بالقرائن ، دراسة مقارنة، دار النهضة العربية، القاهرة ١٩٩٨، ص ٥٦٣ وما بعدها.

(٢) د. سليمان أحمد محمد فضل ، المرجع السابق ، ص ٣٧٠

(٣) د. سعيد عبد اللطيف ، المرجع السابق ، ص ٢١١.

(٤) د. سعيد عبد اللطيف حسن، المرجع السابق ، ص ٢٣٢،٢٣٣.

وتختلف أيضاً حجية التوقيع الإلكتروني في الإثبات المدني عنه في الإثبات الجنائي، حيث يخضع في الإثبات المدني لقواعد شكلية، أما في الإثبات الجنائي فيخضع تقديره لمطلق سلطة قاضي الموضوع، واقتناعه بصحته وقوته الإثباتية [١]، كما أن وجود نظام تسجيل الدخول في شبكة الإنترنت، يسمح بتحديد الأشخاص الذين دخلوا أو حاولوا الدخول بعد ارتكاب الفعل الجرمي، وتعد حالات ضبط مرتكب الفعل متلبسًا نادرة أو أنها وليدة الصدفة، وحتى لو تم ضبطه متلبسًا، فقد يرجع ذلك إلى خطأ في نظام الحاسوب أو الشبكة أو الأجهزة الأخرى[٢]، أو عن طريق مراقبة الشرطة بعد ملاحظة وجود بعض الاعتداءات، والفقه الفرنسي يعتبر انتهاك نظام الأمن لبعض المواقع المحمية، دليل حتمي وقرينة قاطعة على وجود القصد الجرمي وسوء نية مرتكب الفعل[٣]، ويمكن للماسحات الضوئية، وطابعات الليزر أن تكون أداة ارتكاب الجريمة، ففي عام ١٩٩٤، قام أحد الأشخاص في مدينة دلاس الأمريكية بتزوير تراخيص القيادة لسيارات التاكسي باستخدام الماسحات الضوئية، وطابعات الليزر، كما جرت محاولات لإصدار بطاقات التأمين، وأوامر صرف مالية، وبعض أنواع الصكوك من خلال استخدام برمجيات الرسوم المتطورة، وأنظمة الطباعة المتخصصة[٤].

(١) أصبح التوقيع الإلكتروني بديلاً عن التوقيع التقليدي ويؤدي ذات الوظيفة فيما يتعلق بالوثائق والرسائل الإلكترونية، فهو يحدد شخصية المُوقع، ويعبر عن إرادته في التزامه بمضمون الوثيقة وإقراره لها، وهو دليل على حضور أطراف التصرف وقت التوقيع، أو حضور من يمثلهم قانونًا أو اتفاقًا. د. سعيد عبد اللطيف حسن، المرجع السابق، ص ٢٤٤ وما بعدها. د. هدى حامد قشقوش- الحماية الجنائية للتجارة الإلكترونية عبر الإنترنت، دار النهضة العربية، القاهرة، سنة ٢٠٠٠، ص٧١ وما بعدها.

(٢) د. عبد الفتاح بيومي حجازي، المرجع السابق ، ص ٤٦.

(٣) د. أحمد حسام طه تمام، الجرائم الناشئة عن استخدام الحاسوب، (الحماية للحاسوب)، دراسة مقارنة، دار النهضة العربية ، القاهرة ، سنة ٢٠٠٠ ، ص ٢٧٤، ٢٧٥.

(4) Flusche, Karl J. – Computer Crime and analysis of Computer evidence – Itain't Just hackers and phreakers anynore- Information System Security – Spring 1998-Vol.7. Issue 1. P. 24.

المبحث الثاني

القانون الواجب التطبيق علي جرائم الإنترنت

تمهيد وتقسيم:

إن الطبيعة الخاصة للجرائم الإلكترونية والتي تتميز بها عن الجرائم التقليدية من أنها جريمة عابرة للحدود، وتطبيق القواعد التقليدية على الجرائم الإلكترونية لا يتلاءم مع تحديد محل وقوع الجريمة في العالم الإفتراضي، كما أن مسألة الإختصاص والقانون الواجب التطبيق ؛ تثير عدة صعوبات تكمن في مكان ارتكاب الجريمة الإلكترونية حيث يصعب تحديد مكان وقوع الفعل المجرم في هذه الجرائم، لأنه يتم في بيئة افتراضية غير ملموسة.حيث يقع السلوك المادي للجريمة في أكثر من دولة كأن يقع السلوك الإجرامي في دولة وتتحقق النتيجة الإجرامية في دولة أخرى، ومن ثم يكون قانون كل دولة تحقق فيها أحد عناصر الركن المادي للجريمة قابلاً للتطبيق، مما يؤدي إلى تنازع الإختصاص بين أكثر من تشريع وطني و بين أكثر من دولة لملاحقة نفس النشاط الإجرامي، كما في حالة ارتكاب فعل التهديد عبر الرسائل الإلكترونية حيث قد يرتكب الفعل المادي في بلد ويتلقاه الضحية في بلد أخر بعد أن تمر في كثير من الأحيان بأكثر من دولة قبل وصولها إلى دولة الاستقبال [1]. ويثور التساؤل هنا عن القانون الواجب التطبيق علي تلك الجريمة، وقد يكون الفعل مباحاً في دولة ومجرماً في دولة أخري، وعلي ذلك سيتم تناول القانون الواجب التطبيق عبر جرائم الإنترنت من خلال مطلبين: يتناول الأول تطبيق القانون من حيث المكان، بينما يتناول المطلب الثاني تطبيق القانون من حيث الزمان .

(1)http://www.alkanounia.com/%D8%A7%D9%84%D8%A؛http://www.lepetitjuriste.fr/propriete - intellectuelle/laccessibilite-du-site-internet-comme-fondement-de-la-competence-du-juge-dans-le-cas-datteinte-au-droit-dauteur-par-le-biais-dinternet

المطلب الأول

تطبيق القانون من حيث المكان

إن قانون العقوبات يحكم الوقائع التي تقع في مكان يدخل في دائرة فاعلية القاعدة الجنائية ونظراً لأن الكرة الأرضية تخضع لسياسة أكثر من دولة وكل منها لها حدودها الإقليمية فقد ثارت مشكلة بيان الحدود المكانية لإعمال القواعد الجنائية المتعلقة بكل دولة من الدول (١).

ويحكم قانون العقوبات الوطني من حيث المكان مبادئ قانونية هي: مبدأ الإقليمية، ومبدأ العينية، ومبدأ الشخصية، ومبدأ العالمية، وقد أخذ المشرع المصري في تحديد النطاق المكاني للقواعد الجنائية بالمعايير الثلاثة الأولي وذلك في حدود معينة، وسوف نستعرض هذه المبادئ حتي يتحدد في ضوئها نطاق تطبيق قانون العقوبات .

أولاً: مبدأ الإقليمية :

يعني هذا المبدأ سريان قانون العقوبات علي جميع الجرائم التي تقع داخل النطاق الإقليمي للدولة مهما كانت جنسية مرتكبها سواء أكان وطنياً أو أجنبياً، أو جنسية المجني عليه فقانون العقوبات في أي دولة يرتبط ارتباطاً وثيقاً بسيادتها، فيعد بذلك من أهم مظاهر الدولة في سيادتها علي إقليمها، وبمقتضي ذلك لا ينطبق هذا القانون علي الجرائم التي تقع خارج إقليم الدولة ولو كان مرتكبها أو المجني عليه مواطناً مصرياً، ولا يتقيد تطبيق قانون العقوبات بأي شرط خاص طالما أن الجريمة قد وقعت علي إقليم الدولة أيا كان مرتكبها، وقد نصت المادة الأولي من قانون العقوبات المصري علي أن " تسري أحكام هذا القانون علي كل من يرتكب في القطر المصري جريمة من الجرائم المنصوص عليها فيه "، وعليه فيجب احترام سيادة الدول الأخرى بنفس القدر، وبالتالي يخضع كل ما يرتكب علي أقاليمها من جرائم لقوانينها العقابية، فالذي ينطبق علي قانون العقوبات المصري ينطبق علي سائر قوانين العقوبات بالنسبة للدول الأخرى (٢).

غير أن ارتكاب الجريمة داخل الإطار الإقليمي لمصر كمناط لإقليمية القاعدة الجنائية يتحقق أيضاً في الفروض التي يكون فيها الشخص خارج مصر ويرتكب الجريمة داخل القطر، فالعبرة في تحديد إقليمية القاعدة الجنائية يكون بوقوع الجريمة كاملة أو جزء

(١) د. مأمون محمد سلامة ، قانون العقوبات القسم العام ، الطبعة الرابعة ، دار الفكر العربي ، القاهرة ، ١٩٨٣- ١٩٨٤، رقم ٨ ، ص ٧٠

(٢) د. أحمد فتحي سرور ، الوسيط في قانون العقوبات القسم العام ، الطبعة السادسة ، دار النهضة العربية ، القاهرة ، سنة ٢٠١٥ ، رقم ١١٠ ، ص ٢٢٤ ، د. مأمون سلامة ، قانون العقوبات القسم العام ، المرجع السابق ، ص ٧١

منها داخل القطر المصري بغض النظر عن مكان وجود مرتكبها، كما أن ارتكاب الجريمة لا يقتصر علي الحالات التي يكون فيها الشخص فاعلاً أصلياً بل ينصرف أيضاً الي الحالات التي يساهم فيها بوصفه شريكاً، ولقد أراد المشرع تكملة المادة الأولي لمجابهة الحالات التي تقع فيها الجريمة في مصر من أفراد يقيمون بالخارج، فنص في المادة الثانية علي سريان أحكام القانون المصري علي الأشخاص الذين يرتكبون في خارج القطر فعلاً يجعله فاعلاً أو شريكاً في جريمة وقعت كلها أو بعضها في القطر المصري (مادة ٢ – بند أولاً)، ويشمل إقليم الدولة الأرض الإقليمية والمياه الإقليمية والفضاء الإقليمي والسفن والطائرات المصرية [١].

أما بالنسبة لمكان إرتكاب الجريمة فقد اختلفت الآراء بصدده، وإن كان يمكن ردها الي أربعة نظريات: **الأولي:** تعتد بالمكان الذي وقع فيه السلوك المادي، **والثانية :** تأخذ في الإعتبار المكان الذي تحققت فيه النتيجة، **والثالثة:** تعتد بالسلوك والنتيجة معاً، **والرابعة :** تعتد بالجزء الجوهري من نشاط الجاني فتعتبر المكان الذي تحقق فيه ذلك الجزء من النشاط هو مكان ارتكاب الجريمة .

وقد حسم المشرع المصري الخلاف بين الآراء المتعددة واعتبر مكان ارتكاب الجريمة هو مصر، في تطبيق مبدأ الإقليمية إذا وقعت الجريمة كلها أو بعضها في إقليمها، فيكفي أن يتحقق جزء من السلوك أو جزء من النتيجة في مصر حتي يتوافر الشرط الخاص بارتكاب الجريمة داخل النطاق الإقليمي للدولة، و ينبغي ملاحظة أن المقصود بارتكاب الجريمة كلها أو بعضها في مصر لا ينصرف إلا الي الأجزاء من الجريمة الداخلة في الركن المادي المكون لها، أو الأفعال التي وإن لم تدخل في الركن المادي إلا أنها تعتبر في نظر القانون شروعاً في الجريمة معاقباً عليه، وعلي ذلك فيخرج من هذا النطاق الأعمال التحضيرية التي ترتكب في مصر لجريمة تقع في الخارج، وكذلك أفعال التحريض والاتفاق والمساعدة التي تقع في مصر وتتعلق بجريمة ترتكب خارج القطر المصري، فالأعمال التحضيرية للجريمة وأفعال الإشتراك تستمد تجريمها من إرتكاب الجريمة أو الشروع فيها، وطالما ان شيئاً من ذلك لم يحدث في مصر فانه لا يدخل في نطاق القانون المصري الإقليمي أفعال الاشتراك والأعمال التحضيرية لجرائم تقع في الخارج، وأما الفرض العكسي

(١) د. مأمون سلامة ، قانون العقوبات القسم العام ، المرجع السابق ، ص ٧٢

وهو ارتكاب أفعال الاشتراك أو المساهمة في القانون المصري يختص بالواقعة بالتطبيق لمبدأ الإقليمية [١].

وأتفق مع الرأي الذي يذهب إلي أنه إذا تم نشر صور أو رسائل إباحية علي شبكة الإنترنت وتم استقبالها في مصر، فان القانون المصري يكون واجب التطبيق ولو كان المتهم أجنبياً، أو كان الفعل غير معاقب عليه في البلد الذي أرسلت منه، أو يقوم متهم في الخارج بتدمير مواقع مصرية موجودة علي الشبكة أو اقتحام أحد البنوك المصرية وسحب أرصدة منها أو التحريض أو الإتفاق أو المساعدة لفعل ذلك [٢]. وذلك لأن الدولة لها ولاية القضاء بصفة أصلية إذا وقعت الجريمة في إقليمها، فقد يقع السلوك الإجرامي في دولة، وتقع النتيجة في دولة أخري، فمعظم التشريعات لا تضع نصاً يحدد مكان الجريمة تاركاً ذلك لاجتهاد الفقه والقضاء، إلا أن الراجح في الفقه أن السلوك والنتيجة يتساويان من حيث خطورة كل منهما علي نظام وأمن الدولة، فوقوع أيهما في الدولة يجعل لها ولاية أصلية في مقاضاة الفاعل، وقد تبني هذا الرأي وتم النص عليه صراحة في كثير من قوانين العقوبات[٣].

وأتفق أيضاً مع رأي الفقه في أن المشرع بأخذه بمبدأ إقليمية النص الجنائي فهو يساير بذلك التشريعات المعاصرة التي تربط جميعها نطاق تطبيق القانون الجنائي بإقليم الدولة، لأن هذا المبدأ تبرره اعتبارات سيادة الدولة علي إقليمها، والسماح لدولة أخري بممارسة هذا الدور يعني تخلي الدولة عن أهم مظهر من مظاهر سيادتها، كما أن المكان الذي ارتكبت فيه الجريمة هو المكان الذي حدث فيه الإخلال بالنظام العام، وبالتالي وجب أن يطبق قانون هذه الدولة، علي الجريمة تحقيقاً للردع العام، بالإضافة إلي أن تطبيق قانون الدولة التي ارتكبت فيها الجريمة يجعل قاعدة افتراض العلم بالقانون الجنائي قريبة من الواقع، فالغالب أن يعلم الشخص بقانون الدولة التي ارتكب فيها الجريمة، ولا يعلم بقانون دولة أخري غير تلك التي ارتكبت فيها، فخضوع الجريمة لقانون الدولة التي ارتكبت فيها يقود إلي حسن سير العدالة [٤].

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(١) د. مأمون سلامة ، قانون العقوبات القسم العام ، المرجع السابق ، ص ٧٤ ، ٧٥

(٢) د. علاء عبدالباسط خلاف ، الحماية الجنائية لوسائل الاتصال الحديثة ، رسالة دكتوراه مقدمة لكلية الحقوق جامعة القاهرة فرع بني سويف ، سنة ٢٠٠٢ ، ص ٢٦٣

(٣) د. محمود محمود مصطفي ، شرح قانون العقوبات، القسم العام ، الطبعة الثامنة، دار النهضة العربية، سنة ١٩٦٩، ص ١١٤

(٤) د. عمر سالم ، شرح قانون العقوبات المصري القسم العام ، دار النهضة العربية ، القاهرة ، سنة ٢٠١٠ ، بند رقم ٤١ ، ص ٧٤

ثانياً: مبدأ العينية :

مبدأ عينية القواعد الجنائية يعني أن القانون المصري يطبق علي جرائم معينة بغض النظر عن مكان ارتكابها وعن شخصية مرتكبها . فيمتد بذلك ليحكم تلك الجرائم خارج النطاق الإقليمي للدولة دون اعتبار لشخصية مرتكبيها، وهذا المبدأ مؤسساً علي فكرة الدفاع عن المصالح الوطنية خارج النطاق الإقليمي للدولة، فالقانون المصري يطبق علي تلك الجرائم التي تشكل اعتداء علي مصالح معينة قدرها المشرع دون استلزام أي شرط آخر يتعلق بالمكان أو بشخص الجاني[١]. وقد حدد المشرع المصري في المادة الثانية البند ثانياً من قانون العقوبات الجرائم التي ترتكب في الخارج وتخضع لأحكام القانون المصري طبقاً لمبدأ العينية، وقد نص علي سريان أحكام هذا القانون علي كل من ارتكب في خارج القطر جريمة من الجرائم الآتية:

١. الجنايات المخلة بأمن الحكومة المنصوص عليها في البابين الأول والثاني من الكتاب الثاني من قانون العقوبات .
٢. جنايات التزوير المنصوص عليها في المادة ٢٠٦ من قانون العقوبات.
٣. جنايات تقليد أو تزييف أو تزوير عملة ورقية أو معدنية مما نص عليه في المادة ٢٠٢ من قانون العقوبات أو إدخالها وهي مقلدة أو مزيفة أو مزورة إلي مصر أو إخراجها منها أو ترويجها أو حيازتها بقصد الترويج أو التعامل مما نص عليه في المادة ٢٠٣ من قانون العقوبات بشرط أن تكون العملة متداولة قانوناً في مصر [٢]، ويسري القانون المصري علي هذه الجنايات بغير قيد سوي ما نص عليه في المادة الرابعة، فتختص المحاكم المصرية بمعاقبة الجاني مصرياً كان أو أجنبياً، ولا يعلق رفع الدعوي علي حضوره، فتصح محاكمته غيابياً، ولا يشترط أن تكون الجريمة معاقب عليها في محل وقوعها، بل ان علة سريان القانون المصري تكون اظهر عندما لا يعد الفعل جريمة في مكان وقوعه.

ومن هذه الجرائم ما يمكن ارتكابه عن طريق الإنترنت، مثل جريمة السعي أو التخابر لدي دولة أجنبيه (المادة ٧٧/ ب، ج، د) وجريمة تسليم أو إفشاء أسرار الدفاع عن البلاد (م. ٨ عقوبات)، وجرية أنشاء أو تأسيس أو تنظيم أو إدارة جمعيات أو هيئات أو

(١) د. مأمون سلامة ، قانون العقوبات القسم العام ، المرجع السابق ، ص ٧٥

(٢) أ. د. عمر سالم ، شرح قانون العقوبات المصري القسم العام ، دار النهضة العربية ، القاهرة ، سنة ٢٠١٠ ، بند رقم ٥٥ ، ص ٩٧

منظمات تهدف الي سيطرة طبقة اجتماعية علي غيرها من الطبقات (م. ٩٨ عقوبات)، أو يكون الهدف منها مناهضة المبادئ الأساسية التي يقوم عليها النظام الاشتراكي في الدولة أو الحض علي كراهيتها أو الازدراء بها أو الدعوي ضد تحالف قوي الشعب العاملة أو ترويج أو تجنيد شيء من ذلك (م. ٩٨ مكررا عقوبات)، وجريمة حيازة بالذات أو بالواسطة أو إحراز محررات أو مطبوعات تتضمن تجنيداً أو ترويجاً لشيء مما نص عليه في المادتين ٩٨ب، ١٧٤ إذا كانت معدة للتوزيع أو إطلاع الغير عليها (م. ٩٨ مكرر ب)، ويطبق القانون المصري علي هذه الجرائم ولو كان الموقع الذي يبث مثل تلك الجرائم موجوداً خارج الإقليم المصري، وبصرف النظر عن جنسية الجاني، وذلك إعمالاً لمبدأ العينية [١].

ويمكن القول أن هذا المبدأ يتفادى عيوب مبدأ الإقليمية، وإن كان من شأنه أن يحمي المصالح الجنبية التي مُست بسبب ارتكاب الجريمة في الخارج رغم أنه يستهدف أساس حماية المصالح الأساسية الوطنية من المساس بها في الخارج [٢].

ثالثاً: مبدأ شخصية القواعد الجنائية:

لمبدأ الشخصية وجهان: (الوجه الإيجابي، والوجه السلبي)، فالوجه الإيجابي يعني ربط الإختصاص التشريعي بجنسية دولة الجاني . أما الوجه السلبي والذي يربط هذا الإختصاص بجنسية المجني عليه . وقد أخذ المشرع المصري بمبدأ الشخصية في وجهه الإيجابي [٣]. ولا يأخذ بمبدأ شخصية النص الجنائي في وجهه السلبي، فجنسية المجني عليه ليست اعتباراً يحدد نطاق تطبيق النص الجنائي من حيث المكان، ويعلل مبدأ الشخصية الإيجابية بأن علي الدولة أن تضمن حسن سلوك رعاياها في الخارج فتفرض عليهم احترام القانون الأجنبي، ففضلاً عما تحققه مساءلتهم في جرائمهم من تعاون دولي مطلوب في مكافحة الإجرام، فان ارتكاب هذه الجرائم تسئ الي سمعة الدولة التي ينتمي اليها المجرم ومعاقبته في وطنه عندما يعود اليه يرضي الشعور العام، ولم كانت الدولة لا تسلم رعاياها فان معاقبتهم يكون بديلاً لهذا التسليم [٤].

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(١) د. جميل عبدالباقي الصغير ، الجوانب الإجرائية للجرائم المتعلقة بالإنترنت ، دار النهضة العربية ، القاهرة ، سنة ٢٠٠١ ، ص ٥٤ وما بعدها

(٢) د. أحمد فتحي سرور ، الوسيط في قانون الإجراءات الجنائية ، المرجع السابق ، بند رقم ١١١ ، ص ٢٢٥

(٣) أ. د. عمر سالم ، شرح قانون العقوبات المصري القسم العام ، المرجع السابق ، بند رقم ٥٢ ، ص ٩٣ ، د. محمود محمود مصطفي ، شرح قانون العقوبات، القسم العام ، الطبعة الثامنة، دار النهضة العربية، سنة ١٩٦٩، ص ١١٤

(٤) د. محمود نجيب حسني ، قانون العقوبات القسم العام ، الطبعة السادسة ، الناشر دار النهضة العربية ، القاهرة ، سنة ١٩٨٨ ، ص ١٣٦

وقد أخذ المشرع المصري بمبدأ شخصية القواعد الجنائية في المادة الثالثة من قانون العقوبات والتي تنص علي أن " كل مصري ارتكب وهو في خارج القطر فعلاً يعتبر جناية أو جنحة في هذا القانون، يعاقب بمقتضي أحكامة إذا عاد الي القطر، وكان الفعل معاقباً عليه بمقتضي قانون البلد الذي ارتكب فيه " .

ويتضح من النص السابق أن شروط تطبيق مبدأ الشخصية وفقاً لقانون العقوبات المصري تتمثل في الآتي [١]:

١. أن يكون الجاني مصرياً وقت ارتكاب الجريمة، ويستوي أن يكون الجاني حاملاً أكثر من جنسية طالما أن إحداها هي الجنسية المصرية، حتي ولو فقدها بعد ذلك، ويستوي أن يكون المواطن المصري قد اشترك في الجريمة بوصفه فاعلاً أو شريكاً تبعياً .
٢. أن تكون الجريمة المرتكبة في الخارج هي جناية أو جنحة وفقاً للقانون المصري، أما إذا كان الفعل غير معاقب عليه وفقاً للقانون المصري فلا يخضع لأحكام القانون علي الرغم من كونه معاقباً عليه وفقاً لقانون البلد الذي ارتكب فيه .
٣. أن يكون الفعل المرتكب في الخارج معاقباً عليه وفقاً لقانون البلد الذي ارتكب فيه بغض النظر عن درجة الجسامة، فيستوي أن يكون الفعل جناية أو جنحة أو مخالفة فالمشرع المصري لم يستلزم أن يكون الفعل ذا وصف محدد وفقاً للقانون الأجنبي، واشتراط العقاب علي الفعل بالخارج يتطلب أن تتوافر فيه جميع العناصر القانونية اللازمة وفقاً للقانون الأجنبي لتطبيق العقوبة، فاذا توافر سبب من أسباب الإباحة أو مانع من موانع المسئولية أو مانع من موانع العقاب وفقاً للقانون الأجنبي انتفي الشرط الذي نحن بصدده.
٤. عودة الجاني الي الإقليم المصري ولو غادر البلاد بعد ذلك، ويستوي ان يكون حضور الجاني اختياريا أو إجبارياً، اذ في كلا الحالتين يتواجد المبرر لتدخل الدولة .

ويترتب علي ما تقدم أن النص ينطبق علي المصري بالخارج إذا قام بسب أو قذف آخر عن طريق الإنترنت ثم عاد الي الوطن، وعلي العكس من ذلك فلا ينطبق النص اذا كان الفعل الذي أتاه المصري غير معاقب عليه في البلد الذي ارتكب فيه كحديث جنسي، أو التعرض لحياة الرؤساء الخاصة في الولايات المتحدة الأمريكية، وكذلك لا ينطبق

(١) أ. د. عمر سالم ، شرح قانون العقوبات المصري القسم العام ، المرجع السابق ، بند رقم ٥٣ ، ص ٩٣ وما بعدها ،و د. مأمون سلامه ، قانون العقوبات القسم العام ، المرجع السابق ، بند رقم ١١، ص ٧٧ وما بعدها

النص اذا كان الفعل غير معاقب عليه في مصر ولو كان معاقب عليه في الخارج مثل الولوج غير المسموح به علي أحد مواقع الإنترنت [١].

القيود الواردة علي إقامة الدعوي الجنائية الناشئة عن الجرائم المرتكبة في الخارج [٢]:

نص المشرع في المادة الرابعة من قانون العقوبات علي قيدين بالنسبة لإستعمال الدعوى الجنائية الناشئة عن الجرائم التي يمتد إليها القانون المصري خارج النطاق الإقليمي بالتطبيق لمبدأ عينية وشخصية القواعد الجنائية، أو بالتطبيق لمبدأ الإقليمية في حالة إرتكاب فعل بالخارج يجعل مرتكبه فاعلاً أو شريكاً في جريمة وقعت كلها أو بعضها في مصر:

١. حصر سلطة تحريك الدعوي الجنائية في يد النيابة العامة :

الأصل في تحريك الدعوي الجنائية في مصر يتم عن طريق النيابة العامة، وفي حالات استثنائية تمنح هذه السلطة للمضرور من الجريمة، إلا أن المشرع قرر الرجوع إلي الأصل العام في حالة الجرائم المرتكبة في الخارج، أي أن النيابة العامة هي وحدها التي تملك تحريك الدعوي الجنائية عن هذه الجرائم، وعلة ذلك أن النيابة العامة هي الأقدر علي تقدير مدي ملائمة تحريك الدعوي الجنائية في هذه الحالة .

٢. لا يجوز إقامة الدعوي الجنائية ضد مرتكب الجريمة في الخارج إذا حوكم المتهم أمام المحاكم الأجنبية فقضت نهائياً ببراءته أو إدانته واستوفي العقوبة .

رابعاً: مبدأ عالمية القاعدة الجنائية:

يتضمن مبدأ العالمية أن تطبق القاعدة الجنائية بالنسبة للأجانب الذين يرتكبون أي جريمة في أي دولة من الدول طالما تم القبض عليهم في إقليم الدولة، وهذا المبدأ تمليه اعتبارات التعاون بين الدول المختلفة لمكافحة المجرمين ولكن نظراً لما يحدثه تطبيق المبدأ من مساس بسلطان القوانين الجنائية للدولة التي وقعت الجريمة في نطاقها الإقليمي دون ان يكون للدولة التي قبض علي الجاني فيها مصلحة مباشرة للتدخل بالعقاب فقد اقتصر تطبيقه في التشريعات المختلفة علي الجرائم التي تهم الدول المتمدينة بما فيها الدولة التي قبض

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(١) د. علاء عبدالباسط خلاف ، المرجع السابق ، ص ٢٦٨

(٢) د. عمر سالم ، شرح قانون العقوبات المصري القسم العام ، المرجع السابق ، بند رقم ٥٩ ، ص ١٠٢ وما بعدها ، د. محمود محمود مصطفي ، شرح قانون العقوبات القسم العام ، ط٨ ، المرجع السابق ، ص ١٢٦ ، د. أحمد فتحي سرور ، الوسيط في قانون الإجراءات الجنائية ، المرجع السابق ، بند رقم ١٣٦ ، ص ٢٧٦

علي الجاني فيها، ومن أمثلة ذلك جرائم القرصنة والإتجار في الرقيق والإتجار في المخدرات [١].

ويمكن القول بأن لهذا المبدأ أهمية كبيرة لملائمته لجرائم الحاسبات الآلية وشبكة المعلومات الدولية (الإنترنت)، لخطورة تلك الجرائم، وسهولة وقوعها من أشخاص يحملون جنسيات مختلفة، وامتداد عناصرها المادية وسلوكياتها الإجرامية بين أكثر من دولة، في فترات زمنية قصيرة، كما أنها تهدد أمن وسلامة المجتمع الدولي من خلال اهتزاز الثقة في التعامل بالبيانات والمعطيات على شبكة الإنترنت، بما يهدد الأمن والاقتصاد العالمي، وعليه يجب تطبيق قانون العقوبات الوطني علي كل مجرم يقبض عليه في إقليم الدولة، أيا كانت الدولة التي ارتكبت فيها جريمته، وأيا كانت جنسيته، كما يتوقف تطبيق ذلك المبدأ علي أن تكون الجريمة المعاقب عليها جريمة عالمية، مثل جرائم الحاسبات الألية، وجرائم شبكة الإنترنت، و يتطلب الأخذ بهذا المبدأ أن يكون هناك تعاون دولي جاد في هذا المجال .

المطلب الثاني

تطبيق القانون من حيث الزمان

قد تثور مشكلة سريان القانون من حيث الزمان في مجال الحاسب الآلي والإنترنت، حيث يتم ارتكاب السلوك الإجرامي في زمان يكون من الصعب تحديده، وتتحقق نتيجة هذا السلوك في زمن آخر يصعب تحديده، وذلك لقيام الجاني باستخدام التكنولوجيا الحديثة في ارتكاب جريمته، كما في حالة قيامه بزرع البرامج الضارة(الفيروسات) في الحاسب الآلي في زمان معين، بينما تتحقق النتيجة الإجرامية لذلك السلوك الإجرامي وهي إتلاف المعلومات مثلاً في زمان مغاير للزمان الأول، فالقاعدة في تطبيق قانون العقوبات تتوقف علي تحديد الزمان الذي وقعت فيه الجريمة، ويطبق القانون المعمول به وقت ارتكابها.

وتحديد زمان ارتكاب الجريمة له أهميته عند تعاقب القوانين من حيث الزمان، وبالتالي فتطبيق قاعدة عدم رجعية النصوص يعني أن القانون لا يطبق علي الوقعات التي ارتكبت قبل تاريخ سريانه، فيلزم التأكد من أن الجريمة ارتكبت بعد سريانه أو في ذات التوقيت، ويسهل التحقق من تاريخ ارتكاب الجريمة لأن ارتكابها لا يستغرق وقتاً طويلاً وعما اذا كان قبل سريان القانون أو بعده، مثل جرائم الضرب والجرح والإتلاف والنصب والتزوير

(١) د. مأمون سلامة ، قانون العقوبات القسم العام ، المرجع السابق ، بند ١٢ ، ص ٨٠

والإستيلاء علي المال العام، إلا أن هناك حالات أخري منها حالة انفصال الفعل عن النتيجة والجرائم المستمرة وجرائم الإعتياد والجرائم متتابعة الأفعال كالتالي [١]:

أولاً: حالة انفصال لحظة ارتكاب الفعل عن لحظة تحقق النتيجة:

القاعدة العامة هي أن الفعل والنتيجة يتحققان في ذات اللحظة، أو في لحظتين قريبتين نسبياً بحيث لا يمكن القول بأنهما قد ارتكبا تحت إمرة قانونين مختلفين . ولكن قد يحدث أن تتأخر لحظة تحقق النتيجة عن لحظة ارتكاب الفعل لمدة طويلة نسبياً، بحيث يمكن صدور قانون أخر يختلف عن القانون الذي كان سارياً لحظة ارتكاب الفعل، فهل يطبق القانون الموجود لحظة ارتكاب الفعل أم القانون الموجود عند تحقق النتيجة الإجرامية ؟ وقد اختلف الفقه في تحديد القانون الواجب التطبيق في هذه الحالة علي الجريمة إلي رأيان :

الرأي الأول : يذهب أنصاره إلي أن العبرة بالقانون المطبق لحظة النتيجة .

الرأي الثاني: ويذهب أنصار هذا الرأي وهم الاتجاه الغالب في الفقه إلي أن العبرة بالقانون الساري لحظة ارتكاب الفعل ؛ لأن تطبيق القانون المطبق لحظة تحقق النتيجة يعني سريان القانون بأثر رجعي وهو ما يحظره المشرع، ويستند هذا الاتجاه إلي أن لحظة ارتكاب الفعل هي المعيار الذي علي أساسه يتم تقييم سلوك الجاني ومدي مشروعيته .

فنظرية السلوك تستقيم أكثر من غيرها مع أغراض القاعدة الجنائية باعتبارها أمراً موجهاً إلي الأفراد بالالتزام بسلوك أو النهي عن سلوك معين، فاذا كان الفعل مشروعاً وقت ارتكابه فهو يظل كذلك حتي لو تحققت النتيجة المترتبة عليه في تاريخ لاحق لصدور قانون أتي بتجريم جديد للواقعة، فالعبرة بالسلوك الذي يأتيه الفرد في علاقته بالأوامر والنواهي التشريعية وقت ارتكابه، فالأفراد يكيفون سلوكهم الإرادي تبعاً للقواعد الجنائية القائمة وقت ارتكاب السلوك[٢].

