THE ORIGIN OF THE INSTITUTE OF SHIPOWNERS' LIABILITY INSURANCE

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SUMMARY

The origin of the institute of Shipowners' Liability Insurance and Protection and Indemnity clubs are investigated. A necessity and actuality of Shipowners' Liability Insurance are analysed as to the guarantee of calmness and economic security of the shipowner and owner of load and also stability of market relations.

Although marine insurance dates from the Middle Ages, British shipowners did not feel the need to purchase liability insurance until the 19th century when injured crew members began to seek compensation from their employers, and the Fatal Accidents Act 1846 facilitated claims by passengers or their survivors. Shipowners were also becoming increasingly aware of the inadequacy of the available insurance cover in respect of damage caused by their ships in collisions with other ships. The usual cover for claims by other ships and their cargo for collision damage excluded altogether one fourth of such damage and, more seriously, was limited in amount. The maximum recovery under hull policies that time, including both damage to the insured ship and liability for the damage it had caused, was the insured value of the ship.

Keywords: marine insurance, shipowner, load, ship, damage, risk, club, liability, policy, coverage.

АННОТАЦИЯ

В статье исследуется происхождение института страхования ответственности судовладельца и Клубов взаимного страхования. Анализируются необходимость и актуальность страхования ответственности судовладельцев как гарантии спокойствия и экономической безопасности судовладельцев и грузовладельцев, а также стабильности рыночных отношений.

Хотя морское страхование в современном его понимании датируется средними веками, у британских судовладельцев не было потребности страховать свою ответственность вплоть до 19-го столетия, пока члены команды поврежденного судна не начали требовать компенсации от своих работодателей, и вступивший в силу Акт «О смертельных несчастных случаях» 1846 года не способствовал увеличению числа исков от пассажиров или оставшихся в живых. Судовладельцы также становились все более и более осведомленными о неадекватности доступного страхового покрытия повреждений, вызванных столкновениями их судов с другими судами. Обычное страховое покрытие по требованиям других судов и их груза в случае столкновений и повреждений исключала в целом одну четверть такого повреждения и существенно было ограничено в количестве. Именно эти факторы побудили судовладельцев объединиться в так называемые P&I клубы и совместными усилиями – на первых порах – обеспечивать себе надежную страховую защиту.

Ключевые слова морское страхование, судовладелец, груз, судно, повреждение, риск, клуб, ответственность, полис, страховое покрытие.

Purposes of the article. Shipowners' Liability Insurance – Protection and Indemnity Insurance is one of the major forms of the shipowner's insurance [1, p. 84]. P&I Clubs, formed from mutual associations of shipowners, are often the traditional route used by shipowners to find protection and indemnity insurance for their vessels. If Hull and Machinery Insurance, Loss of Hire and Cargo Insurance are widespread enough, the Shipowners' Liability Insurance is related to the necessity that grows constantly, in coverage of the risks, related to the changes that take place in a Marine Law and policy rules of payment of compensation in some countries. Similar changes especially brightly appear in industries of defence of environment and personal traumas. Except this, a great attention is paid to the volume, as a right a demand refund is used in different situations.

However, not to all appearances greater development of meaningfulness of this type of insurance, analysis of existent literature, through this question allows to come to the conclusion, that unlike other objects of marine insurance, shipowners'liability insurance in native sources is spared, in our understanding, insufficient attention. Researches of shipowners'liability insurance by such leading native scientists in the sphere of marine insurance, as G. Grishyn, S. Yefimov, L. Korchevskaya, V. Musin, K. Turbina, M. Tsarkova. Foreign specialists as Brown, Braekhus & Rein, Poland and Rooth and others were examined the contract of shipowners'liability insurance directly, but their researches were not translated into the Ukrainian or Russian language.

P&I insurance embraces different types of responsibility, both within the scope of the contract and beyond the bounds of it. The major spheres here are responsibility for the damage of load; responsibility for the personal traumas or social insurance of crew according to law or tariff agreement; responsibility for pollution of the environment, and also other types of responsibility, that arise up in connection to the insured ship's steering [2, p. 57-59].

Cognition of any phenomenon is impossible without research of fea-

tures of its origin and circumstances that stipulated appearance of this phenomenon. Therefore within the framework of this article it seems expedient to appeal to the historical aspect of origin and development of insurance of responsibility of shipowners.

