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WORLD MARITIME UNIVERSITY



**LOOSE TENDENCY OF “PAY TO BE
PAID” RULE OF P&I CLUBS**

– BASED ON UNDERSTANDING & CLAIM PRACTICE IN
MAINLAND CHINA

BY

JIA LONG

SHANGHAI, P.R. CHINA

A research paper submitted to the World Maritime University in partial fulfillments of
the requirements for the award the degree of

MSc. in International Transport and Logistics

Class of ITL 2016

Declaration

I certify that all the material in this research paper that is not my own work has been identified, and that no materials are included for which a degree has previously been conferred on me.

The contents of this research paper reflect my own personal views, and are not necessarily endorsed by the University.

20Aug2016
Supervised by
Professor GU Weihong
World Maritime University

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Thanks are due to my beloved parents and Ms. Peyton Luo, offered full support during these months.

Finally, any errors or inaccurate annoyance in the paper are the writer's.

Abstracts

Title of Research paper: Loose Tendency of “Pay to be Paid” Rule of P&I Clubs
-- Based on Understanding & Claim Practice in Mainland China

The “Pay to be Paid” provision as basic rule of Protection & Indemnity mutual insurance clubs emphasizes that it is as being condition precedent of the assured (member shipowner)’s right to reimburse from the funds of Clubs in respect of any liabilities, costs or expenses.

As the development of the whole shipping industry especially the progress of marine insurance, P&I Clubs as non-profit making basis facilities has to face completion with commercial insurance companies. Modern international conventions and legislations incline to protect the third claimants’ interests, whereas have to increase the liability of insurer. In Claim executive, Clubs have to give up “Pay to be Paid” Rule while facing direct actions which supported by court.

Back to Chinese Insurance Market, China P&I Club take positive strategies of “internationalization, market-oriented, and professionalism” and has also been actively seeking to expand in the market. According to her self-disclosure, the percentage of international tonnages has risen steadily in recent years. Meanwhile, the nation-owned shipping group COSCO plans to build her captive insurance company on June 2016.

The conclusion of the dissertation is that fixed-premium facilities and legislations upon direct action against P&I Clubs shall continuously push P&I Clubs to weaken or waive “Pay to be Paid” provision in claim executive practice. In non-common law countries alike Mainland China, the updating maritime legislation/regulation and emerging insurance regime shall encourage commercial, fixed-premium P&I Club development. Liability risks shall be reconsidered by commercial insurer while the insurer could make use of reinsurance to arrange risk contribution.

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Chapter 1 Objective and Outline

1.1 Objective of the Study

If marine perils or crew injury happens at voyage of ocean vessel, captain shall urgently contact with the nearest correspondent of P&I club. As mentioned from one brochures of IG (club alliance), approximately 90% of the world's ocean-going vessels is covered by the 13 principal P&I Clubs.¹ P&I Clubs provide a wide range of claim handling services to their shipowner members and play a leading role in maritime casualties.

The writer served over two years in Huatai Insurance Agency & Consultant Service Ltd Shanghai Branch which provides correspondent service in Shanghai and Ningbo ports of Mainland China. It gives the writer lots of opportunities to be immersed in claim frontier of P&I claim executive.

Based on learning and claim handling acting on behalf of Clubs, the writer feels the effects of “Pay to be paid” provision which is golden rule of Protection & Indemnity mutual insurance clubs and also feels its erosion by other factors in current especially in Mainland China.

In order to clear understand the change of the rule, the writer learned and compared the main attributes including commercial insurance, indemnity insurance, mutual insurance, liability insurance. The writer anticipates manifesting it clear by summarizing their difference and interface of these concepts.

Meanwhile, the writer concerns insurance and reinsurance market, start-up captive insurance company and P&I Club of China. Though the writer realizes the conclusion of the dissertation shall/have to stand the test of practice, China P&I Club, captive insurance companies have actively participated in competitive insurance market and explore new risk diversification methods. Hope the paper could provide some beneficial reference for claim executives or pertinent practitioners.

1.2 Outline of the Paper

The first part (Chapter 2) gives brief introduction of P&I insurance and supplies main distinction upon the closely concepts.

