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ON INHERENT DEFECT OF THE SUBJECT-MATTER INSURED

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I. *What the Concept "Inherent Defect" means*

Generally speaking, "inherent defect" means material damages of the subject-matter insured, but from the theoretical point of view, it should be taken to mean the perils or risks which are thought to cause the damages. All its processes of damage go within the subject-matter itself, as in the cases of spontaneous combustion, putrefaction, natural death of domestic animals, disease-harms or insect-damages of agricultural products. It is, therefore, contrary to the risks caused from without the subject-matter, such as perils of the seas, fire, thieves and so forth. But there is no difference between both of them, in the sense that each may be perils or accidents to cause damages.¹ It is general tendency that non-liability of the insurer for inherent defect is prescribed in laws, as well as for the damages caused intentionally or by serious faults of the insured. They differ, however, in their natures and in the reasons of non-liability; especially non-liability in the latter case is applicable in every kind of insurance, but not in the former case. Today in laws of every country of the world, non-liability for inherent defect is prescribed with respect to marine insurance, but not always to insurances for land risks.

Historically, the regulations for land insurances have come from their precedents, those of marine insurance. "Maritime perils" have traditionally meant outer-caused risks which occurred under the unusual condition of the voyage, and so inner-caused risks under the usual condition have not been considered marine risks. This idea was brought into insurances for land risks, and gave birth to the principle that the insurer is not liable for the losses resulted from

¹ There are two kinds of losses caused by the inherent defects of the subject-matter insured. One is definite in its origin and the other is accidental (cf. 2(a)).

inherent defect of the subject-matter because they are not due to the perils insured against so far as the same subject that is damaged is concerned. In marine insurance, it is surely a matter of course that inherent defect of the subject-matter having no relation to adventure cannot be the perils insured against, because they are necessary to be not only accidental but also related with adventure. But in insurances for land risks such as fire insurance or agricultural insurance, it cannot be said that inherent defects—spontaneous combustion, disease or insect damages of agricultural products—are not to be the perils insured against.² Here each case is to be determined whether it can be a peril insured against or not, in accordance with each character of insurance; and in reality many of the inherent defects in insurances for land risks can be the perils insured against, though there are some exceptions like disability insurance, in which the inherent defect like sickness is not to be looked upon as a peril insured against because of its character of insurance.

Thus there is wide difference in the meaning of non-liability of the insurer for inherent defect between in marine insurance and in land insurances. Therefore I do not think it proper to apply the above-mentioned principle to ordinary land insurances as done in the commercial code of Japan (article 641), the French law of the contract of insurance (article 33) and the Italian civil law (article 1906).

II. *Introduction and Criticism of Theories with Regard to the Reason of its Legislation*

I have above related about the history of the regulations regarding non-liability of the insurer for inherent defects. Then, by what reasons has it come to be set up, looking from the view point of the laws actually in force? There are several kinds of theories on this question.

(a) Theory of non-risks

This is adopted in judicial precedents of England, and supported by a part of French professors on the questions of marine insurance and also by some of Japanese professors of insurance laws. The maintenance of the English and French is in brief, that the insurer of marine insurance is liable for the losses caused by the accidents which result from adventure itself, but not for those caused by inherent defects of the subject-matter insured.³ Further they say that the losses by inherent defects should be attributed to faults of the insured, and the perils by their faults are deficient in necessary character for marine perils, or accidental character⁴ (*caractère fortuit des risques de mer*). Here I see two mistakes made. One is that there are always faults committed by the insured on the occasion of the damages happening as the result of inherent defects, and the other is that

² Ripert, *Droit Maritime*, Tom. III 1953. N. 2707.

³ "L'assuré est responsable du fait de sa chose. Il ne peut prétendre à une indemnité pour un dommage qui ne provient pas de la navigation: il n'y a pas risque de mer". (Ripert, *ditto*, N. 2707).

⁴ Ripert, *ditto*, N. 2643; Gow, *Marine Insurance*, 1931, p. 104 ("...it was held the owner of cargo cannot take advantage of his wrong-doing".—*Pirie v. Middle Dock company* 1881).

the perils causing from faults of the insured are deficient in accidental character. As for the former, perhaps we do not need many words to clear its being wrong, and that the feature in this case, as above mentioned, consists in the fact that the losses come from inherent risks of the subject-matter. The latter view may be said to have originated in the conventional idea that has been attached to marine insurance. In the modern times it is the usual view to draw a line between the losses made by the insured faultily and those made by him intentionally. Non-liability in the first case grew entirely out of the actual requirement of management and that in the second case because of the public good.⁵ Considering all these, I can never agree with such theories as try to explain non-liability of the insurer for inherent defects by the reason that they have no character as risks insured against.

