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CAUSA PROXIMA:
THE PARAMETERS OF PERILS OFTHE SEA

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CAUSA PROXIMA: THE PARAMETERS OF PERILS OF THE SEA

By

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To my husband, Saifuddin and son, Amir
for their tolerance and support

Abstract of thesis presented to the Senate of Universiti Putra Malaysia in fulfilment of the requirements for the degree of Master of Science

CAUSA PROXIMA: THE PARAMATERS OF PERILS OF THE SEA

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This study is carried out with the purpose of examining the questions of *causa proxima* and perils of the sea, which is one of the most popular and commonly covered marine risks under the contract of marine insurance. A study on the question of perils of the sea alone, without being connected to the question of *causa proxima*, cannot be completed nor comprehended because these two key areas in marine underwriting are inextricably woven together.

This work reveals that the meaning and application of the doctrine *causa proxima non remote spectatur* (the proxima and not the remote cause must be looked into) are not as easy as they seem to be. There have been contradictions in the meaning of the words "proximate cause", which circumstantially reflects the inconsistency in the approaches adopted by the courts in construing the words.

Another difficulty has been found in applying the doctrine where no specific guideline has been introduced, by the relevant statutes or from the judicial precedents, on how the doctrine should be enforced. The tracking made on judicial decisions dealing with these questions has shown that the interpretation and the application of *causa proxima* were dealt on the individual basis by the judges without looking further back.

Another revelation by this work is on the parameters of the term "perils of the sea", which had become unclear due to the two detected problems i.e. the inconclusive meaning of perils of the sea and the indefinite extent of perils enumerating the term.

This work has been carried out with the commitment and determination to solve the above unresolved problems. The study conducted was carried out with the purpose of finding the best solutions to those problems coupled with the hope to provide clearer and more definitive answers to them.

This paper is laid down in five chapters. The first chapter deals with Introduction, which speaks of marine briefly on the contract insurance as well as on the problem statement and methodology of the study. The second chapter comprises of two main areas; the first one deals with the doctrine of *causa proxima,* it's meaning and application while the second area deals with perils of the sea and the exclusions for the purpose of looking into the meaning of perils of the sea and it's boundary.

Under Chapter Three and Four, a review and analysis of the problems, which are extracted from numerous cases and opinion of various scholars, are revealed that are hoped to provide clearer, if not definite, answers to problems stated in chapter one. Under the third chapter, the meaning and application of *causa proxima* are once again dealt with while the fourth chapter, by exposing the reviewed meaning of the expression "perils of the sea" as well as listing down the established perils enumerating the range of perils of the sea and the limits to such range, explicitly divulges with clearer parameters of the expression.

The final chapter comprises of two main parts; the summary deals with the problems detected and the findings to those problems and the second part, the conclusion, deals with the assessment and analysis founded from the study conducted

Abstrak tesis yang dikemukakan kepada Senat Universiti Putra Malaysia sebagai memenuhi keperluan untuk ijazah Master Sains

CAUSA PROXIMA: PARAMETER KECELAKAAN LAUT

Oleh

WAN IZATUL ASMA BT WAN TALAAT

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Tujuan kajian ini dibuat adalah untuk menyelami persoalan-persoalan mengenai *causa proxima* (proximate cause) yang merupakan doktrin penyebab (doctrine of causation) di dalam undang-undang insurans laut dan kecelakaan laut (perils of the sea). Adalah sesuatu yang mustahil untuk mengkaji mengenai kecelakaan laut semata-mata tanpa menyentuh persoalan *causa proxima* kerana kedua-dua bidang penting di dalam insurans laut ini adalah saling berkait.

Dari kajian yang dilaksanakan, adalah didapati bahawa maksud dan pemakaian *causa proxima* adalah tidak semudah yang disangka. Terdapat berbagai percanggahan mengenai apa yang dimaksudkan dengan doktrin tersebut dimana mahkamah-mahkamah telah mengambil pendekatan yang berbeza. Di samping itu, di dalam aspek pemakaian doktrin *causa proxima* juga terdapat masalah di mana tiada garis panduan tertentu yang dapat digarap dari mana-mana statut atau kes undang-undang. Pemeriksaan ke atas kes undang-undang telah menunjukkan

bahawa mahkamah-mahkamah lebih cenderung untuk membuat keputusan berdasarkan fakta kes masing-masing tanpa mencuba untuk membuat satu formula yang boleh terpakai di dalam semua keadaan.