ويترتب علي ذلك أنه إذا قام أحد مستخدمي الإنترنت ببث فيروس عبر شبكة الإنترنت لغرض تدميري أو للتجسس في وقت لاحق، فيعتد هنا بوقت ارتكاب السلوك وهو

(١) أ. د. عمر سالم ، شرح قانون العقوبات المصري القسم العام ، المرجع السابق ، بند رقم ٦٩ ، ص ١١٧ وما بعدها ، د. أحمد فتحي سرور ، الوسيط في قانون الإجراءات الجنائية ، المرجع السابق ، بند ٧٩ ، ص ١٦٣ ، ١٦٤

(٢) د. مأمون محمد سلامة ، قانون العقوبات القسم العام ، المرجع السابق ، ص ٦٩

بث الفيروس المدمر لقواعد البيانات لا بوقت تحقق النتيجة، التي تتمثل في تدمير أو إتلاف البيانات.

أما بالنسبة للجرائم التي تكون فيها النتيجة الإجرامية جوهر الجريمة بحيث لا يكون هناك مجالاً للحديث عنه ؛ إلا إذا تحققت النتيجة الإجرامية فعلاً كما في الجرائم غير العمدية، فإن العبرة بالقانون الموجود لحظة تحقق النتيجة، وأن تطبيق ذلك القانون لا يكون بأثر رجعي ؛ فالحقيقة أن الجريمة لم ترتكب فعلاً إلا في هذه اللحظة وهي التي يتدخل فيها القانون بالعقاب، وبالتالي وجب الإعتداد بالقانون المطبق في هذه اللحظة. وقد اعتبر القضاء الفرنسي أن لحظة سريان التقادم في الجرائم غير العمدية هو تاريخ تحقق النتيجة وليس ارتكاب الفعل .

ثانياً: بالنسبة إلي قانون العقوبات يستوي في الواقعة التي يسري عليها القانون أن يتعلق بالنشاط الإجرامي أو بالمحل الذي يرد عليه، إذ لا ينفصل كل منهما عن الآخر، ولا تتوافر الرجعية إذا لم ينتج القانون آثاره إلا من حيث المستقبل رغم تطبيقه علي وقائع سابقة علي تاريخ العمل به إذا كانت الوقائع قد استمرت بإرادة صاحبها كما هو الحال في الجرائم المستمرة، وجرائم الإعتياد، والجرائم المتتابعة، وذلك كالتالي [1]:

(أ) الجرائم المستمرة:

يستلزم وجود تلك الجرائم تدخلاً متجدداً من الجاني فترة من الزمن، فيستمر نشاط الجاني بعد إتمام الجريمة، لأنها تكون مدعمة بإرادة الجاني، مثل جريمة استعمال محرر مزور وجريمة إخفاء أشياء متحصلة من جريمة، فقد تستمر فترة طويلة من الزمن، ويتصور وجود قانون جديد يختلف عن القانون الذي بدأت الجريمة في ظله، فإذا وجد مثل هذا القانون الجديد واستمرت الجريمة في ظله طُبق هذا القانون حتي ولو كان أشد من القانون السابق ؛ وبالتالي لا يصح الإدعاء بأن في هذا تطبيقاً للقانون الأشد بأثر رجعي، وهو ما منعه المشرع، إذ أن استمرار الجريمة في ظل القانون الجديد يعني أنها قد ارتكبت بعد سريانه .

(١) د. أحمد فتحي سرور ، الوسيط في قانون الإجراءات الجنائية ، المرجع السابق ، بند ٧٩ ، ص ١٦٤ ، ١٦٥ ، أ. د. عمر سالم ، شرح قانون العقوبات المصري القسم العام ، المرجع السابق ، ص ١٢١ وما بعدها

(ب) جرائم الإعتياد:

وهذه الجرائم لا تقع إلا بتكرار فعل معين، مثل الإعتياد علي ممارسة الدعارة، فلا تثور مشكلة إذا ارتكبت الأفعال اللازمة للإعتياد في ظل القانون المطبق، أما إذا ارتكبت تلك الأفعال في ظل قانون لا يعاقب علي الإعتياد أو يقرر له عقوبة أخف، ثم طبق قانون جديد ارتكبت بقية الأفعال في ظله وكان هذا القانون يعاقب عليه أو يقرر له عقوبة أشد، ففي هذه الحالة يتمثل محل التجريم في جرائم الإعتياد في الميل إلي ممارسة الفعل وليس الفعل ذاته، والمشرع لا يعاقب علي إلا إذا توافرت الدلائل اللازمة علي توافر الميل، وهو ما يعني ضرورة توافر كافة هذه الأفعال في ظل القانون الذي يتم تطبيقه، أما الإعتداد بالأفعال السابقة المرتكبة في ظل القانون القديم واحتسابها لقيام جرائم الإعتياد يقود إلي سريان القانون بأثر رجعي علي أفعال لم يكن يعاقب عليها وهو ما حظره المشرع .

(ج) الجريمة المتتابعة :

وهي الجريمة التي يتم ارتكابها تنفيذا لمشروع إجرامي واحد، مسلط علي حق واحد وبأفعال متماثلة دون أن يقطع بينهما فارق زمني يفصم اتصال بعضهما ببعض مثل جريمة السرقة التي تتم عبر عدة أفعال، فكل فعل علي حدة يعد جريمة، ونظراً لوحدة المشروع الإجرامي وحدة الحق المعتدي عليه أمكن إعتبارها جريمة واحدة، وبالتالي إذا ارتكب أحد الأفعال المكونة لهذا المشروع الإجرامي في ظل القانون الجديد، طبق هذا القانون حتي ولو كان أشد علي المتهم إذ يفترض أن المشروع الإجرامي قد ارتكب بكاملة في ظل هذا القانون.

وفي النهاية يمكن القول أنه إذا كان السلوك مستمراً فالعبرة بوقت ارتكاب الجريمة هو بالوقت الذي تقف فيه حالة الإستمرار، وإذا كان السلوك متتابعاً فالعبرة بالوقت الذي تنتهي فيه حالة التتابع، فإذا ما تعاقبت القوانين في حالة الإستمرار أو التتابع فالعبرة بالقانون الساري المفعول وقت انتهاء آخر فقرة من فقرات السلوك حتي ولو كان أسوأ لمركز المتهم من القانون الذي كان سارياً وقت بدء السلوك [١].

(١) د. مأمون محمد سلامة ، قانون العقوبات القسم العام ، المرجع السابق ، ص ٦٩

Marine P&I Insurance and the Cover of the Third Party

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INTRODUCTION

In the field of "marine insurance", there are two types of insurance for ships, i.e. "ship insurance i.e. hull insurance" and "Protection & Indemnity (P&I) insurance". Majority are familiar with ship insurance, as it mainly covers the property risk of the ship under certain risks, the collision responsibility of the ship, and the cost loss of the rescue. As for the Protection & Indemnity insurance, due to its relatively stable professionalism and complexity, not everyone is familiar with it [(1)]. The study analyses the cover of the third parties under Protection & Indemnity insurance analyse rights, liabilities and duties to associated third parties and comparison of various laws. Protection & Indemnity (P&I) insurance does not have an official and accurate definition. The guarantee of P&I insurance originally refers to the protection of one-quarter collision liability and personal injury compensation liability. Compensation relates to Indemnity, which covers the liability for damages. P&I insurance refers to the combination of insurance and compensation insurance[(2)].

The current Protection & Indemnity insurance is used to refer to the liability risk of the insurance claimed by "the Ship-owners P&I Club". It mainly covers the ship-owners outside the scope of the ship insurance, operates the ship and manage liability risks such as cargo liability, pollution liability, death liability, collision, touch liability, personal injury, wreck handling liability, fine liability and contractual liability[(3)]. In a strict sense, P&I insurance and marine insurance are not an accurate classification of maritime risks. P&I insurance and ship insurance complement each other and complement each other to build a ship owner's risk protection system jointly. P&I insurance has been continuously adjusted with the continuous development of social, legal and ship insurance,

(1) Ter Haar, Roger, Anna Laney, and Marshall Levine. Construction insurance and UK construction contracts. CRC Press, 3Ed (2016):209-299.

(2) Morris, Gregory DL. "FROM TIME OUT OF MIND: A Brief History of Marine Insurance." Financial History 124 (2018): 28-31.

(3) Han, Wang. "On If an Insurance Policy Is a Perfect Contract of Indemnity in Marine Insurance." China Legal Sci. 6 (2018): 77.

which has played an essential role in ensuring the gradual development of the shipping industry [1].

The proposed study aims to discuss the significance of the insurance of third contracts (protection and indemnity) that affect insurance contracts, i.e. insurance contracts for the benefit of the third parties[2]. The insurance refers to the compensation of the other party by linking the agreement of the party that compensates the paid premiums. In particular, ship insurance covers the damages or loss of terminals, cargo, ships, and property transferred between the final destination and origin. According to the insurance below, different types of marine insurance are offered. Insurance Hull is the first insurance of the ship-owner and depends on the existence or capital value of the ship. If the ship is damaged, it is mainly property damage insurance. Other insurance is a source of income for the ship and is intended to cover the loss of income[3].

Background of Study

According to Jain et al., (2018)[4], marine insurance covers all insurance contracts intended to compensate for damages caused by natural risks of maritime navigation. This includes potential hazards that can damage ships, products, and others. Marine insurance has evolved since its inception, as today's coverage covers not only ships and marine items but also a wide range of ships, including cargo, and legal obligations that may come from sea mail or port. Marine insurance has evolved since its inception, because nowadays there is a great opportunity not only for ships and marine items, but also for insured items, including cargo, goods and civil liability that may come from a maritime mission

(1) Mukherjee, Proshanto K., and Huiru Liu. "Legal Regime of Marine Insurance in Arctic Shipping: Safety and Environmental Implications." In Sustainable Shipping in a Changing Arctic, Springer, Cham, (2018) 191-225.

(2) Ross, Jaimie. "Comment: Cleanup Cost Liability for Oil Spills: Whether the FWPCA Alternative Remedies for Recovery of Cleanup Expenses." Florida State University Journal of Land Use and Environmental Law 2, no. 1 (2018): 4.

(3) Ross, Jaimie. Ibid,5

(4) Jain, Akshita, S. T. Sawant-Patil, Sherif Arora, and T. B. Patil. "MARINE HULL INSURANCE USING PRIVATE BLOCKCHAIN, FILECOIN." International Journal of Advanced Research in Computer Science 9, no. 3 (2018) 94-99.

or port. In the insurance of ships, even ships that are in repair are insured. This insurance was one of the pioneers in the field of insurance since the first risks that were covered were those of navigation, in theory, originated in the middle Ages because of the high maritime traffic in the Mediterranean and the prohibition of the Catholic Church to make loans to the course.

Further elaborated by Germano, (2015)[1], in related to insurance, the loss of business insurance is the most important, as the primary purpose is to compensate for the loss of revenue if the vessel stops serving the ship because it is damaged. Commodity insurance refers to the transport of goods from one place to another. The seller or the buyer of the goods carries it out regularly, but it can be applied without official sales, such as the transport of goods from one department to another. "P&I insurance" is the primary liability insurance in the context of shipping, as the insurer (owner) is also responsible for "personal injury and loss of life and property". Typically, the risks covered by P&I clubs are explained in more detail in the insurance contract.

As a starting point, "an insurance contract is a contract where the insurer", the P&I Club, will pay compensation to the person who agreed, i.e. ship-owner, if some events occur. The person entering into the contract with the insurer, and who pays the premium, is called the person effecting the insurance contract[2]. Under P&I conditions, the person who pays the premium and has affected the insurance will be identified as a member and the beneficiary of the sum insured as assured. Typically, the person or company affecting the insurance will also be the beneficiary under the policy (the assured), primarily, involving the right to claim compensation in connection with an insured casualty. However, the person who is going to receive the compensation may be another person than that one who

(1) Germano, Elizabeth. "A Law and Economics Analysis of the Duty of Utmost Good Faith (Uberrimae Fidei) in Marine Insurance Law for Protection and Indemnity Clubs." . Mary's LJ 47 (2015): 727.

(2) Noussia, Kyriaki. The principle of indemnity in marine insurance contracts: a comparative approach. Springer Science & Business Media, (2007):27.

effected the insurance due to, for instance, a unified financial interest between the assured cover and the primary insured(1).

Such persons may be called co-insured, but may also have other names. A similar distinction is not used in English insurance law. Differently, they will use the concept of third parties whereas the problem inherent in the distinction is solved through the doctrine of agency, implying that the person effecting the insurance acts as an agent for the assured or through assignments of the policy. It is to note that the term co-insured can refer to both several assured and several insurers. However, considering that the proposed study will cover the insurance for the benefit of more than one assured, when the term co-insurance is mentioned here it will mean the assured co-insurance and not co-insurance between several insurers(2).

As explained by Petrinović et al., (2017)(3), Protection & Indemnity insurance for ships flexibly cover civil liability according to the risks in each case. However, war or terrorism damages that are covered by additional insurance and provided by specialized insurers are excluded. The "P&I insurance" is civil liability insurance for reimbursement; that is, the insured ship-owner must first pay the compensation to the third party and then try to recover what was paid from his club. It is the clause of the previous payment. As there may be several civil liabilities for damages to third parties, who is the subject obliged to contract the P & I insurance. This will depend on each specific case, but the tendency is to move this obligation from the property to the operation of the vessel, that is, not so much in the owner but the ship-owner. Although the same compulsory insurance may have multiple insured persons other than the obligor, they can be

(1) Mohamed, Abdullah Hassan. "Marine Assured's duty of Disclouse: A Study of English and Kuwaiti Law." Journal of Law/Magallat al-Huquq 39, no. 3 (2015):11-74

(2) Gurses, Ozlem. Marine Insurance Law. Routledge, (2015).47-49.

(3) Petrinović, Ranka, Ivana Lovrić, and Trpimir Perkušić. "Role of P&I Insurance in Implementing Amendments to Maritime Labour Convention 2014." Transactions on maritime science 6, no. 01 (2017): 39-47.

identified by their name in the insurance policy(1). A minimum amount must be insured. Although this can sometimes be insufficient in the case of significant losses with ships that pollute the waters with hydrocarbons, which lists several examples in which the compensation has not reached to compensate the injured, despite that has risen over the years. The amount of the insured capital in passenger ships, however, has increased significantly in recent years(2).

In the P&I insurance contract relationship, the insurance premium paid by the ship-owners as the insured to the insurer (ship-owners mutual insurance association) is generally not a fixed amount agreed by the parties before the contract is established, and the ship-owners operation of the insurer and insurance claims have specific right to intervene and decide; and the ship owners' mutual insurance association as an insurer is not for profit, and provides many services other than insurance compensation for the insured free of charge. In addition, P&I insurance contracts have some distinctive features that are different from ordinary commercial insurance contracts(3). P&I insurance is insurance against the legal liability of the ship-owners for third parties. Moreover, the "third party" is any person who, in addition to the ship-owners, has a statutory or contractual claim for the insured vessel. "P&I insurance" is generally covered by arranging the ship to enter the"Mutual Insurance Association". The members of this mutual insurance association are the ship-owners, or the bareboat charterers, ship management companies(4).

(1) Majd, Mohammadali. "RECENT DEVELOPMENTS IN MARINE INSURANCE LAW AND CONSEQUENCES FOR IRAN." (2018). 14.

(2) Majd, Mohammadali. Ibid,15.

(3) Petrinović, Ranka, Ivana Lovrić, and Trpimir Perkušić. "Role of P&I Insurance in Implementing Amendments to Maritime Labour Convention 2014." Transactions on maritime science 6, no. 01 (2017): 39-47.

(4) Knight, Alan. "Port State Control: An Important Concept in the Safety of Life at Sea, the Protection of the Marine Environment, and of Goods in Transit." In The Future of Ocean Governance and Capacity Development, Brill Nijhoff,(2018): 462-467.

As configured by Kelsen, (2017)[1], protection and indemnity insurance dates back to the 19th century in London, England. Currently, the ship-owners and their charters are trying to ensure their ships and the owner receives insurance for the goods. However, ship-owners and leasing companies are aware that goods may be inaccurate when goods are lost or damaged at sea, and therefore require third party indemnity insurance for liability. In the first half of the nineteenth century, insurance companies did not want to take on third-party cargo liability risks, so the owners responded to the creation of a joint "P&I club". As the volume of traffic increased in the second half of the nineteenth century, the number of insurance claims increased, especially, as regards collision requests and third party obligations. During this time, team members want more and more benefits from their employers.

Clarke (2017)[2] defined the abbreviation of "protection and indemnity insurance" is the insurance that the insured ship-owner should undertake in the operation of the ship business, but does not include the liability risk within the scope of the ship insurance coverage. The insurance subject of P&I insurance is the ship owner's liability risk, so in terms of attributes, it belongs to the scope of liability insurance, which is different from the ship insurance whose property is mainly property insurance. As a supplement to ship insurance, it adapts to the objective needs of ship-owners in operating the ship business and enriches the content of marine insurance. The main part of the P&I insurance business is not the insurance company, but the P&I association organized by the ship-owners voluntarily (P&I Club)[3]. Ship P&I insurance plays an important role in the international marine insurance market. With the development of ship insurance and reinsurance business, ship P&I insurance plays an increasingly important role. To understand ship P&I insurance, you must start with its history and development.

(1) Kelsen, Hans. General theory of law and state. Routledge, 2017. p.n.d.

(2) Clarke, Malcolm Alistair, Richard JA Hooley, Roderick JC Munday, Leonard Sedgwick Sealy, A. M. Tettenborn, and P. G. Turner. Commercial law: Text, cases, and materials. Oxford University Press, 2017. 43-45.

(3) Kelsen, Hans. General theory of law and state. Routledge, (2017)24.

Ship P&I insurance has a long history and has been popular since the mid-19th century. In May 1885, the first ship owners' mutual insurance association was established. It is the British Britannia P&I Club. In the second year, the North British P&I Club (North) was established. Afterwards, the British P&I Club, the London Steam P&I Club and other ship owners' P&I Clubs were established. In the late 19th century, the British-centred Ship-owners P&I Club Group was gradually established in the world(1). The creation of the P&I Club has a profound historical background and is summarized in three main reasons. First, in order to transfer the collision liability of the ship insurer unwilling to bear after the collision of the ship.

Second, in order to transfer personal injuries and illnesses on board the ship, such as crewmembers and shore loaders risks caused by illnesses and other accidents(2). Major accidents such as collisions in ships will not only cause property damage, but also crew and other employment. Personal injury or death. Even if the ship is in normal navigation, especially in the long sea voyage, it is inevitable that the crew will be personally injured, sick and so on. When the ship is in the process of loading and unloading, accidents such as accidents of loading and unloading workers, tally personnel and other shore personnel are also frequent occurrences(3). Therefore, in order to allow this part of the risk to be transferred, many ship-owners voluntarily organize to cover such risks in the form of mutual insurance.

Third, liability for damage caused by the ship's unseaworthiness or the carrier's failure to manage the cargo appropriately. According to, ship-owners are not excused as carriers when they are unseaworthy or the carrier does not control the goods, even if they have insured the ship's insurance, the ship the insurer also does not agree to cover this liability risk. Ship-owners naturally want to transfer this risk to others(4). The best way is for the ship-owners to organize and protect

(1) Bundock, Michael. Shipping law handbook. Informa Law from Routledge, (2018)37-41.

(2) Baatz, Yvonne, ed. Maritime Law. CRC Press, (2014). 48-50.

(3) Bundock, Michael. Ibid, 39.

(4) Zhao, Lijun. "Uniform seaborne cargo regimes-a historical review." J. Mar. L. & Com. 46 (2015): 133.

each other so that one person's fault can get everyone's help. The above is an important reason for the establishment of the Ship-owners P&I Club. Of course, the ship mutual insurance association is produced because the ship-owners can organize the exchange of experience and experience in operating the ship in order to reduce the payment of insurance premiums to the insurers. The history of the development of the International Ship P&I Club also tells us that this is an effective organization to promote international shipping safety and economic operations, and is playing an active role in the international shipping industry(1).

The Ship P&I Club has been established for more than 140 years. Only in the London insurance market in the UK. At the end of 1995, about 39 P&I Clubs underwritten the maritime business, forming the main body of the mutual insurance association in the London market (2). Among them, 11 P&I Clubs are international P&I groups (The International Group of P&I Clubs, Member of IG). Today IG is made up of 17 ship P&I associations, which monopolizes the world. More than 95% of the ship's gross tonnage. In fact, IG is a unique reinsurance system for the ship owners' mutual insurance association. The mutual insurance associations participating in IG are independent of each other. For a certain amount of compensation, the mutual insurance associations shall bear the responsibility independently. For insurance liabilities exceeding this amount, they shall be borne by IG's mutual fund or by mutual, the insurance associations are responsible for each other, or the IG is insured against other insurance markets, and this amount is constantly changing (3).

For example(4), according to current regulations, the insurance liability of less than US$5 million is independently borne by the mutual insurance

(1) Kelsen, Hans. General theory of law and state. Routledge,(2017)25.

(2) Tsimplis, Michael. "The liabilities of the vessel." In Maritime Law, Informa Law from Routledge, (2017): 324-405.

(3) Cachard, Olivier. "INTERNATIONAL AND NATIONAL OIL POLLUTION REGIMES: THEIR COEXISTENCE IN CONTINENTAL EUROPE AFTER THE ERIKA AND PRESTIGE INCIDENTS." In Maritime Liabilities in a Global and Regional Context, Informa Law from Routledge, (2018):68-77.

(4) Tsimplis, Michael. "The liabilities of the vessel." In Maritime Law, Informa Law from Routledge, (2017):324-405.

associations; the insurance liability of between US$5 million and US$30 million is borne by the funds established by the mutual insurance associations participating in IG. Mutual insurance associations insure the insurance liability between $30 million and $1.5 billion. If the insurance liability exceeds $1.5 billion, it will be reinstated to other international insurance markets.

The International P&I Club Group meets regularly to study and formulate major guidelines and policies for international ship P&I insurance, such as premium adjustment, acceptance of members, reinsurance policies, compensation principles for major underwriting risks, major maritime cases, and insurance market control and development. It has become the core organization of the international marine insurance industry. Traditionally, there is no limit to the compensation of the Ship P&I Club, but since February 1996, IG has limited its underwriting liability to less than $20 billion, but the liability for oil pollution is limited to $50 billion(1).

In addition, the Campbell 1846 Lord Law promised crewmembers requirements on the dashboard, and given the boom in North American and Australian migration, ship-owners believed that passengers were likely to be high. In 1885(2), in response to increasing risks and inadequate reasoning, the first member of the Defence Forces was established as a shipowners' association (later became a British P&I club). The purpose of the club was to take responsibility for the risk of collision, which is not accompanied by a marine life insurance policy other than life and personal injury. The club has been successful and has created similar communities. After nearly 20 years, the club began to provide the ship-owners with additional insurance so that the club named P&I (3).

As per Thomas, (2015)(4), Co-insurance is the insurance agreement between the person effecting the insurance and the insurer is made to the advantage of more than one assured. In this case, the cover may be planned to protect parties

(1) Tettenborn, Andrew, and Barış Soyer. "DIRECT ACTION AGAINST INSURERS AND P & I CLUBS." In Maritime Liabilities in a Global and Regional Context, Informa Law from Routledge, (2018):206-244.

(2) Tsimplis, Michael. Ibid, pp. 324-405.

(3) Sarrabezoles, Aurélie, Frédéric Lasserre, and Zebret Hagouagn'rin. "Arctic shipping insurance: towards a harmonisation of practices and costs?." Polar Record 52, no. 4 (2016): 393-398.

(4) Thomas, Rhidian, ed. The modern law of marine insurance: Volume four. CRC Press, 2015.

who may be at risk due to operations or activities in which they are involved — for example, crew agents who employ crewmembers for the ship. Hence, the position of the co-assured will be examined to identify their rights and obligations(1). An important question here is to what extent the rules addressed to the member are also discussed to the co-assured, in a perspective of identification. Furthermore, to what extent the insurer may invoke a breach caused by the member against the co-assured. Therefore, it intends to examine some of these situations. For that, the analysis of the P&I Clubs statues and rules, in particular, "SKULD P&I CLUB, GARD P&I CLUB and UK P&I CLUB" will allow making a comparison between the conditions. It is to mention that it is outside the scope of this study to discuss the international regulations above mentioned in depth. The purpose is therefore limited to a more superficial demonstration of the differences related to the cover of third parties under Protection & Indemnity insurance(2).

Aims and Objectives

The aims and objectives of study are;

- To evaluate protection and indemnity insurance;
- To analyse third-party co-insurance;
- To assess rights and duties associated with third-party co-insurance; and
- To compare different countries, law with respect to marine insurance.

Significance of the Study

The significance of the study is to analyse marine insurance accurately to protection and indemnity insurance. The study provides measures to third parties under the protection and indemnity club. The study contributes to examine benefits that are given to third parties under protection and indemnity insurance also stating rights, liabilities and duties.

The study has analysed protection and indemnity insurance with respect to third party liability in the marine insurance. The study comprises of eight; chapters each

(1) Ter Haar, Roger, Anna Laney, and Marshall Levine. "PROFESSIONAL INDEMNITY INSURANCE AND DIRECTORS'AND OFFICERS'LIABILITY INSURANCE." In Construction Insurance and UK Construction Contracts, Informa Law from Routledge, (2016): 209-229.

(2) Thomas, Rhidian, ed. The modern law of marine insurance: Ibid,54.

chapter holds its own significance. The first chapter provides different sources of law. The second chapter provides detailed analysis of protection and indemnity clubs along with issues and liabilities available to the third party. The third chapter provides legal nature of protection and indemnity contracts to third parties. The, fourth, fifth, sixth, and seventh chapter provides rights and duties available to third parties in general and under English law and its association with Brazilian law. The eight chapter is associated with protection and indemnity contracts to third parties under United States of America.

CHAPTER 1; THE SOURCES OF LAW

1.1 UK "P&I Insurance" "(Protection and indemnity insurance)"

1.1.1 Introduction

The "Protection and Indemnity Insurance" is also commonly recognised as "P&I Insurance". This is a sort of mutual or shared maritime cover of insurance delivered and offered by a "P&I club". While furthermore, an organisation that provides marine insurance offers "hull and machinery" breakdown coverage for owners of ships and offers cover for cargo owners(1). "P&I also offers coverage for risks that are open-ended that conventional insurers are hesitant to provide cover for. The distinctive "P&I" insurance cover comprises of the third party risk for the carrier in order to cover damages resulted during carriage of party's cargo. It also provides covers for war risk and risk resulting from environmental damages such as risks from oil spills and pollution. In the United Kingdom, both P&I clubs and conventional underwriters are subjected to the "Marine Insurance Act 1906"(2).

A "P&I" club is an association for shared insurance that offers risk pooling, representation and information for its associates. Not similar to the marine insurance organisation, which reports and accountable to its shareholders, whereas a P&I club merely reports to its associates(3). Originally, the "P&I Club" were

(1) Bazvand, Aboutaleb. "The Principle of Indemnity in Valued Marine Policies." European Journal of Multidisciplinary Studies 1, no. 6 (2016): 55-62.

(2) Huybrechts, Marc A., and Theodora Nikaki. "Marine Insurance." In The International Handbook of Shipping Finance, Palgrave Macmillan, London, (2016): 267-283.

(3) Theocharidis, George, and Patrick Donner. "The Relationship Between Nationality of Ships,"Genuine Link," and Marine Insurance." In Shipping Operations Management, Springer, Cham, (2017): 215-229.

typically operators of ships, owners of ships or demise characters, but more lately, they are also forwarders of freight and operators of the warehouse(1).

Under the Marine Insurance Act(2), the premium is paid by the assured in order to have coverage, which endures for a specific period, for example for a year or duration of the voyage. This means the duration of voyage and time period is a source of "P&I Insurance"(3). This paid premium is an aggregate sum of money that is summed into the pool of club as a type of "kitty" which is referred to as pool fund. If at the year end, there are still finances in the pool, every member have to pay a reduced sum of money for the subsequent year, but if the club has to make a major payments such as after an oil leakage. each associate has to pay additional amount to replenish the required amount of the pool. This means that these damages and losses to parties of the cargo items during the voyage are also a source of law, which resulted in different insurance and marine laws. There is a Global Group of P&I Clubs founded at Peek House, London. These Clubs collaborate to offer money on massive and large claims applying a typical system to judge and evaluate the liability of the insurance provider(4).

1.1.2 The United Kingdom "Insurance Contract Act 2015"

The new Ac+ for insurance was made effective and came into force on August 12, 2016, during the policy year of 2016/2017 with the title of "UK Insurance Act 2015 ". This new Act is able to offer additional protection to both non-consumer and consumer purchasers of insurance. As such, it also aimed to modify the English Insurance contract law that is presently classified in the "Marine Insurance Act 1906" also referred to as "MIA 1906"(5). When it was being drafted, it was identified that the new Act might not be needed in sophisticated markets, within the sector of the marine insurance market. Instead, it

(1) Huybrechts, Marc A., and Theodora Nikaki. Ibid, 267-283.

(2) Marine Insurance Act 1906.

(3) Billah, Muhammad Masum. Effects of Insurance on Maritime Liability Law. Springer International Pu, (2016)156.

(4) Watson, Harold K. "A Fifty Year Retrospective on the American Law of Marine Insurance." Tul. L. Rev. 91 (2016): 855.

(5) Soyer, Baris, and Andrew Tettenborn. "How much flexibility is there in a voyage charter?–An eclectic cornucopia!." In Charterparties,.. Informa Law from Routledge, (2017): 179-208.

was expected that some insurers would contract out, as it is not applied in several provisions of the new Act.

In this new Act numerous modifications have been made for example; the "pre-contract disclosure duty" has been substituted by a new "fair presentation duty", there only single remedy (of evasion) for non-disclosure or falsification, the regulation on breach of warranty has modified materially. It contracts out, or removal of most of the Act is allowable, under the "Enterprise Act 2016", from 4 May 2017, and insured has become capable of claiming compensations for late payment of a legal claim(1).

The new Act also specifies that the insurer has to disclose every material that has to be known by the insured or he has to know right. It also specifies that there is a need to carry out a reasonable search in order to discharge "fair presentation duty". Under this clause, the information must be fair, clear and accessible to the insured and every material has to be substantially correct and up to date with new insurance regulations and laws. The remedies that are offered under this act involves, the policy can be avoided by the insurer but they have to return all premiums if they can evidence that it would not have to be included into the policy at all, if the insurer has entered the policy but on varied terms, then the policy will be considered as if it involves those clauses and terms, if the policy has been entered the insurer, but they have priced higher premium, it can be reduced by the insurer proportionately, and the payable amount on the claim has to reflect and reveal that adjustment of premium(2).

(1) Keceli, M.A., Establishing a new protection and indemnity (P&I) insurance institution in Turkey. (2012):53.

(2) Miller, Dana D., U. Rashid Sumaila, Duncan Copeland, Dirk Zeller, Baris Soyer, Theodora Nikaki, George Leloudas, Stig T. Fjellberg, Rebecca Singleton, and Daniel Pauly. "Cutting a lifeline to maritime crime: marine insurance and IUU fishing." Frontiers in Ecology and the Environment 14, no. 7 (2016): 357-362.

Moreover[1], the insurer can then avoid paying the claim amount if any proposal from the state met is incorrect or inaccurate, even if minor, immaterial, a warranty breach will no longer discharge the liability of insurer permanently. If the remedy has been breached before the loss, insurance cover will remain in place under the specified law of contract. Insurers have no lawful liability to pay for valid claims in the specified period. Since 4th May 2017, “Enterprise Act 2016” has modified the “Insurance Act 2015” to make insurers enabled to claim for damages that actually resulted from the late and unjustified payments of insurers, this will create liability to pay a claim.

1.1.3 The conditions of P&I Insurance UK

The primary and major condition includes a required provision of instructions and guidance and instruction on the facts and details of materiality. Under section 18 of the "MIA 1906" UK, a situation was considered and denoted as material if can impact the judgement of a sensible insurer in fixing the amount of premium or identifying whether the risk will be taken by him. This condition was created from the viewpoint of the insurance provider, imposes, and enforces disclosure load on the insured parties without delivering any instructions. It can be backed with the case law of "[Lambert v Cooperative Insurance Society][2]" where the decision was held that the test of materiality is required. It can be backed with another case law of "[Pan Atlantic Ins. Co v Pine Top Ins][3]" where it happened that phrase "impacted the judgement" considered only to the accurate circumstances for insurance provider might have desired to know about, but not essentially performed at the time of examining risks. This objective or materiality test means the insured was needed to disclose each information piece, which would have an impact on the insurer mind. This condition resulted in two prime problems. Primarily it signified that insured was alleged to dreadfully enhance standard and was predicted to read in the sensible insurance provider's mind

(1) Liu, Jing, and Michael Faure. "Risk-sharing agreements to cover environmental damage: theory and practice." International Environmental Agreements: Politics, Law and Economics 18, no. 2 (2018): 255-273.

(2) Lambert v. Fishermen's Dock Cooperative, Inc.,(1972) 297 A.2d 566, 61 N.J. 596.

(3) Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd, (1995) A.C.1. 501.

efficiently. Moreover, it signified that insurance provider might evade strategies and policies, notwithstanding there is no fundamental connection amid the actual as well as non-disclosure loss.

