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Preventive Measures: Costs for sacrificing of insured property to prevent further loss (such as oil pollution, or ransom fee for the piracy)

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At a glance, preventive measures can be defined as:

“Measures that the insured is obliged to take, in order to avoid the occurrence of the insured event or to mitigate loss should the insured event occur”

Under this light, it is admissible to rewrite the original title as:

“Expenses, including but not limited to cleaning costs and ransom fees, incurred by the insured, or by a third party on his behalf, in order to prevent or to avoid further damage to the subject matter insured arising out of risks such as oil pollution and piracy”

Generally understood in marine insurance jargon as the “duty to sue & labor”

Particular average expense

English common law v. Continental Law

English common law

The prevailing view under English common law is to approach the so-called duty to avoid losses through the lens of causation.

This appears to be the only way to reconcile sections 55 (2) (a) and 78 (4) of MIA 1906.

This is consistent with the position that the promise embodied in a contract of insurance is one of prevention of loss and not one of indemnity.

“The duty to mitigate is not in any sense an obligation, contractual or otherwise. It is a condition attached to the right to claim damages”
Sotiros Shipping Inc v Sameiet Solholt [1998] 2 Lloyd’s Rep 574, 580 per Lord Staughton J

S.55: Included and excluded losses.

(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular

*(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, **even though the loss would not have happened but for the misconduct or negligence of the master or crew.***

S.78: Suing and labouring clause

*(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of **averting** or minimizing a loss.*

Continental Law

Virtually all continental codes view the duty to mitigate very differently - as an actual duty to be complied with under pain of forfeiting the right to claim an indemnity that would otherwise be forthcoming.

IMPORTANT: unlike under MIA 1906 78 (1), save as otherwise provided in the contract the said endeavor is not supplementary to the main insurance cover.

Preconditions to Recovery

1.- Peril not only likely but imminent

Expenditure is incurred not in response to the peril but in apprehension thereof v. *Loss* arising from fear or anticipation of a insured peril is not caused by an insured peril

“peril must act immediately, and not circuitously...directly and not collaterally...[otherwise the owners would be afforded] the opportunity of creating imaginary dangers whenever the [subject matter insured] was not likely to reach the port of destination in a sound state, and, by giving notice of abandonment to throw a loss upon the underwriters to which they were not liable by the terms of the policy” per Lord Alvanley in Hadkinson v Robinson [1942] AC 691.

2.- Reasonable measures

English common law : objective standard referred to the conduct that might be expected of a person of normal competence given the circumstances

Continental law: objective standard broadly defined under the guise of the *“pater familia”*

Ultimately, reasonableness is a question of fact to be judged according to the circumstances, the assured is not given full control.

e.g. **Lee v Southern Insurance Co (1870) LR 5 CP 397.**

3.- Costs/measures taken to avert an insured peril

Expenses must to have been incurred in order to avert an insured peril.

Free from particular average warranty?

Art 1180 (2) Chilean Commerce Code

MIA 1906 S. 78 (3): Expenses incurred for the purpose of averting or diminishing any loss **not covered by the policy** are not recoverable under the suing and labouring clause.

Costs/Measures Taken To Avert An Insured Peril

Pollution

Pollution is straightforward in that it involves the aversion of a liability that would otherwise fall on insurers

e.g. Rules of the Britannia Steam Ship Mutual Insurance Association

19(12) Pollution:

Liabilities which a Member may incur, together with costs and expenses incidental thereto, as the result of an escape or discharge or threatened escape or discharge of oil or any other substance from the Entered Ship or from other property.

The following shall be recoverable:

Clean-up (B) The costs of any measures reasonably taken for the purpose of preventing, minimising or cleaning up an escape or discharge of oil or any other substance from the Entered Ship or from other property together with any liability for losses or damages arising from any measures so taken

19(20) Sue and labour (B):

Losses, costs and expenses necessarily incurred by a Member after an incident in order to avoid or reduce a liability or expenditure against which the Member is insured by the Association, even if such losses, costs and expenses would otherwise be excluded by these Rules.

IMPORTANT: Expenses incurred in order to avoid damage to environment are generally excepted under Rule C of the York-Antwerp Rules 1994 to save where they are incurred in connection with the entry into or stay at port of refuge or the handling of cargo where the cost thereof are admissible as GA or otherwise capable of being classified as salvage.

Costs/Measures Taken To Avert An Insured Peril

Ransom fee for piracy

Piracy presents a challenge only due to the natural tendency to label such payments as unlawful.

As a matter of authority Piracy has long being considered a maritime risk no matter the recent tension to shift it back into a war risk

Following the principles contained on the Ordonnance de la Marine (France, 1681) as early as 1783 EMERIGON stated that :

“Pirates are those who cruise at sea without commission from any prince or sovereign state, to plunder ships that they meet” **EMERIGON Balthazard Marie (1850): A Treatise on Insurances (London, Butterworth), p. 412.**

This is virtually undistinguishable from the decision of the Court of Appeals (England) in the case of **Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltds [1909] 1 KB 785, CA:**

“A pirate is a man who plunders indiscriminately for his own ends, and not a man who is simply operating against the property of a particular state for a public end...”

Ransom Fee for Piracy

Continental Law:

Ordonnance de la Marine (France, 1681) Art 10 Tit *des prises* made it clear that piratical seizure was not a proper means of acquiring dominium over the subject matter so seized.: if recaptured it will be returned to owners upon paying the *expenses for rescue* - same as in unlawful capture.

Art 6 tit *des avaries* Ordonnance de la Marine (France, 1681), Art 400 (1) French Commerce Code 1807 , Art 936 (1) Spanish Commerce Code 1829 and Art 1090 (1) Chilean Commerce Code 1865 place "composition" to pirates in the rank of general average expenditures.

It follows that under Continental law no general prohibition against ransom appears to have existed.

Common Law:

Rule for Construction of Policy # 8: *the term pirates includes passengers who mutiny and rioters who attack the ship from the shore.*

E.g. Masenfield v Amlin [2010] 1 Lloyd's Rep, IR 345 per Steel J and Masenfield v Amlin [2011] EWCA Civ 24 by the English Court of Appeals.

-No general prohibition against the payment of ransom ("there is no universal morality against the payment of ransom" per Lord Justice Rix.

-Piracy does not amount to total loss (irretrievable deprivation) nor constructive total loss (unlikelihood of recovery) *per se* (although it may mature into one).

-In principle, ransom would be recoverable under S. 78 (4) MIA 1906 (though *obiter dicta*).

Ransom Fee for Piracy

General:

It is submitted that, in general, continental law and English common law take the same view as to the legality of ransom payment as the proper subject of a particular average clause incurred under the sue & labor clause/rule of law.

What about other alternatives?

General Average?

S.66 (4). General Average Loss: subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him, and, in the case of general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

No Similar Provision Under Continental Law

Thanks