¹ Brochure from IG club

For the objective understanding in detail, the writer compare upon commercial/non-compulsory insurance, indemnity insurance, liability insurance and mutual insurance since P&I insurance joins with the abovementioned attributes.

The writer stresses the role of P&I Club in claims and especially in the direction actions by third parties.

The second part (Chapter 3) lists the role of P&I Club especially the role of Club in the direction action of liability insurance.

The third part (Chapter 4) detailed explains “Pay to be Paid” rule and its origin and development/change in history.

In fourth part (Chapter 5), the writer explores that as the development of the whole shipping industry especially the progress of insurance regime, P&I Clubs as non-profit making basis facilities has to face full completion with commercial insurance facilities.

Meanwhile, the international regulations/laws also influence the principle of P&I Clubs. The writer could conclude that fixed-premium facilities and legislations upon direct action against P&I Clubs shall continuously push P&I Clubs to weaken or waive any “Pay to be Paid” provision in claim executive practice.

Chapter 2 Introduction

2.1 Definition of “P&I”

*“A P&I Club is an association of commercial shipowners and charterers and other associated parties, which provides protection against a number of risk inherent in industrial ship operation. The essence of P&I Clubs is that they are mostly **mutual associations**, where the members are both insured and insurers, contributing to claims via so-called “calls”. Whereas a shipowner’s hull and machinery insurance is designed primarily to protect the assured against losses to his vessel, the **protect and indemnity** insurance offered by P&I Clubs **indemnifies an owner** in respect of the discharge of **legal liabilities** he has incurred in operating his vessel.”*²

Simply, the letter of ‘P’ refers to ‘Protection’ whereas the letter of ‘I’ refers to ‘Indemnity’. It is from the first sentence of the book, one of Lloyd’s shipping standard reference work books which gave comprehensive appearance of P&I insurance.

² Steven J. Hazelwood, & David Semark.(2010). P&I Clubs: Law and Practice. Lloyd’s Shipping Law Library.

Referring to the above definitions of “P&I” from the classic book, Dr. Steven J. Hazelwood mentioned several core concepts: mutual associations, via calls, indemnify owner and legal liabilities. Even for people who serving in commercial insurance, some of concepts is not common and the writer shall offer detailed description latter in this Chapter.

*“An **association** of owners and operators of ships that have grouped together to insure each other on a **mutual, non-profit** making basis, against their **liabilities to third parties** and certain costs and expenses arising out of the operation of their ships.”³*

In another concise but clear definition, there are a number of features including in this definition and also partly reappear with above definition: association, mutual, non-profit, liabilities to third parties. The word is also from a textbook published by International Group of P&I Clubs (IG) for training and examining claim executive.

*“... there are four factors that are of particular importance with respect to the structure of the P&I cover. Firstly, the cover has always been developed as a direct response to shipowners’ need for **liability insurance**. ... Secondly, there must always be a link to an insured ship. Liabilities and losses incurred by a shipowner without any connection to an insured ship fall outside P&I club cover. Thirdly, the cover is unlimited save for the theoretical limit introduced on overspill claims. ... Finally the P&I cover is an **indemnity insurance**, which means that the club is only obliged to indemnify the assured when the latter has discharged his liability to third party claimants.”⁴*

The above introduction comes from Gard P&I Club’s Handbook. The writer did not find the working definition in the material. But the concept of liability insurance and indemnity insurance reappear again. The writer intends to deconstruct the different “P&I Club” terms for further interpreting the regime and laying a foundation of claim awareness. In other words, the P&I Club of today stems from the sources of some closely concepts: commercial insurance, indemnity insurance, mutual insurance, liability insurance.

2.2 Difference and interface of concepts of P&I insurance

2.2.1 Commercial/Non-compulsory Insurance

In general, non-compulsory insurance refers to the commercial insurance which provided by market-oriented insurance companies. In the light of free market principle, any individual or organization could plan to insure with an insurance company to

³ Module 2: P&I insurance, history, operation and practice. the International Group of P&I Clubs

⁴ 6.1, Gard Handbook on P&I Insurance., Fifth edition (2002) Assuranceforeningen Gard-gjensidig

protect their own interests against possible risks from outside. It is not compulsory insurance which is force by government or regulations.