Satu lagi persoalan yang timbul ialah kekaburan parameter kecelakaan laut (perils of the sea) yang disebabkan oleh dua masalah utama iaitu maksud kecelakaan laut yang tidak jelas dan had kecelakaankecelakaan yang boleh dikategorikan sebagai kecelakaan laut.

Oleh yang demikian, kajian ini yang bertujuan untuk mencari jawapan dan penyelesaian kepada masalah-masalah di atas dijalankan yang mana hasilnya adalah tesis ini yang mengandungi lima bab. Bab yang pertama menyentuh mengenai undang-undang insurans laut secara ringkas di samping memaparkan masalah-masalah yang akan cuba dicari jawapannya dan kaedah-kaedah kajian. Bab kedua adalah ulasan karya dan juga ulasan atas kes undang-undang yang di bahagikan kepada tiga bahagian iaitu *causa proxima*, kecelakaan laut dan kecelakaan-kecelakaan yang dikecualikan.

Bab ketiga dan keempat memaparkan ulasan semula (review) kedua-dua persoalanpokok iaitu causa proxima dan kecelakaan di laut segala perbicaraan dan percanggahan pendapat mahkamah di dalam menjawab masalah-masalah yang disebut di atas. Akhir sekali, bab kelima memaparkan ringkasan dan rumusan atas kajian yang dijalankan dan keputusan-keputusan yang diperolehi.

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I certify that an Examination Committee have met on November 24, 1999 to conduct the final examination of Wan Izatul Asma Wan Talaat, on her Master of Science thesis entitled "*Causa Proxima*: The Parameters of Perils of the Sea" in accordance with Universiti Pertanian Malaysia (Higher Degree) Act 1980 and Universiti Pertanian (Higher Degree) Regulation 1981. The Committee Members for the candidate are as follows:

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CHAPTER I

INTRODUCTION

Under this introductory chapter, the writer will briefly endeavour the law of marine insurance before laying down the still unresolved problems surrounding the doctrine of *causa proxima* and perils of the sea, two of the most important but controversial areas in marine insurance, and the methodology used in conducting this study.

The Law of Marine Insurance

In international trade, shipping is relatively the cheapest mode of transportation where international traders, shippers and consignee alike, are directly involved in transporting their merchandise. This centuries-old transportation contributes to the development of trade, creating a worldwide network of merchandising. Import and export of goods have in fact been facilitated and progressed with the existence of the shipping industry.

With the evolving shipping industry in the world, marine insurance, which forms an integral part of both international trade and maritime law, plays a significant role. Marine policies provide for the coverage on the cargo on board a ship as well as on the carrying ship. Shippers of merchandise and the owners of a vessel abound for a voyage can be rest assured that, with marine policies, their interests are safely protected. This illustrates to us on the importance of marine

insurance globally and ensuing from that, a study on marine insurance must be endeavored for the purpose of strengthening the knowledge in this area of law of insurance.

In Malaysia, the significance of marine insurance is an irrefutable fact with the nation's fast progress in international trade. With the rapid emergence of several ports in the West and East Malaysia, the need for having our own laws in marine insurance is clearly manifested where the market of marine insurance have started to be of great demands.[1] Both the international and local underwriters are racing to cater for such demands but a recent study conducted by the General Association of Insurance Malaysia (PIAM) showed that the outflow on the purchase of marine policies in 1997 is estimated to be at a substantial amount of RM 850 million compared to the total premiums paid to the local companies, which stood at only RM 286.3 million.[2] Thus, shippers and ship owners are urged to purchase their insurance from the local insurance companies as a step to reduce the country total outflows thereby easing down the current economic turmoil.[3]