On the other hand, according to Dr. Kitazawa and Dr. Suguro of Japan, because the losses by inherent defects have the definite cause of happening, it is naturally unnecessary for the insurer to make them up; and therefore inherent defects cannot be risks.⁶ But apparently this is contrary to the actual facts: many cases of inherent defects have accidental character while there are a few of them which are definite in their origin as in the case of ordinary leakage or breakage of cargo in marine insurance. Today most professors of every country agree that there are two kinds of inherent defects, definite and indefinite in their origin.⁷

(b) Theory of rationalization of insurance management

Dr. Imamura says that insurers were released from that responsibility for the convenience of insurance management, for there are two kinds of losses by inherent defects, one is measurable of its probability of happening and the other is unmeasurable.⁸ To be sure, there are two of such kinds of the losses by inherent defects, but I think it would be overhasty to conclude that no liability of the insurer for inherent defects was regulated from such reason. If the actual requirements must be taken into consideration in such cases, law should regulate the remission of the insurer's liability only about such kinds of insurances as need that consideration, or should, on the contrary, principally make the insurers liable for inherent defects through all kinds of insurances, and make them, who has the right of self-protection, apply the method of inserting the special agreement of no liability of theirs.

Accordingly, this theory is of service to clear the regulations concerned in

⁵ Y. Kato, *Theory of Loss of the Seas*, (in Japanese) p. 19; Welford and Otter—Barry *Fire Insurance* 1948 p. 62, f. n. (d) ("...The wrong is in making a claim founded on such an act...That act does not become wrongful where a claim is founded on it and its consequences, but the claim is").

⁶ Kitazawa, *Theory of general clause in fire insurance*, (in Japanese) p. 364-347. Suguro, *Marine Insurance*, p. 298. (in Japanese): Magee, an American professor, has the same opinion ("Risks are distinguished from inherent vice."—Property Insurance 1955, p. 49).

⁷ Y. Kato, *Theory of Marine risks*. (in Japanese) p. 203; Imamura, *Theory of the contract of marine insurance*, (in Japanese) Vol. II, p. 148; Ritter, *Das Recht der Seeversicherung* II, S. 1029; Picard et Besson, *Traité général des Assurances Terrestres*, Tom II, p. 102; Arnould, *Marine Insurance*, 1954 s. 778.

⁸ Imamura, *ditto*, p. 150.

marine insurance, transport insurance etc,⁹ but is of no use in many kinds of land insurances, particularly insurance of domestic animals, agricultural insurance or the like. In a word, this is of no use to explain about the reason of legislation as to the regulations that establish, as in the commercial code of Japan (article 829. No. 1), no liability of the insurer for the damages by inherent defects.

(c) Theory of tacit interpretation (*Interprétation tacite de volonté*) of the person concerned with the contract of insurance

This is urged by Piccard and Besson,¹⁰ and it is acknowledged that this theory is the unconventional one on the question here, and suits every kind of insurance against loss. But, will the insured of ordinary insurance ever tacitly interpret the remission of the insurer's liability for inherent defects? I think we had better deny it. If there is any of such tacit interpretation, it is on the side of the insurer; and the insured will have the quite opposite interpretation. The contract of insurance is usually closed, because of its feature, with general clauses¹¹ which the insurer draw up; so the limits of the risks which the insurer charges are settled also by the insurer himself. However it does not always follow that the items of the contract correspond with what the insured wish. Anyhow, this question should be regulated in law according to the quite objective situation of things.

(d) Theory of quasi-liability of the insured without fault or theory of equity

Each theory of (a), (b), and (c) not having precisely cleared the reason of legislation under question, I think it perhaps proper to take into consideration the idea of liability (of the insured) without fault in the civil law of Japan. Generally, the subjective condition for one to be liable for making up some losses occurred is that they are caused on purpose or by his faults. But it has recently grown to be apt that he takes the liability without any of that condition. Of course it does not here directly correspond with the concept of liability without fault in the civil law. For, in the latter case there exists properly liability on the side of the one who infringes the right of the other; in the former case, there is no liability in the proper meaning on the side of the insured,—strictly speaking, perils themselves have nothing to do with liability on his side.¹² Yet both are common in this point that the person concerned suffers disadvantages without any fault of his own. The insured can not claim the indemnity for the loss. Standing here, I am going to explain about the meaning of the remission of the insurer's liability for inherent defects according to "liability without fault" in the civil law, as follows:

Even though there are no fault of the insured about the happening of risks, they should be liable for the damages resulted from within the subject-matter, which is in their possession. For instance, the insured in marine or fire insurance should take liability, as the owner of the subject-matters such as cargo or com-

⁹ In this case it is often difficult to know the definite rate of risk about some kinds of cargo.