The advantage of commercial insurance is that there is cover in the event of a claim. The insured has the comfort of knowing that it will not face unforeseen financial disruption, whereas the fixed premium is also let insurer clearly known their financial balance.

But the disadvantage for the insured is that the premium shall be in 'lost' if there is no claim. The fixed premium shall go into the insurance company's coffers in advance.

In common law country, the insurance companies are registered under the Companies Act. Insurance company has same attributes with other companies owned by stakeholder who invests, contribute to the capital of company. Therefore, owner requires insurance companies to make profit which has been deducted by expenses and reserves, belong to the shareholders. Commercial insurance companies charge a fixed and non-refundable premium in general. These insurers usually have, or are required to have, large amounts of capital as security in order to ensure that all claims to be met. Unlike P&I Club, commercial insurers tend to make contract to avoiding extra payments and limiting their liability for ease of forecasting risk.

As per commitment, any proprietary insurance company is almost limited liability company. Any shareholder's liability for the insurance company's debts is limited to the nominal value of their own shares. Therefore, the maritime perils with huge liability claims from third party could give rise to great financial risk of insurance companies.

Upon the claim philosophy, commercial insurance companies shall focus on underwriter and risk management more. Generally, insurance company tends not to employ too much 'in house' claims executives. Often external surveyor, assessors, adjustors or lawyers are hired to one specific claim case, the fees of which are an additional cost of the claim that appears on the insured's insurance record. For earning substantial profits, the underwriter and claims handler shall expedient risks insured and premiums matched for keep a lower index of claim rates. Rather than meet the insurance need of the member alike P&I Clubs, profit-based insurer paid their attention on take advantage of contact to avoiding risks incurred.

2.2.2 Indemnity Insurance

The use of the word 'indemnity' in the name of the Clubs is significant. It makes clear that the liabilities of the Club are only to reimburse/indemnity her member against the liability to the third party cargo interest that he has incurred. The Club is, accordingly, under no obligation to the aggrieved third party direct. Today, this feature extends to practically all risks covered by the Clubs and has important consequences in the event of a Member's insolvency. In particular, it exempts the Clubs from the provisions of the

Third Parties (Right against Insurers) Act 1930, which gives a third party the right to sue the insurer of the tortfeasor direct, if the tortfeasor itself goes into liquidation.

From an insured's viewpoint, the payment is usually the similarity: the insurer side pays expenses of loss or claims to the insured. But in the maritime claims, the different proceedings shall give rise to the whole different results.

The mechanism of Indemnity insurance is the assured shall be required to make a payment for the claimant's loss and then could be "reimbursed" by the insurance carrier for the loss and out of pocket costs including, with the permission of the insurer, claim expenses. The type of insurance cover provided by P&I Clubs has traditionally been indemnity insurance, although in several important respects, this principal has been diluted by international instruments.

2.2.3 Liability Insurance

Liability insurance places an obligation on the insurer to pay any damages which the assured is likely to pay as a result of occurrences which defined in his insurance over. The insurer's duty to indemnify arises on the occurrence of the insurance event. It is not necessary in the absence of express terms to the contrary.

The liabilities, losses costs and expenses covered by the Club must be incurred by the member directly; for example, where the member has a direct liability to a third party – under the principal of vicarious liability – for loss or damage caused by his employee in the course of his employment. Alternatively, it may be the member's employee, agent or sub-contractor who incurs the direct liability to the third party. In such a case, the member may be under an obligation to indemnify him against that liability. That obligation may arise under a contract between the member and the person concerned, or it may arise under the general law. If that is so, the Club will cover the member for the indemnity payment he has to make; the Club will not, however, cover the employee agent or contractor. The member being such as would be covered by the Club if the member had incurred it directly himself. This means that, for example, the Club will not cover in rem claims against an entered ship incurred by someone other than the members, such as the previous owner or bareboat charterer not entered in the Club.

The Club does not require, as a pre-condition of cover, that a competent court or arbitration tribunal shall first have determined any liability to a third party incurred by a member. In the event of a claim, it is sufficient that the Club, after its investigation, is satisfied that the member is under a liability, or is likely to be under a liability, to the claimant, for the cover to operate. Often, particularly in the case of cargo and personal injury claims, there is some doubt whether the member has a liability to the claimant and it is therefore possible to settle the claim on a compromise basis. In such cases, the

Club will cover the agreed settlement, provided it has approved it.

