

Introduction to the law of insurance

1

Contract of insurance

- A contract where,
- in consideration of a payment
- the insurer (insurance company) agrees to take on a risk borne by the insured
- and if the risk so insured against does occur
- then to compensate the insured for the loss sustained.

2

Three main elements in a contract of insurance

- Premiums: For the payment of a consideration, the assured gets a right of receiving a sum of money upon the occurrence of a specified event.
- Uncertainty: There must be a degree of uncertainty, about the occurrence of the specified event.
- Insurable interest : The assured must have an insurable interest , at the time of making the contract.

3

Differences between a contract of insurance and a contract of wagering

Insurance is taken to protect “what is yours” ; but in the thing you issue	can bet on anything
Courts will enforce a contract of insurance	Courts will not enforce a contract of insurance
cannot insure the same thing or risk, with two insurers	you can place bets with more than one bookmarker for the same item.

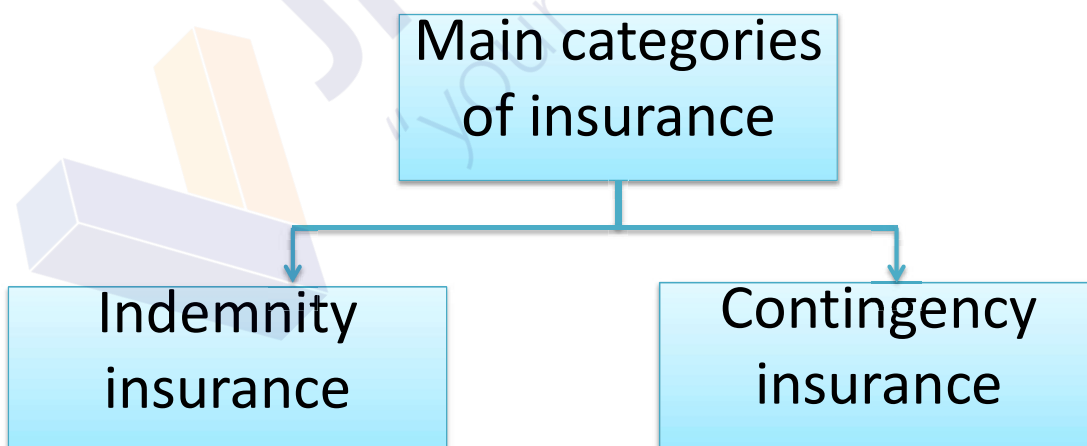
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Applicable law

- English law- Governs life, fire and marine insurance.
- Roman-Dutch law - Governs all other types of insurance.
- If Roman-Dutch law is not clear on any matter, then the English law principles will be applied by the courts.

5

Main categories of insurance



Provides an indemnity against a loss or damage

Does not provide an indemnity, but it provides a payment on the occurrence of a contingent event.

6

Concepts of “indemnity” and “subrogation”

Indemnity	Subrogation
This principle implies that the insured shall not make a profit out of the insurance. Therefore the insured can claim from the insurer only up to his loss.	The concept or doctrine of subrogation applies to indemnity insurance contracts, and not for contingency insurance contracts.
	This Concept or Doctrine of Subrogation means that the insurer is entitled to enforce any remedy which the insured himself may enforce against any third party.
	this doctrine places the insurer in the position of the insured, upon the insurer honoring the insurance claim of the insured.

7

Concepts of “indemnity” and “subrogation”

- Example: concept or doctrine of subrogation
- Johnny obtained a fire insurance policy on his goods, from an insurance company. The goods were destroyed by a fire caused due to the negligence of Nelly. The insurance company paid Johnny under the policy. Under the principal of subrogation, Johnny’s legal right to sue Nelly for the damages now passes on to the insurance company, and therefore the insurance company can now sue Nelly to recover the damages it paid to Johnny.

8

Concepts of “indemnity” and “subrogation”

- Case law: Where the insured cannot make a profit out of the insurance
Castellain v Preston [1883]
- A house that was insured against fire was sold by the insured. But before the completion of the sale, the house was damaged by fire. Upon the insured’s claim, the insurance company paid him on his policy, since he was still the owner.
- Subsequently, the purchaser paid the full price for the house, and completed the sale.
- Held: The insurance company’s claim for the return of the payment they made to the insured under the policy was granted by the courts, as otherwise, the insured would have made a profit on insurance.