¹⁰ Piccard et Besson, *dotti*, p. 96.

¹¹ About "general clauses" cf. Maitani, *The Study of the Character of the general clause*, (in Japanese) 1953 (esp. p. 468 and the following).

¹² But some of French professors acknowledge the idea of liability of the insured in such cases. (*L'assure est responsable du fait de sa chose*—Ripert N. 2707).

modities, for the damages by inherent defects of them.¹³ And the basic reason that supports this conclusion comes from the idea of equity. We can explain clearly by this idea I believe, about the reason of no liability of the insurer for the losses by inherent defects.

III. *Inherent Defect and its Causality*

I wonder how we should take the causality existing between such risks and damages in the case when the remission of the insurer's liability is prescribed for damages by inherent defects of the subject-matter insured, as it is in the regulation of the above-mentioned commercial code or in general clauses.

I think that the remission of the insurer's liability is a kind of restriction of risks, and have not any special nature in it, and there is no objection to decide the causality in this case following general principle.¹⁴ But some professors say the special theory of causality should be applied to in this case.

Its point is that the insurer can get rid of his liability on only its damage owing directly to such a risk, but he can not acknowledge the causality between such a risk and indirect damage, even when happened on the same subject-matter insured.

Dr. Imamura, for instance, insists on as follows. Inherent defect has a kind of risk in its nature, and this is a special nature, and nothing but the revelation of the nature of the subject-matter insured. Therefore, the existence of causality are hard to acknowledge on damages relating indirectly to this revelation, so the insurer can not get off his liability.

I can not but argue against this theory. Even if the inherent defect has a special character, a revelation of the inherent nature of the subject-matter insured,—I have doubt too on such an idea of his—there, I suppose, lies no reason of a special interpretation as above mentioned on the application of the principle of causality, because the special character is a kind of risks.

Namely, as a matter of course, the insurer can not get off his liability when the existence of causality is acknowledged in the damage according to the principle of causality in the law of insurance even for the damage indirectly caused by inherent defects, so far as it occurs within the same subject-matter insured.

For instance, the same thing can be said that other kind of risks such as "War risks", "Risks of Pilferage" are exempted from the insurer's liability in the contract.

Furthermore, according to the law of insurance contract of France (Article 44, Article 33), some professors say that in fire insurance, the insurer should not be got off his liability for the damage due to combustion by fermentation, or spontaneous calorification of the subject-matter insured. For, as I expressed

¹³ The idea of inherent defect involves, in the broader sense, wear and tear, unseaworthiness of ships.

¹⁴ On the theory of causality to be adopted on the contract of insurance against loss, I already, expressed my opinion in my work—"Causal Problems in Fire and Marine Insurances" (The Annals, Oct. 1955).

already (cf.¹⁵ (a)), they have taken the matter that inherent defect of the subject-matter insured is deficient in contingency, so it has no character of risks.

According to this idea, damages by combustion because of inherent defect of the subject-matter insured is caused by Fire (Combustion) itself, and be unable to be attributed to inherent defect.¹⁶

Some French professors in the modern times point out the error of such a interpretation, and say that the insurer should be got rid of his liability for not only damages by fermentation itself of the subject-matter insured, but also damages by combustion resulted from fermentation, and the insurer who answered for fire risks should be liable in such case only when the fire spread to, and injured the other subject-matter insured.¹⁷

If inherent risks or inherent defect and losses occurs within the same subject-matter insured, the insurer can be got rid of his liability for making good the losses as long as an inevitable relationship or natural processes are acknowledged between them, even if the connection of causality is indirectly made, or any intermediate risks may bring results outside the subject-matter insured in its way. For instance, it is so when the cargo, the subject-matter insured happens to cause spontaneous combustion in marine insurance contract, and spread to explosives shipped together, and finally, explosion resulted in complete destruction of the cargo.¹⁸

In English and German judicial precedent or theories, non-liability of the insurer is not limited to direct losses in such cases.¹⁹

¹⁵ Cf. p. 162 *ditto* Dr. Imamura.

¹⁶ This is an opinion written in an explanatory statement of a draft of the current law of insurance contract of France. (Picard et Besson. p. 99).

¹⁷ Picard et Besson, p. 98-100.

¹⁸ A judicial precedent of England on marine insurance. *Taylor v. Dunver* 1869. ("Again, goods thrown overboard in consequence of inherent defect or of the undue development of their inherent qualities (*vice propre*), cannot be recovered from underwriters using the ordinary form of policy.") (Gow p. 108).

¹⁹ A judicial precedent on motor insurance of America. There are considerable confusions in the view of actual business, but *Shaucross*, the law of motor insurance, 1949 p. 506, is near my view.