In general, the insurance of the legal liability to pay compensation and costs awarded against the insured in favor of another party, in respect of death, injury, disease, loss or damage sustained by that party.

Above all, the distinction between liability and indemnity insurance is that payment by the assured is necessary under indemnity insurance before the insurer is involved, whereas this is not required under liability insurance.

2.2.4 Mutual Insurance

According to 'pure' mutual theory, in a mutual insurance company the premium payable depends on the claims made. Thus, every time a claim is made it is shared between the members of the mutual, with each member contributing according to his own participation in the mutual. For example, if there were ten shipowners entered in a mutual, each with one ship identical to the others, each in the same trade, with the same crew and the same cover, each would contribute one tenth to any claim by any of them. This theory was applied in practice in the early mutual, hence the expression 'call', rather than premium, as a call is made to members to contribute to claims.

At the time of Hull & P&I Club forming, shipowners contacted with each other and plan to establish consortia voluntarily. It seems that the initial commercial insurer is their competitors but they have different insurance business scope. These shipowners would like to make use of the advantage of co-operating force for managing their maritime common or joint risks by insurance method. On the original of times, the shipowner members from the same districts tend to form or being organized in the same centering club. To today's Clubs, the same principle of co-operating by syndicate regime together with each other still exists even if current all clubs absorb their client member from all over the world.

Clearly, that level of commonality is unlikely to be realistically achievable. What would normally happens is that adjustments would be made to the contribution made to the P&I Club by different shipowners to ensure that they are fair, as between one member and another. For example, an owner of a large oil tanker trading to the USA would probably paying more into the P&I Club than the owner of a small bulk carrier trading around Europe.

As we compared above, good business people formed the Clubs for pragmatic reasons. They questioned the need to pay insurance premiums to market underwriters – particularly those operating a monopoly, as was the case in the 18th century – Whose

business it was to make a profit out of offering the insurance facility, in order to generate a return on capital for their capital providers/shareholders. By coming together in mutual Clubs, the shipowner members felt that by insuring each other, they could achieve optimum efficiency in the management of their money. In a P&I Club there are no shareholders, whose money would need servicing by the payment of dividends or the returns. The fund of a Club are contributed collectively by the members. Hence, there is no need for a P&I Club to underwrite for profit. The members of a P&I need only pay sufficient funds into the Club to meet the claims and of the actual running and administration of the Club to meet the claims experienced by its members, as well as the costs the reinsurance facilities for the larger claims and of the actual running and administration of the Club. The Clubs also offer their members cash-flow advantages. As we shall see, the Clubs do not require the total premium requirement for a given policy year to be paid wholly in advance, on the commencement of the policy year. Usually, the premium is paid in instalment during the policy year, with the final tranche of it being paid some eighteen to twenty months after the year began.

The design of P&I Clubs regime has interfaced with different activities of human beings to understand and control risks. People identify analysis and control of risks which can threaten the assets or earning capacity of an enterprise. The P&I insurance stems from many historic sources of insurance tools, such as non-compulsory insurance, indemnity insurance, mutual insurance, liability insurance.

Chapter 3 The role of P&I Club

3.1 The role of P&I Club in the claim

The clubs can appoint lawyers and other advisers on behalf of the member and although the club can require the member to pay the costs of such experts before seeking an indemnity, it is usual for the club to settle those costs directly on behalf of its member. Clubs have rules under the “risks insured” section which expressly provide for the payment of legal costs and insured under his club cover. Questions have arisen, however, as to whether a club is required to pay the costs awarded to a successful claimant where the club had started by supporting its member but then ceased to do so on the eve of the trial.

On the occurrence of an insurance event or potential event to which the member’s cover might respond, the claims handling service of the club will be brought into operation. The club can counsel and advise members, appoint lawyers and surveyors for the member and arrange security for the release of arrested vessels.