9

Classifications of insurance

- Life insurance
- General insurance (fire insurance, accident insurance, burglary insurance, etc.)
- Marine insurance

10

Life insurance and contracts of assurance

- Life insurance is different from all other types of insurance, in that death is certain, with the only uncertainty being as to when death will occur.
- In all other types of insurance, the uncertainty lies in the happening of the event insured against.
- In a life insurance contract, upon the payment of premiums by the insured, the insurer agrees to pay a pre-agreed sum of money upon the death of the person whose life is insured.
- Life insurance can be classified as a contingency insurance, since it is a contract to pay a sum of money when the event insured against (i.e. death) occurs -which invariably does.
- As it can be said that death is actually “assured” of occurring, life insurance can also be called a contract of assurance.
- The terms “insurance” and “assurance” in insurance law mean the same thing and there is no distinction between these two terms.

11

Fire insurance

- Fire insurance is a contract of indemnity.
- If, during a specified time period, the assured suffers a loss or an injury, either to a specified property or to himself, due to a fire, he is indemnified up to the extent of the agreed amount.

12

What constitutes “fire”, in terms of fire insurance?

- In relation to fire insurance, it is essential that the fire should have been caused by ignition, in order to fall within a loss that is covered by fire.
- If the fire is not caused by ignition, it does not constitute “fire” under a fire insurance policy, and is therefore not treated as a fire.
- Any loss by a fire, even a loss which is caused by the insured’s negligence is covered under this type of policy.

13

What constitutes “fire”, in terms of fire insurance?

- Case law: fire by ignition
- Harris v Poland (1941) 1 K.B. 462
- Harris had obtained a fire insurance policy to cover her jewellery. One day she hid this jewellery in a grate under the coal. Subsequently having forgotten this, she lit the fire. As a result the jewellery was damaged.
- Held: Harris could recover the damage from the insurer under the fire insurance policy.
- ❖ The cause of the fire is immaterial in fire insurance, unless such fire was deliberately caused by the insurer or someone acting on his behalf.

14

Average clause in fire insurance

- An average clause is incorporated into fire insurance policies.
- The effect of an average clause would be that if the property being insured has been undervalued in the policy. And if such property is destroyed by fire, the insured will not receive the total amount insured for. He will receive only an amount proportionate to the amount insured.

15

Average clause in fire insurance

- Example : average clause

Actual value of the property = Rs. 100,000

Insured value of the property = Rs. 75,000

Therefore % insured = 75 %

The sum receivable from insurance:

If the full property is destroyed = 75 % * Rs.
100,000

If 60% of the value of the property is destroyed = 60%
*(75%*Rs.100,000)

16

Accident insurance

- Not a contract of indemnity.
- An agreement to pay a specified amount of money, on the happening of certain events.

17

Accident insurance

The payment of this specified of money would be in the following manner:

- Payment when insured dies: In the event that the assured dies in an accident, the sum assured will be paid to the executors of the deceased.
- Payment in partial or total disablement: In the event of a partial or total disablement due to an accident, a lesser amount of money will be paid.
- Payment when unable to work: In the event the assured is unable to work, a weekly sum of money will be paid.

18

Marine insurance

- A contract of marine insurance refers to a contract where the insurer undertakes to indemnify the assured against losses incident to a marine adventure. Therefore it could be said that marine insurance is a contract of indemnity.

19

Various kinds of marine insurance policies

Voyage policies

- In voyage policies the subject matter of the insurance is insured for a particular voyage only.

Time policies

- In time policies the contract is to insure for a definite period of time, i.e, the duration of the policy is for the defined period of time.

Valued policies

- These policies specify an agreed value for the subject matter which is being insured.

Unvalued policies

- In unvalued policies, the value of the subject matter of the insurance is not specified, but is left to be ascertained subsequently, subject to the limit of the sum insured.

Floating policies

- In these policies, the insurance is described in general terms, without naming the ship and the other particulars. The name of the ship and the other particulars will be defined later through a declaration.