Another condition is to show evidence of material inducing them to enter the contract. For example in the case of "[St Paul's Fire & Marine Insurance Co v McConnell Dowell Contractors Ltd][(1)]", this was done by applying and utilising the proof from other insurance providers as well as eyewitnesses that were expert. However, an appropriately higher burden was imposed by this condition on the insurance providers in non-disclosure circumstances. Such a condition as the enhanced intensity of artificiality and complexity to the test of materiality. For example, it can be backed with the case law of "[Marc Rich v Portman][(2)]" where it was found by Longmore J that the insurer itself is the most unacceptable witness. This revealed wondering negligence or insignificance to the prudent practice of underwriting. However, the condition of inducement and incentives did enable the law court to restrict insurance provider's recourse to the severe remedy of evasion, as exemplified in "Drake Insurance Plc v Provident Insurance Plc[(3)]".

Furthermore, each "protection and indemnity insurance" club necessarily needs to have a corporate structure which involves documents such as rules and statutes that highlights and control the agreement of insurance amid the club and its associate[(4)]. Therefore, the situations and conditions as a primary source of the law and major condition of P&I Insurance. On the other hand[(5)], the insurance cover that is afforded by the insurer will not comprise the deductible fixed by the company or otherwise consented with the holder of the policy. Another condition

(1) St Paul Fire & Marine Insurance Co (UK) Ltd v. McConnell Dowell Constructors Ltd, 1995 Lloyd's Rep 2 (1995). 116.

(2) Marc Rich & Co AG v. Portman, 1996 Lloyd 1 (1996).

(3) Drake Insurance Plc v Provident Insurance Plc. P.n.d.

(4) Leonard, A. B. "Introduction: the Nature and Study of Marine Insurance." In Marine Insurance, Palgrave Macmillan, London, (2016): 2-22.

(5) Leglu, Catherine. "Illicit speech, unsayable bodies, and eighteenth-century medievalism:" Nocrion: conte allobroge"." In Forum for Modern Language Studies. Oxford University Press, 2019. 32-34.

is that the contract and agreement of insurance merely apply amid the insurer and the holder of policy and other co-assured or assured party or individual. Rendering to these terms and conditions an applicant or a claimant will not be entitled to direct the insurance coverage claim directly to the insurance company except when it is specified insignificant regulations of law or is particularly outlined in the terms and conditions. Where the holder of policy is entitled to direct claim against the insurance provider to important rules of law, the cover provided by the insurance provider will always be restricted to what had been consented amid the policyholder and insurer.

1.1.4 The UK Plan for Marine related Insurances

Insurance related to Marine services is the procedure to provide coverage for vessels or shipments to get them insured for probable losses or damage from the origin port until it reaches to destination. Marine services related insurance products are a type of insurance established in the maritime sector to provide protection to costly products that are being reported as a voyage(1). Throughout the 19th century, the "Lloyds London" and the "Institute of London" had established standardised clauses to be utilised in marine coverage also referred as the "Institute clauses". Marine insurance is, most of the time, grouped and associated with the risk of transit and aviation. In further plan, the standard policy has also be included in the "marine Insurance Act" (2). In 1991, the market of London shaped a new type of standard policy referred to as Mar 91 with the Organisation Clauses. The MAR 91 formula is an over-all statement of insurance cover; the Organisation Clauses are used to outline and develop the details of the coverage(3).

London's Lloyds is comprised of names that are creating their own "wealth at risk" in order to underwrite cover of insurance. The Plan of marine insurance allows covering for aircraft and vessels platforms. "Hull and machinery" policy is a type of insurance cover, which is limited for cases of loss from the explosion,

(1) Leonard, A. B. Ibid, 2-22.

(2) Grossmann, Schimon, and Michael G. Faure. "Conditions for effective risk sharing against marine pollution: the case of the Ría de Vigo." (2017). p.n.d.

(3)Leonard, A. B. Ibid, 2-22.

fire eruption, salvage aircraft and land conveyances. The marine insurance plan also allows cover for constructive total loss, general average, total loss, liability from the fractional collision and with extra premium restricted to provide insurance coverage for boilers and shafts breaking. All methods of hull cover should be decided from a cover broker. The marine cover insurance has numerous types of policies, which include, voyage policy, time policy, floating policy, mixed policy, valued policy, builder's risk, and unvalued policy(1). Thus according to the plan, under voyage policy the insurance will be provided for vessel just for a particular voyage for example from London to New York plus the ship is also insured for the period of 24 hours after the arrival and destination port.

Under the mixed policy plan, this is a mixture amid time and the policy of voyage. In simpler words, the voyage is covered for a specific voyage and a particular period. Whereas under floating insurance plan, this provides coverage for habitual suppliers(2). It provides insurance for multiple shipments, which are declared afterwards with other additional particulars. This insurance plan is most suitable for the exporters because excludes trouble of taking separate cover each time of making shipment. Moreover, the valued policy plan covers the third parties products and their shipping charges and anticipated 10 to 15 % profit margin, which is more to the actual value of goods. Several cove plans also provide cover for shipping construction throughout its construction process, all risks including voyages, places, for the maximum limit to provide cover to the vessel, and coverage of vessel in specific port for the specific period under builder's risk, blanket policy, and port risk plan respectively. These are the plans of UK Marine Insurance proving coverage to third parties(3).

1.1.5 Literature

The comments to the clauses and sections themselves and add general presentations of problems around the topic third party or co-insurance and are also

(1) Ivamy, Edward Richard Hardy. *Marine insurance*. Vol. 3. Butterworths, 1969. 27.

(2) Padovan, Adriana Vicenca. "Direct action of a third party against the insurer in marine insurance with a special focus on the developments in Croatian law." *Poredbeno pomorsko pravo* 42, no. 157 (2003): 35-83.

(3) Haehl Jr, Harry L. "Hull Policy: Additional Insurance Permitted." *Tul. L. Rev.* 41 (1966): 315.

be utilised as secondary law sources(1). Literature is mostly of interest when resolving the lawful dispute and conflict. Arguments for against or either a specific position might already have been analysed, and it is simply possible that the third parties are capable of contending with the perceptions adopted by a concerned commentator without resolving lawsuit or litigation. Also, have an influence on a United Kingdom legal decision, particularly when the global market is the leading market in maritime commercial practices. Moreover(2), the procedures revealed in the UK CLUB, inversely from other P&I Insurance conditions, and will not bring the idea of "co-assurance or co-assured" or "co-insured". Rather, third parties.

They will function with the idea of assignment, which signifies the transfer of rights act or interest from one party to another party. On the other hand, it can also be said that it is the instrument y which transfer of rights is impacted. Alternatively, the idea of the agency doctrine, which signifies the act, which represents the interest and benefits of third parties. The regulations are beneficial for third parties coverage is providing them comprehensive care in the best interest of owners and the insurer with the application of general regulations of contract law(3).

1.2 International P&I Insurance in Norway and United States

1.2.1 Norway

The insurance contracts in Norway are regulated and controlled under the "Insurance Contract Act of 1989". The subsequent lines are going to analyse how far depart right from ICA leads in specific direction specifically related to insurance related to marine services. Besides the documents like regulations, statutes, and rules that highlight and control the agreement of insurance amid "P&I Club" and the associates are also analysed in this report taking into account that the conditions of P&I have particular clauses and provisions associated to the

(1) Ntovas, Alexandros XM, Robert Veal, M. N. Tsimplis, Andrew Serdy, and S. Quinn. "Autonomous ships–What does the future hold?." (2015). p.n.d.

(2) Gurses, Ozlem. Marine Insurance Law. Routledge, (2015):32-34.

(3) Popham, Mitchell J., and Chau Vo. "Misrepresentation and Concealment in Marine Insurance Contracts: An Analysis of Federal and State Law Within the Ninth Circuit." *USF Mar. LJ*11 (1998): 99.

topic[1]. It is likewise significant to monitor and observe that a primary feature of the Marine Insurance market of Norway is the utilisation of the conditions "Norwegian Marine Insurance Plan" "NMIP". For this cause, the following lines are also examined with the applicability and the issues associated with "P&I Insurance". Ultimately, the commentaries to the clauses also highlight the issues general representation within the P&I Insurance, and this is used as a major source of Law[2].

1.2.2.1 Marine Insurance Act

In Norway, the contracts and agreements of insurance are regulated and controlled under the "Insurance Contract Act 1989. In line with the ICA's 1 to 3 initial paragraphs, the beginning point is that the provision in Apart is important and mandatory for the advantage of the individual having an entitlement or a right against the insurance provider otherwise or unless stated in the Act[3]. Though, there are exclusions and exceptions from this regulation related to definite professional insurance agreements that are highlighted in the second paragraph from A to E and in the exception letter that is C. Excluded from the ICA lines 7 to 8, related to liability insurance regulations in Part A might be departed from the insurance coverage linked to ships that must be registered and recognised to the code of maritime.

Concerning to "P&I insurance", the application of the ICA is considered as more remote or lacked taking into account the situations being expressly that the insurance " Contract Act of 1989" will not be applied thus leads to the appropriate governing of the arbitration proceedings under regulations specified under the Act. The reason for the governance is that ICA is extremely consumer focussed and consumer protected under the business market and insurance related to marine

(1) Leader, P. G. F. "Protection and indemnity insurance." *Maritime Policy and Management* 12, no. 1 (1985): 71-89.

(2) Popham, Mitchell J., and Chau Vo. ,Ibid, 99.

(3) Marine Insurance Act 1989.

in Norway have been controlled by a very broader and wider condition set depending on each kind of marine insurance(1).

1.2.2.2 The conditions of "P&I Insurance."

The major of the insurance of marine that is used for ships that are ocean going is impacted through thirteen shared associations. These relations and associations are mainly found in the England, Scandinavia, and Bermuda, and have widespread cooperation with the help of "The International Group(2)". Every "P&I club" is needed to have a corporate and governance structure which involves documents such as regulations and statutes that highlights and control the insurance contract amid the club and its associates. Therefore, the conditions as a major source of this paper analyses with an aim to identify in what was these clauses have been structured and divided associated to the element assured. Marginally different, the "Gard P&I Club" is segmented into six parts. Part I is related and concerned to obtainability of cover, part II is based on cover of P&I, part III is associated with mobile and offshore units coverage, part V is based on relation to defence cover, and part VI is related to general restrictions and several other provisions(3).

1.2.2.3 The "Marine Insurance Plan" of Norway

As illustrated in the SK rule, 47.3 highlights that the law of Norway will regulate the regulations and any arbitration proceedings, except for "Insurance Contract Act of 1989" will not be applied. At this point, it is pertinent to analyse whether the "Marine Insurance Plan" of Norway can be identified as the law of Norway in the case when ICA is not used. For general marine Insurance, the complete background law is the marine Insurance law of Norway, which has provided the rules and regulation for more than centuries, and it is also committed to coverage of insurance attached to the ship. The issues that are addressed in NMIP are the questions, which are not addressed in and regulated under the ICA,

(1) Merkin, Rob, and Jenny Steele. Insurance and the Law of Obligations. Oxford University Press, 2013.76.

(2) Pavliha, Marko. "Overview of Marine Insurance Law." *IMO International Maritime Law Institute, Malta, 7th–10th January*(2013). 7.

(3) Steele, Jenny, and Rob Merkin. "Insurance between neighbours: Stannard v Gore and common law liability for fire." Journal of environmental law 25, no. 2 (2013): 305-317.

and those are issues provided only to be analysed under ICA. General "marine insurance" contract entered into in Norway is usually denoted to the conditions of the plan(1).

1.2.2. 4 Literature

The comments to the sections themselves and likewise additional general revelations of problems regarding the topic of co-insurance and are also be utilised as secondary law resources and basis. Literature is most of the times of advantage and interest when resolving a lawful conflict(2). Influences either for or in contradiction of a specific position might already have been analysed, and it is quite likely that the parties shall be capable of showing consent with the perceptions adopted by the valued commentator while lacking solutions to litigation or lawsuits(3).

1.2.2 United States

1.2.2.1 Introduction

The "National law" of the USA comprises several regulations and rules on marine-related insurance services and products with the help of decisions of court, which can also be backed with the case of [Wilburn Boat Co. v. Fireman's Fund Ins. Co] where the decision was held that national law of the United States is heard in court decisions, the rules is not mandatory but several of the states have compulsory regulations in their insurance regulation and codes, which is in several situations might apply to policies of insurance for marine services(4).

1.2.2.2 P&I conditions of USA

The rules and regulations regarding marine insurance under "P&I club" of the USA is categorised among three classes or assured classes. As per the

(1) Hurd, Howard B. *The Law and Practice of Marine Insurance Relating to Collision Damages and Other Liabilities to Third Parties: And Maritime Conventions on Limitation of Shipowners' Liability and Other Subjects*. E. Wilson, (1930). p.n.d:36-52.

(2) Hurd, Howard B. *Ibid*. 36.

(3) Hopkins, Manley. *A manual of marine insurance*. Smith, Elder, (1867) 33-35.

(4) Healy, Nicholas J., and Gordon W. Paulsen. "Marine Oil Pollution and the Water Quality Improvement Act of 1970." *J. Mar. L. & Com.* 1 (1969): 537.

description, class 1[1] that is "protection and indemnity insurance" rule one have an introductory interpretation as associates that are general provision from 1.9. While provision also provides clarification to members, joint members and associates and co-assured. The provisions also provide insurance for risk and damages and provide defence for such losses[2]. These risks are not included in class 2 with regards to conflict amid members, joint associates, and ventures. While in class 3, insurance coverage for risk regulation and rule for charter is included, and all members, associate members and affiliates and also co-assured are included in the coverage. This it can be said that conditions related to "P&I Insurance" of USA includes comprehensive coverage for all stakeholders involved in marine related exports and imports services and seek for protection and safety of their items being voyaged.

1.2.2.3 The "Marine Insurance Plan" of the USA

The "Oil Pollution Act" of the United States and the "comprehensive environmental response", compensation and liability act outlines the restriction of liability and obligation and require a vessel to have a certificate of financial obligation for the vessels and another carriage such as tanks. The USCG "National Pollution Funds" focus on the evidence of monetary obligation from an underwriter that could be an insurance provider of a self-insured claimant. UK insurance agreements involve conventional maters of marine coverage involving war risk, hull and machinery risk, freight, protection indemnity, and character's risk and cargo-associated coverage's[3].

The "Oil Pollution Act[4]" of 1990, provides the outline and framework for the obligation and liability for discharge of oil-related products into navigable shorelines and water or the United States comprehensive economic zone.

(1) Lee, Paula Hamilton. "Untying the Gordian Knot and Opening Pandora's Box: The Need for a Uniform Federal Maritime Rule of Uberrimae Fidei with Respect to Marine Insurance." *Tul. Mar. LJ* 19 (1994): 411.

(2) Wilson, Cheryl L. "The Direct Action Statute and Ocean Marine Insurance: Can Protection and Indemnity Insurers Convince the Courts to Manacle an Old and Beaten Enemy." *Loy. L. Rev.* 37 (1991): 121.

(3) Go, Sabine. *Marine Insurance in the Netherlands 1600-1870: a comparative institutional approach*. Amsterdam University Press, (2009)73-75.

(4) Oil Pollution Act 1990

Generally, the accountable party for containers in specific, an operator, an owner, or demise character is obligated for losses and damages involving costs of removal natural resources damages and lost revenues and net earnings(1).

The act classifies fortifications to obligation, comprising war and acts, and acts of god, of third parties. The USA is a party to the 1910 "Brussels Salvage Convention and the 1989 Salvage Convention". Though salvage circumstances are typically decided under doctrines of the over-all maritime law, central courts have exclusive dominion over salvage circumstances brought that can be discussed under the light of the above laws. This seeks to provide USA exporters and importers to get their products, including oil-related products insured under the USA "Marine Insurance Plan"(2).

Chapter 2; Protection & Indemnity Insurance

2.0 Meaning of Protection and Indemnity Insurance

"Protection and Indemnity insurance" coverage and compensation covered by the transport. Over the past 150 years, callers have been called for third party liability insurance, which could not be recovered under the typical shell and plant policies. The primary purpose of P&I insurance is to protect the owner from personal injury and death, as well as marine shell insurance or quarter collision liability or excessive collision responsibility not covered by the interactive shell club(3). The P&I Club is considered an unregistered association with the members holding the insurance company and the insurer. This has led to some problems in particular. In response, the P&I Club is now set to have a separate legal structure from its members. For this reason, the P&I Club should have an institutional

(1) Tilley, Mark. "The Protection and Indemnity Clubs and Bankruptcy." *J. Mar. L. & Com.* 17 (1986): 531.

(2) Belete, Lidya Kassahun. "Implementation and enforcrment of the ISM Code in the Ethiopian Maritime Safety Administration." (2018) 65-67

(3) Staring, Graydon S., and George L. Waddell. "Marine Insurance." *Tul. L. Rev.* 73 (1998): 1619.

structure that includes documents such as representation and rules of conduct representing and regulating insurance contracts between the club and members(1).

2.1 Nature of Protection & Indemnity Insurance

The nature of P&I insurance is liability insurance and mutual insurance.

2.1.1 "P&I Insurance Is a Third-Party Liability Insurance"

"P&I insurance" mainly covers various tort liability, contractual liability and statutory liability arising from the ship-owner's external liability in the operation and management of the ship, such as cargo liability, pollution liability, excellent liability and contractual liability. These responsibilities constitute the subject of insurance for "P&I insurance". Since the "P&I insurance" is the insurance that the ship-owners liability for the third party, it is subject to insurance to "third-party liability insurance(2)".

2.1.2 "P&I Insurance is a Mutual Insurance"

Mutual insurance refers to the form in which an individual with a standard risk pays a membership fee to form a mutual insurance organization, and the common dangers arising from the members of the organization are paid in accordance with the "Articles of Association" and Terms of Organization. "P&I insurance" is essentially a form of mutual insurance. It is the payment of membership dues by the ship-owner. It is a "P&I Club" of the mutual insurance organization(3). The responsibility of the Ship-owners P&I Club for the ship-owner is in accordance with the insurance terms of the association. It is a form of insurance for compensation. Since P&I insurance covers sizeable third-party liability insurance with high moral hazard, therefore general commercial insurance is unwilling to underwrite. Mutual insurance is adopted to make the insured involved in the management of the insurer and share the common risk that can effectively reduce and avoid the generation of moral hazard (4).

(1) Hoyt, Sarah P., Linwood H. Pendleton, Olivier Thebaud, and Cindy Lee Van Dover. "Addressing the financial consequences of unknown environmental impacts in deep-sea mining." In Annales des Mines-Responsabilite et environnement, no. 1, FFE, (2017): 43-48.

(2) Hodgin, Ray. *Insurance law: text and materials*. Routledge, 2002. 24-26.

Thomas, Rhidian, ed. The modern law of marine insurance: Volume four. CRC Press, 2015.32-36. (٣)

(٤) Rible, Stephen V. "A Juxtaposition of Hull and Protection & (and) Indemnity Coverages." *Tul. L. Rev.* 83 (2008): 1189.

2.2 P&I INSURANCE FEATURES

P&I insurance has the characteristics of comprehensive coverage, flexibility and a high degree of security.

2.2.1 Covering a Wide Range

P&I insurance covers all the liability risks of ship-owners in business management. It provides the ship-owner with 25 standard coverage, including the crew's liability for injury, illness and death, and other personnel and passengers other than the crewmembers. P&I insurance provides a wide range of coverage. This includes responsibility for injury, illness, death, crew repatriation and replacement costs. The insurance also covers liability for loss or damage of personal belongings, liability for unemployment of the crew after total loss of the vessel, liability arising from certain compensation agreements or contracts, collision liability, property responsibility for loss or damage(1).

The insurance also covers change of extra cost of the route, placement of illegal immigrants and asylum seekers, cost of life-saving assistance, pollution risk, ship towing responsibility, wreck handling responsibility, quarantine costs, cargo liability(2), property liability on board the boat, but failed to obtain general average assessed contributions, general average compensation for the ship, fines, exclusive compensation for salvers, maritime investigation costs, expenses incurred by ship operations, damage prevention and legal fees, and costs incurred in implementing the instructions of the Association. The costs incurred by ship operations are also the Omnibus Clause. For other risks not explicitly stated, the board of directors of the P&I Club can decide whether to underwrite or not, and provide for the complex and variable risk types faced by members(3).

2.2.2 Strong Flexibility

The flexibility of "P&I insurance" is reflected in the fact that it does not strictly follow the relevant insurance principles, such as the principle of insurance

(1) Ahmad, Rusniah. "LIABILITY OF A SEA CARRIER IN UNDER INDONE." (2016).

(2) Thomas, Rhidian, ed. The modern law of marine insurance: Ibid.33

(3) Soyer, B., and G. Leloudas. "Carriage of Passengers by Sea: A Critical Analysis of the International Regime." Mich. St. Int'l L. Rev. 26 (2017): 483.

benefits. In the current complex ship management, P&I Club provides maximum protection for members and is insured for a ship. People often set up multiple people, such as registering ship-owners, management companies, operators, light tenants, etc. as members to underwrite. The flexibility also includes the ability to compensate for specific risks(1).

Since the insurer of the "P&I insurance" is the mutual insurance organization of the ship-owner, the member who is the insured can decide the relevant issues through the members' meeting and the board of directors of the highest authority of the "Ship-owners P&I Club", and the members have specific decision-making power. Moreover, the Ship-owners "P&I Club" is committed to safeguarding the interests of ship-owners. For certain risks, it may not be listed in the risk of P&I insurance, but the board of directors can decide whether to cover the risk. Even for non-insurance risks, the Ship-owners P&I Club may choose to make sure appropriate remedies for members when considering certain circumstances(2).

2.2.3 High Level of Protection

The shipping industry is a high-risk industry. Ship-owners often face huge liability risks, so it is especially important to obtain a high degree of insurance coverage. General liability insurance often sets insurance limits due to the combination of risk control and risk diversification(3). However, for P&I insurance, there is no limit to the risk of oil pollution liability, and other liability risks are not covered by insurance. P&I insurance provides members with unlimited insurance coverage. Even for the risk of oil pollution liability with a limit of 1 billion, this limit is the highest value of current international conventions or domestic laws for ship owners' oil liability. The high liability limit is, and under normal circumstances, can effectively protect the interests of ship-

(1) Rible, Stephen V. "Ibid, 1190.

(2) Siddiqui, Atiq W., and Manish Verma. "Assessing risk in the intercontinental transportation of crude oil." Maritime Economics & Logistics 20, no. 2 (2018): 280-299.

(3) Domaradzka, Alina. "The Revision of the Insurance Mediation Rules at EU Level and its Impact on Consumer Protection." *EIPAScope* 2012, no. 2 (2012): 19-24.

owners. This high level of protection for P&I insurance is not available in other areas of liability insurance(1).

2.3 Ship-owners P&I Club

2.2.1 Meaning of the Ship-Owners "P&I Club"

When it comes to "P&I insurance", it is impossible to say that the "Ship-owners P&I Club" has all the characteristics of "P&I insurance" based on the features of the "P&I Club". The Ship-owners "P&I Club", also known as the Mutual Protection Association, it is a non-profit mutual aid that is voluntarily formed by the ship-owners and mainly covers the liability of the ship-owners in the business management, such as cargo liability, pollution liability, excellent liability and contractual liability(2).

2.2.2 The Historical Development Of the Ship-Owners P&I Club

In the early 18th century, the UK allowed only individual insurers and the two insurance companies, "the Royal Exchange Assurance and the London Assurance", which were chartered in 1720, to monopolize the marine insurance business. This rigid insurance system has brought many drawbacks. More and more ship-owners are beginning to be dissatisfied with higher rates and strictly limited insurance coverage(3). These ship-owners founded the hull and mutual insurance association in the middle of the 18th century. Under the control of the ship-owners, such associations provide non-profit hull insurance to each other, which protects the interests of ship-owners.

Nevertheless, with the abolition of the franchise and monopoly of the two insurance companies in the UK in 1824, a large number of insurance companies appeared in the UK's insurance market. In the fierce competition, such as Lloyd's has preferential rates, no deductibles and reliable information resources, the hull

(1) Ruozzi, Elisa. "Toward a Growing Protection of Social Rights of Seafarers: The Amendments to the Maritime Labour Convention, 2006 Concerning Financial Security for Abandoned Seafarers and for Death and Long-Term Disability." IL DIRITTO MARITTIMO (2016): 519-551.

(2) Gliha, Dino. "Piracy in Light of Marine Insurance Law with a View of Ransom Payments." Zb. Prav. Fak. Sveuc. Rij. 39 (2018): 833.

(3) Crews, Chelsea C. "The Liening Tower of Precedent: The Fifth Circuit Further Fractures Consensus on Choice-of-Law Clauses Governing Maritime Liens in World Fuel Services Singapore Pte, Ltd. v. Bulk Juliana M/V." Tul. Mar. LJ 41 (2016): 585.

mutual insurance association is in a disadvantage in the fierce competition, and some compensation records are excellent. The ship-owners began to turn to other insurance companies for insurance, which led to a decline in the hull P&I insurance premiums, and the hull insurance association began to decline(1).

During this period, people did not recognize liability insurance. At that time, the ship-owners liability to third parties was minimal and could be ignored. Until the middle of the 19th century, the continuous development of British law drastically increased the responsibility of ship-owners. In 1836, in the case of De Vaux v Salvador(2), the United Kingdom ruled that owners could not obtain compensation for ship collision liability from the current standard ship insurance policy. After the introduction of the jurisprudence, the insurance market adjusted the underwriting risk of ship insurance and began to cover the risk of ship collision liability. However, it is underwriting of collision liability incomplete.

To promote the insured to strengthen management and avoid collision accidents, the insurer only bears 3/4 of the damage liability in the "collision clause", and the compensation amount is based on the ship's Value is limited(3). In this way, the ship-owners have to bear the risk of one-quarter collision liability, the risk of collision of the ship value collision, the liability risk of touching the fixed floating object and the personal injury caused by the crash. Due to the rapid development of economy, society, science, and technology during this period, the shipping industry has become larger and more complex, and the price of this ship has begun to increase substantially. The risk of collision liability that the ship-owners himself bears is enormous(4).

(1) Clarke, Malcolm. The Insurance Act 2015: A New Regime for Commercial and Marine Insurance Law. Informa Law from Routledge, 2016. 18-21.

(2) De Vaux V Salvador (The "La Valeur") (1836) 4 Adolphus And Ellis 420 – Charter Party Casebook". 2013. Charterpartycases.Com. https://charterpartycases.com/case/395-de-vaux-v-salvador-the-la-valeur-1836-4-adolphus-and-ellis-420.

(3) De Vaux V Salvador (The "La Valeur") (1836) 4 Ibid.

(4) O'Neil, William E. "Insuring Contractual Indemnity Agreements under CGL, MGL, and P& (and) I Policies." *Tul. Mar. LJ* 21 (1996): 359.

For avoiding such circumstances in 1846, the British Parliament passed the Fatal Accidents Act 1846 (also known as the Lord Campbell's Act)(1), which provided that the survivors of those who died because of misconduct by others may claim damages. At the time of the British immigration to the New World, the bill faced a considerable liability risk for ship-owners carrying large numbers of immigrants. Although the British Merchant Shipping Act of 1854(2) promulgated the liability limit for ship-owners in 1854, it stipulates that the ship-owners liability limit is not less than 15 pounds per ton of ship cargo, and the calculated amount is actual. There is still a considerable difference in the price of the ship, and the ship-owners will bear the significant risk of personal injury and death.

Therefore, ship owners began to pay attention to the enormous liability risks that these traditional ship insurances do not cover and find ways to guarantee chances. In the end, they used the business model of the Hull Mutual Insurance Association to establish a ship-owners mutual insurance organization that underwrites the liability risk. May 1, 1855, The first P&I Club was created, known as the Ship-owners Mutual Protection Society, the predecessor of the current Bretagne P&I Club, but it only covers " protection " insurance, i.e. underwriting Death and personal injury, dock damage and risk of collision liability(3).

During this period, the ship-owners responsibility for the goods was not outstanding. The ship-owners could stipulate various exemption clauses on the bill of lading according to the freedom of contract(4). Therefore, the ship-owners did not have any liability for the goods until the second half of the 19th century. This situation has only changed. In the case of the Western Hope round in 1870, the series was circulated to Port Elizabeth for additional cargo, and then on the

(1) Accidents Act 1846

(2) Shipping Act 1854

(3) Henderson, Roger C. "Insurance Protection for Products Liability and Completed Operations-What Every Lawyer Should Know." *Neb. L. Rev.* 50 (1970): 415.

(4) Bartenstein, Kristin, and Kristina Maximova. "Report of the fourth sino-canadian exchange on the Arctic: current and emerging legal, political, geopolitical and historical issues, Quebec City, 12-13 May 2016." (2017). 7-10.

way to the original destination port of Cape Town, South Africa, the load sank, and the court ruled that the ship-owners was improper by circumventing, the liability for damage caused by the goods shall be liable(1).

At this time, the liability risk of the ship owners' mutual assistance association is not included in the liability risk. Since then, the ship-owners responsibility for the goods has continued to emerge, and the ship-owners have eagerly requested the association to underwrite the cargo liability. Because of this, in 1874, the first ship-owners mutual compensation association was established to cover compensation insurance, i.e. risk of underwriting cargo liability. Subsequently, the Ship-owners Mutual Assurance Association began to modify its insurance clauses and increased the compensation insurance, so that the association became the owner's insurance association that underwrites the guarantee insurance and the compensation insurance. The Ship-owners P&I Club is a mutual assistance insurance organization established by ship-owners to adapt to the development of the times, to protect their interests, and to draw on the mechanisms and models of the hull mutual insurance association(2).

2.4 Ship-owners P&I Club Features

2.4.1 An Insurance Organization Established By the Ship-Owner

Because the risk of P&I insurance is vast, commercial insurance companies are not willing to underwrite. To protect their interests, ship-owners have to establish their insurance organizations to cover such colossal liability insurance. The organization's mission is to maintain and preserve the credibility and interests of its members and to provide professional services. Since the Ship-owners P&I

(1) Feichtner, Isabel. "Contractor liability for environmental damage resulting from deep seabed mining activities in the area." Marine Policy (2019). 56-60.

(2) Australia, Rean Monfils Gilbert-Sea. "Strategic environmental assessment and future potential shoreline impacts of the oil spill from WW11 shipwreck Hoyo Maru. Chuul Lagoon-Federated States of Micronesia." (2016). p.n.d.

Club is the ship owner's insurance organization, the insurance organization has some flexibility in claims and underwriting(1).

3.4.2 Mutual Insurance Organization

The ship owners' mutual insurance association takes the form of the ship owner's share of the average loss to resist the common risks. Each member has the function of managing and influencing the association. In the early stage of the establishment of the "P&I Club", the association did not have independent legal personality. It was a loose organization. At that time, each member of the association was both an insured and an insurer with a dual identity. The "Ship-owners P&I Club" is a mutual aid insurance organization in its fullest sense. Now, the "Ship-owners P&I Club" has become a company or association with independent legal personality. The association has the true meaning of the insurer. Members can only influence and control the "P&I Club" through membership and directorship. The ship-owner is alone an indirect insurer(2).

2.4.3 International Insurance Organization

Although the association has a specific country name or place name in its name, its members come from different countries, and the association's entry ships have a global track. Therefore, the P&I Club's business scope has to be spread all over the world and become an international insurance organization. The P&I Club has established an extensive network of communication agency services in major ports around the globe to provide a full range of professional services for maritime shipping(3).

2.4.4 Association Is a Non-Profit Organization

Since the P&I Club is the ship owner's organization and mutual aid insurance organization, these characteristics determine that the P&I Club is a non-

(1) Xu, Jingjing, David Testa, and Proshanto K. Mukherjee. "The Use of LNG as a Marine Fuel: Civil Liability Considerations from an International Perspective." Journal of Environmental Law 29, no. 1 (2017): 129-153.

(2) Depledge, Duncan. "Britain in the Arctic Today." In Britain and the Arctic,.Palgrave Macmillan, Cham, (2018): 63-99.

(3) Pateras, George Dimitri. "Enhancing Civil Military Integration for Strategic Sealift." PhD diss., University of Plymouth, 2017. p.n.d.

profit insurance organization. The fund of the association relies mainly on membership premiums, and its purpose is to provide services to the members of the ship-owners. Since the ship owners' mutual insurance association is not for profit, it can provide a high level of professional services at a lower premium(1).

2.5 Function and Role of the Ship-owners P&I Club

The Ship-owners "P&I Club" has three functions, i.e. insurance function, investment function and service function. The insurance function is the most important and fundamental function of the P&I Club(2). It provides financial protection for the ship owner's liability risk. The investment function of the "P&I Club" is that the "P&I Club" uses idle funds to conduct investment activities to achieve the purpose of maintaining and increasing the value of the fund and enhances the P&I Club's ability to resist risks. The service function of the P&I Club provides members with a wide range of specialized services to safeguard the interests of ship-owners. The service functions of the P&I Club are as follows(3):

2.5.1 A Complete Global Service Network

The association has established a comprehensive communication agency network in all major ports around the world and employs experienced lawyers, surveyors and consultants to assist the association and ship-owners in handling cases, providing advice, technical guidance and legal advice to ship-owners, consultation and so on(4).

2.5.2 Issue a Credit Guarantee to Release the Ship

Applying for the court to detain the ship is the most common means for the claimant to protect his or her interests. Once the vessel is delayed, it will affect the operation of the ship, causing the ship-owner to suffer a massive loss of schedule, even if the ship-owner is not satisfied within the specified time. The guarantee will also expose the vessel to the risk of being auctioned. Due to the unique operating mechanism and good reputation of the Ship P&I Club, the credit

(1) Martin, Frederick. *The History of Lloyd's and of Marine Insurance in Great Britain: With an Appendix Containing Statistics Relating to Marine Insurance*. Vol. 44525. Macmillan and Company, 1876.