One of the advantages to be gained from membership of a P&I association is the unique and superior claim

3.2 The role of P&I Club in the direction actions by third party

It is a rare occurrence for a Club to appear in legal proceedings in order to defend a claim against its member. Since direct action by a third party claimant against a club in this country is less likely possibility such occasions will be more unusual.

The fact that the clubs come into the picture at such an early stage in the claims procedure largely accounts for the fact that they were so rarely joined as third parties under the third party joinder procedures in the Rules of the Supreme Court. In the past it has been held that an assured, against whom an action has been brought by the claimant, could not join his liability insurer as third party. In more recent cases, however, the rule of the Supreme Court have been construed in a more relaxed fashion and it has been suggested that there is now no reason why leave to join a liability insurer should not be granted if it is just and convenient to do so.

The rise, founding, development of P&I Clubs in history

In the 18th century the risk of collision seems to have been perceived as relatively unimportant, but by the start of the 19th century concern was growing, and collision cases began to appear in the law reports of the time. Certain principles were confirmed by the House of Lords in the case of *Hay v Le Neve* in 1824.

In 1854, the efforts of shipowners to reduce their liabilities were in part successful, in that the Merchant Shipping Act that year granted the shipowner the right to limit his liability for loss of life and personal injury to passengers to the value of the vessel and freight.

The Merchant Shipping Act of 1854 came into effect on 1 May 1855: the very day that the first of the so-called 'Protection Clubs' opened for business. The first Protection club was called 'The Ship Owners Mutual Protection Society' (the predecessor of the present Britannia Steam Ship Insurance Association).

Chapter 4 "Pay to be Paid" Rule

The word "to be Paid" refers that the member shipowner have to firstly discharge or pay

the involved out of funds belonging to him unconditionally. The word “Pay” refers that P&I Clubs as insurer shall indemnify thereafter when her member shipowner has discharged the liability to third party claimant.

4.1 General

The “Pay to be Paid” provision as golden rule of Protection & Indemnity mutual insurance clubs emphasizes that it is as being condition precedent of the assured (member shipowner)’s right to reimburse from Clubs’ funds in respect of any liabilities, costs or expenses.

It refers that the member shipowner involved shall first have discharged or paid the same out of funds belonging to him unconditionally. The “Pay” refers that P&I Club as insurer shall indemnify thereafter when her member shipowner has discharged the liability to the third party claimant.

The “Pay to be Paid” rule which is not all but the most principal in the Shipowner Mutual Protection and Indemnity Association, was decided as being valid in The Fanti and the Padre Island case (1989) under the UK law.

Start with the “Pay to Be Paid” principal introduction and its historical origin, which includes its design intention and P&I Club’s structure for applying the principal, in this part, the writer would narrate the effective of the principal to “the insurer” i.e., P&I Club, “the insured” (member/client of the Club), “the unspecified third-party” (the party who losses benefits) by searching articles and materials to explain of the detailed principal.

4.2 The origin of Pay-to-Be-Paid rule

Considering the objective of P&I Club is to protect ship-owners interests mutually without making profit alike general insurance company, P&I Club was designed as mutual association system that their members is deemed as Club’s member rather than “Clients” only.

A good deal of learned attention has been devoted to the legality and morality of liability and indemnity insurance but attitudes has changed in liability insurance in general and in relation to marine indemnity insurance in particular.

Although it tends to belie the importance of P&I Club cover, such a description does

illustrate the way in which the mixed bag of risks has developed in an unplanned empirical and piecemeal fashion. New heads of cover has emerged as social changes and technological and legislative developments in the past century and a half have demanded. A ship-owner with full protection and indemnity cover will be insured against liabilities in respect of everything from catastrophic oil spills, dramatic and costly collision and staggering loss of life to feeding stowaways, compensating passengers for loss of luggage and bailing out drunken crew members from local goals.⁵

The Fanti and the Padre Island case and its effects

In the Subsection 5 of Section 9 of Third Parties (Rights Against Insurers) Act 2010, people abolish the rule in The “Fanti” and The “Padre Island”, ensuring that a pay-first clause will not apply to rights transferred under the Act. However, importantly, subsection 6 limits the effect of subsection 5, preserving the rule in the “Fanti” and The “Padre Island” in cases of marine insurance except in relation to death or personal injury claims.