20

Warranties in marine insurance

Implied warranties in marine insurance

- i. In the case of a voyage policy: at the commencement of the voyage, the ship is seaworthy for the purpose of the particular adventure insured.
- ii. In the case of a voyage policy: where the voyage is to be performed in stages, at the commencement of each stage, the ship is sea worthy for the purpose of that stage.
- iii. In the case of a voyage policy on goods or other movables: at the commencement of the voyage, the ship is not only seaworthy as a ship, but is also reasonably fit to carry the goods to the destination contemplated by the policy.
- iv. Where the policy attaches while the ship is in port: the ship shall be reasonably fit to encounter the ordinary perils of the port.
- v. That the adventure is a legal one and will be carried out in a lawful manner.

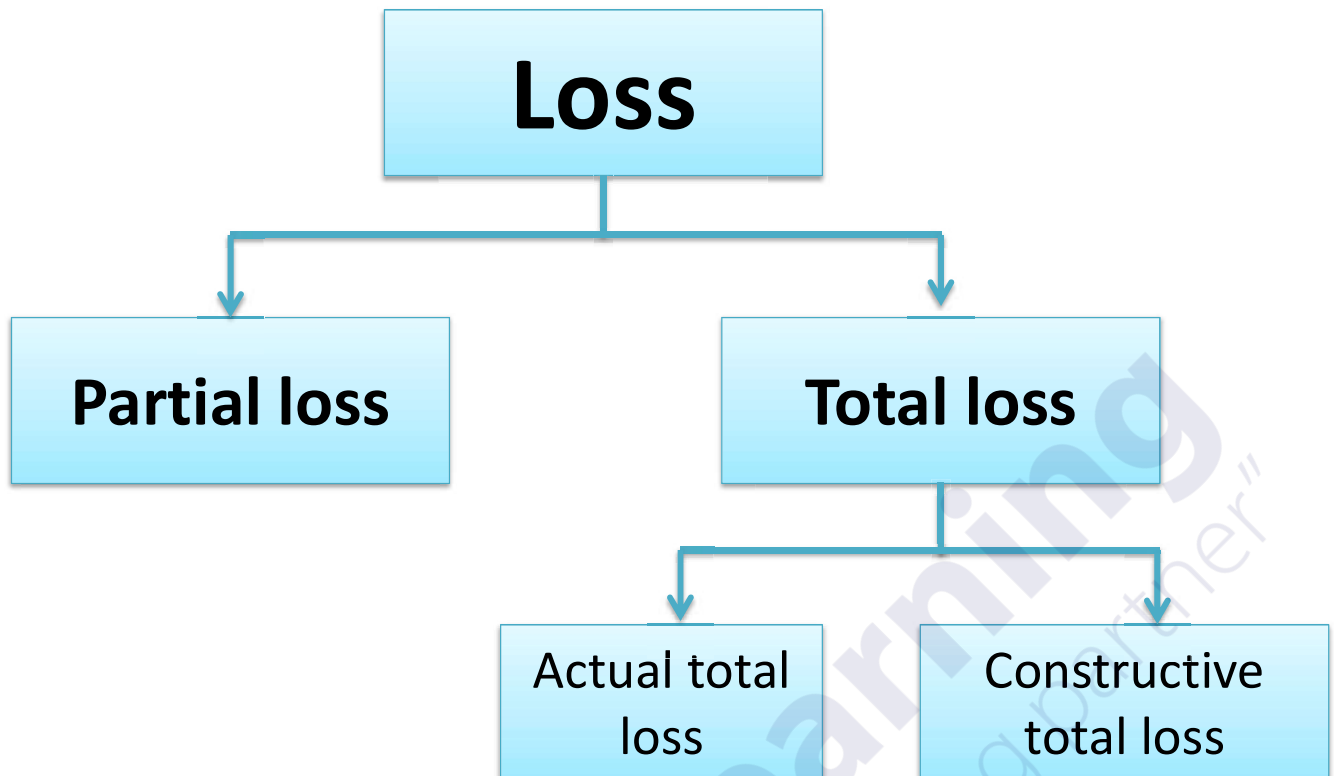
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Warranties in marine insurance

- Case law: ship to be seaworthy at the commencement of each stage of the voyage
- Greenock SS Co v Maritime Insurance Co. Ltd (1903) 2 K.B. 657
- A ship was insured for a round voyage from UK to USA and back. The ship left one port without enough coal to go to the next port of call. Therefore, to prevent the ship being a total loss, some of the ship's fittings and spars had to be burned.
- Held - As the ship was not fit to meet the ordinary perils of the voyage when she left one port to the other, there was a breach of an implied warranty. Therefore the insurers were not liable to pay for the value of the fittings and spars so destroyed.