(2) Sperdokli, Elli. "Marine Insurance for Oil Pollution." *Tort Trial & Ins. Prac. LJ* 49 (2013): 611.

(3) Miller, Michael D. *Marine war risks*. Informa Pub, 1994.87-90.

(4) Pateras, George Dimitri 2017.Ibid, 2017.

guarantee issued by it is widely accepted. Therefore, the P&I Club often issues a credit guarantee with releasing the ship or avoiding the ship being detained upon receiving the request of the ship-owner. Reducing and preventing damage to vessels.

2.5.3 Provide loss prevention information

The P&I Club concentrates the liability risks of almost all ocean-going ship-owners in the world. It can explore the characteristics and laws of accident risks, provide damage prevention information and develop measures to guide ship-owners to strengthen management, prevent risks, and avoid accidents(1). The loss prevention information provided by the Ship-owners P&I Club can reduce the occurrence of insurance accidents, and the compensation after the event is pre-existing prevention and suppression in the event.

2.5.4 Proof of the existence of P&I insurance

At present, many countries such as Japan, India, Sri Lanka and other countries have enacted laws requiring ships entering the port of the country to provide insurance certificates for specific liability risks. Otherwise, they will be barred from entering the port. These specific liability risks are mainly aimed at the enormous dangers of severe public interest, such as oil liability risk and shipwreck removal responsibility. In response to this situation, the Ship-owners P&I Club often issued a certificate that the ship has insured the liability insurance as required so that the ship can enter the port smoothly. Also, in the chartering practice, the lessee usually also requires the ship to ensure the insurance. It can be seen that if P&I insurance do not cover ocean-going vessels, it will be difficult to operate(2).

3.5.5 Express Opinions On Behalf Of the Ship-Owner

As the representative of the "ship-owner, the P&I Club" and the International P&I Group actively participate in relevant international conferences or international organizations to express the opinions of ship-owners to safeguard

(1) Llorca-Jaña, Manuel. "1 THE MARINE INSURANCE MARKET FOR BRITISH TEXTILE EXPORTS TO THE RIVER PLATE AND CHILE, c. 1810–50." (2010): 25-36.

(2) Montgomery, Richard A. "Duties and Liabilities of Marine Insurance Brokers and Agents." *Mar. Law.* 7 (1982): 33.

the interests of ship-owners, especially in the formulation of international conventions concerning ship owners' responsibilities. The "P&I Club" and the International "P&I Club" are prominent representatives and actively participate in the legislation(1).

2.6 Organization

The Ship-owners "P&I Club" has an independent legal personality and can assume responsibility for its property(2). When the association is terminated or dissolved, each member has the right to share the assets of the association. The member's liability to the association is limited to the membership of the payment association. This is different from the loose insurance organizations that did not have an independent legal personality at the beginning of the establishment. The current P&I Club has implemented corporate management(3).

The P&I Club generally implements the management model of the General Assembly, the Board of Directors and the Manager. The General Assembly is held once a year and is the highest authority. It has the functions of electing and removing directors and making resolutions on significant issues. The board of directors is the executive organ of the general assembly(4). It is responsible for the implementation of the decisions made by the public meeting and the formation of the managerial organization. The manager is the daily operation and management department of the P&I Club and is responsible for the regular underwriting, claims and investment under the authority of the Board of Directors(5).

(1) Danoff, Eric. "Marine Insurance for Loss or Damage Caused by Terrorism or Political Violence." *USF Mar. LJ* 16 (2003): 61.

(2) Augustine, Jonathan C. "Other States Should Get with the Program and Follow Louisiana's Lead: An Examination of Louisiana's Direct Action Statute and Its Application in the Marine Insurance Industry." *Tul. Mar. LJ* 27 (2002): 109.

(3) Chacon, Víctor Hugo. "Ship Arrest in the Republic of Panama and Its Harmonization with International Law." NUS-Centre for Maritime Law Working Paper 18, no. 09 (2018).

(4) Augustine, Jonathan C. " Ibid, 110.

(5) Senu, Amaha. "The global assemblage of multi-centred stowaway governance." PhD diss., Cardiff University, 2018. p.n.d.

2.7 International P&I Group

To avoid vicious competition and further diversify risks, some P&I clubs have begun to unite to defend against threats jointly. In 1899, the UK P&I Club, the Britannia Club, the Standard Club, the London Club, the Newcastle P&I Club (Newcastle) Clubs and the Sunderland Club and other six major P&I clubs have signed a "joint agreement" to share risks and arrange reinsurance to strengthen the strength of individual ship owners' P&I clubs. The Loss Association is located in London, so it is called the "London P&I Group", which is the predecessor of the "International P&I Group[(1)]".

With the addition of P&I associations in other countries, the London P&I Group has become the current "International P&I Group". In 1981, the International P&I Group was established as an independent organization with a legal personality and was granted the qualification of an observer of the International Maritime Organization. At present, the "International P&I Group" consists of 11 P&I Clubs, which are[(2)]:

- "American Steamship Owners Mutual Protection and Indemnity Association, Inc.";
- "Guardian P&As Association";
- "The Britannia Steam Ship Insurance Association Ltd.";
- "The Japan Ship Owners' Mutual Protection and Indemnity Association";
- "The London Steam-Ship Owners' Mutual Insurance Association Ltd."; "
- The North of England Protecting and Indemnity Association Ltd.";
- "The Shipowners' Mutual Protection and Indemnity Association (Luxembourg)";
- "The Standard Steamship Owners' Protection and Indemnity Association Ltd.";
- "The Steamship Mutual Underwriting Association Ltd.";

(1) Aldrich, Michael. "A Partial Remedy for the Plight of the Boat People: Protection & (and) Indemnity Insurance." *Colum. Hum. Rts. L. Rev.* 18 (1986): 289.

(2) "International Maritime Organization ". 2019. Imo.Org. http://www.imo.org/en/Pages/Default.aspx. p.n.d.

- "The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd."; and
- "The West of England Ship Owners' Mutual Insurance Association (Luxembourg)"

The 11 P&I Clubs cover approximately 90% of ocean-going vessels and 95% of ocean-going tankers worldwide. The International P&I reduces and spreads the risk of P&I insurance to the greatest extent through the sharing among members and the typical external reinsurance. At present, the retention of each member association of the International P&I Group is the US $ 6 million(1). For claims exceeding the retention amount, the compensation mechanism of the International P&I Group is compensated. The international P&I Group's guarantee mechanism is divided into three levels: group retention, excess loss reinsurance and catastrophe allocation(2).

The first level is the group's retention, which exceeds the association's 6 million US dollars in conservation to 50 million. Each member association apportions the US dollar claim; the second level is excess loss reinsurance, and the excess reinsurance refers to the reinsurance of the reinsurer in the London market for claims exceeding the group's $ 50 million in retention, and the group has 11 The P&I Club's risk has a durable bargaining power and is able to obtain very favourable reinsurance rates for ship-owners(3).

The current reinsurance insurance coverage is $ 2 billion, which is a claim between $ 50 million and $ 2.05 billion. Reinsurance, which is the most significant single reinsurance agreement in the world; the third level is catastrophe sharing, the group's claim for more than $ 2.05 billion reinsurance limit, through

(1) Kingston, Christopher. "Marine insurance in Britain and America, 1720–1844: a comparative institutional analysis." *The Journal of Economic History* 67, no. 2 (2007): 379-409.

(2) Mutenga, Stanley, and Christopher Parsons. "Marine Insurance." *The Blackwell Companion to Maritime Economics*11 (2012): 452.

(3) Diaz, Felipe. "American Steamship Owners Mutual Protection and Indemnity Association, Inc. v. Dann Ocean Towing, Inc. 756 F. 3d 314 United States Court of Appeals for the Fourth Circuit (Decided June 26, 2014)." Admiralty Practicum 2014, no. 1 (2018): 7.

the levy of catastrophe to the ship-owners and the apportionment of the associations. The current catastrophe share is theoretically about $ 3 billion. As of now, there has not been a catastrophe claim that exceeds the reinsurance limit, so the group's level of protection has not been applied. Through three levels of the arrangement, the International P&I Group can provide ship-owners with maximum protection of approximately US$ 5 billion, but for oil pollution risks, the International P&I Group has a liability limit of US$ 1 billion(1).

Members of the International P&I Club have appointed communication agents in 680 ports around the world to establish a global service network to provide quality, fast and professional services to ship-owners(2). The International P&I Group provides a venue for exchanges and communication between ship-owners and associations; it provides an international forum for discussion of legal and technical issues, which oversees the transfer and competition between member associations in accordance with international group agreements(3).

2.8 Legal issues related to P&I insurance

2.8.1 The Law Application of P&I Insurance

In P&I insurance, the relationship between the association and the member is a relationship between P&I insurance. The adjustment of this relationship is mainly based on the certificate of the ship's membership, the charter of the P&I Club and the insurance clause, and the declaration of membership is required to pass the group. The application and the association accept two links, which are the most direct manifestation of the contracting process between the members and the association, and the certificate of admission of the ship is usually incorporated into the principal rights and obligations of the P&I Club's articles of association and insurance clauses(4). The relationship between the association and its members

(1) Crais Jr, Arthur A. "Direct Actions in Marine Insurance: A Jurisprudential Overview." *Mar. Law.* 1 (1975): 63.

(2) Kingston, Christopher. 379-409

(3) Underhill, R. Michael, and Brian J. Hickman. "Between a Rock and a Hard Place: Ethics Issues in the Context of Defense Counsel's Immediate Response to a Marine Oil Spill." *USF Mar. LJ* 7 (1994): 163.

(4) Zhu, Ling. *Compulsory insurance and compensation for bunker oil pollution damage*. Vol. 5. Springer Science & Business Media, 2007.

is primarily a marine insurance contractual relationship. Article 218 of the Maritime Law stipulates that the liability for a third party can be used as the subject of marine insurance. It is affirmed that the P&I insurance with the third party liability as the underwriting content belongs to marine insurance(1).

The laws concerning marine insurance contracts in English Law mainly include the Maritime Law, the Insurance Law and the Special Procedures for Maritime Litigation. Article 153 of the Insurance Law stipulates "The relevant provisions of the Maritime Law shall apply to marine insurance; if there is no provision in the Maritime Law, the relevant provisions of this Law shall apply", therefore, for the marine insurance contract law, the Maritime Law "Prior to the Insurance Law, but for the particular marine insurance contract of P&I insurance, the Insurance Law provides for commercial insurance only in Article 2, and Article 156 provides "The insurance organizations of other natures other than insurance companies stipulated in this Law shall be separately specified by laws and administrative regulations(2).

Since P&I insurance is not commercial insurance and the P&I Club is not an insurance company as stipulated in the Insurance Law, the Insurance Law Not applicable to the P&I contract and the P&I Club. In summary, the laws applicable to P&I insurance and P&I clubs mainly include the Maritime Law, the Maritime Procedures Special Procedure Law and the Social Group Registration Management Regulations(3).

2.8.2 Direct Claims P&I Club

For strengthening the protection of the victim, the law gives the victim the right to claim directly from the insurer of the infringer, commonly known as the direct insurer(4). In marine insurance, since the P&I Club covers the liability risk, it is the direct object of the appeal. The direct insurer was initially developed from

(1) Underhill, R. Michael, and Brian J. Hickman. Ibid, 163.

(2) Jervis, Barrie. *Reeds Marine Insurance*. A&C Black, 2013.

(3) Lomas, Owen. "The prosecution of marine oil pollution offences and the practice of insuring against fines." *J. Envtl. L.*1 (1989): 48.

(4) Fayle, C. Ernest. "Shipowning and Marine Insurance." In *The Trade Winds*, Routledge, (2013):29-52.

the British Third Party's Law on the Rights of Insurers in 1930[1]. The law stipulates that a third party, that is, a victim, under certain conditions, can replace the insured (injurer) status and directly file a lawsuit with his liability insurer to claim damages, but the exercise of the right must meet certain conditions, i.e. The third party's request for damages has obtained a successful judgment or arbitral award against the responsible person, and the natural person who is the accountable person has died or the legal person as the responsible person has been dissolved or bankrupt[2].

However, the judicial practice in the United Kingdom believes that since the P&I Club stipulates the "prepaid " principle in the insurance clause, only the member has the right to claim compensation from the P&I Club if the member has fulfilled the compensation obligation. The member's prepayment is the P&I Club. The prerequisite clause of liability more than a third party directly filed a lawsuit with the P&I Club, which does not satisfy the premise of "member pays first", so the P&I Club can refuse to be directly appealed by a third party, the British House of Lords in The "Fanti" And the "Padre Island" case affirms this view[3].

2.8.3 Limitation of Liability

Although the P&I Club provides an unlimited amount of P&I insurance in addition to its oil duty liability, this does not prevent the P&I Club from having the right to limit liability. The liability limitation or compensation limit of the P&I Club is mainly reflected in two aspects[4]. First, the PBX insurance contract stipulates the liability limit. For example, in the insurance clause, the maximum liability of the P&I Club for the ship owner's oil pollution liability is One billion

(1) Riermaier, Paul K. "Compulsory Discord-The Second, Third, and Fifth Circuits Still Interpret the Term Compulsory by Law in Protection and Indemnity Policies Differently: Danos Maine, Inc. v. Certain Protection & Indemnity Underwriters." *Tul. Mar. LJ* 35 (2010): 645.

(2) Noussia, Kyriaki. The principle of indemnity in marine insurance contracts: a comparative approach. Springer Science & Business Media, 2007. p.n.d.

(3) Jin, Di, and Hauke L. Kite-Powell. "On the optimal environmental liability limit for marine oil transport." *Transportation Research Part E: Logistics and Transportation Review* 35, no. 2 (1999): 77-100.

(4) Hope-Ross, W. J. "Insurance and Indemnity Problems in Offshore Drilling Operations." *Alta. L. Rev.* 11 (1973): 471.

US dollars, the maximum compensation limit for the charterer's oil pollution liability is 350 million US dollars; the other limit is to enjoy the ship owner's liability limitation according to the domestic law or international conventions on the limitation of liability. These two aspects have double protection for the responsibilities of the P&I Club(1).

For the first point, since the maximum insurance coverage that the International P&I Group can provide is about US$ 5 billion (previously US$ 4.25 billion), some scholars believe that P&I insurance is the same as other liability insurance, and it is also limit insurance. If the liability limit of the P&I Club is not specified in the membership certificate or insurance clause, it should be regarded as unlimited insurance. The Association shall be solely liable for the balance of the claim after using the maximum guarantee provided by the International P&I Group(2).

For the second aspect, the P&I Club's right to limit the liability of the ship-owner under domestic law or international convention is an independent right. It does not lose the right because of the ship owner's loss of liability(3). The 1992 International Convention on Civil Liability for Oil Pollution Damage has been clearly defined. Although China's Maritime Law does not explicitly stipulate this, it can be inferred from its relevant provisions that the liability of the liability insurer's liability is also an independent right and is not affected by the ship owner's liability(4).

Article 206 of the Law stipulates(5): "If the insured may limit the liability for compensation in accordance with the provisions of this Chapter, the insurer who is liable for the claim for maritime claims shall have the right to enjoy the same limitation of

(1) Riermaier, Paul K. Ibid, 645.

(2) Schoenbaum, Thomas J. *Key Divergences Between English and American Law of Marine Insurance: A Comparative Study*. Cornell Maritime Press/Tidewater Publishers, 1999. p.n.d.

(3) Burke, Richard E. "An Introduction to Marine Insurance." In Forum, vol. 15, 1979: 729.

(4) Athanassiou, Lia. Maritime Cross-Border Insolvency: Under the European Insolvency Regulation and the UNCITRAL Model Law. Informa Law from Routledge, 2017. p.n.d.

(5) Bosma, Shane. "The regulation of marine pollution arising from offshore oil and gas facilities-an evaluation of the adequacy of current regulatory regimes and the responsibility of states to implement a new liability regime." *Austl. & NZ Mar. LJ* 26 (2012): 89.

liability in accordance with the provisions of this Chapter", in the second Article 109 also stipulates: It is proved that the loss caused by the claim for compensation is due to the responsible person. The person who is intentionally or knowingly may cause damage and is caused by indiscriminate acts or omissions shall not be entitled to limit liability in accordance with the provisions of this Chapter. "These provisions give the liability insurer the right to limit the liability, but do not stipulate that the liability insurer loses the conditions for limitation of liability)[(1)].

Therefore, the P&I Club has the right to claim the limitation of liability if the ship-owner loses the limitation of liability. The P&I Club also clarifies this in the insurance clause: "Limited liability is in accordance with the terms and conditions of this insurance and any special terms and conditions of the ship's insurance, the Association's insurance for the entry ship can be based on the law Responsibility for judgment and establishment. The Association shall not be liable for any amount exceeding the liability of the law[(2)]".

CHAPTER 3: LEGAL NATURE OF PROTECTION & INDEMNITY INSURANCE CONTRACTS

Before analysing the legal nature of the ship's P&I insurance relationship, it is necessary to clarify the law of the ship owners' mutual insurance association as a party to the P&I insurance status. The Ship-owners Mutual Assurance Association is a mutual assistance insurance institution between ship-owners. It covers the risk of ship owners' sea operations and aims to protect the interests of ship-owners and compensate members for economic losses[(3)]. Although the foreign ship owners' mutual insurance association is a legally-registered limited liability company with legal person status, the ship owners' mutual insurance associations are often not established under the conditions of commercial

(1) Morris, Gregory DL. "FROM TIME OUT OF MIND: A Brief History of Marine Insurance." Financial History 124 (2018): 28-31.

(2) Lu, Andrew, Sally Hill, Thinesh Thillainadarajah, Rob Leonard, and Edward Lee. "Developments in Australian private international law 2016-2017." Australian Year Book of International Law 35 (2018): 509.

(3) Petrinović, Ranka, Ivana Lovrić, and Trpimir Perkušić. "Role of P&I Insurance in Implementing Amendments to Maritime Labour Convention 2014." Transactions on maritime science 6, no. 01 (2017): 39-47.

insurance companies(1). Administratively vested in the management of the Ministry of Civil Affairs, the business is directed by the Ministry of Communications, not an insurance company in the strict sense of the insurance law. Since the activities are not in commercial insurance behaviour as stipulated in Article 2 of the Insurance Law, they are not covered by Insurance.

Supervisory committee management and supervision. Article 156 of the Insurance Law stipulates that laws and administrative regulations shall separately prescribe insurance organizations of other natures other than insurance companies specified in this Law(2). This article deals with the application of rules of insurance organizations of other species. Regarding insurance companies of different characters other than insurance companies, there are mutual insurance organizations and insurance cooperatives based on international practices(3). The establishment and operation of such insurance organizations are qualitatively different from those of insurance companies. Although the law and administrative regulations have not provided for the P&I Club so far, it should be an insurance organization of other nature as stipulated in this article(4).

3.1 Organizational Form and Legal Nature of Ship-owners Mutual Insurance Association

The ship owners' mutual insurance association has a history of more than 160 years. Since the first association that appeared in the United Kingdom in 1855, its organizational form and legal nature have changed continuously(5). Today's ship-owners interact with each other. The Association of Insurance and the Association of Ship-owners Mutual Protection in the initial period have been far from the legal nature, and determined the changes in the legal nature of the P&I insurance contract. The ship owners' mutual insurance association was

(1) White, Michael WD. *Marine pollution laws of the Australasian region*. Federation Press, 1994. p.n.d.

(2) De Roover, Florence Edler. "Early examples of marine insurance." *The Journal of Economic History* 5, no. 2 (1945): 172-200.

(3) De Roover, Florence Edler. Ibid, 172-200.

(4) Petrinović, Ranka, Ivana Lovrić, and Trpimir Perkušić. Ibid, 39-47.

(5) Hong, Yanci. "Effects of Recent Insolvencies in the Offshore Oil and Gas Industry on the Efficacy of Knock-for-Knock Provisions." (2018). p.n.d.

formerly known as the Hull Club in the United Kingdom in the early 19th century(1). The "local" "mutual" insured the Hull Insurance Ship Insurance Association. Hull Club is a registered commercial organization with no contractual relationship with member ship-owners and is reorganized every year(2). In Hull Club, the insurance contract relationship exists between the member and all other members. Each member ship-owner is responsible for the loss suffered by each member of the membership ship. When one member goes bankrupt, other members are not associated with its responsibility. Therefore, the member ship-owner, who is both an insurer and an insured, is a right Mutual Insurance(3).

The P&I Club was developed based on Hull Club. It is said to have Protection Club (1855) and Indemnity Club (1873); Protection Club covers ship-owner liability risks associated with ship Ownership, such as collisions. Responsibility; Indemnity Club includes risks related to the "operating" of the ship, such as cargo damage liability; the two types of liability insurance that covers are by mutual insurance association of P&I Club(4). However, all the ship owners' mutual insurance associations have included both types of risks at the same time, and there is no clear dividing line between these two types of hazards.

Therefore, it is of no practical significance to distinguish between Protection Club and Indemnity Club. At present, the ship owners' mutual insurance association classifies the risk of its underwriting as "Class", but Protection and Indemnity do not distinguish this classification; on the contrary, the traditional

(1) Jayakumar, S., Tommy Koh, Robert Beckman, and Hao Duy Phan, eds. Transboundary Pollution: Evolving Issues of International Law and Policy. Edward Elgar Publishing, 2015. 56-58.

(2) Adshead, Julie. "The application and development of the Polluter-Pays Principle across jurisdictions in liability for marine oil pollution: The tales of the 'Erika'and the 'Prestige'." *Journal of Environmental Law* 30, no. 3 (2018): 425-451.

(3) Myburgh, Paul. "P & I Club Letters of Undertaking and Admiralty Arrests." (2018). p.n.d.

(4) Dadiani, Davit. "Cyber-security and marine insurance." (2018). p.n.d.

Protection and Indemnity are merged at the same level, and Differences in risk categories such as FD&D, Hull, Strike or[1].

The early P&I Club was similar in structure to Hull Club, and there were no other legal entities that were officially registered as companies or independently responsible. The insurance contract relationship only existed between "members" and other members of the association. Members are responsible for the proportion of other members "individually"; members are both insured and insurers. The "mutuality" shown is also pure. The Club is just the Keeper of the Purse for all members. Members have no right to claim from the association, only the right to ask other members to share. Therefore, the early P&I Club was just a name shared by all members, and even the "Partnership" was not counted[2].

In the United Kingdom, the Companies Act 1862 provides for organizations with more than 20 people to register if there is a fee. The court subsequently ruled that the insurance policy issued by this unregistered mutual insurance association was invalid because the name of the insurer was not indicated on the insurance policy[3]. This has prompted many associations to transform into a corporate form and gain legal status quickly; and more importantly, after registration under the company law, the ship owners' mutual insurance association can obtain the qualifications of the litigant, and the association can sue the members in their name and ask for Members can also sue the association for insurance compensation if they are due. Before registration, according to the common law, the association can only sue members in arrears in the name of all members; members can only sue other members for a share of their losses, difficulties in the proceedings[4].

(1) Rawlings, Philip. "What can history tell us about insurance regulation?." In *Systemic Risk and the Future of Insurance Regulation*, Informa Law from Routledge, (2017): 31-46.

(2) Talonen, Antti. "Systematic literature review of research on mutual insurance companies." Journal of Co-operative Organization and Management 4, no. 2 (2016): 53-65.

(3) Liu, Jing, and Michael Faure. "Risk-sharing agreements to cover environmental damage: theory and practice." International Environmental Agreements: Politics, Law and Economics 18, no. 2 (2018): 255-273.

(4) Romanova, Daria Evgenievna. "Marine Insurance Warranties. Development in England, in comparison with other countries." Master's thesis, 2015. 95-97.

In the UK, the modern ship owners' mutual insurance association is generally registered as a limited liability company with no "share capital" and "Limited by Guarantee". Members are not stockholders, have no capital and their fundamental obligation is to ensure that mutual insurance claims are shared. By this way, the Ship-owners Mutual Assurance Association does not have a corporate legal person form, but according to Article 7 of Guarantee Law, it can act as a guarantor, and its reputation guarantee is effective(1).

After the Second World War, the international trend of the major ship owners' mutual insurance associations became more and more apparent. At present, the Ship-owners Mutual Insurance Association also covers ships owned by non- ship-owners(2). In summary, the organization form of the ship owners' mutual insurance association is gradually changing. The current ship owners' mutual insurance association, according to the company law and the insurance law of the place of establishment, is generally in the form of a limited liability company and has complete Litigation subject qualification(3).

By the way, the International Federation of Ship owners' Associations, or the International Group of P&I Clubs, founded in 1899, is currently an unincorporated association of 11 ship owners' mutual insurance associations. The original purpose was to share broad claims between the participating ship owners' mutual insurance associations, which were adjusted by the Pooling Agreement revised year by year(4). After 1951, the Alliance assumed the responsibility of arranging huge claims for reinsurance.

In order to avoid low-cost competition between associations, the members who joined the alliance in 1929 signed the Inter-Club Gentlemen's Agreement,

(1) Bryce, Ian, Lee Anderson, Mark DeCorte, Lewis Bublé, Len Carr, Terry Gustafson, Ron Fowler et al. "Notice of Annual General Meeting." (2015). p.n.d.

(2) Dickinson, A. J. "The right to Rome? The law applicable to direct claims against insurers, and anti-suit injunctions." *Law Quarterly Review* 132, no. October (2016). 624-673.

(3) XU, Tie, and Pengfei ZHANG. "Compulsory Liability Insurance for Marine Drilling Platforms Pollution under Chinese Law." *Journal of Shipping and Ocean Engineering* 6 (2016): 356-363.

(4) Zboron, Michael. "Insurance underwriting and broking in the London insurance market: the role of reputation and trust in the insurance decision making process." PhD diss., University of Southampton, 2015. p.n.d.

which was revised after the Gentlemen Agreement, and is currently applicable to the 2013 International Union Agreement (IGA: The International Group Agreement 2013). The International Federation of Ship owners' Insurance Association has no litigation subject qualification, and the Group Constitution, the above Pooling Agreement and the International Group Agreement (IGA) adjust the rights and obligations of the mutual insurance associations participating in the alliance. The Ship-owners Mutual Assurance Association has not yet participated in the alliance(1).

3.2 The Reciprocity of P&I Insurance and the Double Contract

The ship-owner insured all or part of the tonnage of the ship in a ship owner's mutual insurance association insurance premium insurance after the ship owner's mutual insurance association accepted, the ship owner's mutual insurance association should issue the ship's "entry" to the ship-owner. "Certificate of Entry ", the ship is called "Entered Vessel ", and the ship-owner becomes a "Member" of the Association(2). The membership certificate is not only the proof of the insurance contract but also the role of "Policy/Insurance Cover" and the evidence of the "Membership" of the ship-owner. In other words, the membership certificate also proves "Contract of Insurance" and "Contract of Membership" and has the legal nature of "Dual"(3).

As mentioned above, the modern ship owners' mutual insurance associations have long been registered as commercial organizations according to the laws of the place of establishment. They have full litigation subject qualifications, whether they are insurance contracts certified by the certificate of entry or membership contracts. Between members and associations, there is no direct contractual relationship between the two members. The one hand, when the member owes money, other members have no right to sue the member; on the

(1) Morris, Gregory DL. "FROM TIME OUT OF MIND: A Brief History of Marine Insurance." Financial History 124 (2018): 28-31.

(2) Kendall, David, and Harry Wright. *A Practical Guide to the Insurance Act 2015*. Informa Law from Routledge, (2017):272-276.

(3) NURHUDA SULAEMAN, S. H. "TANGGUNG JAWAB KONSORSIUM ASURANSI PENYINGKIRAN KERANGKA KAPAL." PhD diss., Universitas Airlangga, 2019. p.n.d.

other hand, no member has the right to sue other members and request any insurance compensation(1).

Therefore, it is still said that the member ship-owner is both an insurer and an insured, which is already very inaccurate; from the perspective of the contractual relationship, this statement can even be said to be wrong. Judging from the legal nature of the insurance contract, the P&I insurance contract is still a liability compensation insurance contract, and the liability insurance contract issued by the general commercial insurer is not different in legal nature(2).

In order to avoid misunderstanding, the Association's terms are particularly evident on the "Payment First" principle. In addition to personal injury and death, in general, a third person has no right to sue the Ship-owners Mutual Assurance Association as a liability insurer(3). However, the member ship-owner, as evidenced by the membership certificate, is both an insured and a member of the association. Members have a dual legal personality. Mutuality is still one of the fundamental differences between P&I insurance underwritten by the Ship-owners Mutual Insurance Association and ship-owner liability insurance covered by commercial insurers on the market. According to the comments made by Mr Frans Malmros, the managing director of Swedish Club, in The Swedish Club Letter 2/1998, this “mutuality” is mainly reflected in the following aspects(4):

3.2.1 Assessing Losses and Sharing Risks

The Ship-owners Mutual Assurance Association is a non-profit organization whose operating principle is that the contributions collected in each insurance year must be equal to the insurance liabilities incurred during the year. If the "Advanced Call" and investment income received at the beginning of the insurance year is insufficient to cover the insurance liability and management

(1) Sarrabezoles, Aurélie, Frédéric Lasserre, and Zebret Hagouagn’rin. "Arctic shipping insurance: towards a harmonisation of practices and costs?." Polar Record 52, no. 4 (2016): 393-398.

(2) Wennekers, Jonathan. Piracy in the maritime insurance of the shipowner. Vol. 356. Mohr Siebeck,(2016):623-625.

(3) Sarrabezoles, Aurélie, Frédéric Lasserre, and Zebret Hagouagn’rin. Ibid, 393-398.

(4) Desai, A. and Kashiyani, B., 2015. Role of insurance as a risk management tool in construction projects. International Journal of advanced Research in Engineering Science and Management, 2(3/3).

expenses incurred during the insurance year, each member is obliged to end at the end of the insurance year(1), and thereafter until the insurance when the close is announced annually usually after 3 years), one or several additional fees or supplementary fees are paid. If the ship-owner is out of the insurance year or is suspended by the association, or the member is required to surrender in the middle of the insurance year, the ship-owner seeking exemption is obliged to pay the Association a "Disclaimer", to cover the Association's expectations i.e. additional membership fees(2).

On the other hand, if there is any "prepaid contribution", the association should return it to the member ship-owner of the current year, or as the "Reserve Call" of the association (usually), to increase investment income and enhance the financial strength of the association. Under certain conditions, the association also has the right to charge the member a surprise club fee(3). This annual accounting principle also clearly explains why the Ship-owners Mutual Insurance Association should never allow any member to arrears. Otherwise, it will severely damage the interests of other members and affect the survival of the association. For arrears members, the association generally does not pay claims, does not provide guarantees, and even revokes its insurance.

In the ordinary commercial insurance contract relationship, the insurance fee or premium is fixed, and the insurer has no right to require the insured to pay the insurance premium separately to make up for the loss, and the insured is not entitled to the profit. Some ship owners' mutual insurance associations also cover the liability compensation insurance business of some fixed-rate ship-owners or charterers. However, Mutuality is still considered the cornerstone of P&I

(1) Billah, Muhammad Masum. Effects of Insurance on Maritime Liability Law. Springer International Pu, (2016)76.

(2) Eggers, Peter MacDonald, and Simon Picken. Good faith and insurance contracts. Taylor & Francis, 2017. p.n.d.

(3) Petrinović, Ranka, Ivana Lovrić, and Trpimir Perkušić. "Role of P&I Insurance in Implementing Amendments to Maritime Labour Convention 2014." *Transactions on maritime science*6, no. 01 (2017): 39-47.

insurance(1). In the 1970s, the Ocean P&I Club over-insurance fixed-rate business losses were severe, causing excessive membership fees for members of the Mutual Insurance Association. Many members of the ship-owners sued the association and demanded a withdrawal(2).

It was also a lesson that the Ocean Marine Mutual Club P&I Club declared bankruptcy for reasons such as excessive fixed rate business. In short, the membership fee is different from the insurance premium, which is the proportion of the member's annual contribution to the association. Members must share the yearly expenses of the association and actually, share their respective insurance compensation. In each claim, the insurance compensation that a member receives from the association also includes, in theory, the assessed contributions of the member.

In terms of the association, there is generally an "Enhanced Risk Extension Clause" also known as Omnibus Rule, which authorizes the board of directors to claim the member's unconfirmed or excluded claims. The bus is also appropriate for compensation after considering the particular circumstances of the case, without giving reasons, to precedent effect. There are certain exceptions to the insurance compensation that are not strictly handled in accordance with the terms of the contract(3).

According to the liability insurance contract, the insured (insurer) pays the insurance premium according to the indirect insurer, and when the insured causes damage to the insured, it shall be liable for compensation, and the insurer shall

(1) Vatsalya, Vatsalya, Sherif Arora, Akshita Jain, T. B. Patil, and ST Sawant Patil. "MARINE HULL INSURANCE USING PRIVATE BLOCKCHAIN, FILECOIN PROTOCOL AND SMART CONTRACTS." International Journal of Advanced Research in Computer Science 9, no. 3 (2018): 94.

(2) Psarros, George Adamantios. "Analysis and Findings." In *Energy Efficiency Clauses in Charter Party Agreements*, Springer, Cham, (2017): 31-45.

