A Study on the Section 55 of Marine Insurance Act, 1906(Cargo Exclusions)

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Ⅰ. Introduction

The Marine Insurance Act 1906 (hereafter the MIA 1906) has been generally recognized as the governing law when one claims the insured amount under the contract of cargo insurance in South Korea.[158]

The section 55 of the MIA 1906 is very important to the practitioner because it stipulates for which losses the insurer is liable. The insurer undertakes to indemnify the assured for the loss or damage caused by risks covered but refuses to indemnify the loss or damage caused by the exempted and uncovered risks. Namely, indemnification by the insurer is given not against the occurrence of the covered risks, but against the loss of or damage to the subject-matter insured causally linked to risks covered

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158) 1991.5.14. 90 DAKA 25314. (Lucky goldstar co., v. Korea Fire Marine Insurance Co.,)

in the manner required by the contractual terms of the policy[159].

In practice, it is not a simple work to ascertain the liability of the insurer in the event of maritime accident because the risks covered and risks excluded are stipulated over and there again, for example, in the Marine Insurance Act 1906, the clauses of policy and Institute Cargo Clauses. Furthermore, in Korean marine insurance markets, both the S.G policy and the new MAR policy have been used together in practice.

In this article, the purpose of this study is to make an attempt to compare the rules as to for which losses the insurer are liable under the MIA 1906 with those under Institute Cargo Clauses and the clauses of policy. In order to achieve this purpose, it will refer to various literature which includes textbooks and articles as well as the relevant cases. In addition, it will try to provide practitioners with practical advice as to the question of when the insurer is liable.

Ⅱ. The Significance of the Section 55(2) of MIA 1906

1. Included and Excluded Losses under the Section 55 of MIA 1906

The section 55 of MIA 1906 stipulates what losses the insurers are liable for. The criterion to decide such losses primarily relies upon the question of whether a loss was proximately caused by a peril insured against. That is, in the event of an accident causing losses or damages to the goods insured during the carriage. it must be considered first what was the proximate

159) Wan Izatul Asma Wan Talaat, "Causa Proxima Non Remote Spectatur:Doctrine of Causation in the Law of Marine Insurance", Journal of Maritime Law & Commerce, Vol.34, No.3, July, 2003.p.479.

cause of such losses or damages.

But it is not a simple work to ascertain the proximate cause of losses or damages in the event of maritime accidents. Historically, the principle of proximate cause was established after the Leyland case in 1918.[160)]

In this case, the vessel was torpedoed by a German submarine, but tugged and managed to reach Havre. The vessel was grounded and sinked because of a gale. The shipowners claimed for a loss caused by perils of the sea under a policy excluding the consequences of hostilities. But the court held unanimously that the grounding was not a novus actus interveniens, the torpedoing was the proximate cause of the loss, and the underwriters were protected by the exclusion. Lord Shaw stated as follows. "The chain of causation is a handy expression, but the figure is inaccurate. Causation is not a chain but a net."[161)] The principle of proximate cause which relies upon the question of which is proximate in effectiveness has been chosen by the courts since this case.

What is the effective and proximate cause is not provided in detail in the case. It has been rather left as a question of fact for the tribunal of fact. Thus, it is difficult for one to describe the effective and proximate cause in a definite way, but it can be said that it is an independent cause and the most prevailing and dominant to the result. In addition, it is required to adopt the commonplace basis when one decides a cause as the effective and proximate one among several causes affecting the loss and damage.

In a case[162)], Lord Macmillan submitted his opinion that the interpretation to be applied does not involve any metaphysical or scientific view of causation. And Howard N. Bennett[163)] also explained that the courts have eschewed philosophical refinements in favour of the commonplace tests

160) (1916) AC 350.HL.;Leyland Shipping Co. v. Norwich Union Fire Insurance Society Ltd.

161) Howard N. Bennett, The Law of Marine Insurance, Clareden Press, 1996. p. 116.