22

Loss and notice of abandonment



23

Actual total loss

- When the subject matter insured is destroyed and ceases to be the thing insured against.

Example : when the ship goes missing

- An actual total loss is presumed when the ship goes missing and after a reasonable time no news of her has been received.

24

Actual total loss

- Case Law: when goods are destroyed
- Asfar and Co v Blundell [1896]1 Q.B. 123
- A ship loaded with dates sank during the voyage and was subsequently raised. The dates, though no longer merchantable as dates, still retained the appearance of dates and were of value for distillation into spirits.
- Held: there was an actual loss of the dates.

25

Constructive total loss

- When the subject matter insured is reasonable abandoned due to any of the following:
 - Its actual total loss appears to be unavoidable, or
 - The expenditure to prevent an actual total loss would be greater than the value of the subject matter when saved.

26

Constructive total loss

- Example: cost of salvage is greater than the loss
 - The cost of raising a ship which has sunk exceeds the value of the ship when recovered.
- Example: cost of repairing is greater than the loss
 - When goods are damaged, the cost of repairing and forwarding them to their destination exceeds their value on arrival.

27

Constructive total loss

When there is a constructive total loss, the assured may either:

- i. Treat it as a partial loss, or,
- ii. Treat it as a total actual loss and abandon the subject matter to the insurer. Here a notice of abandonment need be given.

28

Notice of abandonment

- This is a notice by which the assured clearly indicates that he abandons unconditionally to the insurer, the subject matter of the insurance.
- This notice may be either in written or verbal form.
- If this notice is accepted, that means that the insurer has admitted for the loss.
- On the abandonment of the subject matter, the insurer is entitled to take over the assured's interest in whatever remains of the subject matter.

29

Measure of indemnity in marine insurance

- If there is a total loss on a valued policy - The measure of indemnity is the sum fixed by the policy.
- If there is a total loss on an unvalued policy - The measure of indemnity is the insurable value of the subject matter.

30

Measure of indemnity in marine insurance

- If there is a partial loss to the ship
- The measure of indemnity is as follows:
- If the ship has been repaired: The cost of the repairs less customary deductions which are generally $\frac{1}{3}$ of the cost of the materials replacing the old.
- If the ship has been partially repaired: The cost of the repairs [as in (i) above], and the amount of depreciation arising from the unrepaired damage.
- If the damages have not been repaired: The amount of depreciation from the unrepaired damage

31

Measure of indemnity in marine insurance

If there is a partial loss of goods:

- i. The measure of indemnity is as follows:
- ii. If part of the goods is lost, in a valued policy: A proportion of the fixed value, as value of lost goods bears to the whole value of the insured goods.
- iii. If part of the goods is lost, in an unvalued policy: The insurable value of the part lost.
- iv. If the goods have been damaged in a valued policy: A proportion of the fixed value, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value.
- v. If the goods have been damaged in an unvalued policy: A proportion of the insurable value, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value.

32

Insurable interest

- **“The person seeking the insurance will benefit from the preservation of the subject matter insured or be affected by its loss.”**
- As insurable interest has to be present at the time the insurance policy is taken. Even if the insurable interest ceases after the policy is taken, the policy will not be affected.

33

Insurable interest in relation to life insurance

- One person sustains a pecuniary (monetary) loss on the death of another person whose life is assured. Here the first person has interest.

34

Insurable interest in relation to life insurance

- Case law: insurable interest for a creditor in the life of a debtor
- Banford v Saunders (1877) 25 WR 650
- A creditor has an insurable interest in the life of his debtor, up to the extent of the debt.
- Dalby v India and London Life Assurance Co (1854) 15 CB 365
- Case law: insurable interest for a debtor in the life a co - debtor
- A guarantor of a debt has an insurable interest in the life of the principal debtor. Furthermore, two joint debtors have an insurable interest in each other's lives, to the extent of half of the debt.