(3) Vatsalya, Vatsalya, Sherif Arora, Akshita Jain, T. B. Patil, and ST Sawant Patil. Ibid, 94.

undertake the obligation to pay the insurance compensation according to the insurance policy(1).

Generally speaking, the P&I Club has the right to collect insurance premiums (contributions) and the power of subrogation, the obligation to pay insurance compensation, the obligation to inform and the obligation to provide related services; the members of the P&I Club have the right to claim insurance compensation(2). The right to vote and be elected as a member of the board of directors, as well as the obligation to pay the dues, the obligation to inform, the duty to notify the accident, the commitment to reduce losses, the requirement to maintain the class, etc., the payment of insurance premiums and amount of insurance compensation are the rights and obligations of both parties.

3.2.2 The Goal Is the Same, Experience Sharing

In terms of ship safety and anti-fouling and damage prevention, member ship-owners and the association's goals are consistent. Because it is impossible to prevent the occurrence of ship accidents, the Association pays special attention to providing excellent accident handling services to help member ship-owners solve problems and ensure that ships resume normal operations as soon as possible(3). The Association has accumulated increasingly rich and practical experience to enable all member ship-owners within the Association to share. The guarantees are provided or arranged by the Ship-owners Mutual Insurance Association, the members enjoy wide international acceptability, so that the joining ship can be prevented from being detained or released immediately(4).

(1) Astorkiza, Kepa, and Ikerne del Valle. "An economic analysis of private side of fishermen's cofradías' activity on the Cantabrian Sea." *Marine Policy* 90 (2018): 152-159.

(2) Kraska, James. "25 Russian Maritime Security Law along the Northern Sea Route: Giving Shape to Article 234 in the Law of the Sea Convention." In *Challenges of the Changing Arctic*, Brill Nijhoff, (2016): 593-612.

(3) Kirchner, Stefan. "Brussels and Klaipėda: the domestic impact of EU maritime law." *Teisės apžvalga* 2 (18) (2018): 88-97.

(4) Yang, Dong, Qing Liu, Liping Jiang, Wei Zhang, and Wenrong Chu. "Shipping business strategies and national policy of China." *Maritime Business and Economics: Asian Perspectives* (2018). p.n.d.

Although the Association is not obligated to provide guarantees to its members, the Association is fully aware of the importance of giving guarantees to its members. Therefore, the managers will generally exercise their discretion to provide the members with the necessary association guarantees. Of course, the precondition is that the member is not in arrears, and the warranty is within the scope of the association's insurance(1).

3.2.3 to Resist Catastrophe and Share Financial Resources

Most of the ship owners' mutual insurance associations operate well and have accumulated significant reserve funds, which gives the association a lot of room to control the additional membership fees. Some associations also use the reserve fund to purchase catastrophe risk insurance for member ship-owners "free of charge"(2). The P&I Club in the International Association of P&I Clubs, using its "pooling" mechanism, can economically and effectively transfer catastrophe risks such as the current single-ownership risk, which is $10 million. Mutuality enables the value of economies of scale to be realized, and ship-owners can pay affordable and more stable premiums to secure their operations.

3.2.4 Quality Is Similar, Equal Treatment

Mutuality requires members accepted by the Association to meet the conditions of the Association's expressly stated Conditions of Entry, such as class; all members' management "Quality" must be similar. The Association requires that the participating ship meet the requirements of the ISM Code. The association is an international group of "like-minded" member ship-owners. Contract transfers without the consent of the association are invalid. On the other hand, mutuality also requires the Association to treat all members fairly and equally in all aspects of risk assessment, determination of contributions and insurance claims(3). The Ship-owners Mutual Assurance Association, which is built on the

(1) Mukherjee, Proshanto K., and Huiru Liu. "Legal Regime of Marine Insurance in Arctic Shipping: Safety and Environmental Implications." In Sustainable Shipping in a Changing Arctic, Springer, Cham, (2018): 191-225.

(2) Hill, Christopher, and Yash Kulkarni. *Maritime law*. Taylor & Francis, 2017. p.n.d.

(3) Billah, Muhammad Masum. Effects of Insurance on Maritime Liability Law. Springer International Pu, (2016) 81.

cornerstone of "reciprocity", has been tested for more than 160 years and has provided a valuable and vital risk sharing system for the stable development of the shipping industry(1).

3.3 The Content of P&I Insurance Contract and Its Dual Legal Nature

As mentioned above, the P&I insurance contract is proved by the membership certificate issued by the association to the member, but the content of the P&I insurance contract to the membership certificate and its approval. The insurance terms include the Association's Memorandum, Articles, Regulations, and other related laws. Ship-owners Mutual Assurance Association merges them and collectively refers to the "insurance clause(2)".

3.3.1 Memorandum and Articles of Association

The association's charter (some called Statutes, such as Grad), and the association's insurance terms (Rules), it is difficult to make a clear distinction (as in the case of Membership). Most foreign ship owners' mutual insurance associations choose to stipulate them separately, and the association's charter is more effective than the association's insurance clause if there is a conflict between the two(3). In summary, the significant issues stipulated in the association's charter include the foundation and purpose of the association, the membership, the general meeting, the board of directors or the committee, and the manager or the Executive Committee, other association organizations such as the Supervisory Committee and the Association's Dissolution or Termination(4).

The matters stipulated in the association's articles of association involve only the rights of the ship-owners as members of the membership contract and the daily operation of the association. However, the association's charter also affects the insurance contract and its insurance claims of the member as the insured,

(1) Yang, Dong, Qing Liu, Liping Jiang, Wei Zhang, and Wenrong Chu. Ibid, p.n.d.

(2) Kendall, David, and Harry Wright. *A Practical Guide to the Insurance Act 2015*. Informa Law from Routledge, 2017. 280.

(3) Osborne, David, Graeme Bowtle, and Charles Buss. *The Law of Ship Mortgages*. Informa law from Routledge, (2016): 158.

(4) Guo, Jianxun. "The Study of Marine Insurable Interest: A Comparison of Laws in China and the United Kingdom." (2017). p.n.d.

because the insurance clause for directly adjusting the insurance contract must obey the association's articles of association(1).

3.3.2 Regulations and Bye-laws

At any time during any insurance year, the association's general meeting and board of directors may formulate new rules in accordance with the association's charter, notify the member ship-owner in the form of a Circular, and thereby unilaterally change the content of the P&I insurance contract. Failure by a member to cause damage or liability may result in the Mutual Insurance Association deducting insurance compensation. This is one of the very different places from a standard commercial insurance contract(2). Such additional rules may be related to the association's charter and may refer to the association's insurance clauses. For example, a member passively becomes an affiliate member of a shipping organization (subsidiary fee paid by the association), requiring members to temporarily add a clause in their lease or bill of lading, requiring members not to go to a port or to issue a particular document, requiring Members arrange pre-shipment inspections for certain goods, or use bills of lading or leases in a specific format(3).

3.3.3 Insurance Terms of the Association

This is the terms of the insurance contract. The main contents are the members of the insurance contract and the contribution of the membership (including the application for membership, partnership, membership certificate and change notice, warranty period, insurance termination notice, membership fee, rate and membership payment)(4). P&I insurance risk, exclusion, limitation of liability, claims, insurance termination, suspension or withdrawal, association funds and other regulations (such as transfer, applicable law and dispute resolution). The most commonly used terms are P&I insurance coverage risks, general rules, membership fees, rates and guarantees, and payment of dues.

(1) Morris, Gregory DL. "FROM TIME OUT OF MIND: A Brief History of Marine Insurance." Financial History 124 (2018): 28-31.

(2) Pearson, Robin, and Helen Doe. "Organizational Choice in UK Marine Insurance." *Corporate Forms and Organisational Choice in International Insurance* (2015): 47.

(3) Leonard, Adrian, ed. Marine Insurance: Origins and Institutions, 1300-1850. Springer, 2016. p.n.d.

(4) Logvinova, I. L., Y. B. Rubin, and A. E. Sherstiuk. "Mutual Insurance of Transport Infrastructure Construction Risks as an Inherent Part of Competitive Environment." *European Research Studies* 21 (2018): 460.

3.4 Difference between Ship Insurance and Ship P&I Insurance

The ship's P&I insurance is based on ship insurance. The P&I Club can accept only ships that have already insured ship insurance. Therefore, when defining the legal nature of the ship P&I insurance relationship, it is also necessary to discuss the differences between it and the commercial insurance of ship insurance. The main ones are as per Logvinova(1):

3.4.1 Insurer's different ship insurance

The establishment of a commercial insurance company must meet the requirements of the relevant provisions of the Company Law and the Insurance Law, such as Articles 70 and 73 of the Insurance Law. The organization form of an insurance company is a joint stock limited company or a wholly state-owned company. The minimum registered capital of an insurance company must reach 200 million(2). Therefore, marine insurance is commercial insurance for the purpose of profit. The insurer of the ship P&I insurance is mainly the P&I Club, which is an insurance organization of other nature, and its operation is not for profit(3).

3.4.2 The Risk of Underwriting Is Different

The insurance of the ship is the subject of insurance. The liability of the third party is not compensated according to the special agreement for the loss suffered by the ship during the voyage or berth due to natural disasters or accidents at sea. Ship P&I insurance covers the liability of the ship-owner in the ship's business activities and is not the liability risk covered by the ship's insurance coverage(4). The insurance coverage of the P&I insurance contract is broader, except for the losses and liabilities caused by the ship owner's intentional acts; the insurance liability covered by the ship insurance contract; the liability for other risks caused by nuclear risks or other nuclear goods, and other risks. It can

(1) Morris, Gregory DL. Ibid, 28-31.

(2) Logvinova, I. L., Y. B. Rubin, and A. E. Sherstiuk. Ibid, 460.

(3) Esteve Costa, Carles. "The direct action against P&I Clubs in the latest judgements." Master's thesis, 2018. 179.

(4) Mohan, Mahdev. "A vanishing silhouette: Acts of state doctrine (s) and interim relief In Singapore." *JE Asia & Int'l L.* 9 (2016): 234.

be included in the scope of P&I insurance coverage, such as personal injury and death, sickness, risk of pollution, and responsibility for wreck disposal(1).

3.4.3 Payment method of insurance premiums

The insured of the ship insurance contract pays the insurance company a premium with a fixed rate (Premium). The insured of the ship's P&I insurance contract pays the "Certificate of Insurance" and generally does not have a fixed rate. It is usually required to pay the Association at the beginning of the insurance year. Prepaid premiums and the subsequent accounting of the Association's annual accounting decision whether to pay additional premiums, members may also pay extra premiums for other accidents(2). The premium paid by the member is the fee of the P&I Club, which is equal to the amount of insurance compensation after deducting the investment income of the Association.

3.4.4 Limitation of Liability

Different insurance amounts are the limits of the insurer's liability for insurance compensation. There are insurance clauses in the ship insurance contract, such as the provisions of the People's Insurance Company of Coastal Inland Ship Insurance(3). Article of Association prohibits the liability and is the agreement on the amount of insurance, and the compensation of the insurance company is usually limited to the amount of coverage. The P&I insurance contract has no insurance amount agreement. The insurance provided by the ship owners' mutual insurance association, in addition to the ship's oil pollution liability risk, the risk of underwriting by the ship owners' mutual insurance association is unlimited(4). Of course, due to the ship owner's legal liability and the liability for maritime claims, the risk assumed by the Ship-owners Mutual Insurance Association will not exceed the above limits.

(1) Logvinova, I. L., Y. B. Rubin, and A. E. Sherstiuk. Ibid, 460.

(2) Zhao, Liang, and Li Lianjun. *Maritime Law and Practice in China*. Taylor & Francis, 2017. p.n.d.

(3) Nazzini, Renato. "Arbitration and the expanding circle of consenting parties: joinder of additional parties and consolidation of related claims." In *Transnational Construction Arbitration*, Informa Law from Routledge, (2017): 92-106.

(4) Rangarajan, S. "The Constitution and the Concentration of Economic Power." (2015). 37.

CHAPTER 4; CO-INSURANCE

4.1 Introduction

Co-insurance means or it signifies that the agreement of insurance amid the individual affecting the insurance that is a member of the club and the insurance provider is made to the advantage of more than one insured or assured(1). As a result, the provisions discovered in the contract of insurance are managed and addressed to the individual who impacted the insurance which is member, signifying that a co-insured is not an association and has no direct obligations and duties(2). Though P&I might be required for the purpose of potential co-insurance contract taking into account the liability for losses and damages occurring to individuals in the form of cargo losses and is insured by the club in preference to provides claiming benefits to individual, third-party or group of individuals(3). Co-insurance assumes that the co-insured had benefits and interest to be ensured that it will be obligated unless the insurance coverage protects him. The regulations and rules related to co-insurance depend upon who the parties are to the insurance agreement and who will be impacted by the consequences of damages and make sure that they are covered comprehensively(4).

4.2 Parties involved in the contract

The United Kingdom system differentiates amid the person affecting the insurance and the insured. The person affecting the insurance is the one who enters into the agreement with the insurance provider, whereas the insured is the individual who has the entitlement and indemnity right when there is causality. Typically, the person or the organisation influencing the insurance will also be the recipient or the beneficiary under the policy (the insured), primarily and foremost including the right to claim compensation in linked with the insured causality. Co-insurance under the conditions of P&I in the UK utilises the same distention but

(1) Chen, Binghua. "A corpus-based study of Chinese and English translation of international economic law: an interdisciplinary study." (2017). 134.

(2) Ababneh, Mahmoud. "Analyzing the New Institute Cargo Insurance Clauses of 2009 and its Harmonization with the Arabic Marine Insurance Legislations." Journal of Law/Magallat al-Huquq 39, no. 3 (2015). 87.

(3) Mast, Martijn, Felix Pigmans, Roelof Verbeek, Ramon van‘t Wout, Maikel van Zuijdam, and Mrs van der Drift. "Autonomous sailing Safety, liability and legislation." (2016). p.n.d.

(4) Jing, Zhen. Chinese Insurance Contracts: Law and Practice. Informa Law from Routledge, (2016). 125.

applies distinguished terminologies. The individual who influenced the insurance will be identified as an associate, and the beneficiary is provided with the compensation against any losses arising(1).

The "P&I Club" – the UK differentiates evidently the idea of associates and co-assured as followed: associates could be any owner in partnership or owner who is having separate shares, who is a partly owner having half the shares, trustee, or demise charterer of any come into in vessel, operator or the manager having control and regulation of the operation and employment of an arrived vessel, with such control that could be practiced by owner of the ship, and any other individual who have possession and regulation of any arrived vessel(2).

Co-assured is referred as the party, other than the associate whose name is mentioned on the certificate of entry, to whom the association or the club has agreed upon based on limitations and restrictions in order to extend the coverage that is afforded to the associate(3). In certain aspects, the "P&I Club Gard" differentiates as a beginning point, both concepts, and treat associate as co-assured where the context enables as illustrated in the regulations such as GR rule 1. It discusses associate as an owner, operator, or charterer involving a bareboat or charterer of demise of a ship entered in the associations who were rendering to the statutes or duties and these regulations are entitled to members of the association, the term associate will in these regulations, include an affiliate or Co-assured(4).

Yet, GR and P&I situations declare that co-assured is any individual who is insured in pursuance to regulation 78.1 (b). Regulation 78- the cover of insurance for Co-assured and its associates, to whom the association has been agreed are

(1) Nazzini, Renato. Ibid, 92-106.

(2) Rangarajan, S, Ibid,81-84.

(3) Yang, Yiqing. "The Past and Future of Utmost Good Faith: A Comparative Study between English and Chinese Insurance Law." (2017). 317-323

(4) Yang, Yiqing. Ibid, 317

subject to this regulation 78 to such other terms as might be needed, to extend the cover afforded by the club to the associate or any other name as co-assured(1).

4.3 Non-Automatic Co-Insurance

One normally makes a differentiation amid automatic co-insurance signifying that the co-insured is described in the situations irrespective of any data or information from the side of assured non-automatic co-insurance. It depends on particular contracts and agreement amid the club and the assured (Mast et al., 2016). In "P&I insurance", as observed in the above section, co-assured is referred as the party, other than the associate whose name is on the entry certificate to whom the association has shown consent focussed to the limitations to extend the insurance coverage afforded to the associate. This description would lead to co-insurance that is non-automatic since it depends on a specific agreement(2).

The similar is discovered in the Rule referred to as GR 78.1. Where the rule says that association might show agreement r disagreement based on the provisions of this regulation and to such other terminologies as might be needed to extend the insurance coverage provided by the association to the associate and affiliates(3). Moreover, any person who is linked to or associated with the associate will not be particularly referred to in the entry terms and referred to as co-assured. Therefore, the description of co-assured leads to the conclusion that the co-insurance brought in the situations is non-automatic as it depends on particular consent amid the member and the "P&I Club" even in the mortgage cases(4).

(1) Andrews, Neil. "Arbitration and the expanding circle of consenting parties: joinder of additional parties and consolidation of related claims." In *Transnational Construction Arbitration*.. Informa Law from Routledge, (2017): 48-62.

(2) Lee, Byoung-yun. "An analysis on wreck related national laws of the Republic of Korea considering the Nairobi International Convention on the Removal of Wrecks, 2007." (2017). :87-91

(3) Žuškin, Srđan, Neven Grubišić, and Matthew Sumner. "Shipowner management in accordance with mutual agreement." *Pomorstvo* 29, no. 1 (2015): 69-74.

(4) Coles, Richard, and Filippo Lorenzon. "Insurance Legislation and Contracts." In *The Law of Yachts & Yachting*, Informa Law from Routledge, (2018): 149-178

Here it is imperative to analyse the idea of joint associates and affiliates. Joint associates arise where the vessel is entered in the names of two or more operators or owners. All joint associates under an entry qualify for associates in the association with entire proportionate advantages and liabilities of such associations as outlined in the statutes and regulations of the "P&I Club". Consequently, it can be said that co-insurance in P&I has to be non-automatic as it depends on contractual agreement amid the parties in benefit of a third party who will be named as co-assured from onwards(1).

Thus, it can be said that "P&I clubs" also provides insurance under the cases of co-insurance. Moreover, it tends to provide extensive and comprehensive coverage for the protection of third parties who are arrived in the contract of co-insurance.

The most significant of these is that however, neither the club associates can be, the co-assured is expressly referred to in the entry certificate, nor the affiliate is not. Therefore, the co-assured is referred to as insured and covered as a party in the agreement of contract. This signifies that the co-assured has the right and is entitled to the advantages under the conditions and terms off the agreement of insurance consented to when he was referred and named(2). Contrariwise, an associate is not a party to the agreement of insurance and is not spontaneously allowed to any advantages obtainable under such agreement or contract. Thus it is to say that co-insurance in “P&I Insurance” should be non-automatic as it depends on contract amid the parties in benefit of a third party who shall be referred as co-assured from onwards(3).

4.4 The “Third Party Co-assured”

To describe it concisely, it can be stated that the co-insured do not require co-insurance unless he might be obligated for damages that are covered by the

(1) Ambrose, Clare, Karen Maxwell, and Michael Collett. *London Maritime Arbitration*. Informa law from Routledge, (2017): 373-375

(2) Zhang, Jinlei. The formation of insurance contract in London market. Swansea University (United Kingdom), 2008. 68-71

(3) Fjaervoll, Anna Linnéa. "The knock for knock regulation in the WINDTIME." Master's thesis, (2013). 68-71

"P&I Insurance". If he cannot be obligated, he simply has no insurable interest. Therefore, the association or the club might show consent to extend the insurance cover provided to the member to a co-assured referred to in the entry certificate(1). Rendering to the Act and laws of insurance specified above, this co-assured could be an individual that has beneficial interest in the management of operation or manning of the entered vessel, and also it could be a holding company or the advantaged owner of the associate of any cover of co-insurance referred in the agreement or it could be a vessel mortgagee as analysed hereunder(2).

4.4.1 Mortgagee, Operators, and Crewing Agents

As stated the association or the club might show consent to extend the insurance coverage to the associate to a co-assured referred in the entry certificate who is an individual referred in the management, operation or operating of the vessel that is entered(3). Under the UK and Norwegian code it is stated that owner of the ship also referred to as (redder) will be obligated and liable to the provide companion against the damages resulted in the product or service by the negligence or any other fault of the principal or master, crew, pilot, or other doing work in the vessel or ship(4).

Consequently, when damage results from the operation of the vessel or ship, the owner of the ship might be accountable and liable. He is accountable for a variety of assistants who might result in losses and damage by the act of carelessness or oversight during the provision of service. The error has to be committed to the employment scope. This is both a temporary restriction that is also said, as the act has to be carried out throughout the course of employment and substantive restriction, which is also referred as the act that should be in some manner linked with the duties of the employees.

(1) Silver, Lawrence, Robert E. Stevens, and Kenneth Clow. Concise Encyclopedia of Insurance Terms. Routledge, (2010). 1150

(2) Castellano, Giuliano. "Governing ignorance: emerging catastrophic risks—industry responses and policy frictions." The Geneva Papers on Risk and Insurance-Issues and Practice 35, no. 3 (2010): 391-415.

(3) Chatzikosta, Dimitra, and Δήμητρα Χατζηκώστα. "Third party ship management-Literature review." (2017). 253-255

(4) Rawlings, Philip. "“A SACRED TRUST FOR THE FUTURE”: REGULATING INSURANCE, 1800–70." *The Cambridge Law Journal* 77, no. 3 (2018): 570-599.

Therefore, the co-assured is protected when he is doing job as-as owner and therefore might be said directly obligated and accountable rendering to the diverse regulations in the "Maritime Code", for example, the provision discovered in the code while the operator that is a charterer of bareboat, or a mortgagee) is held accountable because of the mistake of the ship during the time of its operations that would usually be of the accountabilities of the owner(1).

In this scenario, the co-assured has to demonstrate that the associate would have been considered as obligated, and the claim had been filed or brought against such associate. Additionally, it is to note that if the co-assured is referred and identified as a mortgagee, the "P&I Insurance" coverage will be including similar peculiarities(2). Rendering to the rules and regulations, the co-assured referred in the entry certificate declared is the vessel's mortgagee. There are certain scenarios, where the mortgagee is equally obligated and liable with the owner of the vessel or ship. Rendering to USA legislation of pollution, the mortgagee might in certain situations be equally obligated with the owner of the ship and others who have a contribution in oil losses and damages(3).

Under the section 1005 (a), the general and overall regulation is a that-the responsible party, or the guarantor of the accountable party is obligated to the interest of claimant for the amount paid in claim satisfaction under this act and regulation for the tenure mentioned in the subsection. Under the clause of "Payment by the Guarantor"- the payment of benefits and interest under the tenure mentioned in guarantor's subsection is based on the section. Subsequent to the section 1016, enforces restriction on the liability of guarantor: Nothing in this act will enforce liability concerning an accident or any guarantor for losses or costs of removal, which surpasses, in the total, the number of monetary accountabilities that the guarantor has delivered for an accountable party showing pursuance to this section. The aggregate liability of the guarantor or direct action for claims that

(1) Ib Dadiani, Davit. "Cyber-security and marine insurance." (2018). p.n.d.

(2) Reece Thomas, K. "State Immunity." *Insight* (2016). p.n.d.

(3) Davies, Martin. "Cross-border insolvency and admiralty: a middle path of reciprocal comity." *The American Journal of Comparative Law* 66, no. 1 (2018): 101-126.

were brought under these sections concerning an incident will be restricted to that amount(1).

Therefore, the association might show consent to extend the cover provided to the associate the co-assured referred in the entry certificate. In this scenario, the co-insured as mortgagee shall have interest and benefits that could be insured, and therefore, will require co-insurance as of the fact that he might be said as liable for losses and damages by the legislation under USA regulations(2).

4.4.2 Charterer

Rendering to the clauses "Marine Insurance Act" and set by the "P&I Insurance" might show an agreement to enhance the insurance coverage provided to the associate to a co-insured who is referred in the entry certificate and who is a charterer of the vessel that is entered and also being associated to affiliated with the associate insured under the similar entry(3). Under this classification, the co-insured associated or affiliated charterer on the entry of owner is insured and covered for liabilities cost, losses, risks, expenses and payments that is occurred as the charter of the vessel or ship, given such risks also insured and covered under the entry of owner. A co-insured and covered charterer under an entry of owner is based on the restriction of insurance coverage appropriate to the charterer(4).

4.4.3 The Global industry

This classification is only obtainable to the international operators who are bound by the contract of service with the insured or assured associate. Rendering to the rules and regulation, the association of the club might also reveal an

(1) Keceli, Muhammet Alper. "Establishing a new protection and indemnity (P&I) insurance institution in Turkey." (2012). 94-96.

(2) Keceli, Muhammet Alper. "Establishing a new protection and indemnity (P&I) insurance institution in Turkey/by Muhammet Alper Keceli." (2012). 94

(3) Marin, Jasenko, Mišo Mudrić, and Robert Mikac. "Private Maritime Security Contractors and Use of Lethal Force in Maritime Domain." In *The Future of the Law of the Sea*, pp. 191-212. Springer, Cham, 2017.

(4) Ameye, Evelyne, and Iñigo Igartua Arregui. "National nuclear third party insurance pools revisited from a European Union competition law perspective." Journal of Energy & Natural Resources Law 30, no. 3 (2012): 265-300.

agreement to extend the cover of insurance provided to the associate to a co-insured specified in the entry certificate who is an individual, a contractor or who have been entreated into the contract referred as "knock for knock" agreement that is customised and utilised in the international marine activity with the associate for services provision by the ship or vessel(1). This is based on given that, the association has approved the contractor and its related terms which are not less favourable to the owner ensured that the every party will be held accountable for loss and damage to the items being transported and voyaged resulting damages such as death or physical injury, its own personal property or the property of others and the property of its affiliates and several other contractors and subcontractors, regardless of any fault or ignorance of that party or affiliates, licensees or the contractors and of their personal property(2).

The voyage category is applicable only to the agreement and contractual obligation and liabilities associated to the vessel that is entered and is obtainable only if the co-assured has contracted with the associate or member on the basis of knock for knock signifying that the agreement has to be provided that each party is accountable for any damage or loss to its own contractor of personnel of the contractor(3). There has been progressing increases in both the P&I as well as individual clubs and their retentions and the restriction collectively insured by the pool. The two of the graphs in the below image demonstrate the growth and development of retention of an individual club and of layers of the pool from 1989 to 2008. The trend shown by the below graphs shows the stability in year-by-year basis in an exposure. For retentions, the major increases were in the initial 1990s, and again it was seen from 2005 to 2007. The timing for the upsurges in pooling was same from 1992 to 1994 and to 2004, but the most expansion based on the material of exposure was the coinsurance layer introduction in 2004(4). The timing

(1) Baughen, Simon. *Shipping law*. Routledge, 2015. 414-417

(2) Eggers, Peter MacDonald, and Simon Picken. "Other contracts of the utmost good faith." In *Good Faith and Insurance Contracts*, Informa Law from Routledge, (2017): 113-130.

(3) Thomas, Rhidian, ed. The modern law of marine insurance: Volume four. CRC Press, 2015.

(4) Huybrechts, Marc A., and Theodora Nikaki. "Marine Insurance." In The International Handbook of Shipping Finance, pp. 267-283. Palgrave Macmillan, London, 2016.

for the increases in Pooling was similar (1992 to 1994 and 2004), but the most material expansion of exposure was the introduction of the Upper Pool and coinsurance layer in 2004.

4.4.4 The rights of co-insured or co-assured against insurance provider under "P&I Insurance" coverage

As parties in the contract of insurance to the certificate of entry of the insured associates, the co-insured will have the cover in terms of P&I under for such claims of losses and damages and those claims and damages must appropriately be filed against the associate who is showing negligence and ignorance towards the better provision of services from which the loss is being occurred(1). The co-insured might have a right and an entitlement to claim for indemnity from the "P&I Club", irrespective of whether the loss claim has been established against the associate. It is significant though, to address that the cover of co-insurance is based on the same confines, which rule the insured associate. Alternatively, it can be said the cover of co-insurance is limited to the sum that the associate can recover from Gard if he is said and found as liable for damages and losses(2).

4.4.5 Subrogation and Waiver

The associate or the affiliate whether he is an operator or the contractor is a party to a several of contracts and agreement in the duration of operations comprised in the offshore identification, exploration, and development projects. Such agreement and the contracts are most of the times involve one or both parties that are named in the contractual agreement not to work with or against other, a claim to which it is entitled otherwise(3).

Such kinds of entitlement might could be arisen at common law, or a tort that has been committed by the other member or the party or who is under the

(1) Minko, Dmitry. "Implications of the Qingdao metals scandal for commodity repurchase agreements." PhD diss., Haute école de gestion de Genève, 2016. p.n.d.

(2) Baughen, Simon. *Shipping law*. Routledge,(2015),414.

(3) Thomas, Rhidian. "THE PLACE OF SUBROGATION IN INSURANCE LAW: THE DECEPTIVE DEPTHS OF A DIFFICULT DOCTRINE." In *The Modern Law of Marine Insurance*, Informa Law from Routledge, (2015): 235-262.

agreement and have done contract breach or by law or statute, the claiming party is being conferred with specific law rights. In this background, the actions, abilities and rights of the party can normally be considered to involve the actions rights actions, and abilities of the employees of that party, contractors, and subcontractors and for any other individual or organisation performing on behalf of the party(1).

As amid, the member and the club, the club is bound and contracted by such releases from obligation, liability, provided by the release and follows the "knock-for-knock principle" or else is approved by the pursuant of the club to the entry terms. The club can also avail and is entitled to the benefits of the associate whether such right and interest are present in the agreement, in the tort, or in any other right, which can be practised or has ensued. A subrogation waiver provided by the "P&I club(2)" shall protect the several other parties from possible losses and ensured to be provided with benefits from the club. Nevertheless, it will not safeguard the other parties from such obligations and liabilities, which are appropriate to bear in line with the contract.

This signifies that cover provided under the P&I insurance by the club provides comprehensive coverage for third parties in the contract. Thus, rights and interest of those parties are protected under the third parties insurance by these clubs(3). The co-insurance that is protective goes above the protection that is simple and provided under the subrogation waiver clauses because these insurances shall also safeguard the co-assured against the obligation and liabilities, expenditures and costs which must be faced and managed by the associate who is insured under the contractual and agreement terms, given the agreements meeting the necessities for "protective co-insurance" coverage(4). Neither a subrogation waiver clause nor a clause of protective insurance will

(1) Thomas, Rhidian, ed. The modern law of marine insurance: Volume four. CRC Press, 2015.

(2) Caballero, Gonzalo, and David Soto-Oñate. "Environmental crime and judicial rectification of the Prestige oil spill: The polluter pays." *Marine Policy* 84 (2017): 213-219.

(3) Huish, Robert. "The failure of maritime sanctions enforcement against North Korea." *asia policy* 23, no. 1 (2017): 131-152.

(4) Xu, Jingjing, David Testa, and Proshanto K. Mukherjee. ,Ibid,129-153.

provide relief to the party from need to arrange own insurance for such obligations and liabilities which are appropriately the party's responsibility for instance damage or an injury to the crew to the equipment of subcontractor(1).

Furthermore, clause 8 to 2 of the coinsurance plan is new in the year 2016 that is being followed in many of the European States including the UK and this is the new versions, and the regulates and controls the rights and benefits of insurers from being subrogated to claims against the co-assured. The clause revealingly delivers that the insurance provider does not have any interest or right in particular in the contract of insurance or the third party which is co-insured has taken the express agreement and contractual liabilities and obligations to an assured to stay obligated and liable for damages and losses of the type or else protected and covered under the third party insurance(2).

The impact of the of the clause of 8-2 is that the moment the insurer accepts it to con-insure the third party does not revealingly reserve the interest and right to pursue recourse against the third party who is co-insured, he will be considered to have surrendered any interest or the subrogation right against him, subjected to that the rights have not been fortified by the assured to receiver or being protected under the coverage of insurance, it is also specified under clause 8 to 3 and in the sub-clause 2 described under 11.2.3(3). The load is on the underwriter to standby any such interest and right of subrogation in contradiction of the co-assured except the co-assured has specifically consented to remain obligated and liable despite the fact that he is third party co-insured(4).

(1) Xu, Jingjing, David Testa, and Proshanto K. Mukherjee. "The Use of LNG as a Marine Fuel: Civil Liability Considerations from an International Perspective." Journal of Environmental Law 29, no. 1 (2017): 129-153.

(2) Tan, Kendall, and Janice Pui. "Key Developments in Singapore Ship Arrest Laws: A Practitioner's Perspective." *Turk. Com. L. Rev.* 1 (2015): 253.

(3) Liu, Jing, and Michael Faure. "Risk-sharing agreements to cover environmental damage: theory and practice." International Environmental Agreements: Politics, Law and Economics 18, no. 2 (2018): 255-273.

(4) Liu, Jing, and Michael Faure. Ibid,255-273.

One illustration to this could be that most of the times, the charterer at the time when it is warranted by the Charter party that ports that are ordered the vessel needs to proceed and go are safe for the vessel, the vessel starts to leave the port. Therefore of the vessel is hazardous or damaged or lost due to the insecurity of the port, the charterer has to compensate the individual for the loss and damage. The insurance provided for hull being compensated the owner arty for the loss, for example, repairing cost and repurchasing cost under the hull insurance will usually be subrogated to the possessor's claim-to-claim against the charterer. Though, if the charter party is co-insured under the coverage of hull insurance, there will be no subrogation interest of right into any claim in contradiction of the charter party unless the insurance provider of the hull has specifically earmarked such subrogation right rendering to Cl. 8-2[1].