Root of shipowners' liability insurance starts from the beginning of the XVIIIth century. In 1719 the British government accepted Act of Parliament that gave a franchise right to engage in marine insurance only to two insurance companies. In absence of competitive activity these insurance companies tried to take advantage of the got advantage and began to appoint too high bonuses for their services [3, p. 30-31].

At that time the basic type of marine insurance was Hull & Machinery Insurance. Shipowners of main marine ports of Britain – London, Liverpool, Newcastle, Bristol – decided to give up the inpayment of these high bonuses and, not looking on unlegality of the actions, to unite in an association or in "Hull of clubs" with the aim of mutual coverage of the losses caused to their ships [3, p. 32-33].

These were set up by groups of shipowners, drawn in each case from a small geographical area, who were dissatisfied with the scope and cost of the hull insurance then provided by the two companies who had been granted in 1720 a statutory monopoly which excluded other companies from such business, namely the Royal Exchange Assurance and the London Assurance, and by individuals operating in London from, for example, Lloyd's Coffee House. These hull Clubs were essentially unincorporated associations or co-operatives of shipowners who came together to share with each other their hull risks on a mutual basis, each being at the same time an insured and an insurer of others - still the basic concept of the present P&I Clubs, despite the fact that they are now incorporated so that in law it is the Club and not the individual Members who provide the insurance.

In 1824 the government of Great Britain came to the conclusion, that an insurance "monopoly" does not operate practically, and the Parliamentary act was nullified. This decision allowed again to create a competition at the market of marine insurance. Insurance companies began to offer to the shipowners stable Hull & Machinery Insurance on the very advantageous commercial terms, that allowed to them beforehand to foresee annual charges on insurance.

After the removal in 1824 of the company monopoly in favour of the Royal Exchange and the London Assurance, greater competition had a salutary effect on the rates, terms of cover and service offered by the commercial market and by Lloyd's underwriters. The hull Clubs became less necessary and went into decline. A few exist today, but their share of the total market is not very significant.

With the increase of competition more shipowners went out the Protection & Indemnity clubs and applied for insurance services to the market of commercial insurance. The future of these "clubs" looked absolutely having no prospects, however, the chain of events that breathed in new life in some of these clubs took place.

But as the hull Clubs declined, shipowners found the need to create similar associations for a different purpose. The need sprang partly from the steady increase from the middle of the 19th century onwards in the burden upon British shipowners of liabilities to third parties. It became more usual for injured crew members to seek compensation from their employers, and claims by dependants of crew members who were killed were facilitated by Lord Campbell's Act of 1846. The possibility of claims by passengers was greatly increased by the same Act and by the vast numbers of passengers who constituted the flood of emigrants to North America and Australia in the second half of the century. Shipowners needed cover against these risks. They were also becoming increasingly aware of the inadequacy of the insurance cover that they did have in respect of damage caused by their ships in collisions with other ships. The usual cover for claims by other ships and their cargo for damage caused in collision excluded altogether one fourth of such damage and, more seriously, was limited in amount (apparently the maximum recovery under the policy, including both damage to the insured ship and liability for the damage it had caused, was the insured value of the ship).

English court's decision made a precedent in the case De Vox vs Salvador accepted into proceeding in 1836. The court had accused for the collision of two ships a shipowner, mister De Vox Guilt, who was not able to prove in court an insurance company's duty that insured Hull & Machinery Insurance of his ship, to recover the loss damaged to other ship. Other words, a court confirmed a fact, that the standard policy of Hull & Machinery Insurance shuts out the insurance protecting of shipowner from the damages accused by a ship to the third persons. Decision of the British court, caused the animated discussion among shipowners, as they realized that such precedents would often take place in the future, not having here, as appeared, the reliable protective insurance [4, p. 30-34].

Shipowners afterwards organized meeting with the representatives of insurance companies, where a compromise agreement was attained: insurance companies extend the given insurance defence in case of ship collision by introduction of the special clause "responsibility for a collision" (RDC – "running down clause" or "collision liability clause"), but had limited the responsibility to 75%, leaving to 25% on responsibility of the risk on shipowners as original franchise. However, shipowners mentioned that the 25% responsibility of the ship collision is a very high for the "theory of authenticity" of collision, to leave her on an own risk. In the search of way out of situation that happened, shipowners decided to appeal to the clubs of mutual insurance with a request to organize insurance defence, the aim of that would be reimbursement of similar losses on collective basis, necessary to them on the own stake of responsi-

bility on a collision. Clubs found out a willingness to insure to the 25% risk on mutual basis [3, p. 35-36].