162) yorkshire Dale Steamship Co.Ltd. v. Minister of War Transport(The Coxwold) (1942] A.C. 691, 702.

163) Howard N. Bennet, op.cit., p.115.

which the ordinary business man conversant with such matter would adopt.

After all, the section 55 of the MIA 1906 provides the principle of proximate cause and it shall be taken as an effective cause. The insurer takes the liability when the loss or damage caused by a proximate cause which is one of the risks covered under the contract of insurance. Although the MIA 1906 is silent about the definite meaning of proximate cause, it can be settled that a proximate cause must be both dominant and efficient one. An immediate cause may be proximate so long as it is also dominant and efficient.[164)]

2. Excluded Losses under the Section 55(2) of MIA 1906

The statutory excluded losses set out in section 55(2) are directively relevant to the old Institute Cargo Clauses because they do not have a general exception clause. On the other hand, it is irrelevant to the new Institute Cargo Clauses because they have a general exception clause for themselves.

The section 55(2) of MIA 1906 constitutes three parts as follows.[165)]

First, it provides that the insurer is not liable for any loss 'attributable to' the wilful misconduct of the assured, whereas he is liable for loss proximately 'caused by' a peril insured, even though the loss would have happened because of the misconduct or negligence of master or crew. That

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164) Wan Izatul Asma Wan Talaat, id, p.496.

165) Section 55(2)of MIA, 1906; 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; (b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against; (c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

is to say, the insurer does not cover the wilful misconduct of the assured but cover the misconduct or negligence of master or crew.

In this part, one must consider two points as follows. One of them is what are the differences of implications of the terms 'attributable to' and 'proximately caused by'. The other is whether the insurer provides the coverage against the misconduct or negligence of master or crew in all cases or not.

The expressions such as 'attributable to' and 'proximately caused by' are used in various parts of the MIA 1906 and Institute Cargo Clauses. In the section 39(5) of the MIA 1906, the insurer is not liable for any loss 'attributable to' unseaworthiness where the ship is sent to sea in an unseaworthy state with the privity of the assured in a time policy. And, in the sections 55, 64 and 66 of the MIA 1906, providing the liability of insurer, the term 'caused by' was chosen as the criterion of liability of indemnity.

The general rule can be deduced from the use of such phrases under the MIA 1906 and Institute Cargo Clauses; the phrase of 'caused by' is chosen when the liabilities of indemnity of the insurer are provided, whereas the phrases of both 'attributable to' and 'proximately caused by' are chosen when the exclusion from the liabilities of indemnity of the insurer is provided.

These points say to us the legal contemplations of the parliament that they intended to deal with the liability of insurer more strictly but with the exclusions of insurer less strictly. So the exclusions of insurer are widely recognized by the MIA 1906.

However, the new Institute Cargo Clauses did not adopt this general rule. The two criteria, that is to say, 'reasonably attributable to' and 'caused by' have been used together in stipulating losses or damages for which the insurer is liable or excused.

For example, while the clause 1.1 of the new Institute Cargo Clause (B) and (C) have used 'attributable to', the clause 1.2 of the new Institute

Cargo Clause (B) and (C) have used 'caused by'. It is submitted that 'attributable to' is used when it is more easy to find out the relations between the risk and the loss or damage to the goods in the accident like fire, explosion, stranding and sinking. On the other hand, 'caused by' is used when it is not easy to find out the relations between the risk and the loss or damage to the goods in the accident like general average sacrifice, jettison and washing overboard. Moreover, the clause 4.1 of the new Institute Cargo Clause (A), (B) and (C) stipulating losses or damages for which the insurer is excused also adopts 'attributable to' and the clause 4.3 and 4.4 of the new Institute Cargo Clause (A), (B) and (C) is adopting 'caused by'. Furthermore, the Institute Cargo Clauses have used the other various expressions to qualify the terms for some of their risks such as 'reasonably attributable to', 'arising from', 'resulting from'.Therefore, the question arises whether there is any measurable difference between these terms[166). J.C.B Gilman argues that the test for causation under the words "reasonably attributable to" is intended to be less stringent than the proximate cause test[167). On the other hand, it is argued that since a different expression has been chosen, a different meaning must be intended. But most judges would probably adopt the same approach.[168)