Alternatively, it is likely and probable that the charter party is prepared to provide compensation amount to the party to which loss has occurred because of the negligence of the charter party. The party to whom the compensation may be provided could be a hull owner, and the claim is compensated due to the loss of damage in the vessel. The causes of damage can be illustrated as collision liability, or it could be any reason. Thus, these types of claims are covered hull insurance[2].

Thus, the charterer might show consent to comprise in the charter party a section to the consequence that he will endure accountable and responsible rendering to the dangerous port section, despite the fact that he is co-insured under the hull insurance (. Such a clause of express will be sufficient to provide the insurance provider of hull an interest and a right of alternative in contradiction of the charterer for harm to or damage of the container due to insecure port, even if

(1) Çetin, İ. B., E. F. Akgül, and E. Koçak. "Competitiveness of Turkish Coaster Merchant Fleet: A Qualitative Analysis By Short Sea Shipping Perspective." *TransNav: International Journal on Marine Navigation and Safety of Sea Transportation* 12 (2018). p.n.d.

(2) Fan, Chihhao, Cheng-Jui Hsu, Jia-Yu Lin, Yung-Kai Kuan, Chieh-Chung Yang, Jui-Hsiang Liu, and Jiunn-Horng Yeh. "Taiwan's legal framework for marine pollution control and responses to marine oil spills and its implementation on TS Taipei cargo shipwreck salvage." *Marine pollution bulletin* 136 (2018): 84-91.

the insurance provider of hull has not himself earmarked an interest and a subrogation right against the charter party(1). Cl. 8-2 necessitates that such sections are specifically included in the agreement that is charter party agreement. The antithesis is intended and clear. Any oblique terms to a similar consequence will not be sufficient to protect any alternative from the insurance provider(2).

If the loss and damage to the hire insurance provider have compensated the earing and income loss as of the damage to the container or vessel resulted by ordering the container to the insecure port, he might chase or pursue the alternative option against the carter party either rendering to the clauses of express in the damage of hire insurance agreement or in the pertinent charterer, given that the law and regulation governing the charterer also allows indirect damages and losses such as income and earning loss or damage to be claimed(3).

Even however, clause 8 to 2 is referred to as new and latest in 2016, it can also be said that it merely confirms what obeys from the background and contextual law. The background law might, of course, and evidently, vary from the country to country and might not essentially be settled law(4). It signifies that it comprehensively protects the rights and interest of both the charter party and as well as the party whose items are being transported through the vessel or the container. These clauses of co-insurance under the P&I third-party insurance maintain the right balance of securing the rights and interests of both the parties.

While on the other hand Norwegian as well as UK law of marine and third party insurance under P&I is mainly associated and concerned with the published

(1) Fan, Chihhao, Cheng-Jui Hsu, Jia-Yu Lin, Yung-Kai Kuan, Chieh-Chung Yang, Jui-Hsiang Liu, and Jiunn-Horng Yeh. Ibid, 84-91.

(2) Luo, Meifeng, and Sung-Ho Shin. "Half-century research developments in maritime accidents: Future directions." *Accident Analysis & Prevention* (2016). p.n.d.

(3) Padovan, Adriana Vincenca, and Iva Tuhtan Grgić. "Is the marina operator's berthing fee a privileged claim under the Croatian maritime code?." *Il Diritto Marittimo* 119, no. II (2017): 366.

(4) Walker, Simon. "Keeping Concentrate Shipments Under Control." *Engineering and Mining Journal* 218, no. 4 (2017): 24.

judgement in prior cases or the award of arbitration(1). However, in 1988, it was written in the thesis by the "Hans Jacob Bull" professor at the "Nordic Institute of Maritime Law at the University of Oslo", that co-insurance mechanism likewise as unintended obligation insurance. On page 318, he accomplishes that in consequence a co-insurance also suggests a subrogation waiver against the co-insured or co-assured and mention to other researcher's backing up this view. Thus, the waiver clause seems beneficial for both the parties being charterer and the owner party as it makes sure that values of the inflation, property, and depreciation have been considered and taken into account in the limits and agreement of insurance. An appraisal or the assessment once every three years is an effective thumb rule and is sufficient, relying on the situations and circumstance(2).

4.4.6 Disclosure duty of Co-Insured or co-assured

The person impacting the insurance that is the contracting or agreement party will normally have a right or an interest in the matter of the subject of insured and will take out the coverage or insurance for his own and personal advantages(3). However, he might also enter in the agreement and contract of insurance for the advantage of a third party in the contract who might have a right or an interest in the insured's subject matter. Typically, the individual or the owner impacts and insurance to safeguard their own rights, interest, at the same time classify, and labels as assured or insured as well. Any party whose insurance coverage agreement ensures rights and interest is described as an insured or assured. The assured or insured who has not affected insurance contract us referred to as co-assured(4).

(1) Parsons, James R. "MARINE InSURAnCe AnD THE PoLAR CoDe." In *Global perspectives in MET: Towards Sustainable, Green and Integrated Maritime Transport*, (2017): 401-410.

(2) Kuzu, Ali Cem, and Özcan Arslan. "Analytic comparison of different mooring systems." In *Global perspectives in MET: Towards Sustainable, Green and Integrated Maritime Transport*, (2017): 265-274.

(3) Barlas, Baris, Reyhan Ozsoysal, Ertekin Bayraktarkatal, and Osman A. Ozsoysal. "A study on the identification of fire hazards on board: A case study." *Brodogradnja: Teorija i praksa brodogradnje i pomorske tehnike* 68, no. 4 (2017): 71-87.

(4) Varona, Gema. "Restorative Pathways after Mass Environmental Victimization: Walking in the Landscapes of Past Ecocides." *Oñati Socio-Legal Series, Forthcoming*(2019). p.n.d.

Clauses 8-3 and the sub-clause 1, extend the duty disclosure scope outlined in above sections, to any co-insured, other than, co-insured or co-assured mortgagee are also covered in the third party insurance contract, and they are aware of having referred and considered under the insurance policy as co-assured or co-insured(1). If the breach of an insurance contract has been as a breach of duty of disclosure, the insurance provider might merely invoke this break against the other third or co-assured parties if the co-insured had the general decision-making power and authority for the vessel operation as specified under the clauses 8-3, sub-section 3 and clauses 3-37. The co-assured in a break of the duty of disclosure might have surrendered his individual insurance even if he was not in the responsibility of the process of the vessel(2).

Sub-clause 2 regulates the breach of contract made by the third party for the regulations and rules to a duty of care. This provision provides the right and insurance provider with the interest and right to invoke the resoles and regulations in cases of loss, damages, and duty of care in order to ensure the rights and obligations for both the insured and the insurance provider(3). A charterer who is co-insured or co-assured has the duty of care in order to meet and comply with the regulations and rules of safety associated with the insurance contract. For example, dangerous and hazardous items that are carried on the vessel might forfeit the protection under the agreement of co-insurance if the break is in violation of the clause 3 to 22 and clause 3 to 25 resulting in loss of or damage might pursue alternative option against the charterer. The similar will smear to the damage of hire insurance provider who has remunerated the owner of the items being damaged for the loss of money and time due to the damage(4).

(1) Myburgh, Paul. "P & I Club Letters of Undertaking and Admiralty Arrests." (2018). p.n.d.

(2) Parsons, James R. "MARINE InSURAnCe AnD THE PoLAR CoDe Ibid, 401-410.

(3) Gay, Robert. "The Inter-Club Agreement: The Meaning of "Act", Causation and The Boundaries of The Agreement The Yangtze Xing Hua e Boundaries of The Agreement The Yangtze Xing Hua." *Lloyd's maritime and commercial law quarterly* 2 (2017): 182-189.

(4) Barlas, Baris, Reyhan Ozsoysal, Ertekin Bayraktarkatal, and Osman A. Ozsoysal. Ibid, 71-87.

4.4.7 Independent co-insurance and referred third parties

This clause was latest and introduced in the year 2016 and correspondents to the clauses 8-4 of the plan of 2013. The heading the was edited and amended in order to make it more clear that the clauses implement both the person referred in the third parties in insurance contract as well as mortgagees. Specific modification and changes were also created in the text. The provision provides the extended security and protection to a person named as the mortgagee and the third party in comparison to rule and regulations specified in above sections and in the classes discoed above as 8-2, 8-1, and 8-6(1). The protracted insurance cover can be triggered by a clear contract highlighting that the regulations in clauses 8-7 shall smear to the co-insured third party and/or mortgagee. Conflicting to other sections in analysed above, with an aim to obtain the security and protection specified in Cl. 8-7, the co-assured third party has to be referred in the contract of insurance(2).

The independent coverage of insurance signifies that the co-insured or co-insured is referred in the third party is not classified with the person affecting the insurance or with other insureds or assured if discovered in breach with their contract and agreement. This signifies that insurance provider can neither break of disclosure duty on the part of the individual influencing the insurance coverage nor any failure to encounter the duty of care on the other assured's part for example safety regulation breach(3). On the other hand, those sections and clauses in the above section that purposely restrict or exclude insurance covered, for example, clauses 3-17 and clauses 3-19. Will also apply the co-assured mortgagee or referred the third party if established independent insurance coverage under clauses 8-7. Nevertheless, it cannot be a complete substitute for a “Mortgagee Interest Insurance”. This kind of insurance coverage is a distinct insurance cover,

(1) Faure, Michael, and Donatella Porrini. "Göran Skogh on Risk Sharing and Environmental Policy." *The Geneva Papers on Risk and Insurance-Issues and Practice* 42, no. 2 (2017): 177-192.

(2) Stewart, Kent. "Criminality on the Australian coast." *Ausmarine* 39, no. 7 (2017): 36-36.

(3) Cashman, Daniel, Ajay Ratan, and Andrew Scott. "Decisions of British Courts During 2016 Involving Questions of Public or Private International LawB. Private International Law." *British Yearbook of International Law* (2018). p.n.d.

which is carried out by the mortgagee bank on also a portfolio, individual or fleet basis(1).

Chapter 5: Rights and Duties of Co-Assured

Under the rights and duties of the co assured, the provision are described to the third party affected by the insurance of the ships, it implies that co-insured who is not a member do not have any direct duties. As it is mentioned that insurance must be needed for co-assured third party considering that, these parties directly are involved in the ship operations and therefore to reach to the position concerning co assured rules(2). Here the issues will be identified and evaluated (SK Rule 5.4)

5.1 Due care and disclosure

Concerning the topic of third party cover for the benefit, first aspect present here is to identify extended rules concerning due care and duties of disclosure applied by the co-assured third party in their responsibilities and its breach. Secondly, to what extent they might invoke against co-assured before the completion of an insurance contract, and thirdly, insurance that is affected by the person have a central role in playing with regards to insurer information about the potential changes and risk exposure in such exposure(3).

As per the conditions, it is required that members of the association shall make correct and full disclosure, before the insurance contract is concluded, in all the circumstances, a) it is known to any agent or member or on behalf of the affecting insurance, or in the business which is identified by the member or even by the agent b) where the Association gets influenced in order to decide on what terms cover is required to be given. c) make full, prompt and correct disclosure of every change circumstance to the Association, this is known by the members in

(1) Wu, Pei-Ju, Mu-Chen Chen, and Chih-Kai Tsau. "The data-driven analytics for investigating cargo loss in logistics systems." *International Journal of Physical Distribution & Logistics Management* 47, no. 1 (2017): 68-83.

(2) Bilgin, Burcu Celikcapa. "Right of Direct Action Against Liability Insurers under the New Turkish Commercial Code." *Turk. Com. L. Rev.* 1 (2015): 265.

(3) Lefkowitz, R. Y., M. D. Slade, and C. A. Redlich. "Rates and occupational characteristics of international seafarers with mental illness." *Occupational medicine* (2019). p.n.d.

order to cover the risk of association and d) to make the possible measures against causing or agreeing without taking approval priory from the Association, in changing any circumstance by the association that covers the altered risk(1).

Regarding the duty of care and responsibility of disclosure, the rules are present that presuppose the duties that are compelled by the insurance relationship, and it provides the regulations related to the possible sanction to the insurer in an event these duties got breached. During the period of insurance, the due care duties can be divided into four different rules, safety regulation, alteration risk, and causality caused negligence by the duty of notification and assured and to avert the loss(2).

The required information is provided to the insurer related to the disclosure duties along with necessary information in order to estimate risk, whereas the alteration risks and their concerning rules that are not altered are secure as compared to these insurance period assumptions. If either on the duty of care the duty of disclosure has been breached, the insurer has the rule for terminating the relationship with third partyand to ignore the future causalities liability. In the case of breach of duties, the sanction is available to the insurer regarding the duties of care and disclosure is addressed to the member(3).

However, this may be co-assured and addressed where it is allowed by the context, and it means that, in many cases, the co-assured will identify the member. The rulings of SK Rule 45.4 brings about any failure by the joining member and by the family member, or by any assured or any affiliate, with compliance to these

(1) Petrinović, Ranka, Ivana Lovrić, and Trpimir Perkušić. "Role of P&I Insurance in Implementing Amendments to Maritime Labour Convention 2014." *Transactions on maritime science*6, no. 01 (2017): 39-47.

(2) Stevens, Richard. "The migrant crisis—implications for P&I cover." (2016). p.n.d.

(3) Wu, Pei-Ju, Mu-Chen Chen, and Chih-Kai Tsau. Ibid, 68-83.

obligations and rules, shall however be deemed towards the member and joint member failure, affiliates and co-assured(1).

However, the most prominent difference between the affiliate and co-assured is that although none of them can become these Association members, the co-assured is expressly named in the trade certificate entry between the affiliate and the co-assured, which results in the co-assured being insured. If a person is in the contracting party regarding the insurance, so for the contract benefit, he is entitled to the insurance rights, pursuant to the agreed conditions and terms. Similarly, as the affiliate is concerned, he is not insured regarding insurance contact party, this is the reason they are not entitled automatically to the contact benefit. After all the incidents, in its sole discretion the association, to an extent agree in covering an affiliate but in doing so, there must be no obligations present(2).

This produces various differences between the affiliates and co-assured. One such concern is about the liabilities under the contract of insurance. As the insurance contract is not a party for affiliates, for the payment the third party is never liable of the calls or premiums (association although sets out the premium outstanding against the paid compensation to an affiliate. In contrast to this, the co-assured usually like, members and joint members are jointly liable for all sum of insurance under the certificate entry and its association where they are co-assured or named(3). Therefore, to the co assured the rules would be addressed and as per these conditions, the insurer will have the right to refuse the compensation in payment.

5.2 Unlawful, Deliberate and Fraudulent Acts

On the Association, the member must not make any claim that is based on fraud, and if someone allow the vessel to be used in order to carry out the shipment for illegal purposes or even cause or attempting causality deliberately,

(1) Croucher, Thomas Mark Swan. "Changing the Rules: An evaluation of whether the Norwegian Maritime Code should implement the Rotterdam Rules approach to transferring obligations and rights through the trading of bills of lading." Master's thesis, The University of Bergen, (2016)89-91.

(2) Wu, Pei-Ju, Mu-Chen Chen, and Chih-Kai Tsau. Ibid, 68-83.

(3)Stevens, Richard. "The migrant crisis—implications for P&I cover." (2016). p.n.d.

any failure to comply with the requirement present above is co assured by the SK Rule(1) 45.5 Whereas any omission or conduct to any joint member affiliate or co assured would make the Association reduce or reject the claims regarding the failure. Thus, all the members, affiliates, joint members and co assured shall be deemed.

5.3 Premiums

As a rule SK Rule 4.1.2(2) is stating, the payment duty rests along with the member. Thus the co assured with the member must not be identified, considering that according to the conditions just the member is obliged to pay premiums, in the SK Rule 4.1.2 ―The premium determined by the Association and payable by the member as regarding the member, the conditions are stating it clear that these members must pay all the premiums and sums due to the fall of the Association. In case of the failure in complying with the requirement, the members are not entitled to the recovery of Association with respect of any event during when is outstanding, is present in sum or any premium and Association must be authorised to handle all or even one case of Association to its member for the time being(3).

However, the conditions of SK Rule 45 regulates the co-assured position, as per this rule name present of a co-assured on any Certificate of Entry shall be severely and jointly liable with respect of all calls, premiums and other sums in respect to the Association of the entered vessel.

As a result of this, payment of the Association to the joint member or any affiliate or any co assured or any of the member, must be deemed to the member payment of and also to all the jointly affiliates that fully discharge the Association obligations in respect of the payment(4).

(1) Regulation S-K

(2) Regulation S-K

(3) Judice, Monica Pimenta. "The Cover of Third Parties Under P&I Insurance." Master's thesis, (2008). 112-115

(4) Eliasson, Robin Lars-Arvid. "Navigating stormy waters-How large discretion is the master allowed concerning navigational matters." Master's thesis, (2016). 78-80

Notice that any member of the family or even any joint member, or any affiliate or any co assured, to comply with obligations under these rules, as a failure must be deemed to the member payment, along with affiliates and co-assured, therefore the addressed rules to the members are consequently addressed to the co-assured, so that the sanction would reach to the assured. The addressed rules to the members, therefore, are also addressed to their co-assured, by which consequently the sanction would reach towards the co-assured(1).

5.4 Certification and classification

It shall be a precedent condition for the cover insurance that the vessel entered remains closed entirely with the social classification which is then approved by the Association as the classification of vessels does not change the society without the prior consent and that member shall maintain the validity of the statutory certificate which is issued on the behalf or by the vessel flag of the state in relation to the ISPS code and ISM code(2).

In any failure and of its event to comply with any requirements present above, the members will not be entitled to any Association recovery with respect to any occurrence of event during the non-compliance period so far, except this has been the only failure to comply with Rule 28.4.2-3 where the charterer member and its failure was beyond the control of members.

It seems that in this the provision involves the members alone, that is the shipowner since the ship-owner will have the authorisation and records for the society's classification. It may be addressed, however, to the co-assured that an operator, in the Certificate of Entry who is co- assured is involved directly in the contract related to insurance(3).

5.5 Other conditions

Various other conditions includes that members shall comply with any Association's recommendations following survey compliance with any safety

(1) Eliasson, Lars- Arvid, Ibid, 80

(2) Regulation S-K

(3) Tettenborn, Andrew, and Barış Soyer. "DIRECT ACTION AGAINST INSURERS AND P & I CLUBS." In Maritime Liabilities in a Global and Regional Context, Informa Law from Routledge, (2018): 206-224.

regulations or any directions that are issued by Association or any public authority that is capable to comply with the regulations. Also recommendation and rules and the classification society and its requirements, compel with all the state's flag vessel and legislation require for, adaptation, construction, fitment, condition, manning, equipment, management and security, operation of entered vessel (this includes the applicable requirements of *"Code of ISM"*[(1)]) and statutory certificates validity is also maintained that is issued by the vessel flag state for the requirements on request provided by the Association[(2)]. Authorization is necessary in enabling the Association inspection and to provide with any documents or information, in the current vessels possessions and in the classification society previously, related to the class and its maintenance, and to make the Association enable, in order to carry out survey at any time.

As per the *"Rule 35*[(3)]*"*, this rule provides the association with any requested document and information that Association request in order to man, operate for condition or the vessel management, incorporated in all the indemnities and contracts under any required terms by the Association and also excluding all the indemnities and contracts with any terms which association prohibited.

In case of failure to comply with Rules 29.1.1-29.2.[(4)]9 and its requirement that are present in it, the members for any recovery shall not be entitled from Association, however exception is present if the liabilities are proved by the members along with the costs, expenses or losses, in any event, would have been incurred and it might be possible the Association have covered it if the members are compiled with the requirements[(5)].

(1) The International Safety Management (ISM) Code

(2) Kverndalen, Åshild. "Forsikringsdekning for redningsomkostninger ved terrortrussel mot skip." Master's thesis, 2016. 57-59

(3) The International Safety Management (ISM) Code

(4) Regulation S-K

(5) Weihai, Li. "A Security Model and Legal Guarantee for Chinese Maritime Shipping: As Exemplified in the Response to Piracy along the 21st Century Maritime Silk Road." Social Sciences in China 38, no. 1 (2017): 46-65.

It is again to see that the, if member has complied to the requirements SK RULE 45.5 then 5.4, will be applied and all the co-assured that owners identified since any conduct, failure or omission that is caused by any joint member or any member, or any affiliate or any co-assured, under these rules will comply with obligations, and it must be towards the deemed failure for all joint members and member, affiliates and co-assured.

5.6 Burden of Proof

The members might have a burden while proving claims against the results of the Association from the covered risk under insurance.

5.7 Limitations of Co-Insurance

5.7.1 Liability and its limitations in general

The Association insures the liability of the members as they might be determined ultimately and can be fixed by the laws related to the liability and its limitations. Here the association is not liable legally for any excess in the sum of such liability.

Here the co-assured and a member is entailed in limiting the liability that Association cover, with respect to the liability there must be no recovery present for the amount more than to which the liability might be limited(1).

5.7.2 Liability and Its Limitation, Co Assured, Joint Members and Affiliates

Where the covered insurance to the joint member, affiliates and co-assured is extended, the Association's total liability in no circumstance shall not be exceeded to its sum that vessel owner could recover the vessel that is sole assured.

Here the member is considered as the owner but the affiliates or co-assured member is a charterer, any extended covered insurance to the affiliate or charterer with the USD 350 million shall get limited for any vessel with the aggregation that arises from an event, this can be a single vessel.

(1) Andreasen, Kristoffer Roland. "Non-payment of hire, the cancellation and suspension clauses in time chartering agreements and the remedies given the party not in breach." Master's thesis, (2015): 43-46

5.7.3 Labiality and Its Limitation under the Additional Insurance That Is Agreed Separately

The Association and its liability in any case for all or any liabilities, costs and losses and including the expenses, affiliates and assured all members under any one of the events and even under single entry. It might have been limited to the insured sum about the entry. It is always provided that to the Association and its extent that help in reinsuring the risk under one single entry, the Association that might (with the insurance and its exception for the chemical and war risks, computer virus and biochemical Electromagnetically Weapons risks) is obliged only to pay the amount that is in excess of 10% to 10 million USD of the limit covered per event, it is the lowest amount that the Association receives as funds by the Association from reinsurers(1).

5.8 Cover for Termination or Cessation

5.8.1 Cover for Cessation

It is mentioned by the SK Rule 45.3(2) that any communication and its content in between the members and association or even the joint member or any affiliate or any co assured, within the knowledge must be deemed of all the collective members, members, affiliates and co-assured(3).

Where in case the cessation of cover, the co-assured will also be ceased in respect to the SK Rule 45.3(4). The covered insurance shall immediately be ceased where, ownership or the change management has entered inside the vessel, being an individual, the member that becomes bankrupt, against him the receiving order can be made, or this can also become insolvent, by being corporation, claiming that the member is wound up, dissolve liquidator or receiver appointed or the proceedings commences under the insolvency or bankruptcy laws in order to seek protection from the creditors(5).

(1) Georgosouli, Andromachi, and Miriam Goldby, eds. Systemic Risk and the Future of Insurance Regulation. Taylor & Francis, 2017. p.n.d.

(2) Regulation S-K

(3) Georgosouli, Andromachi, and Miriam Goldby, eds. Ibid, p.n.d.

(4) Regulation S-K

(5) Clarke, Malcolm A. The law of liability insurance. Informa law from Routledge, 2017. p.n.d.

A total loss is experienced by the entered vessel, or sometimes it is accepted funds and it might be estimated by the Association as being compromised, constructive and exception in respect to the liability or arranged. This includes the total loss by which the casualty arises, for ten days the vessel is missing, from the day she was heard for the last time. Then at the Llyod's the vessel is posted with the missing complain if it is also requisitioned by the government Authority or State excepting that this insurance might cover the reinstated requisition period that has been ceased.

Under this, the member of breach of the co assured will also cease the cover by considering the SK RULE 45.3(1).

5.8.2 Members Termination

The association of all vessels or even one that on the behalf is entered by the members can also terminate the entry. These members can also be more than one, a) it can be done by giving the notice immediately where under Rule 28.1 the member is under the obligations and its breach (with respect to its risks and alteration and the disclosure), rule 28.2 (with respect to the deliberate, unlawful or fraudulent acts) or under the rule of 28,4 (in respect to the certification and classification of the vessel), b) on the notice given on three days, Under rule 28.3 where breach is carried out by the members obligations (with respect to the premium payments and other associations sums), c) on the notice of seven days where vessel is seen as unseaworthy, and the members are not made as seaworthy without any delay undue, or where Association could not carry any survey as they are not allowed to do so by the members regarding any changes in the circumstances by which the risk covered by the association is altered, or d) on the notice of the thirty days without providing any reason(2).

In the case where the cover termination is present, the cover for the co assured will be based as it is dependent on the SK Rule 45.3 where the communication contents in between the members and Association, or even the joint member, or any affiliate or any co assured shall be in the exception within

(1) Regulation S-K

(2) Regulation S-K

the members knowledge along with affiliates, co assures and joint members knowledge.

However, along with this, the Norwegian Insurance Contract ACT-ICA(1) and its pursuant is terminating the insurance, that does not apply regarding the co-assured. If the contract insurance has been terminated, amended or exist in ceasing, that does not really apply regarding the co-insured under 7-1 sections, and it is also under the subsection of three and two unless it is notified by the insurer's party specifically concerning about the fact within the notice of one month.

The Norwegian Marine Insurance(2) Plan is different, where NMIP adopts the approach that is more dependent. For instance, in § 8-3 the contract of the insurance has been cancelled or amended in relation to the third party that is co-insured. It is to point out however that the co-insurance and its concerning mortgages has taken approach which is different. The NMIP, in this case, adopts a co-insurance independently, for example, § 7-2, it can be seen that if the contract insurance has been cancelled or amended, the mortgages and their rights shall never get affected. Thus, the independent or dependent coinsurance is differently treated considering the applied regulations. In the conditions of P&I, the rule generally is dependent on co-insurance. Further, the co-insurance in the NMIP is dependent, and the co-insurance of ICA will be independent.

5.8.3 Termination and Cessations Effects

No liability shall be present under the Association whatsoever in any respect of an event occurring after termination or cessation.

This cover for the co assured will also be terminated or cease, due to the dependency factor which is explained previously.

(1) Nordic Insurance Contracts Acts

(2) Nordic Insurance Contracts Acts

CHAPTER 6: CO-INSURANCE UNDER ENGLISH LAW

6.1 General View

The fixed percentage that is paid against claim once the deductible is fulfilled is called the co-insurance. Co-insurance is the critical factor of the English Law that is defined quite differently in the Scandinavian system. English law and the Scandinavian system are the two basic law systems that have defined the coinsurance under particular terms and condition(1).

Concept of third-party co-insurance does not operate under the English system thus; it does not make any difference between the assured person and person affecting the insurance. For instance, there can be two possible conditions for the mortgagee either policy that is made under the law is assigned to the lander in the mortgage like any bank having a derivative interest or the person that has an impact on the insurance perform the function of agent for the mortgagee.

In any case, the co-insurance concept is not found whereas the concept is quite evident in the American P&I club that says, *"The party insured under the insurance contract is considered as co-assured."* However, if any person is considered in particular when it can be said that the insured person is deemed to be insured if it satisfies Rule 1.3.8 and 1.3.11(2) under the American law, it can be claimed that co-ensured will be given due to benefits when it was named under the conditions of the insurance contract. It can be defined in a better way while considering the case of the club. When member term is defined under the club rules, it has given the same rights that are given to the operator, charterer, or operator of any substance that is insured under the Association. Where it is necessary that the association must be entitled under the membership of Association if the term member under the context should involve an affiliate, joint member and co-assured (Adel, 2010).

(1) Johansson, Helen. "Causation in Hull Insurance-A Comparison of English and Nordic Marine Insurance." (2013). p.n.d.

(2) Regulation S-K

6.2 Applicant Owner

Applicant owner is the person or entity that is related to the application or the policy and has given some rights along with the responsibilities. The responsibility of the applicant under the law following some policy is to pay the premiums of the policy so that the policy does not lapse. Applicant owner also has the rights of changing the beneficiary, access the related information, but the concept of applicant owner is quite different under the rules that include the further rights, and responsibility of owner. Likewise, under the rule, applicant owner for the condition of entering in the association insurance refers to the owners in some various conditions like the partnership owners, owners having separate shares regarding the severalty, owner as a trustee, owner as mortgagee, part owner, owner as operator, builder or the manager. However, the person having a direct impact on the application, the person on whose behalf the application is made, or being made for entry in the same insurance association that is irrespective of its membership in the association (Stem, R., 2017).

6.3 Managers

Managers generally refer to the person who manages the operations of the association. It is the one who deals with the working staff and carriers out different responsibilities in an organization like the human resources, various operations of the organization, managing the functions like import and export and many other responsibilities. However, these managers can be permanent or time being, but the rule refers to the time being managers of the organization(1).

6.4 Member

Member of any association is the one who enjoys the facilities of the association after filling the terms and conditions of the membership. Once the membership terms are filled, then it has to fill the responsibilities and obey the rules of the agreement. Member is an essential entity of the association whose choices has to be given serious attention and managers form appropriate policies for them under the different strategies. These members can be permanent or the

(1) Fredendall, Lawrence D., Peter Letmathe, and Nadine Uebe-Emden. "Supply chain management practices and intellectual property protection in China: Perceptions of Mittelstand managers." International Journal of Operations & Production Management 36, no. 2 (2016): 135-163.

time being. Permanent members are the one who may be owners or has taken the permanent membership under the terms set by the owners or the managers. Under this rule, the members are not permanent, but time being and the policies that are made for these members are followed strictly under the rule(1).

6.5 Owner

Owners refers to the partnership owners, owners having separate shares regarding the severalty, owner as a trustee, owner as mortgagee, part owner, owner as operator, builder or the manager. However, the person having a direct impact on the application, the person on whose behalf the application is made, or being made for entry in the same insurance association that is irrespective of its membership in the association. Owner also refers to the builder of the ship as well as the person whose name is written on the slip or the entry certificate(2).

Thus in the light of these concepts, the point should be noticed that while dealing with another mortgage or party or the charterer, this person is considered as the one who has effect in the insurance contract and is considered as the agent representing the interest of the third party. In such type of cases, the mortgagee influences insurance for its benefit like the insurance affected person works as an agent for the mortgagee includes the provision of direct or original interest. Hence, the distinction inherited problems are solved through agency doctrine under the letter of attorney or power of attorney in the condition when the person who influences the insurance works as an agent for the assured (Judie, 2008).

In the civil law system mandate or the system of common law, power or letter of attorney is the legal authorization of act on behalf of other entity in the matter of business or any legal matter. Two entities are involved one the principal and other is the agent. The principal is the one that authorizes the other on specific conditions and terms. The principal makes the guidelines for others under individual Acts like the Agency Act 1973(3). Then the principal hires the agents

(1) Correa, Carlos María, and Abdulqawi Yusuf, eds. Intellectual property and international trade: the TRIPs agreement. Alphen aan den Rijn: Wolters Kluwer, (2016) 347-362

(2) Paul, Ellen Frankel. Property rights and eminent domain. Routledge, (2017) 74.

(3) Agency Act 1973

for working on any particular project under the conditions set by the same Act that also set the responsibilities and the rights of the agent or attorney. Whereas under the general contract law that deals with the agency, the agent can be acted on behalf of the principal under the limits and rules that are agreed by both of the entities. Manager in the cases is the one whose authority exceeds the limits of manager whereas agent does not involve in the ratification of acts. The agent is also restricted to give information of the agency to any unknown or unsuitable person; otherwise, his act can execute it from the agreement or mandate.

On the other hand, the principal should satisfy the contracted obligations along with the agent with the confirmation of authorized mandate and upon asking the importance must be paid for the necessary expenditures of the execution. If any losses occur with the execution of mandate, the principal must pay these losses whenever they do not result in the guiltiness. Lastly, the principal pays the expenditures to the attorney that are occurred on the execution of the mandate. These expenditures can be a simpler one that occurs while the execution of mandate or the remuneration that must be paid to agent despite the assumed effect except the case in which agent is the one who is blamed.

Moreover, it should be considered that while dealing with other parties, the person may assign the policy has an effect on the insurance dealing with mortgage thus it can be said that it has the derivative interest. This is the reason for which it is stated in UK Rule 15 A, of UK Introductory that any Association will not give insurance under the contracts between the owner and the association and these contracts can be assigned even if the written consents of the managers are not available. Whereas the managers have, the right of either accept the consent or reject it within their discretion even without stating any reason. The managers are also allowed to give their consent on such things that they think are suitable for the condition, and there will be no hindrance in their way. This concept can be clarified by taking the example of assignment (project) under the law of real state agencies.

Assignment refers to the transfer of rights from one party to another under the law; the one who assigns it is assignor whereas the second one is the assignee.

The legalisation of the assignment refers to the rights and the liabilities under the law. The manager rejects any assignment that is made without the consent of the managers, or it will be considered as void and will have no effect of this assignment that shows the importance of this assignment further. Furthermore, UK Rule 15 B of UK Introductory Act states about the specification of the managers for the conditions of giving the consent of the assignment. Association shall include the claim that is presented by the assignee for the deduction or retain of such amounts, and it can be estimated by the managers that whether it is sufficient for the discharge of liabilities of the association assigner whether it existed at the assignment time or having accrued. According to MIA (Marine Insurance Act 1906), a marine policy is assignable unless it contains terms expressly prohibiting assignment. The conditions do not prohibit such assignment but in order to be binding for the underwriters, some formal requirements must be fulfilled(1).

In the second case, the mortgagee must be assigned with the policy like the provision of the rights under the policy. Policy refers to the principal or the course of proposed with the help of an individual or organization. Here policy refers to the terms that tell the procedure if the assignment is not followed correctly. Thus, the policy binds the assignee and assignor under the conditions of the assignment.