With the increase of emigration to America and Australia courts began to make decision against shipowners fault in death of people, that found a reflection in accepted in 1846 by English parliament document that became afterwards known as the Fatal Accident Act or Lord Cambell's Act [5, p. 23]. Some insurance companies began to engage in insurance of death and injury of people.

In 1847 was passed another act, that put onto shipowners the responsibility for damages accused to the piers, weirs and any other port property [6, p. 18].

In these terms of strengthening of requirements to the shipowners it was necessary to find an exit from a situation that was folded, and he was found. Shipowners came to the conclusion, that they will be able better to control similar risks, if will appeal to the clubs of mutual insurance of Hull & Machinery Insurance; and those, in turn, were ready to accept on insurance the risks related to exploitation of courts and defence of interests of shipowners of "protecting risks" – "risks of defence" [6, p. 19-20]. Accordingly the clubs of mutual insurance, that accepted these risks on insurance, got the name of Clubs of defence.

Character of Hull & Machinery Insurance clubs had changed. In 1855 the first club – "Ship's of Owners Mutual Protection Society" was regenerate from Society on Hull & Machinery Insurance of "Peter Tindall, Riley & Co". He gave to the shipowners insurance coverage of responsibility at a collision (to 1/4 responsibilities over 3/4, that is given on the policy of Hull & Machinery Insurance) and responsibility before passengers for death and severe injury. At first, as follows from the name of society, the basic idea of their services and of other clubs that have arisen up later was defence of interests of insured shipowners by means of skilled lawyers, but not compensation of losses, that shipowners could bear as a result of collision with other ships or as a result of death (severe injury) of passengers [5, p. 23-24].

Until 1870 these was no need in insurance of responsibility for a load that, as there was no practice of bringing regress claims to the shipowners of from the side of insurers of load. The English legislation gave complete freedom in entering into contracts to the interested persons. Shipowners, using such advantage, plugged in the agreements on the bills of lading certain warning, that released them from responsibility for death or damage of loads that is transported. If a shipper wanted, that his load was accepted to transportation, he was forced to agree to such terms of bill of lading.

This practice changed after death of freight ship of "Westernhope". This case became an important turning point in history of insurance of P&I. Ship, directed for unloading in, in order to take an additional load in other port, deviated from a course and went by port of entry. After it ship has sunken in the district of Cape of Good Hope on the way to Capetown. The bills of lading on a load contained usual terms about release of shipowner from responsibility for death or damage of load that is transported. The owner of load has bought a claim against a shipowner and won a case. A court decided that, if a ship did not deviate from the course set by agreement without visible reasons, then a load should be delivered to the port of entry. Thus, a shipowner was confessed by accountable for loss of load, as, deviating from a course, he breached Contract of freight. Thus, he could not refer to the terms of bill of lading about the exception of responsibility for a load that is transported. A shipowner, paying indemnification to the owner of goods, appealed to the "Club of defence" with a request to pay to him an insurance compensation on this claim. However Club refused in insurance compensation, explaining such refuse that shipowner's responsibility in relation to a shipper was not insured in Club [4, p. 40-41].

After a case with the ship of "Westernhope" the necessity in insurance coverage of the shipowners' risks, related to death or damage of loads that is transported, became obvious. First club of compensation of "Steamship Owners Mutual Protection and Indemnity Association" was created in 1874 in city Newcustle [5, p. 22].

Until 1870, shipowners could use the exclusions in their Bills of Lading to avoid liability for cargo related claims. An incident occurred whereby it was deemed it lay outside of the exclusions and the shipowner was liable and Club rules did not cover the cargo claim.

In 1874 the risk of liability for loss of or damage to cargo carried on board the insured ship was first added to the cover provided by a protection Club. The values of cargoes had risen and cargo underwriters had become keener on recovering their losses from shipowners, in which they were encouraged by a somewhat more sympathetic approach by the courts. After 1874 many Clubs added an indemnity class to provide the necessary cover. Subsequently, most of these separate classes have been amalgamated with the class reserved for the original protection risks, and today the distinction between the two classes has virtually disappeared within the P&I Clubs.