35

Insurable interest in relation to life insurance

- Case law: interest in own life.
- Griffiths v Fleming (1909) 1 KB 805
- A person has an insurable interest in his own life. Further a spouse has an insurable interest in the life of the other spouse.

36

Insurable interest in relation to life insurance

- Case law: insurable interest of siblings
- *Evamson v Crooks* (1911) LT 264
- Sisters do not have an insurable interest in the each other's lives.

37

Insurable interest in relation to life insurance

- Case law: parents and children
- *Howard v Refuge Friendly Society* (1886) 54 LT 644
- Parents have no insurable interest in the lives of their children, nor the children on the lives of their parents, unless the children are being supported by the parents.

38

Insurable interest in relation to life insurance

- Case law: employer and employee
- *Hebden v West* (1863) 3 Bands 597
- An employee, engaged for a term of years, has an insurable interest in the life of his employer for the period for which he is employed. The reason being that if the employer dies, the employee stands to lose his employment and wages.

39

Insurable interest in relation to general insurance

- In the context of general insurance, an insurable interest is present where one person has a proprietary or contractual right to any property.

Example : tenant on building

- A tenant has an insurable interest in a building if he is bound by the tenancy agreement to pay rent on the building, even after the building is destroyed by a fire or accident.

Example: carriers on goods

- Innkeepers and carriers have an insurable interest in the goods entrusted to them.

40

Insurable interest in relation to general insurance

- Case law: shareholders on company property
- Macaura v Northern Assurance Co.Ltd. (1925) AC 619
- Macaura sold his business to a company in which he was the major shareholder. The property, which was also transferred to the company, was insured in Macaura's name. After the sale, the property was destroyed by a fire. Macaura claimed under his insurance policy.
- Held: by the English house of Lords, that Macaura did not have an insurable interest in the property, as the property now belonged to the company. Therefore the company has an insurable interest in the property. But since the insurance policy is not in the name of the company, the insure was not liable to pay for the loss.

41

Insurable interest in relation to marine insurance

- If a person is interested in a marine adventure, in consequence of which he may benefit by the safe arrival of the insurable property, or be prejudiced by its loss, damage or detention. then that person is said to have an insurable interest.
- The assured must have the insurable interest at the time of the loss. He need not have it when the insurance is effected.

42

Insurable interest in relation to marine insurance

Persons who have an insurable interest in a contract of marine insurance

- (i) The lender of money on bottomry or arespondenti, to the extent of the loan.
- **Bottomry:** This is a pledge of the ship and freight to secure a loan to enable the ship to continue the voyage (it is named after the bottom or keel of the ship, which is figuratively used to express the whole ship).
 - **Respondentia:** This is a pledge of the cargo only, and not of the ship.
- (ii) The master and crew, to the extent of their wages.
- (iii) A person advancing freight, to the extent that the freight is not repayable in case of loss.
- (iv) A mortgagor, to the extent of the full value of the property.
- (v) A mortgagee, for the sum due under the mortgage.
- (vi) The owner, to the extent of the full value (not withstanding that a third party has agreed to indemnify him from loss).
- (vii) A re-insurer , to the extent of his risk

43

Principle of “uberrimae fidei” or “utmost good faith”

- A very important aspect of all contracts of insurance, is that a duty is imposed on the person applying for the insurance cover, to exercise “utmost good faith” in all his declarations to the insurer.
- In Latin. utmost good faith is referred to as “uberrimae fidei”
- **The principal of uberrimae fidei:** the person seeking the insurance owes a duty to disclose to the insurer every material fact, which he knows or ought to know, about the insurance, so that the insurer can properly evaluate the risk that he is undertaking.
- The failure to disclose a material fact by the person seeking the insurance, gives the insurer the right to reject payment on the policy, i.e: such failure makes the policy voidable.

44

Material facts

- A fact is material, if it can influence the judgment of a prudent insurer in deciding whether to accept the risk or not, and in the event the risk is accepted, in fixing the premium.