4.4 Two impetuses from outside give rise of weakness tendency of “Pay to be Paid” provision

4.4.1 Practice in claim executive

As claim executive, the writer served for Huatai Insurance Agency & Consultant Service Ltd which provides correspondent service for major P&I Clubs in P.R. China.

To P&I Clubs themselves, Huatai Insurance Agency & Consultant Service Ltd. (Hereunder refer as to “Huatai”) is their overseas correspondent rather than “branch” or “agent”. In legal nature, Huatai as one of worldwide Club correspondents does not permanent contractual relationship with the club. Huatai are also not authorized to accept directly legal process or submit to jurisdiction since they are indeed not “agents” of the club, nor of the managers, even nor directly on behalf of the members. Alike other correspondent companies in other countries or even continents, Huatai is an independent company and his main operation mode is earning consultant fee by assisting club’s members in dealing with claims in Chinese ports.

⁵ “Limitation of liability and insurance” Hamburg Studies on Maritime Affairs, 2008

In treatment of practical claims, there is a gap from claim decision maker of Club to the oversea correspondent onsite. Therefore, the member could take advantage of “Pay to be Paid” rule to escape their liability discharge to P&I Club or to collaborate with third parties to earn insurance reimbursement when the Club could not be onsite.

The member and also the insured, the owner of MV “Forestal Diamante”, reported the case to her P&I Club pursuing indemnity reimbursement. The MV “Forestal Diamante” was repairing to class survey in Dockyard of Shanghai, China. Due to inappropriate operation of her crews and administration, the oily water has been spilled out and made the repairing dock dirty. The dockyard calculated of their loss, which could be incurred USD150,000 for cleaning and loss income pertinently. Actually, the shipyard has long relationship with the member/the insured. The compensation contract and its final amount was fixed according to negotiation between shipyard and the owner of “Forestal Diamante”. Even though club instruct surveyor to investigate for protecting Club’s interest by local correspondent, the claim handler could not control the negotiation procedure.

5.2 In practice, the dilemma of rule upon claim executive

The premise of reimbursement by P&I Club is that the owner and P&I Club have highly consistent interest. Owner would like to reduce loss no matter for his own or on behalf of club. Meanwhile, the owner was not familiar with the local port whilst the correspondent has much experience in. Therefore, the correspondent could take advantage to negotiation with the opponent. On the arrival of the claim deal, the principal could arrange payment accordingly.

In the case of MV “Forestal Diamante”, the insured has stronger and longer relationship with the shipyard than correspondent. For shipyard, they would like to negotiate with owner/the insured rather than correspondent. Since the final settlement agreement would be signed/ agreed by owner firstly, the shipyard as third party claimant generally prone to settle with them directly. Moreover, the shipyard considered that the payment would not be reaching their fulfillment if they directly proceed to with Club’s representative/correspondent or claim handler of Club directly.

On the other hand, owner as the insured has no much intention of lowering the third party claims. The potential reason of it is that the claim will be borne by insurer rather than themselves. Moreover, the owner/ the insured would bid another friend contract for mutual benefit. The insurer as the real stakeholder has no much opportunities to negotiate it under the emergency situation.

Therefore, the “Pay to Be Paid” rules in the abovementioned case give the room for some kind of colluding between owner and the third claimant.

4.4.2 Club rules as Defense to Direct Action

Under section 1(4) of the 1930 Act the insurer was protected by any defense which would have been available to the insurer if the assured were himself claiming under the policy.

As Harman LJ has remarked, the third party cannot “pick out one bit – pick out the plims and leave the duff behind”. There were, however, qualifications to this rule, for example, that the defense raised by the insurer must have related to the particular liability transferred under the Act of 1930. A P&I Club could not, for instance, assert a right of set-off for unpaid calls if the rules did not make payment of them a condition precedent to liability.⁶

The “Pay to be paid” rule gave rise to difficulties in practice whilst the third party claimant anticipates to be paid from P&I Clubs according to liability insurance. In the situation, the member/also the assured has no capacity to pay directly. However, the contractual relationship between the member and the P&I Club stipulates that the payments should happen at the condition that the assured has discharged their liability to the third party.