Under the general contract law, the contracted assignment of rights is the complete transfer of rights to parties so that it can receive the benefits that are assured to that body under the contract. It can be observed from the example of a contract between the two bodies A and B where party A has contracted with party B to sell its ship for some amount of money say $ 30000 after contracting the party A will tell the benefits of the contract when it is sold to the party C for some amount.

(1) Zhang, Xuefan. "Identifying consumerist privately owned public spaces: The ideal type of mass private property." Urban Studies 54, no. 15 (2017): 3464-3479.

In the example, party[1], A is assignor whereas party C is assignee and party B is obligor. However, it should be noted that here, party C does not act as the third party beneficiary party. It should also be considered that the common law favours the assignment freedom thus; the assignment is permitted if it is not restricted within the context of the contract. An assignment neither decreases the chances of another party to receive any benefits nor its effect on the duties of the other parties. Under the assignment, the unique rights are given to the parties that cannot be assigned to another party. If party a pays, $1000 to party C for representing its case than it will not pay to any other party for the same case that can be summarized that the party A cannot assign the contracts rights to the legal representation of another party.

Hence, it is possible to affirm that the concept of identification in the context of marine insurance does not exist in UK marine insurance law. Thus, it is clarified that the rules for the owner will be different for the third party[2], as the person effecting the insurance is the one who is agent represents the interest of third party or merely an assignee of its duties and rights. The insurance law handbook says if the issue of wilful misconduct is considered, the other party B will not be claimed due to the actions of party A under the policy when A is separately interested from B. This is mainly the case when the insurance affects the advantage of two or more assured for instance for both mortgagee and mortgagor. Whereas if the claimant is not the assured originally, but used the title of the assignment, in this condition, the insurer can appeal for misconduct against the assignee by the assignor.

Under Rule 1 of UK Introductory, the Association has provided cover thoroughly in the benefit of the owner. This is further elaborated in Rule 14 under the UK rule that if a member whose name is not on the register enters in a certain property based on call or any other preferable source, then its name will be

(1) Jin, Di, and Hauke L. Kite-Powell. "On the optimal environmental liability limit for marine oil transport." *Transportation Research Part E: Logistics and Transportation Review* 35, no. 2 (1999): 77-100.

(2) Jervis, Barrie. *Reeds Marine Insurance*. A&C Black, 2013.

entered in the register so that further chaos will be appropriately handled. This is not only true for the one type of owner but also includes the joint owner, permitted assign, insurer but also the extent allowed under the rules 10, 11, 13 and 15[(1)]. Furthermore, it should be noted that the rights should not be acquired according to the third party under the Contracts Act 1999[(2)] of the United Kingdom or the legislation of the same nature. The above statement constitutes Rule one of the UK introductory. At the same time, UK rule 5L says that all insurance contracts that are made under Association shall be dealt according to the Marine Insurance Act 1906 irrelevant to the modifications with such Act. However, in these cases below mentioned provisions can be applied as the background law.

Uberrimae fides insurance is elaborated under the MIA (Marine Insurance Act 1906[(3)]) Section 17 that imposes the duty on its insurance, i.e. such type of questions should be adequately understood, and such risks not be misrepresented. Further, the material facts are disclosed under section 18 that is mainly related to the rating and acceptance of risk. Non-disclosure is the term that is used in case of failure to do so or reduces the chances of insurance by the insurer. Section 50 of MIA further elaborates the fact that the ship-owner might assign the policy benefits to ship mortgagor or in some cases any third party. It should be noted that concept of co-insurance does not exists under the English Law or even in English insurance system but the concept of the composite system is present in the system in the insurance is provided more than one entity, and each of them has the diverse interest in the insured subject matter. Thus, it can be said that the legal material should be existent for the regulation of institute of such types that is based on the paper and serves as an interpretation source[(4)].

6.6 Composite Insurance

Concept of composite insurance is slightly different from the co-assured that says that composite policy takes place when the insured party makes the insurance on the place of the third party. The whole situation is explained in the *"Barlow*

(1) Marine Insurance Act

(2) Contracts Act 1999

(3) Marine Insurance Act

(4) Eggers, Peter MacDonald, and Simon Picken. "The insurance contract uberrimae fidei." In Good Faith and Insurance Contracts, Informa Law from Routledge, (2017): 91-112.

Lyde & Gilbert LLP[1]*"* that defines the situation that the third party is co-assured but on behalf of the insured party. Under the English system of third insurance, party ensures the primary or contract suggests for the composite policy, i.e. the policy under which the divisible interest of the insurance is covered whereas the policy covers the interest of both at the same time[2].

This is further elaborated in the *"Barlow Lyde & Gilbert LLP*[3]*"* and the case of *"National Oilwell (UK) Ltd v Davy Offshore Ltd)* [4]*"* where the subcontract obliged the terms of the main contract for getting the insurance policy of property of all risks that covers the equipment supplied under the subcontract before the delivery of equipment. Subcontractor can enjoy the above benefits under the law, but it should be noted that all of these are exist before the delivery, not after the point when all the material under the contract is delivered. There is also a defined rule for the liability under the policy under which the main contractor procures the policy against the liability in case of any defect of the material under the contract, and it should be pointed out that the policy exists for both main contractor and sub-contractor before as well as after the delivery. If the defects are caused after the delivery because of any suitable reason belongs to the main contract then due to delay in the construction it will occur the loss to the main contractor as it is the one who delayed order. In the case mentioned, the insurer, who tried to cover the money from the subcontractor through the subrogation, paid these losses.

However, the subcontractor rejected the claims with the statement that the subcontractor was the party of insurance contract thus is saved from the proceedings of subrogation under the general rule that the subrogation does not exist for the insured parties. Thus the court held decision on behalf of the sub-contractor and ordered that the subcontractor was not co-insured but on the risk of

(1) Marine Insurance Act

(2) Diacon, Stephen, ed. A guide to insurance management. Springer, 2016. p.n.d.

(3) IN RE JOHNSON & JOHNSON TALCUM POWDER PRODUCTS MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION, MDL No. 16-2738 (FLW)(LHG) (D.N.Y. Oct. 11, 2018).

(4) NATIONAL OILWELL (UK) LTD. v. DAVY OFFSHORE LTD. [1993] 2 Lloyd's Rep. 582

delivery[1], therefore, the main contractor should be authorized to insured on behalf of the subcontractor. However, it was not the case as the sub-contractor took the obligation. Thus, the main contractor noticed on the insurance of pre-delivery losses. Therefore, it was decided that the main contractor and sub-contractor are co-insured only for the pre-delivery risks[2].

Under the English system of contract, the policy covers the interest of both the main contractor and the sub-contractor, but the policy is composite in which each of them has a separate contract concerning the insurer. The case of "*Barlow Lyde & Gilbert LLP[3]"* further elaborates that the third possibility is also considered in the English system that says that the policy taken by the single insured under the agreements of contract with any other party but the other acts as the intended beneficiary. Thus, in other words, it can be said that according to Martine Insurance Act, interest numbers can be insecure as the alternative of the composite policy but for the one that is insured for the benefit of himself and the person who is not identified.

By examining the composite interest deeply, it is observed that the typical examples of the interest are the policies made by the mortgagee and mortgagor. The claim is observed in the *"Barlow Lyde & Gilbert LLP abid[4]"* where both entities acted as the relevant for the composite interest. It shows that both the owner and the lender are related to one another concerning the composite interest under the English system of contract.

By examining the *"cover of the third party under P&I insurance"* is examined it can be proved that it is suitable for the examination of some core issues regarding the composite policy under the English law as according to the paper, the third party is the person, not the member that is named on entry certificate[5]. Association is mainly agreed with the person whose name is

(1) NATIONAL OILWELL (UK) LTD. v. DAVY OFFSHORE LTD. [1993] 2 Lloyd's Rep. 582

(2) Bundock, Michael. Shipping law handbook. Informa Law from Routledge, 2018. p.n.d.

(3) First State Ins. v. Banco de Seguros Del Estado, 254 F.3d 354 (1st Cir. 2001).

(4) Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

(5) First State Ins. v. Banco de Seguros Del Estado, 254 F.3d 354 (1st Cir. 2001).

mentioned on the certificate of entry for extending the afforded cover to the member. It should be noted that under the policy identification of the specified persons is sufficient enough as it also includes the description along with the name. This description of the specified person includes the details about that person like its address, contact number and the behalf on which it is part of the contract so that no any chaos takes place in the composite relationship. It should be noted that the description must include the reason for co-insured in the related question.

The claim is further elaborated in the case of *"Talbolt Underwriting v Nausch Hogan & Murray Inc (The Jackson 5) 2006 2 Lloyd's Rep 195*[(1)]*"* that defines the condition in further details. In the case, the question came out that whether or not the repairers of ship-owners were co-insured under the prescribed policy: as well as for the companies that are associated and affiliated, interrelated companies, subsidiary, and the ventures of joint interest. The court decides that the repairer was not part of the group of companies similar to the main contractor and is more than the concept of contract repairing that was required to give rise joint venture[(2)].

For understanding the case clearly, case of the alleged insured can be taken under consideration if the name of the alleged co-insured entity is not mentioned with the name or described in the way that it is considered as the subject insured under the policy. The question arises that whether the main insured entity that is the actual proposer acted as the agent or not, i.e., whether co-insured entity acted as the unidentified principal of main insured. Before examining the facts in detail, it is necessary to identify the partially disclosed or the anonymous principal[(3)]. An unidentified principal is the one where one party while transaction knows that the actual principal thus in these cases, both the agent and principal are thoroughly liable for these types of transactions. Under the English law, if any subject a signs

(1) Talbot Underwriting Ltd v. Nausch, Hogan & Murray Inc, 2006 E.W.C.A. Civ 889 (2006).2 leoyd's law Repport, 2006,195

(2) Rose, Francis. Marine insurance: law and practice. CRC Press, 2013.

(3) Rose, Ibid, 2013.

any contract with the T on the name of a then it is open for the third party to assert that the contract takes place by A on behalf of P. Thus, the resulting contract was between the P and T, but in actual sense, the real principal A is unidentified.

The same situation was observed in the case of "*Cooke J in Talbot Underwriting v Nausch Hogan & Murray*[(1)]" in which it is understood that the impact of the unidentified principal is same as that of the common principal, but it creates problems in the relation between the agent and principal. Related to the issue, the case shows that the court held the decision on the bases of facts, not the relation between the agent and principal as the relation was unclear due to complexity[(2)].

The case of the unidentified principle under the study is identified in the case of *"Siu Yin Kwan v Eastern Insurance Co Ltd "* [(3)]" that held that the owner of the ship requested to the agent of a ship for providing the policy that includes the powers of ship owners. The policy that is provided to the shipping owner must include the potential of the owner and the liability of the owner towards its customers and employees. In the case, it was observed that the policy was issued, but the issue was that the shipping agent named as the insured. Under the same circumstances, an accident occurred for which the owner of the ship was considered as liable to its employees and the matter was worse when the Privy Council held that the owner was insured correctly following the policy that is made by an agent for the principal. The council held that under the policy the authorization, as well as intention, had also been held thus the owner of the ship is liable to the employees. Furthermore, in the book *"Barlow Lyde & Gilbert*[(4)]" it is explained that some possible problems can occur when the non-recognized entity in the policy claims as insured.

(1) Talbot Underwriting Ltd –v– Nausch Hogan & Murray ("Jascon 5"), Ibid,195

(2) Tettenborn, Andrew, ed. Charterparties: Law, Practice and Emerging Legal Issues. Taylor & Francis, 2017.

(3) SIU YIN KWAN AND ANOTHER V EASTERN INSURANCE CO LTD: PC 16 DEC 1993 ,I All ER (1994):213

(4) Kelso Enterprises, Ltd. v. M/V WISIDA FROST, 8 F. Supp. 2d 1197 (C.D. Cal. 1998).

Thus, the chapter accomplishes that the fixed percentage that is paid against claim once the deductible is fulfilled is called the co-insurance. Concept of third-party co-insurance does not operate under the English system and does not make any difference between the assured and insurance affecting the subject. Whereas the idea of composite insurance exists in the English, system that is slightly different from the co-assured that says that composite, the policy takes place when the insured party makes the insurance on the place of the third party. Under the English system of contract, the policy covers the interest of both the main contractor and the sub-contractor, but the policy is composite in which each of them has a separate contract concerning the insurer. Finally, it can be said agreement is not authorised if the primary insured for obtaining the cover for some other person that in some conditions can ratify the act that is unauthorized under the law and thereby it claims as to the party for the main contract.

CHAPTER 7: CO-INSURANCE UNDER THE CASE OF BRAZILIAN LAWS AND REGULATIONS

Brazilian practices of the co-insurance highlight the fragilities that enhance the benefits, rights and interest specified under current laws and regulations in respect to the association amid numerous insurance providers or in respect to the security and protection of the insured and co-assured or the beneficiaries(1). The lacking and absence of regulations surprises any scholar who prior to analysing the questions in the context of Brazilian practices, approaches the co-assurance with the help of comparative law. It has been examined and explained by the several researchers that true and correct dialogue of the parties in this field is necessary to avoid disputes. It is in between restricted doctrine, and the rapid jurisprudence is to asses and evaluates the subject matter. The only thing that the terminology co-insurance is comparatively the hardships to describe, disabling as the fallouts, also the ensuring of rights and interest of both insureds including third parties and insurance provider(2).

(1) Osborne, David, Graeme Bowtle, and Charles Buss. *The Law of Ship Mortgages*. Informa law from Routledge, 2016. p.n.d.

(2) Rogan, Peter, ed. The Insurance and Reinsurance Law Review. Law Business Research Limited, 2018.

De Oliveira, (2018)[1], considering the absence or lack of regulations and rules of law that outlines the law models supplied by the jurisprudence that is comparative, it is hard or complex to know in what way to proceed as it is not easy to classify and recognise appropriately the kind of co-insurance that confronts the Brazilian exercise and practice today. In fact, co-insurance in the country is fundamentally associated and referred to the co-insurance amid insurance providers and the parties including the third parties, which is also amid co-insurance amid numerous assured.

Co-insurance within the Brazilian law viewpoint is fundamentally that modality where numerous insurance providers are carrying out the risk on shared basis sharing via premium and being the selection of the co-insurance providers the approximate leader. To put it in our lawful picture of the lacking and irregularities it is now highlighted the new and latest "Civil Code 2003" that promotes the unification of the commercial and civil obligations in specific articles that are 760 and 761. However, as denoted, these sections and provisions are referring to co-insurance amid the insurance providers and not the one who is referred to in the contract. Therefore, it is clear that more scholars and studies carried out to enhance the sector and market of insurance in Country Brazil, comprising the one associated to the description of the co-insurance and the bound parties under co-insurance third-party contract[2].

The entire insurance market, including co-insurance and reinsurance, is governed and controlled by the "Decree-Law No. 63, of 1966", which formulated the national procedure and system of private insurance. This law establishes the primary instructions and guidelines on the national strategies and policies for the

(1) De Oliveira, Alberto. "Market Solutions and Inequalities in Sanitation Services Access in Brazilian Cities." Theoretical and Empirical Researches in Urban Management 13, no. 4 (2018): 28-42.

(2) Talonen, Antti. "Systematic literature review of research on mutual insurance companies." Journal of Co-operative Organization and Management 4, no. 2 (2016): 53-65.

organisations serving the insurance sector as well as formulate and extends power to the controlling organisations and authorities(1).

At the opening of the market for reinsurance and co-insurance, complementary and regulation no 126 of 2007 was published to control and regulate the reinsurance and co-insurance, related contracts and transactions and still present a lawful keystone. The "Civil Code of 2002" now mainly controls contract of insurance. Furthermore, the public law is smeared to the co-insurance as well re-insurance market, and it looks like the laws associated with public bidding, IT and infrastructure and agreements and administrative proceedings of sanctioning. In addition, the re-insurance and co-insurance marketplace is severely controlled, particularly when it arises to amalgamation, solvency regulations, registering and deregistration, standardized wordings of contracts etc.(2).

Therefore, Brazilian regulations and laws outline the obligation of the insured person to notify the claim to the insurance provider with an immediate effect as the former gets aware of the loss and damage. It likewise orders that the actions of both insurance provider and the insured individual within the background of the insurance association be directed by the greatest good belief and faith. Grounded on such rules and provisions, Brazilian cases are to the impact that late notice, in the situation, does not establish an adequate basis for refusal of compensation of claim(3).

7.1 Reservation of rights

Brazilian law and regulation have no significant and specific provision for the coinsurance, which does not specify it cannot be accomplished or done. In that

(1) Australia, Rean Monfils Gilbert-Sea. "Strategic environmental assessment and future potential shoreline impacts of the oil spill from WW11 shipwreck Hoyo Maru. Chuul Lagoon-Federated States of Micronesia." (2016). p.n.d.

(2) Lee, Young-Chan. "A study on maritime casualty investigations combining the SHEL and Hybrid model methods." *Journal of the Korean Society of Marine Engineering* 40, no. 8 (2016): 721-725.

(3) McCalla, Robert J., and Brian Slack. "Port, corridor, gateway and chain: exploring the geography of advanced maritime producer services." In *Integrating Seaports and Trade Corridors*, Routledge, (2016): 99-116.

sense or meaning, it can be suggested that entire communications issued by the insurer to the insured and then implementable, the holder of policy in the duration of claims handling focus that their contents will not be built as an insurer's right waiver resulting from policy and or the regulation and law comprising the right to possibly identify and recognise absence and lacking coverage for any and all damages resulting from the claim. It is significant that the behaviour of an insurer is steady with that(1).

7.2 Non-disclosure and misrepresentation

Brazilian law addresses the subject of non-disclosure or misrepresentation. It is done under two different moments. Moment 1 is underwriting and acceptance risk, and moment 2 is the throughout the policy terms in situations of enhanced risk or hazard. In the first, the non-disclosure/misrepresentation will involve the forfeiture of the rights of insured to the indemnity collectively with the outstanding payment of the premium as an obligation. The misrepresentation and the non-disclosure is a major enough that it might influence the acceptance of the risk or the rates of premium and cumulatively, (I) the insured performed on undesirable faith, which ought to be evidenced by the insurance provider(2).

In the occasion that the misrepresentation or the non-disclosure did not consequence from undesirable faith of the insurance provider (or the insurance provider is not capable to evidence otherwise), the insurance provider will be permitted to select among the terminating the policy or upholding it and collecting additional premium or changes. Nevertheless, in case of no such occasion or event, it will be capable of refusing a claim on that basis. Whereas in the second moment, misrepresentation or non-disclosure might involve forfeiture of the rights of insured to indemnity results in undesirable faith, which then again do the insurance provider prove. Fail to notify the insurance provider of any loss or

(1) Huybrechts, Marc A., and Theodora Nikaki. "Marine Insurance." In The International Handbook of Shipping Finance, Palgrave Macmillan, London, (2016): 267-283.

(2) Hurić-Larsen, Jesper Fredborg, and Angela Münch. "Competition and Environmental Policy in the EU: Old Foes, New Friends?." *Journal of Industry, Competition and Trade* 16, no. 2 (2016): 137-153.

damage occasion considerable enhances that risk of non-payment of the claim, as it is known by the insured(1).

7.3 Co-insurance and reinsurance claims

In overall terms, the current Substantive law of Brazil seems as additional favourable for the insured's, but current and latest developments highlight the major shifts for an additionally balanced system. This implies that regulatory agencies and consumer protection agencies in the country have a major impact on the insurance market. This also signifies that the rights of both parties, whether insured or insurance provider are comprehensively secure under these regulations. The insurance provider also have the right in certain situation that they may deny the claim payment when it is the fault of insured's for example of the insured person did not check the wellness and fitness of the vessel that is the responsibility of the insured or any damage in the vessel is not informed by the owner of the ship which is his duty of care then failure to do so, both parties can file a claim in even of losses arising from mistake of any party(2).

7.4 Rights of third-party coinsurance under Brazilian P&I Insurance law

The P&I insurance in Brazil give the right to the third party to file against the claim against the insurance provider for the claim resulting in any damage or loss of the product, which was insured on co-insurance basis. The Brazilian laws draw a differentiated line in this regard amid insurance for civil liability and mandatory liability insurance. In this regard, it has also been specified by the Supreme Court that third party cannot file or move against the insurance provider if the insurance provider is not the party to the legal claim or the lawsuit. Nevertheless, in the recent amendment in co-insurance and third-party insurance, the court has allowed the third party to move or file against the insurance provider and can claim for the damages and losses arising from that(3).

(1) Leonard, A. B. "Introduction: the Nature and Study of Marine Insurance." In Marine Insurance, Palgrave Macmillan, London, (2016) :2-22.

(2) Yang, Yiqing. "The Past and Future of Utmost Good Faith: A Comparative Study between English and Chinese Insurance Law." (2017). p.n.d.

(3) Haugland, Ane. "Be Careful Where Your Ship Gets Wrecked: A Comparative Study of Wreck Removal in the United States and Norway and the Implications of the Nairobi International Convention on the Removal of Wrecks." *Loy. Mar. LJ* 16 (2017): 37.

7.5 Rights of Insured for direct claim or action against co-insurer or re-insurer

According to the Brazilian law of insurance, there is no right contain by the insured to claim against the reinsurer or the co-insurer if the co-insurer is the principal insurer of the party its products being voyaged or any other liabilities. But there are some exceptions to this regulation, that the insured can bring the claim against the insurance provider in the liquidation or total loss resulting from negligence or misrepresentation of the insurance provider and the insured can also claim against both parties whether co-insurance or reinsurance provider. Remedies that insurance provider has in case of misrepresentation or non-disclosure by the insured(1).

The civil code of Brazil under article 766 specifies that the omission of deliberates by the insured of the situation for which they must be aware of, they could have impacted the acceptance of risk, or they could have made the insurance provider accepting to ensure their item or anything they might not want to, but due to non-disclosure, and misrepresentation, insurance provider has ensured such item. This when to resulting in loss and damage to the insurance provider, they can file a claim against the insured party and can also deny any compensation or claim amount to the insured party(2).

The gap of providing sufficient information from the insured party to the insurance provider has been filled by the Brazilian Jurists, and the courts have given clear instruction for reduction of such gap. This signifies that now insurance company has the clear and obvious right to receive sufficient information regarding items of service to be insured and it is the obligation of the insured party to disclosure all the necessary and required information to the insurance provider. In order to do this, under the Brazilian law, a detailed risk questionnaire has to be filled out by the insured and provided to co-insurer and principal insurer before entering into agreement or contract of co-insurance or reinsurance(3).

(1) Gorbunova, Inna. "Seguros P&I. Cambios y desarrollo en los últimos 20 años." (2018). p.n.d.

(2) Baughen, Simon. *Shipping law*. Routledge, (2015): 87-89

(3) Georgosouli, Andromachi, and Miriam Goldby, eds. Systemic Risk and the Future of Insurance Regulation. Taylor & Francis, 2017. p.n.d.

This signifies that requirement of a good faith that has to be upheld by all the parties into the insurance contract as advised by the "Superior Court of Justice". It can be backed with the case law of "Agent in REsp 16411348/SP" where it was stated by Justice "Moura Ribeiro" that insured was under the duty of care to provide complete information and liable for information disclosure to the insurance provider and it was also held that the care duty could not be discharged only by filling out the risk questionnaire. This signifies to the major issue that whether insured acted and performed in good faith by revealing true and correct information in the risk questionnaire(1).

For example, before insuring a car, insurance provider asked in the questionnaire regarding the number of previous accidents of car or frequency of repairing shop visits of a subjected care, and despite numerous accidents and service centre visits the car owner specifies no service centre visits and no accidents just to prove the fitness of the car. This suggests that in order to get car insurance owner or the insured did not act in good faith and thus in case of a claim, the insurance company might bear a huge financial loss. Thus, in this case, after identification of the incorrect information or undisclosed information served by the insured, insurance company can deny the claim(2).

7.6 Potential liabilities on ship-owners under co-insurance and third-party contracts

Cover for the obligations and liabilities not covered or insured by policies of hull and machinery in marine insurance is usually provided based on non-profit by the "Protection and Indemnity" which is referred as P&I clubs that are grounded on mutuality(3).

Insurance businesses provide P&I cover as Raetsmarine, and further big insurance providers as AIG have comprised in their insurance services portfolio the insurance service provider for marine insurance. It is also recognised that after the vessel incident or an accident, the vessel A investigated, checked and detained

(1) Pijaca, Marija, and Božena Bulum. "Rizici osiguranja kod ugovora o zakupu broda." *Zbornik Pravnog fakulteta u Zagrebu* 67, no. 1 (2017): 85-105.

(2) Tharmakulasingam, Sri Ganesan. "Riding On The Winds Of Change." *Journal of Malaysian and Comparative Law* 30 (2019): 51-64.

(3) Drobitko, Oleg. "Legal framework pecularities for arresting of seagoing ships in Lithuania." (2018). p.n.d.

believing that it was not worthy of the sea and resulted in the loss to the insured(1). Thus, the insurers require investigating and verifying the details and the facts behind such loss. If vessel A is covered and insured under the Brazilian market, time policy and the checking of seaworthiness should be done and must have taken place prior to book the vessel and start of its operations or trip. If it is not checked, then, insurance providers might be in a position to deny or refuse liabilities or paying claim against losses to insured.

This will also happen in the case of policy of voyage if it has started the trip in unseaworthy position breaching the consideration of common insurance law that principles of implied warranty will be applied on the insurance company and thus they will be liable under the Brazilian marine insurance laws which also provides coverage for the liabilities resulting from collision of ship or vessel(2). It is to take into account that a crash per sea does not yield an obligation. Obligations for crashes as well for allisions rely on "the discovery of responsibility that produced or donated to the loss incurred". The circumstance in question demonstrates that the freighter vessel "B" was on a dock on the procedure of unloading freight at the instant when the vessel "A" hit it(3).

Thus, the owners of the vessel A might perceive and put a view that the collision or crash was not a consequence of a fault but from "inevitable or unpredictable accident" which might be linked with the technical fault or machinery failure. But if the cause or reason of the crash is not dominated then inevitable or unpredictable accident plea can be filed but it will not be accepted as it happened in the case of The Merchant Prince [1892], in which it was specified that crash was a consequence of technical fault in steering of the vessel, and it got amid that hindered to move the ship's direction. Thus, it was stated by the court

(1) Kuzu, Ali Cem, Emre Akyuz, and Ozcan Arslan. "Application of Fuzzy Fault Tree Analysis (FFTA) to maritime industry: A risk analysing of ship mooring operation." *Ocean Engineering*179 (2019): 128-134.

(2) Haugland, Ane. Ibid, 37.

(3) Bhattacharya, Yogendra. "Employee engagement in the shipping industry: a study of engagement among Indian officers." *WMU Journal of Maritime Affairs* 14, no. 2 (2015): 267-292.

that as the reason for an accident was unknown, the court refused the plea of the inevitable accident(1).

Under Brazilian laws, collision liability covers and insurance policies or agreement with "fixed and floating objects" "(FFO)" always relies on the H&M policy that is hull and machinery policy. It also remembers that P&I clubs offer cover and insurance for liabilities that are not protected under Hull policy. That is why the Standard Brazilian insurance covers for obligations and liabilities in a case of a collision under the hull policy, and it signifies that Hull insurer will pay for the three-fourths of the understood and implied liabilities given that the limit is 75 % of the total value of the insured item or vessel. The P&I club covers liabilities is the remaining portion and non-covered under the policy of hull. In association to FFOs the standard Brazilian market, Hull sections offer no cover, and then in this circumstance, the P&I Club helps to provide the insurance coverage(2).

But if the agreement or the contract of marine insurance obey the international hull sections and clauses with the changes to offer obligation and liability coverage to four-fourths and any liability resulting from contact with FFOs, then the P&I will not offer this coverage. The aggregate cover for liabilities on crash and contact with "FFO" is particular characteristics of the clauses and sections of Nordic Plan. The collision produces and generates the sinking of the tanker ship or vessel and the loss of cargo items(3). The clauses of the hull do not provide the insurance coverage for cargo in the insured ship or vessel. To evade responsibility and liability on the cargo vessel owners, they might invoke and have immunity grounded on the "Hague Visby Regulations". Ultimately, liability might be forced on the possessors of the vessel "A" if the responsibility in the crash is finally professed upon the ship or vessel.

(1) Georgosouli, Andromachi, and Miriam Goldby, eds. Systemic Risk and the Future of Insurance Regulation. Taylor & Francis, 2017. p.n.d.

(2) Padovan, Adriana Vincenca. "The importance of marine insurance in the legal protection of the sea." In *Pravna zaštita mora*. Hrvatska akademija znanosti i umjetnosti, (2017): 78-83

(3) Briggs, A. "Direct actions and arbitration: all at sea." *Lloyd's Maritime and Commercial Law Quarterly* 2016, no. 3 (2016):537-563

Furthermore, the P&I clubs deliver insurance coverage for the liabilities resulting from crash and collision of the vessel with other ships or vessels. This is because the collision of the vessels might result in heavy financial losses because the huge amount of raw material or finished goods are damaged and broken or missed in the sea and thus owners of such items bear huge losses. Thus, the items that are covered by the P&I Clubs include salvage, cargo, towage, and scrap items. Each of these items has massive financial value and the collision of vessel consequence in losses of these items having higher financial value. Thus, the clubs provide coverage as well as expenditures in association to labour costs, wage costs and legal costs and for the penalties(1).

As stated above, a collision produces various probable damages and potentially loses and liabilities. Criminal penalties and charges are possible to appear when the damages from sea conditions take place. Immediate measures and actions to prevent or reduce loses and capabilities are needed. Maritime fatalities might occur in diverse parts across the world with diverse authorities and systems of law. The benefit of the P&I Clubs in a severe loss such as casualty is the growth of Correspondents to help owners of the ship and masters in a similar place of the accident or collision(2).

Thus, from the above sections, it can be summarised that Brazilian co-insurance and third parties coverage under P&I Insurance is effective in order to secure the rights and interest of both insurance providers and insured parties(3). Thus, it also regulates effectively the transactions and dealings involving co-insurance and third parties in the contract of insurance.

7.7 Summary

The current Brazilian practices regarding the co-insurance laws and regulations were discussed in this chapter. The discussion is based on the association of several insurance providers that provides security and benefits to the beneficiaries or assured ones.

(1) Geldenhuys, Kotie. "Stowaways–the hidden problem." *Servamus Community-based Safety and Security Magazine*111, no. 3 (2018): 40-47.

(2) Pijaca, Marija, and Božena Bulum. Ibid, 85-105.

(3) Regulation S-K

The current law shows a lacking of law and order of the regulations of the Brazil government regarding the co-assurance and insurance policies. It is found in several types of research that there is a rare reference seen among the policies of insurance and the relevant cases. It is not easy to understand the current situation of Brazilian law and practices being done under the jurisprudence of the country.

The law of civil code 2003 shows the true picture of lacking the regulations that do not refer to the people who are bound in the contract of co-insurance and insurance providers. Decree-Law no 63 is the present law under which Brazil formulate sits insurance system giving guidelines and giving powers to the organizations. This law clarifies that the insured person is obligated to claim for the insurance provider to have the immediate effects. This will clear all the claims, and the communications will be easier between the insurer are the insured. The law entails two different moments of non-disclosures that is underwriting and risk acceptance and the terms of risk enhanced within the policy frame. Both these covers the rights of the insured obligating him/her for the premium.

However, it is also said that the current law is considered a favourite for the people who get insurance with some amendments to the previous one. It also consists of the right to the people that they can claim for their payment in case of the fault of the damage. In addition, the P&I policy of the country gives the same right with some exceptions. The claim is restricted to be in liquidation or the loss through the negligence of the provider, and it is equally applicable to the insurer. To claim for the damage, the insured party is required to fulfil all the necessary requirements by filling a questionnaire. Moreover, the collision of Hull policy is discussed under the Standard Brazilian setting the limit for the liabilities to be covered under insurance.

P&I policy is the recommended policy to be followed by insurance companies as it covers the towage, scarp, cargo, and salvage because all these have financial values and can also cause an immense amount of loss. The policy covers the other costs as well, including the wage costs, legal cost and other penalties. The sea conditions are described separately under this law, and it requires criminal penalties to the insurer. In addition, it

was analysed that maritime fatalities require a lot of facilities and organised law considering the diverse issues that can be helped by P&I. It can be summarised that Brazilian co-insurance and third parties coverage under P&I Insurance is effective in order to secure the rights and interest of both insurance providers and insured parties.

CHAPTER 8: PROTECTION & INDEMNITY CLUBS UNDER THE UNITED STATES OF AMERICA

In the Anglo-American legal system, the insured's liability for damages to a third party is the subject of insurance (i.e., third-person insurance), which can take two forms, one of which is liability insurance, and the other is "compensation" insurance (indemnity insurance). The main difference between the two is that under the compensation insurance, the actual payment of damages by the insured is a necessary condition for the insured to make a claim; and under liability insurance, there is no such requirement. It can be seen that the compensation insurance exists purely for the benefit of the insured, to fill the insured's actual losses for the ultimate purpose, the insured has no damage, the insurer does not bear the insurance payment liability; and the liability insurance abandons the ultimate goal(1). The idea of filling the insured's loss and developing the function of protecting the interests of third parties, regardless of whether the insured actually paid compensation to the victim, as long as the insured's liability for the third party has been determined in accordance with the agreement between the insured, the victim and the insurer, the insured may file a lawsuit against the insurer. If the insured's payment cannot be made, for the third person, in both cases, the result is the opposite(2).