Likewise, in the law aspect of marine insurance, little development was shown. To this present date, we are yet to have our very own legislation in this area apart from the existing Insurance Act and Regulations 1963, which has very little provisions on marine insurance. Thence, whenever any dispute of this area of law

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[1] Myint Soe, The Insurance Law of Malaysia, 1979, p. 205.
[2] The Star, 20/7/98, p. 30.
[3] Ibid.

provisions on marine insurance. Thence, whenever any dispute of this area of law arises, the Malaysian courts have to, by virtue of Section 3 and 5 of the Civil Law Act, 1956, resort to English Law. The said sections read as follows,

> S.3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall-
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with the statutes of general application, as administered or in force in England on 1 December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with the statutes of general application, as administered or in force in England on 12 December 1949, subject however to subsection (2):
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.
>
> (2) Subject to the express provisions of this Act or any other written law in force or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.
>
> .....
>
> S.5(1) In all questions or issues or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of coming into force of this Act, if such question or issues had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.
>
> (2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any matters referred to in subsection (1), the law to be administered shall be the same as would administered in England in

> the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

Section 3 provides for the general acceptance of English law in Malaysia where the States in Peninsula Malaysia only accepts the English common law and the rules of equity as at 7 April 1956. On the other hand, the application of the English law in Sabah and Sarawak is further extended to the English statutes of general application, as at 1 December 1951 and 12 December 1949 respectively. Subject to the proviso however, such application of the English law in Malaysia can only be realized if the circumstances of the States of Malaysia and their inhabitants allows so.

Section 5 allows the adoption of English law with respect to certain specified matters of mercantile nature including marine insurance. Subsection (1) is relevant to the application of the English law, inclusive of it's statutes, in West Malaysia with the exception of Penang and Malacca, two of the former Straits Settlement States, as at 7 April 1956 i.e. the date of the Civil Law Act, 1956 coming into force. In Penang, Malacca, Sabah and Sarawak, the scope of application of English law in those matters is extended to the like cases at the corresponding date.

The above provisions allow the application of English law in marine insurance, which is certainly lacking in our written laws. Due to such *lacuna,* the Malaysian courts have no alternative but to look into the English law as our source of law and the statute applicable is the English Marine Insurance Act, 1906, which was promulgated from various judicial decisions and trade conventions practiced in

the marine insurance markets.[4] Apart from the English Marine Insurance Act, 1906 and the relevant English case law, marine insurance contracts in Malaysia are also subject to the provisions of the local Contracts Act, 1950 and the Specific Relief Act, 1974.[5]

History of Marine Insurance

The origin of insurance as a whole can in fact be attributed to marine insurance, which was an ancient form of underwriting flourished from the shipping activities. Marine insurance was first initiated back in the 12th century by the Italian merchants, who undertook risks for the goods shipped on board a vessel abound for a voyage.[6] Apart from insuring the cargo, these so-called underwriters were also acted as ship owners, traders, cargo owners as well as moneylenders.[7]

This practice of acceptance of risks was then brought to England at around the 14th and 15th centuries where it was first operated in various coffee shops in London and in the 17th century, one such coffee shop owned by Edward Lloyd, which was very famous, subsequently became the commonplace for underwriters to meet and conduct their insurance business, particularly in marine underwriting[8]. The coffee shop was consequently incorporated by an Act of Parliament in 1891 and continued to become the international center for underwriters to this present day. Thence, the word "Lloyd" has become very synonymous with the world of

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[4] Kamaruddin Hanim, *Undang-undang Insurans Laut di Malaysia – Penggunaan Akta Insurans Laut 1906(UK) – Aspek Pengecualian di bawah Perlindungan Polisi Insurans di bawah S. 55(2)(c)*, (1997) 3 M.L.J. cclxxxi.
[5] C.K.K. James Wong, Shipping Laws in Malaysia and Singapore, 1976, p. 208.
[6] R.C.Kohli, An Introduction to Insurance Practice and Principles in Singapore and Malaysia, 1982, p. 6.
[7] Ibid.
[8] Ibid.