In the United States it was believed that this insulation of the insurer served only to defeat justice and the greatest barrier to allowing direct action by an injured party was not the fact that he was not a party to the insurance contract but the fact of the presence in such contracts of “no action” clauses which required the assured to be found liable and to have discharged that liability. This is because where an assured is insolvent and not capable of paying his judgment debt, the insurer, under such a rule, will never be called upon to pay. Most American states have enacted legislation negating the effects of the “no-action” clause on the grounds that it is contrary to public policy. Some states have legislation against the incorporation of such clause and have, in effect, thereby converted indemnity policies into policies of liability insurance.

There are a number of instances in which a claim may be made directly against P&I Club pursuant to international liability conventions.

These include...

(i) the ability of claimants under the Civil Liability Convention to claim against a Club putting up a CLC “Blue Card”, the 1992 Fund’s ability to proceed directly against a club in respect of its liability under STOPIA and TOPIA;

⁶ Steven J. Hazelwood, & David Semark.(2010). P&I Clubs: Law and Practice. Lloyd’s Shipping Law Library.

- (ii) claims under paragraph 10 of Article 7 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001;
- (iii) a (prospective) right of direct action under the 2002 Protocol to the Athens Convention 1974 and the HNS Convention, as well as the Nairobi Wreck Removal Convention.⁷

The convention has benefit to promote P&I Club to participate in claim executive actively. Since the accident/ perils on sea happen with large losses, the shipowner possibly happens unable to compensation. The shipowner as the insured intentionally rejects to pay first. It results in the situation that club collects calls from the member but rejecting to indemnity as “the insured has not pay the loss of third parties” and no actual loss of the insured. Therefore, the legislation of third party direct actions against Club shall benefit for protecting the interest of third parties. Moreover, it shall urge the Club actively participate in the claim case and settle cases timely.

In Maritime Procedure Law of The People’s Republic of China, article ninety-seven comes from the 1969 international convention on civil liability (hereinafter referred to as the "1969 CLC") which China joined.

In Chinese claim executive, the article 97 of Chinese Maritime Procedure Law is only statutory law upon the third action legislation. Therefore, the case of third actions against P&I Clubs in China almost happens in the type of pollution damage cases.

As the convention effects on, the claim against Club shall be comprehensive acknowledge by courts whether the insured is insolvency or not. The Club shall face the risk of being prosecution.

Chapter 5 Loose Tendency of “Pay to be Paid”

5.1 General introduce of CPI

The International Group Clubs provide P&I cover for over 90% of the world’s ocean-going shipping, but there are certain sectors of shipping which fall outside the ambit of the Group.

China Shipowners Mutual Assurance Association (China P&I Club for short), established in Beijing on January 1st, 1984 under the approval of the State Council of

⁷ Steven J. Hazelwood, & David Semark.(2010). P&I Clubs: Law and Practice. Lloyd’s Shipping Law Library.

People's Republic of China, is a non-profit mutual marine insurance organization. From the beginning, China P&I Club has aimed to safeguard the prestige and interests of Members under relevant laws and regulations of China, as well as international laws and customs applicable. As per Regulation on Registration and Administration of Social Organizations of the State Council, China P&I Club was registered as a social organization. It is subject to the supervision of both the Ministry of Civil Affairs and the Ministry of Transport.

Over the last 30 years, China P&I Club has greatly expanded its scope of business. China P&I is the largest P&I insurer in China. The mutual hull insurance has achieved significant growth as well in recent years, which made China P&I Club a leading player of the H&M business in China. China P&I Club can now provide its members with one-stop insurance service ranging from P&I Risks, H&M risks, War Risks to Charterers' liabilities and FDD risks.

The percentage of international tonnages has risen steadily in recent years. Guided by the strategies of "internationalization, market-oriented, and professionalism", the Managers of the Club have been drawn on the wealth of experiences of our counterparts overseas, and striven to be integrated with the international practices in both management system and market-oriented service area, so as to provide prompt, efficient and high quality service to our members.

5.2 The practice of Chinese P&I Club and Fixed premium insurer

As abovementioned strategies of "market-oriented" and actively absorbing member overseas, the non-profit attributes has been weakened in CPI.