8.1 Third Party's System

P&I insurance provided by the Protection & Indemnity Clubs is traditionally compensation insurance. The P&I Club only pays for the amount that the members of the association should compensate and have paid. Typical association rules often include the following provisions: "Unless the board of directors makes

(1) Fedi, Laurent, Olivier Faury, and Daria Gritsenko. "The impact of the Polar Code on risk mitigation in Arctic waters: a "toolbox" for underwriters?." Maritime Policy & Management 45, no. 4 (2018): 478-494.

(2) Tarr, Julie-Anne. "Marine insurance law reform in Australia–A following sea." Australian Business Law Review 45, no. 2 (ABLR 117) (2017): 117-127.

the opposite decision based on discretion, the member shall first settle the same amount as a precondition for a member to claim compensation for the liability, cost or expense of the association. This is the pay to be paid or pay the first clause. Historically, the term was incorporated into the P&I Club rules to enable its members to rely on the financial stability of other members.

With the development of the third party's system of insurers' rights, the boundary between liability insurance and compensation insurance has become increasingly blurred. In the United States, most states have enacted third-party direct litigation legislation that allows victims to sue directly against insurers of third insurance to claim compensation; and to deny the legal effect of the "no litigation" clause on the grounds of a violation of public policy. Some states also prohibit the issuance of an insurance policy that does not expressly stipulate that a third person have the right to sue the insurer when the insured is in bankruptcy directly. It even believes that the insurer cannot invoke the defence object specifically for the insured. The United States effectively converts a compensation policy into a liability policy(1).

In 1930, the United Kingdom enacted the Third Person Rights (for Insurers) Act, which, in accordance with the law, provided that the insured was a company, if the insured was a natural person, was bankrupt or reconciled with the creditor, dissolved; second, the insured's liability to the third party has been determined, and the insured's right to the insurer in relation to his liability for the third party is transferred to a third party. Further, the third party can claim from the insurer. The prepayment clause of the P&I Club and the third party rights law conflict with the legal effect; in this case, whether the prepayment clause will face the fate of being declared invalid as in the US non-action clause, thus affecting the P&I(2).

The reason why this issue is mainly concerned in settlement of the British law is that, according to statistics, there are currently more than 20 ship owners'

(1) Exarchopoulos, Georgios, Pengfei Zhang, Nicola Pryce-Roberts, and Minghua Zhao. "Seafarers' welfare: A critical review of the related legal issues under the Maritime Labour Convention 2006." Marine Policy 93 (2018): 62-70.

(2) Haugland, Ane. Ibid, 37.

P&I clubs in the world, and 16 of them are more substantial, 11 of which are in the UK, and the 11 P&I Clubs have absorbed 80% of the world's merchant ships, London has become the centre of the international ship claims industry, so research on issues related to P&I Clubs is closely associated with UK law(1).

8.2 Scope of Application of Act, 1930 and Basis for Direct Claims of Third Parties

It is precise because of the traditional distinction between liability insurance and compensation insurance that the 1930 law applied to P&I insurance, which once had doubts. Article 1(1) of the Act stipulates that it apply only to insurance contracts; therefore, whether the law applies to P&I insurance, the form of mutual insurance depends on whether the relationship between the association and the members can be regarded as an insurance contract. The Monmouthshire & South Wales Mutual Indemnity Society Ltd. Etc. Case and The Allobrogia case eliminated this doubt(2). In The "Allobrogia" case, Judge Slade determined that although the Act, 1930 did not define the insurance contract, the arrangement between the P&I Club and its members was a general legal term and Article 1(1) of Act, 1930.

In English law, some of the principles are universal. One of them is that only the parties to the contract can sue for the contract. The law does not know what the third party's rights arising from the agreement is(3). This is the principle of contractility (privately of contract); this principle does not recognize any interest of the third party under the contract. When the insured of the liability insurance loses its solvency, the third party cannot directly obtain the claim from the insurer(4).

The introduction of the United Kingdom's 1930 law reflects the reform trend of British law to weaken the principle of contractual relativity. The phenomenon directly dealt with by the law is that when the insured loses its solvency, the insurance proceeds become part of its assets, and the victim of the third party can only participate in the bankruptcy process as an ordinary creditor. In 1930, the law

(1) Drewniak, Megan, Dimitrios Dalaklis, Momoko Kitada, Aykut Ölçer, and Fabio Ballini. "Geopolitics of Arctic shipping: the state of icebreakers and future needs." Polar Geography 41, no. 2 (2018): 107-125.

(2) Nordic Insurance Contracts Acts

(3) Drewniak, Megan, Dimitrios Dalaklis, Momoko Kitada, Aykut Ölçer, and Fabio Ballini. Ibid, pp107-125.

(4) Nordic Insurance Contracts Acts

passed the legal transfer of the insured's rights to a third party, so that the insurance income was exempted from being part of the insured's bankruptcy property, thus protecting the interests of third parties(1).

As for the basis of the rights that the third party has acquired, the British legal practice and doctrine generally hold the right to transfer, that is, the direct claim of the third party is the insurance claim of the insured obtained by legal transfer. The court strictly interprets Article 1 of the Act, 1930 as the insured's rights, and transfers them to a third party with any conditions or premises affecting their rights; using Harman's Judge in the Post Office v. Norwich Union Fire Insurance Society Ltd(2) (Post Office v. Norwich, 1967). Said that the third person could not pick out the plums and leave the duff behind. The court emphasized that the law was intended to give third-party insured status, and Judge Brandon stated in the "Fanti" case that "it is clear from the provisions of the Act, 1930 that the legislator never intended to have a third person in the right. The insurer's relationship is more advantageous than the insured itself, except for Article 1(3).

Therefore, the rights of the insured transferred to a third party are subject to the defence of the insurer. The insurer shall have no less than the right agreed in the insurance contract for the third party and shall bear no more than the liability as stipulated in the insurance contract. This means that if the insured has a false statement, a breach of the obligation of truthful disclosure, or a breach of the insurance contract, the insurance insurer can invoke the defence, the insurer can also resist the third party without insurance liability. The prepayment clause in the insurance contract is one of the arguments often cited by the insurer. It has a fundamental destructive power to the third party's direct claim, because the legal consequences it sets are incompatible with the 1930 law: the law of 1930 One of the applicable preconditions is that the insured is insolvent, which often indicates that the insured is incapable of paying compensation to a third party, which cannot meet the requirements of the prepayment clause, and if the insurer is allowed to

(1) Ross, Jaimie. "Cleanup Cost Liability for Oil Spills: Whether the FWPCA Precludes Alternative Remedies for Recovery of Cleanup Expenses." J. Land Use & Envtl. L. 2 (1986): 51.

(2) Post Office v. Norwich Union Fire Insurance Society Ltd, 1967 Q.B.2 363 (1967).

invoke the prepayment clause, the third party naturally does not Enjoy direct claim(1).

As mentioned above, the Act, 1930 does not want to grant a third person the right to be superior to the insured, except for Article 1(3). This article is the so-called "anti-avoidance provisions", which stipulates that "any liability insurance contract established after the implementation of this law, if directly or indirectly agreed, when the insured occurs in paragraph 1 (a) of this article or Any event identified in item or (its property has been escrowed under an order issued under section 421 of the Bankruptcy Code of 1986) declares that the contract is invalid or alters the rights of the parties, and the contract has no effect." Visible, the legislator has envisioned. It is possible for the insurer to take the solvency of the insured as a prerequisite for his liability, thereby circumventing or reducing his liability under the 1930 Act(2).

8.3 The English Court's Determination of the Validity of the Prepayment Clause

On this issue, the English courts have been controversial for quite a long time. In The “Allobrogia” case, Judge Slade envisaged two ways of negating the P&I Club’s prepayment clause defence: first, he believed that there could be arrangements between the requestor and the liquidator to satisfy the requirements of the rule, "although obeying the preconditions stipulated in Rule 28 clearly represents an entity issue related to the facts of the case. I do not think it is completely impossible to speculate. For example, I cannot be sure that under the cooperation between the requester and the company's future liquidator. A plan cannot be devised to enable the liquidator to perform the debts of the claimant by lending, and then the debt is paid directly or indirectly from the association in accordance with normal procedures. This plan can achieve full compliance with rule 28(3)." He pointed out that if the above plan is not implemented, the prepayment clause is also very likely to have no legal effect in accordance with

(1) Kennedy, Greg. "The British strategic assessment of the United States as a maritime power: 1900–1917." In Britain's War At Sea, 1914-1918, Routledge, (2016): 10-29.

(2) Benamara, Hassiba, Jan Hoffmann, and Frida Youssef. "Maritime Transport: The Sustainability Imperative." In Sustainable Shipping, Springer, Cham, (2019): 1-31.

(3) Babazadeh, Araz. "Port and berth: safe or unsafe?." (2018).

Article 1(3) of the 1930 Act, but it is "not necessary and inappropriate in this case to be disadvantageous in this regard. The conclusion of the association was not clearly defined(1).

In 1988, the two cases were submitted to the Court of Appeal together. The Appeals Chamber, composed of judges of O'Connor, Bingham and Stuart-Smith, listened to various views of third parties (cargo claimants) regarding the inapplicability of the P&I Club Prepayment Clause. The third workforce seeks to persuade the court that the prepayment clause should not be interpreted narrowly or that the principle of equity should be observed, and that the person seeking compensation does not need to suffer losses (i.e., advance payment) before the execution of the compensation contract(2). The Court of Appeal denied these two points of view and believed that their precise wording based on the prepayment clause was untenable(3).

The third person also invoked Article 1(3) of the Act, 1930 and the Court of Appeal unanimously determined that the Prepayment Clause did not violate the article. The loss of solvency does not change the rights of members of the association to the association, nor are the rules of the association intended to alter these rights; association rules are at best only effective in depriving members and third parties of these rights. On the other hand, the Court of Appeal unanimously supported the request of a third person to negate the prepayment clause to comply with the rules of the association(4).

This view is rooted in Judge Staughton(5). After the Court of Appeal believes that the rights and obligations of members are transferred to a third person, the third person must be treated as a member. If a member must fulfil certain conditions before seeking compensation from the association, the third

(1) Till, Geoffrey. Seapower: A guide for the twenty-first century. Routledge, 2018.

(2) Till, Geoffrey. Seapower: Ibid.

(3) Kelsen, Hans. General theory of law and state. Routledge, 2017.

(4) Bhattacharya, Yogendra. Ibid, 267-292.

(5) Gold, Megen. "Remove it or Lose it: Wrecking and Removing in the United States." J. Mar. L. & Com. 46 (2015): 51.

party should do the same; for example, submitting the claim to arbitration and the prepayment rule is another example. If the prepayment rule applies to a third person and the third person must pay for it, this requirement is impossible to achieve. Therefore, the Court of Appeal denies it. If the Court of Appeal is interpreted broadly, it will have the following effect such as for a contractual condition that cannot be fulfilled, a party, i.e. trustee, assignee or subrogate can ignore the situation and ask the other party to perform .

The House of Lords will soon overthrow this determination. The House of Lords, in accordance with the usual natural interpretation of the rules of the association believes that its members are not entitled to compensation from the association unless the member itself first performs its duties. In other words, the member's payment of a third party's claim is a prerequisite for the association's reimbursement(1). They acknowledge that there is an equitable principle that allows a compensatory contract to pay the third party directly or in some cases to the compensated person to perform a first compensation contract. However, this principle of equity cannot be applied as long as the contract stipulates the opposite agreement. If the association rules do not explicitly include a prepayment clause, a member or a third party can invoke this equitable principle; in this case, the terms are expressly included in the rules of the two associations(2).

The House of Lords also found that members of the association, if they did not pay the claim, had only possible rights to the association, and this possible right was transferred to a third person under the 1930 Act. The third person cannot obtain a better reason than the insured concerning the insurer. They confirmed that if the insurer had a defence to the insured, he would also enjoy the third person. As for the view of the Court of Appeal that the prepayment conditions are impossible or ineffective, the House of Lords believes that it cannot be invalidated

(1) Zhang, Xuefan. "Identifying consumerist privately owned public spaces: The ideal type of mass private property." Urban Studies 54, no. 15 (2017): 3464-3479.

(2) Zhang, Xuefan. Ibid, 3464-3479.

simply because the terms of the contract cannot be fulfilled. They also denied the idea that the prepayment clause violated Article 1(3) of the Act, 1930(1).

According to the House of Lords' judgment, the P&I's prepayment clause will prevent third parties from directly using the association under the law of 1930. The third party can only file a lawsuit against the insured as an ordinary creditor unless the P&I Club exercises discretion and is allowed to pay. It is worth mentioning that Judge Goff warned the P&I Association that he said the possibility of the P&I Club refusing to pay the victim under the prepayment clause in the case of personal injury and death, reminding the association that it should not seek in such instances. The premise of the terms of the asylum and the legislator should strengthen the legislation to prevent the P&I Club from using this clause to escape responsibility(2).

British scholars also disagree on this issue. The editors of the 16th edition of the Arnold Marine Insurance and Average Act consider that it is challenging to apply Article 1(3) of the Act, 1930 to the prepayment clause, as it only exempts the insurer from loss of solvency. The terms of liability are invalid. Another scholar, Hurd, believes that it is impossible to give effect to the prepayment clause because it would defeat the purpose of the 1930 Act, and he cited the Thompson v. Reynolds (Thompson v. Reynolds, 1993)(3) case as an analogy. In the example, after the two ships collided, the ship responsible for the collision was betrayed in accordance with the order of the maritime court, and the proceeds of the sale were paid to the owner of the injured ship to perform the damages awarded and was considered to be The amount that the insurer should pay under the agency

(1) Choi, Bulim, Seungwoo Yoo, Kang-Dae Lee, and Su-il Park. "An environmental impact comparison of disposable wood pallets and reusable steel cradles: A case study on rolled steel coils in container shipping in South Korea." *International Journal of Sustainable Transportation* (2019): 1-8.

(2) Huish, Robert. "Making Sanctions Smart Again: Why Maritime Sanctions Have Worked against North Korea." *Asia Policy* 25, no. 3 (2018): 42-48.

(3) Thompson v. Reynolds, 858 S.W.2d 328 (Tenn. Ct. App. 1993).

collision clause, although it is not actually paid in accordance with the provisions of that article(1).

8.4 Late Development

Although the House of Lords has made a judgment in favour of the P&I Club, there has been doubt about whether commercial use of the prepaid clause is commercially justified. In the course of the review of the 1930 Act, the English Law Commission pointed out that the provisions of the Act of 1930(2), on the transfer of the rights and obligations of the insured, were initially intended to give third parties the same status as the insured, but the actual effect somewhat deviates. It is often impossible for a third person to meet the conditions stipulated by the policy, or the nature of these conditions determines that they can only be performed by the insured, or because the insurer insists on being conducted by the insurer, which directly hampers the third The person filed a lawsuit against the insurer. Therefore, the Law Commission recommended that certain restrictions should be imposed on the defences invoked by the insurer(3).

Among them, the prepayment clause was proposed as a particular issue, and the Legal Committee issued an advisory opinion for this purpose. Most of the consultants believe that the law of 1930 should be reformed to prevent the insured from using the prepayment clause. Some people suspect that the mutual insurer is based on the solvency of its members, pointing out that many claims were not paid first by the insured before the claim was paid. Many people suggest that the P&I Club's practice of not using the prepayment clause in personal injury cases is not enough to protect a third person. The opposite view is that the prepayment clause is crucial to the operation of the P&I Club.

(1) Mutmainnah, Wanginingastuti, Achmadi Bambang Sulistiyono, and Masao Furusho. "Introducing 4M Overturned Pyramid (MOP) model to analyze accidents in Maritime Traffic System (MTS): a case study on collisions in Japan based on occurrence time." In *Applied Mechanics and Materials*, vol. 862, Trans Tech Publications, (2017): 220-225.

(2) Contracts Act 1999

(3) Jensen, Caitlin M., Ellen Hines, Barbara A. Holzman, Thomas J. Moore, Jaime Jahncke, and Jessica V. Redfern. "Spatial and temporal variability in shipping traffic off San Francisco, California." Coastal Management 43, no. 6 (2015): 575-588.

They believe that if the P&I Club is not allowed to use the prepayment clause, it will force its migration to other countries. It was also reminded that legal reforms in the area of marine insurance being discussed at the international level should be avoided. The International Maritime Organization is considering compulsory insurance and third party direct litigation system for claims other than oil and harmful toxic substances. Based on these feedbacks, the Commission found the Court of Appeal's determination to be preferable to the House of Lords' decision. As Judge Bingham has noticed, the third person is not bound by the prepayment clause, and in fact, does not contradict the policy of the Act, 1930(1).

The Commission believes that if the insurer is allowed to invoke the prepayment clause. It will result in the statement made by Judge Stuart-Smith. "Any responsible insurer can cross the law by using a prepaid requirement to drive a four-wheeled carriage. Even those insolvents who is liquidated do not always insist on performing. The new bill should strengthen the protection of third parties, and the prepayment clause should not be valid after the transfer of rights. At the same time, the Commission noted that it was reluctant to engage the new law in the field of marine liability insurance, which is currently being negotiated at both the national and international levels and should avoid conflict with international measures(2). Therefore, the Commission recommended that the new law only invalidate the prepayment clause for marine insurance in those personal injury cases, which is consistent with the practice of the P&I Club(3).

8.5 Changes Occurred At the International Level

Whether the liability insurance is separated from the compensation contract to fill the damage, or whether the third party is allowed to file a lawsuit directly against the insurer, it reflects the strengthening of the protection of the third party's interests. In addition, because of this factor, the insurer's enjoyment of the third party is subject to more and more restrictions. The United Kingdom has

(1) Huish, R., 2017. The failure of maritime sanctions enforcement against North Korea. asia policy, 23(1), 131-152.

(2) Jervis, Barrie. *Reeds Marine Insurance*. A&C Black, 2013.

(3) Maurer, Andreas. "Lex maritima." In Encyclopedia of Private International Law, Edward Elgar Publishing Limited, (2017):1114-1119.

enacted the Employment Responsibility Act of 1969 and the Road Traffic Act of 1988, both of which prohibit the insurer from invoking third parties with certain defences against the insured under the insurance contract. The third person has better rights to the insurer than the insured(1).

Contrary to this movement, the prepaid clause in the P&I Club implements the traditional concept of compensation insurance. If the insured unfortunately loses the ability to pay off, the insurer can refuse to assume insurance liability because it has not suffered actual losses. This will create glaring inequities for third parties. As noted above, in many states in the United States, no litigation clauses have been abandoned, and the P&I Club's prepayment clauses are effective in English courts, even in the Law Reform Report of the Law Commission(2). This is so because they fully take into account the unique nature and operating mechanism of the P&I Club. The P&I Club is an international ship-owner organization that is voluntarily organized by ship-owners to protect each other and share the damages that are the responsibility of the ship-owner. It is a non-profit organization. The members of the association are both insured and insured. It is an insurer. It can be seen that giving full understanding and respect to the rules of the P&I Club is an essential factor in safeguarding and promoting the development of the shipping industry; and this consideration and the policy of protecting third parties are bound to form a restraining force(3).

At a time when the British domestic law was ruined, significant changes had taken place at the international level, and there was a great spark of fire. In the 1969 International Convention on Civil Liability for Oil Pollution Damage, as a mechanism for implementing liability established by the Convention, the legislator introduced the concept of compulsory insurance and stipulated the third party's direct claim to the insurer. Article 7, paragraph 8, of the Convention, clarifies the defences that the insurer may invoke. Any claim for pollution

(1) Germano, EliZabeth, and Garrett Greene. "ST. MARY'S LAWJOURNAL." (2016).

(2) Özdel, Melis. "I. The EU and the Carriage of Goods by Sea under Private Law and EU Regulation." In EU Maritime Transport Law, Nomos Verlagsgesellschaft mbH & Co. KG, (2016): 95-210.

(3) Hiller, Alexander L. "The challenge of cybersecurity in the maritime domain." (2017).38-41.

damages may be filed directly with the insurer of the ship owner responsible for the pollution damage or other person providing financial security. In such cases, In this case, the defendant can invoke the limit of liability determined in Article 5, paragraph 1, regardless of whether the ship-owner has actual fault or complicity. It can also invoke the defence of the ship owner's private ownership(1).

The defence of pollution damage originating from the ship owner's deliberate violation may be invoked, but it shall not invoke any other security that it may have cited in the proceedings filed by the ship-owner. The defendant has the right to request the ship-owner to participate in the proceedings under any circumstances. It can be seen that according to the compulsory insurance system, a third person cannot only directly sue the insurer, but does not need first to sue the insured to determine the responsibility, and the insurer cannot invoke it to counter the insured's defence, including of course The prepayment clause of the association is very different from the UK legislation. From the basis of the rights of third parties, the rights acquired by third parties under the Act, 1930 are transferred from the insured, and with the transfer of the insured's obligations, they are strictly related to the contract between the insurer and the insured(2).

Under the Oil Pollution Liability Convention of 1969, the rights of third parties are obtained directly according to the special provisions of the Convention and are independent of the rights of the insured. Therefore, the insurer must not confront the insured's reasons against the third party's direct claim of the person. In this sense, the third party's immediate claim is not the insured's right as stipulated in the liability insurance contract, and the insurer is obligated to pay the third party's insurance compensation. In short, if the law of 1930 is based on the transfer of rights as its legal basis, then the Oil Pollution Liability Convention, 1969 is based on the original acquisition. It can be said that the compulsory insurance and third party direct litigation system established by the Convention, 1969 marks a higher level of protection for the interests of third parties. This is the

(1) Allison, Simon. "Salvage Companies and Protection of the Marine Environment: Time to Pay the Piper?." PhD diss., University of Western Australia, (2015):59-61

(2) Lindley, Jade. Somali piracy: A criminological perspective. Routledge, (2016):25-27

result of the increasing importance of the marine environment for the international community(1).

At the beginning of the Liability Convention of 1969, the relevant persons in the insurance industry once thought that the compulsory insurance system is established could only be a one-act, but the facts show that their predictions are wrong. The mandatory insurance system not only becomes a guarantee of the success of the responsibility convention but also are important factors that have a profound impact on other international legislation. The same system was adopted in the International Convention on Liability in 1996 and Damage Compensation for Maritime Transport of Hazardous Substances and the International Convention on Civil Liability of 2001 for Fuel Pollution Damage. In addition, the draft Convention on the Removal of Shipwrecks and the Protocol to the 1974 Athens Convention currently under review by the IMO Legal Committee are also prepared to include mandatory insurance requirements(2).

(1) Konschnik, Kate. "Regulating stability: State compensation funds for induced seismicity." Geo. Int'l Envtl. L. Rev. 29 (2016): 227.

(2) Soyer, Barış, and Andrew Tettenborn. Maritime Liabilities in a Global and Regional Context. Informa Law from Routledge, (2018): 17-19.

Conclusion and Recommendations

Conclusion

From the above analysis it has been found that the prime objective of "protection of Indemnity Insurance "that is P&I Insurance is to protect and safeguard the rights and interest of assured and insured from the risk and threats of the liabilities that might arise from their activities of maritime and processing of shipments of valuable items of several third parties that might be damaged, lost, and broken during the voyage or being shipped from one destination to another destination. Contemporary P&I, obtainable to owners of the ship and charter parties tends to deliver and offers comprehensive coverage for a broader variety of liabilities, damages, losses and hazards to items and products being voyaged. It also covers for the loss of life, and physical harms and injuries to passengers, crew, wreck removal, and loss or damage to the property and pollution.

Gard has increased and developed from the P&I Insurance provider of native vessels sailors at the beginning on the 20th century, to one of the biggest players in the "international marine insurance" industry that provides insurance coverage for assets loss, liabilities and loss of income during cash in safe or cash in transit. Owner of the property or an asset and Mutual P&I has the biggest business line. As a multi-line insurance provider, with the robust rating in the insurance market, Gard is the uniquely placed and positioned to comprehend the how risks are suited and fit together and classify the finest products choice ensuring service and coverage.

As observed, insurance is coverage provided by the agreement that binds the party to indemnify another party against particular losses and damages and loss in return for the amount of premium that is paid. Associating to the topic, it was essential to restrict the research and thesis to specific kind of insurance, and thus it has been done for co-insurance, reinsurance, and third parties coverage under P&I Insurance. This insurance is the central and main liability insurance in the shipping context. It is fundamentally the liability of the insured and assured,

which also covers health, injury, death, and damage to loss of the property or any valuable items being voyaged.

The agreement and contract of insurance are whereby the insurance provider, the P&I club will pay for the compensation to the individuals who formulated and are bound in the contract that is the associates of the club if the described events occur. However, the individual who is going to get the compensation may be another individual than that one who has influenced the insurance. In the case, the clauses of the co-insurance will be applicable. From the above analysis, it has also been that coinsurance means and signifies that it is the insurance contract amid the individual influencing the insurance and the insurance provider is made to provide an advantage to more than one and multiple assured.

This assured is, in turn, is referred as the third party to the insurance contract which is referred on the entry certificate to whom the association has shown consent with respect the limitations to extend the cover provided to the associate of the association or P&I club. Therefore, it is rational to declare that the necessities and provisions found in the insurance agreement or insurance conditions are tackled and addressed to the individual who impacted the insurance, which is part of the agreement, inferring, as a beginning point, that the co-insured, who is a third party to the agreement, has no direct obligations, liabilities and duties.

Though, the P&I Insurance might be required for the possible co-insured referring that these parties are most of the times directly engaged in the operation of the vessel or ship and thus in a provision to break the agreement or contract rules and clauses. In a comparative approach, it remained concluding to observe that some of the provisions tackled and, managed to the associate might also be addressed to the co-insured or assured. This is due to the "Doctrine of identification" as referred in SK rule as described in the above analysis. This was also described under the European or UK system that differentiates amid the person influencing the insurance and the insured party.

The individual influencing the insurance is the one when enters into the agreement with the insurance provider whereas is the individual who has the interest and right of protection and indemnity when a loss or damage occurs. Differently, the particular Norwegian and UK system does not work with the idea or the notion of co-insurance of a third party and do not distinguish amid the individual influencing the insurance and the insured party. In this background, the regulations and rules studied and addressed to the vessel or ship owner are also be addressed to the third party as the individual impacting the constrict of insurance is referred taken into account as the agent who is representing the interest of the third party or an assignee of obligations, duties, and rights.

Under the Brazilian system, the lacking or the absence of regulations and rules surprises any scholar who, prior to assessing the question regarding Brazilian practices, and the approaches for co-insurance by the comparative law. The policy and jurisprudence to assess and to evaluate the subject is extremely restricted and only address with the fact itself, incapacitating, like fallout, the likelihood of construction of a jurisprudential model. Consequently, the examination of the P&I Clubs rules, statues, and regulations in particular "SKULD P&I CLUB", UK P&I CLUB", and "GARD P&I CLUB" enables to comprehend differences in each system and the terms and conditions a little bit better.

From the above analysis, it has also been found that the P&I insurance is able to provide comprehensive and complete coverage for third parties who could be the co-insured under the insurance agreement as well as principal parties for the damages and loses during vessel trip. Thus, it also tends to maintain the appropriate balance in order to maintain and ensure the rights and obligation of insured party and insurance provider. That is why the most appropriate rationale for obtaining the marine insurance can be the avoidance of uncertain situations and prevention for unforeseen risks and hazards that might arise from road, sea, and air conditions during the shipment of the products and services from one destination another through the vessel, road containers, or airfreight.

This is done to prevent financial as well as non-financial loss such as goodwill and business reputation that is done by paying a certain amount of money that is called a premium to the insurance provider. Potential risks that might be covered under the marine insurance coverage includes damage and loss of vessels or ship, cargo, terminals and any cargo or transport from the point where the inured products or items are loaded to the final destination where they are being unloaded as per the document prepared before shipment started. Then the insurance provider functions grounded on some particular principles and rules that are considered during the whole procedure of marine insurance coverage. These principles are the greatest subrogation. Good faith, a measure of indemnity, insurable interest, and proximate cause.

From the above analysis, it has also been found that the greatest good faith in marine coverage, the probable insured party must provide all the information that is complete and correct and it must not contain any manipulated information to save insurance cost or to provide wrongful disclosure to the insurance provider. It has to be done on a voluntary basis by the insured party without hiding any situations or concealing conditions, whether it is good or bad. Then the insurer and agreement will make the condition for the article r clause grounded on the data and information that is collected and provided by the broker or agent who is working on behalf of insured of insurance provider. The greatest good faith is needed for both the parties bound under the "marine insurance act 1906", section 17. If there is a failure to observe the complete faith by any party being insured or insurance provider, the contract might be evaded by another party when in case the agreement is made enforceable in court.

It can also be concluded that marine insurance providers and the P&I clubs are governed and regulated by the provisions of the above-specified act. Marine insurance providers provide coverage for the known and quantifiable risks that are mainly hull and machinery insurance for owners of the ships and care insurance for owners of cargo. With a contrasting view, the P&I clubs offers insurance coverage for broader unknown risks, which can be called as third parties liabilities and obligations that marine insurance providers are reluctant to provide coverage

for. Third party risks and threats include liability of a carrier to an owner of cargo for damage to items, the liability of a ship after collision, and any damage resulting from environmental pollution and also war risk insurance though, some marine insurance provider are also willing to cover war threats and risks.

It follows that any provided cargo might be insured multiple times. The shipper and cargo owner provide conventional coverage, and the ship or vessel will have the "P&I Insurance" cover. If the cargo is damaged or lost, the owner of cargo must first make a claim of cargo against the vessel but afterwards might evade liability because either, he did not result in loss or, the rules of Hague Visby provides exceptions and exemptions from the obligation or liability. In such a scenario, the owner of the cargo will claim against his or her own insurance provider. If there is a failure in this, but claims against own insurance provider, then reimbursement will be done by the client will be the application of subrogation principle that helps to pursue and claim in own interest and rights against the vessel.

Thus, it has also been found that Subrogation is a lawful principle where the insurance provider takes over the creditor's interest and rights to lawfully chase their debtor. Subrogation rigid can arise in two diverse means. One means is with the help of law, and the other means is with the help of a contract or an agreement. Subrogation from law mostly arises in agreements of insurance coverage. However, subrogation from the law is a justifiable lawful principle, which is a segment or section of law referred to as "just enrichment". The significance of subrogation is greatest common in the sureties and insurance areas. It is also likely that subrogation permits rights of proprietary such as interest or claim to ownership of products and goods. When the insured party claims for compensation and recovery or monetary and losses rightfully by their agreement, an insurance provider pays the compensation back to the insured party for their damages and losses on their behalf at the time.

It has also been found from the analysis that, marine insurance providers charge a premium amount, which is the guarantee to the insured party for full and compressive coverage throughout the validity of the insurance policy. Whereas on

the other hand, P&I Insurance is financed and funded not by the premium amounts but by pool, kitty or calls that are formulated by associates of the club contributing to the shared pool of the club out of which claims are paid. If the pool is insufficient, the club associates will be asked to pay additional call or amount, but if it is in surplus, the club may ask associates to reduce the call or amount for the subsequent year. They can also make a refund for the surplus amount to its members. Only operators of the ships or vessel with a sound and healthy reputation will be permitted to join the club, and any club associate who provides reckless or avoidable damages or losses, the club might ask them to leave.

While a marine insurance provider will, on an average, compensate £70 for every £100 got in premiums, a P&I Club pursues to run as a non-profit focussed business. Inquisitively, the biggest "P&I Club", "Norway's Gard", achieves to syndicate shared P&I business with traditional marine insurance coverage. In this case, the rules of marine insurance act come into force, there will be an increase in third party, and this might consequence in conventional insurance providers losing more finance and businesses to P&I clubs.

Recommendations

By analysing the above case and scenarios, it can be recommended to have voyage policy in order to have the most suitable and appropriate coverage. This policy will provide monetary and financial protection and guarantee for the goods and services transported via vessel or ship. Thus, any loss or damage to cargo will be protected and covered by such policy. Though, like any other insurance policy, the policy of voyage needs the crew which is on-board to be competent and to make sure that the vessel or ship is worthy of the sea and fit for the purpose with a capability of making the purposeful journey. If this is not the case, then the insurer is not needed to provide any monetary protection. The cause and the reason for the fact are that such policies are not objected to cover against the risk that an avoidable, but instead for unforeseen threats. The policy of the voyage is commonly utilised in the business of export, thus play a very big role in it.

Additionally, it can also be recommended that providers of vessel services should attempt to fix the situation and items must not be damaged. In here, it will address what the methods and procedures are to be created with the illustration of

the container or ship. Primarily, when any problematic situation occurs such as an engine lost power, or any damage occurs, it must be analysed or checked if there has been any pollution or probability of pollution. Then it is recommended to lighten or get repaired the ship before it starts to sail and start its trip.

Likewise, the arrangements must be formulated and made to analyse the damage to the ship or vessel or any engine that has caused a problem. There also has to be a clear and stated step to follow with an aim to get the repairs completed and done. The member of the crew must make sure that complete records are kept and this information has been provided to the insurance provider and the insured party in order to avoid any conflicting situation in future.

Moreover, this information has to be preserved for the owners of ships and vessels and insurance providers in exclusive terms and not be disclosed to any third parties other than parties involved in the contract. Moreover, when ultimately the repairs and the record compliance and fulfilment is done, the salvage investigator must work to have a proper submission of the report of an accident with the detail for insurance providers, and the copy must be provided to ship managers as well. These measures should be taken and made sure by the insured party and insurance party that the owner of vessel and ships has followed these measures in order to avoid losses and insurance claims faced by "P&I insurance clubs".

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