At first to the coveraged risks belonged only risks of shipowners' responsibility for maintenance of the loads accepted to transportation. Later to them responsibility was included also on fines, that was laid on a shipowner as a result of error or oversight of captain and members of crew by custom, emigrant, sanitary authorities according to part of general average charges that levy from a ship or load, when a gross average is caused by an error or negligence of ferryman. The "clubs of protection" and "clubs of indemnity" existed long time in parallel in the same cities, practically uni-ting the same shipowners. In the long run shipowners came to the conclusion, that the risks related to protection and indemnity, more expedient to insure after one policy, the anymore, that amount of risks that is insured broadened considerably. In 1886 the clubmen of defence of "North of England Protection Association" and club "Steam-

ship Owners Mutual Protection and Indemnity Association" made decision about joining up. The first incorporated club of responsibility of shipowners (P&I Club) got the name "North of England Protection and Indemnity Association".

Most of P&I clubs, that exist now arose up at the beginning of XXth century. A growing requirement in ships appeared the consequence of distribution of trade operations and carrying passengers. It pulled at to the increase to the amount and capacity of clubs of mutual insurance. Further development of transportations of loads stipulated to convocation in 1924 of international conference in Brussels, the acceptance of international Convention about the bill of lading and the Hague rules that limited responsibility of shipowners [7, p. 3-5]. After bringing some changes and additions by so-called Hague Visby Rules 1968 and Hamburg rules 1978 [8, p. 91] these norms entered the legislation of these norms of many marine countries and are the leading documents that regulate the relations of marine insurance and insurance of shipowners' liability insurance.

Conclusions. Thus, passing the difficult way enough of becoming, insurance of shipowners' liability insurance found the independent place in the system of insurance relations.

While all the original P&I Clubs were based on various towns and cities within the United Kingdom, Clubs were subsequently established and today flourish in Scandinavia, in the United States and in Japan. Most of the major Clubs now belong to the International Group for reinsurance and other purposes. Moreover, many Clubs originally based in the UK have comparatively recently been re-formed in such places as Bermuda and Luxembourg in order to secure, in respect of Clubs' funds representing calls or premiums paid by their Members but not yet used for the payment of claims, freedom from exchange controls. Such freedom is demanded by the shipowners from all parts of the developed and developing world who now make up the truly international membership of the larger Clubs. The popularity of the Club system of insuring liability risks can be judged from the fact that approximately nine out of ten ocean-going ships are currently entered in a P&I Club [9].

Following the grounding of the Torrey Canyon in 1967, coverage for the liabilities, costs and expenses arising from oil spills became an increasingly important aspect of P&I insurance. The Torrey Canyon was an oil tanker LR2 Suezmax Class (supertankers have the VLCC and ULCC class designation) capable of carrying a cargo of 120,000 tons of crude oil, which was shipwrecked off the western coast of Cornwall, England in March 1967, causing an environmental disaster. At that time, the tanker was the largest vessel ever to be wrecked [10].

When they were first formed, shipowners grouped together voluntarily to form their P&I club or association. Even though they were commercial competitors in business, they recognised the advantages of co-operating with each other for insurance purposes. Originally, because of communications difficulties, the shipowners in any one P&I club would tend to be based in the same ship owning centre. The shipowner members of the P&I clubs today tend to be international, but the same principle of grouping together and co-operating with each other still exists. Cultural, religious and nationalistic divides do not hinder co-operation within the international membership of a modern P&I club.

The definition of mutual means an equitable, or fair, sharing of the risks and liabilities with each other. So far as is reasonably practicable all members of a club will have an equal status and no one shipowner will pose a greater burden to the membership as a whole than any other shipowner.

In an ideal situation this would mean that all the members of a particular P&I club operated the same type of ship. It would also mean that the ships were of the same size and age and that they were all engaged in the same trades, carrying the same cargoes and being manned by the same number and quality of master, officers and crew. Clearly, that level of mutuality is unlikely to be realistically achievable. What would normally happen is that adjustments would be made to the contribution made to the P&I club by different shipowners to ensure that they are at a mutually acceptable level. For example, an owner of a large oil tanker trading to the USA would probably be paying significantly more into the P&I club than the owner of a small bulk carrier trading around Europe.

It is an important feature of the mutuality of P&I clubs to ensure that no one shipowner member or group of shipowners unfairly subsidises the other shipowners of the particular P&I club.

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