Causes of losses or damages for which the insurer is exempted under the section 55(2) of MIA 1906 are as follows; the wilful misconduct of the assured, delay, ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured, any loss caused by rats or vermin.

Insofar as there exists a wilful misconduct of the assured, any loss or damage caused by such a misconduct can not be indemnified regardless of there being any correlation between the misconduct and the loss or damage.

166) Donald O'May, Marine Insurance Law and Policy, Sweet & Maxwell, 1993, p. 316.

167) J.C.B.Gilman, Arnould's Law of Marine Insurance and Average, Vol.Ⅲ, Sweet & Maxwell, 1997. para 192.

168) Susan Hodge, Law of Marinr Insurance, Cavendish Pub. Ltd., 1996. p. 167.

In the reported several cases, it was found that the insurer was exempted when the loss or damage was caused by overlapping the covered risks and exempted risks.[169)]

That is to say, it needs not be closely connected between the loss or damage and the wilful misconduct of the assured. Even if the wilful misconduct of assured is a remote cause, the assured may not be recovered. This may be the paradox of the rule of proximate cause that not the remote cause but the immediate cause is to be considered. Generally, if the proximate cause of the loss is a peril insured, the insurer have liability to indemnify the assured. But if it is related to the wilful misconduct of the assured even as a remote cause, it can not be recovered. This is the fundamental principle of the English law that a man shall not take advantage of his own wrong doing.[170)] In addition, this is relevant to the utmost good faith of the contract of insurance. That is to say, the wilful misconduct of the assured is the absolute excluded risk.

Having said that, one must bear in mind that there are two sorts of excluded losses in MIA 1906. One is absolute so that the parties cannot ever contract out of this and the other is subject to the policy proving to the contrary.

The losses falling within the second sort could be indemnified only if the policy otherwise provides. The first paragraph of the section 55(2)(a) does not adopt a phrase such as 'unless the policy otherwise provides'. In addition, one can not find any clause in the policy covering the wilful misconduct of the assured. In constructing the contract of insurance, it is subject to the provisions of the MIA 1906 unless the policy otherwise stipulates. The express terms of policy certainly override the provisions of MIA 1906. The new ICC (Institute Cargo Clauses) (A), (B), (C) also

169) Wood v. Associated National Insurance Co. Ltd. [1984] 1 Qd R 507.; the judge held unseaworthiness and wilful misconduct as the proximate causes for the loss, on appeal, only the latter finding was affirmed.
The Wane Tank Case [1973] 2 Lloyd's Rep 237.

170) per Salmon J, Slattery v. Mance(1962) 1 ALL ER 525 at p. 526

provides that the insurer does not cover loss, damage or expense attributable to the wilful misconduct of the assured.[171] Yet, since the old Institute Cargo Clauses do not have any provisions like in the above, the MIA 1906 is automatically applied because the old policy has the clause of the governing law of English law and practice.

In providing other causes of losses or damages for which the insurer is exempted under the section 55(2) such as delay, ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, the phrase of 'unless the policy otherwise provides' is used. It means that the referred risks can be covered provided the policy so indicated.

The insurer is exempted from the liability for loss or damage proximately caused by delay, although the delay be caused by a peril insured.[172] To exempt from the liability, the delay must be normal[173]. In the case E D Sassoon & Co. Ltd. v. Yorkshire Insurance Co.[174], the mould or mildew, which was specifically insured against under the policy in question, was held to be the proximate cause of loss of the cigarettes which, after a considerable period of delay during transit, arrived badly mildewed. Although there was the delay, the loss was recoverable under the policy. This says to us that the delay have to be read with caution according to situations.