Over the last 30 years, China P&I Club has greatly expanded its scope of business. Starting from only 3 Members and 470,000 entered tonnage in 1984, China P&I Club insures more than 140 Members with over 38 million GT in 2016. China P&I Club has many renowned shipping entities both home and abroad as its member, which includes China Cosco Shipping Corporation Limited, China Merchants Group, HOSCO Group, Shandong Shipping Corporation, Fujian Guo Hang Ocean Shipping (Group) Co., Ltd., Greathorse Group, Seaspan in Canada, OOCL in Hong Kong, IMC Group in Singapore, and so on. China P&I is the largest P&I insurer in China, and ranks the 12th among its global peers. The mutual hull insurance has achieved significant growth as well in recent years, which made China P&I Club a leading player of the H&M business in China. China P&I Club can now provide its members with one-stop insurance service

ranging from P&I Risks, H&M risks, War Risks to Charterers' liabilities and FDD risks.

Including China P&I Club, more and more clubs expands their business not limited only in P&I cover but also H&M cover, Defense cover and FD&D cover. Meanwhile, commercial insurance companies attempt to enter into P&I cover. The club in Britain and Sweden has transfer from non-profit mutual association into non-mutual companies. British Marine Mutual is kind of club who accepts Hull insurance. The club who established 1876 has been into a fixed premium facility. The German Club established a secondary Hull insurance company. Especially, Chinese insurance companies strongly involve in maritime insurance these years and as the mature of reinsurance market, the fixed premium facilities could take advantage of it to take more risks.

5.3 Conclusion

The "Pay to be paid" provision still exists or applied in the rules of current principal Clubs under common law even at the provision has been in erosion at claim practice. In respect of claims for personal injury or death, clubs are partly applied in it. Given that Maritime Labor Convention 2006 and other conventional terms which protect third parity interests shall come into force or preparing adding in, some clubs are trying to adjust their rules to waive "Pay to be Paid" provisions.

Therefore, the route of P&I Clubs' development is from "establishment referring to the mutual regime Hull Club" to "Hull Clubs functions was eroded by fixed premium insurer and P&I Clubs take responsibility for liability risks which commercial insurer rejected" due to insurance regime advance and technology progress/globalization in 18th or 19th century. At 20th and 21th century, the route of P&I Clubs' development is inclined from "pure mutual insurance covers all liabilities by shipowner" to "form fixed premium insurance policy to cover risks from third party liability". In other words, commercial insurer could offer more competitive (low cost and high-efficiency) insurance claim service.

Meanwhile, from Chinese insurance market, the Giant shipping group are exploring captive insurance company imitating from Maersk Insurance A/S. The merge of COSCO and CSCL in 2016 could not be a good news for P&I Clubs. It means the giant shipping group could establish their wholly-owned insurance company to digest huge liability risks in shipping. China P&I Clubs also tend to absorb/attract new member by fixed-premium policy. Fixed premium P&I Club are exploring new regime to expand their insurance market share. And continuing member P&I clubs of IG provided co-insurance to China P&I Club. The exceeds of CPI deductible could be arranged in

reinsurance company on global.

Chinese government has considerably opened insurance and reinsurance market firstly to foreign capital as a condition joining in World Trade Organization since 2001. After 2010, Foreign reinsurance companies and Lloyds are aggressive exploring Chinese markets then before. Obviously Lloyds builds their Chinese Incorporation and let syndicate member in for proceed frontier underwriter business. Even actual underwriting is still in London, Lloyds China has taken a great pace to run reinsurance business. It is easy to estimate that Huge liability risk in shipping risks could be distributed by reinsurance. Reinsurance regime progress could help fixed-premium insurer re-enter in the P&I insurance market.

The conclusion of the dissertation is that fixed-premium facilities and legislations upon direct action against P&I Clubs shall continuously push P&I Clubs to weaken or waive “Pay to be Paid” provision in claim executive practice. In non-common law countries alike Mainland China, the updating maritime legislation/regulation and emerging insurance regime shall encourage commercial, fixed-premium P&I Club development. Liability risks shall be reconsidered by commercial insurer while the insurer could make use of reinsurance to arrange risk contribution.

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