45

Material facts

Non - disclosure of material facts

- The person wishing to obtain insurance has to fill out an application or proposal form given by the insurance company. If the answers to the questions in this form are untrue in relation to a material fact, the insurance policy so obtained becomes voidable, at the option of the insurer.

46

Material facts

- Case law: failure to disclose a material fact (life insurance -1)
- London Assurance v Mansel (1879) 11 Ch D 363
- Mansel applied for a life insurance policy. In filling out the application form, for the question as to whether he had applied to any other insurance company for such a policy, he answered that he already has such policies with two other insurance companies. But he did not reveal in the application that his application for life insurance had also been rejected by several insurance companies.
- Held : Mansel had failed in his duty of utmost good faith to disclose a material fact. Therefore the policy could be set aside.

47

Material facts

- Case law: failure to disclose a material fact (life insurance -2)
- Looker v Law Union Insurance Company (1928) 1 KB 554
- In filling out the insurance proposal form, Looker did not disclose the fact that he was once badly ill from an attack of pneumonia. Subsequently after obtaining the policy, he died because of this illness.
- Held: As this amounts to a non-disclosure of a material fact, the insurance company could refuse to honour the policy.

48

Material facts

- Case law: failure to disclose a material fact (fire insurance)
- Woolcott v Sun Alliance and London Alliance Ltd. (1978) 1 W.L.R. 493
- Woolcott insured his house against fire. Even though he had previous convictions for robbery, he did not disclose this in filling out the proposal form. He maintained that he was never asked about his past. and if asked he would have declared about the past convictions. Subsequently the house was destroyed by fire, and he claimed on the policy, which was refused by the insurer.
- Held: The non-disclosure of the insured's criminal record constituted a moral hazard, which the insurers would have had to assess before accepting the risk. Therefore this non-disclosure was of a material fact. Hence the insurer was entitled to avoid the policy.

49

Material facts

- Case law: Non- disclosure of a non-material fact (life insurance -3)
- Mutual Life Insurance Co. v Ontatio Metal Products Company (1925) AC 344
- In filling out the insurance application form, to the question as to whether he had consulted a doctor during the past five years, the applicant answered "none". But he had actually consulted a doctor for influenza and obtained medicine. However, this illness had not kept him away from work. The doctor for the insurance company conceded that even if this fact had been disclosed by the applicant, the policy would still have been recommended.
- Held: The non-disclosure was not a material non-disclosure. Therefore it did not affect the validity of the policy.

50

Material facts

- **Misrepresentation of material facts**
- Irrespective of whether the misrepresentation was fraudulent or innocent, the insurance company can refuse to pay the insurance claim, if a material fact has been misrepresented.

51

Material facts

- Case law: innocent misrepresentation of a material fact (accident insurance)
- O'Conner v BDB Kirby and Company (1971) 2 WLR 1233
- In filling out the insurance application form, O' Conner mistakenly stated that his car is generally parked inside a garage at his home. But actually the car was normally parked at night in the street outside his home. Eventually the car was damaged when it was so parked on the street, and he claimed for damages from the insurance policy.
- Held: Even though the misrepresentation of a fact, in this case, was not deliberate, the insurance company was entitled to reject the claim.

52

Assignment of an insurance policy

- Assignment, according to the Judicial Dictionary, “vests in the insurer, the insured’s interests, rights and remedies, in respect of the subject matter and substance of the insurance.” Furthermore, the dictionary also says that, “the insurer by virtue of the assignment in his favor, will be in a position to maintain a suit in his own name against third parties.

53

Assignment of an insurance policy

Assignment in life insurance

Assigned by endorsement on the policy, or by way of a separate instrument in a specified form.

- This must be followed by a notice in writing to the insurer.

54

Assignment of an insurance policy

Assignment in fire insurance

- A contract of fire insurance, can be assigned only with the consent of the insurer. In the absence of such consent, the assignment is not valid

55

Assignment of an insurance policy

Assignment in marine insurance

A marine insurance policy can be assigned by endorsement. The assignment may be made either before or after the loss. However, the assured who has parted with his interest in the subject matter assured cannot assign. The assignee can sue on the policy, in his own name.

56