The remaining question to be considered under the section 55 of MIA 1906 is whether the insurer provides the coverage against the misconduct or negligence of master or crew in all clauses or not.

The loss or damage caused by the misconduct or negligence of master or crew is recoverable under the Institute Cargo Clause (A/R), (WA) and (FPA) but not recoverable under the Institute Cargo Clause (B) and (C).

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171) New ICC Section 4.1.
172) MIA, 1906. Sec. 55(2)(b)
173) Susan Hodge, op.cit, p.216.
174) (1923) 16 Lloyd's Rep 129, CA.

The general exclusion clause of the Institute Cargo Clause(A) does not have the wordings that the deliberate damage to the subject-matter insured by the wrongful act of any person is to be excluded. Eventually, the insurer under the Institute Cargo Clause (A) is not exempted from the liability to indemnify the assured for such loss or damage. But the barratry listed on the covered risks of the old policy and the section 3 of the MIA 1906 is not applied to the marine cargo insurance because it means every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.[175]

Ⅲ. The Relations between the Section 55(2) of MIA 1906 and Institute Cargo Clauses

1. The Covered Risks and Exempted Risks under the old ICC.

In practice, the old Institute Cargo Clauses disappeared in London insurance markets. However, insofar as they are still in use in Korea, it is worth to explore the covered risks under the old Institute Cargo Clauses.

In order to see the extent of covered risks, one should first check what risks are covered under the policy and the old Institute Cargo Clause selected at the same time and whether the section 55(2) of MIA is applied or not.

The question arises when the excluded risks under the MIA 1906 apply to the actual contract of insurance. The Institute Cargo Clauses override the MIA 1906. Insofar as there is no contrary stipulation under the Institute Cargo Clauses, the MIA 1906 will be applied to the actual contract of insurance.

175) Rules for construction of policy, No. 11.

The Institute Cargo Clause (A/R) does not have any other specific exempted risk than delay and wilful misconduct of the assured. If the Institute Cargo Clause(A/R) is selected by the parties, the excluded risks under the section 55 of the MIA 1906 are applied to the contract of insurance.

In the case of the Institute Cargo Clause (WA) and (FPA), it depends upon the kinds of the loss or damage caused by the covered risks under the S.G policy whether the insurer is liable or not.

If the Institute Cargo Clause (WA) or (FPA) is selected by the parties, the excluded risks under the S.G policy and those under the section 55 of the MIA 1906 are applied because there is no specific excluded risks under the Institute Cargo Clause (WA) and (FPA).

In consequence, where the excluded risks under the S.G policy or those under the section 55 of the MIA 1906 causes the losses or damages, the insurer is exempted from the liability for them.

2. The Covered risks and Excluded Risks under the New ICC.

Contrary to the old Institute Cargo Clauses, it is possible to ascertain the extent of covered risks under the new Institute Cargo Clauses because they contain clauses for their own covered and excluded risks. It is unnecessary to check the excluded risks under the MIA 1906.

Clause 1 of the Institute Cargo Clause (A) provides that this insurance covers all risks of loss of or damage to the subject-matter insured except as provided in clauses 4, 5, 6 and 7. This means that there is no room to adopt the excluded risks under the MIA 1906.

Accordingly, although some risks are listed under the section 55(2) of the MIA 1906, the loss caused by those risks is recoverable provided the risks are not listed under the clauses 4, 5, 6 and 7 of the Institute Cargo Clause (A).

The good examples are the loss caused by the ordinary breakage and rats or vermin. The ordinary breakage and rats or vermin is the exempted risks under the section 55 of MIA 1906, but is not listed under the clauses 4, 5, 6 and 7 of Institute Cargo Clause (A). The loss caused by the ordinary breakage and rats or vermin is recoverable under the Institute cargo clause(A), but not recoverable under the Institute cargo clause(A/R).

In addition, the piracy is listed under the policy as an excluded risk, but not listed under the war exclusion clause of the Institute Cargo Clause (A). So the piracy is covered under the Institute Cargo Clause(A), but not covered under the Institute Cargo Clause (A/R).

The deliberate damage by the wrongful act of any person is also covered under the Institute Cargo Clause (A) because this is not found in clause 4 of it, but not covered under the Institute Cargo Clause (B), (C). The wilful act of any person is covered under the Institute Cargo Clause (A/R) because it is not named under the section 55(2) of MIA 1906.

We can conclude that the excluded risks under the Institute Cargo Clause (A) are different from those under the Institute Cargo Clause (A/R).

In the case of Institute Cargo Clause (B) and (C), the excluded risks under the section 55 of MIA 1906 are not applied and they do not have any effect on the extent of coverage of the insurer since Institute Cargo Clauses (B) and (C) contain their own clauses providing the specific risks covered. Any loss proximately caused by rats or vermin is not covered under the Institute Cargo Clauses (B) and (C) whether or not the loss is specifically excluded by their general exclusion clause. This is because the risk of rats or vermin is not expressly included in their clause for the risks covered.[176)]

The risks used in marine insurance can be classified as the covered risks, the uncovered risks and the excluded risks.[177)] The covered risks are those specifically stipulated under the policy to be covered by the insurer and the

176) Leo D'arcy et al, Schmitthoff's Export Trade, Sweet & Maxwell, 2000, p.378.

177) Park, Sung Cheul, "The study on the complex causation of loss in marine insurance", The International Commerce & Law Review, No. 15, The Korean Research Institute of International Commerce & Law, Feb. 2001. p.120

excluded risks are those specifically stipulated under the policy to be exempted to the insurer. The others are the uncovered risk. The loss or damage caused by the exclude risks or uncovered risks is not recoverable under the contract of insurance.

Under the Institute Cargo Clause (B) and (C), the rats or vermin is an uncovered risk since it is not listed under the exemption clause or the risks covered clause.

Ⅳ. Conclusion

The MIA 1906 is a very important rule to the practitioner in Korea since it is often selected as the governing law under the contract of cargo insurance. And we are using both the S.G policy and the new MAR policy. The new MAR policy has the basically different form Keywords : MIA 1906, Risks Covered, Institute Cargo Clauses

of cover compared with the S.G polcy. So we are a little confused whether some risks are covered or not under the selected clauses.

The author considered which risks are covered or not under the specific clauses and compared the Institute Cargo Clauses with the MIA 1906.

The excluded risks under the section 55 of MIA 1906 are not applied to the contract of cargo insurance provided that the assured adopts the new Institute Cargo Clause (A), (B) and (C). Accordingly, the ordinary breakage and the loss caused by the rats or vermin are recoverable under the new Institute Cargo Clauses although these are the excluded risks under the section 55 of MIA 1906. And the loss caused by the piracy is also recoverable under the new Institute Cargo Clause (A), but not covered by the Institute Cargo Clause (A/R).

In summary, the excluded risks under the section 55 of MIA 1906 are not applied under the Institue Cargo Clauses (A), (B) and (C), but under the Institue Cargo Clauses (A/R), (WA) and (FPA).

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Marine Insurance Act 1906.

Institute Cargo Clause(A),(B)(C),(A/R),(WA),(FPA)

ABSTRACT

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The MIA 1906 is a very important rule for the practitioner in Korea since it is often selected as the governing law under the contract of cargo insurance. And we are using both the S.G policy and the new MAR policy. The new MAR policy has the basically different form of cover compared with the S.G policy. So we are a little confused whether some risks are covered or not under the selected clauses.

The author considers which risks are covered or not under the specific clauses and compares the Institute cargo clauses with the MIA 1906.

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