

PREDICAMENT ON THE PROXIMATE CAUSE OF "TSUNAMI"

On December 26, 2004, an earthquake of moderate intensity struck a few island nations in the South-East Asia with its epicenter located in the adjoining seabed. The earthquake was followed by a devastating 'Tsunami' (tidal wave) which brought about destruction of life and property which assumed catastrophic proportions.

Even before the untold sufferings and trauma could subside, to the utter dismay of the millions ravaged by the 'Tsunami', another controversy has reared its head which relates to the mundane subject of insurance. The moot question that has surfaced is whether loss or damage caused by 'Tsunami' is to be treated to be proximately caused by 'perils of the seas' or by 'earthquake'. The distinction is of no significance under the standard Hull policy, i.e. Institute Time Clauses Hulls (1/10/83) since both 'perils of the seas' and 'earthquake' are covered thereunder. However, if 'Tsunami' is treated to be proximately caused by 'earthquake', loss or damage caused by 'Tsunami' may **not** be covered by Insurers under policies which specifically exclude loss, damage, liability or expenses caused by earthquake, viz. ITC Hulls - Port Risks (20/7/87) or ITC Hulls - Port Risks including Limited Navigation (20/7/87) or Institute Clauses for Builders' Risks (1/6/88).

Through this humble effort, I urge the body that had devised the Institute Clauses to come out with suitable clarifications in this regard because even though some of us might be so convinced about our perception that the issue itself would appear to be redundant to them, there surely are proponents and opponents of both the views, to which I turn now.

It appears to be the general perception that 'Tsunami', when generated by disturbances in tectonic plates in the seabed, is deemed to have been initiated by 'earthquakes'. Here, for a better comprehension of the origin of 'Tsunami', a look into the sequence of events would be necessary. When the epicenter of an earthquake is under the seabed and the magnitude is fairly high, it sometimes results into shifting or subsidence of the tectonic plates under the seabed causing the sea water to be displaced vertically. The vertical displacement of water, aided by the sea current and wind, travels from the affected area at a very high speed without losing much of the force accumulated at the time of displacement and strikes whatever mass of land comes on its way in the form of giant waves or walls of water. Hence the conclusion that 'earthquake' happens to be the proximate cause of 'Tsunami', because had there been no earthquake, there would have been no 'Tsunami'.

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On the other hand, an authority like R.H. Brown, whilst explaining the scope of cover under the named perils, viz. Earthquake, Volcanic Eruption and Lightning, holds the view that waves and weather caused by these elements are embraced within the expression 'perils of the seas' etc. and would include disturbances of the sea caused by earthquake etc. The earthquake and volcanic eruption perils expressed in the Perils Clause are directed at circumstances when the insured vessel is in harbour, moored in a dock or in a drydock for survey or repair when disaster strikes e.g. a large crane collapsing onto the vessel when earthquake strikes. In the same vein, R H Brown further concludes that in cases where 'lightning' resulted in fire, the loss would be covered under 'fire'; where lightning occurred during a storm, it would constitute a 'peril of the seas'. It is only when lightning occurred other than as a peril of the seas and where it did not cause fire that the loss would be covered under 'lightning'.

Protagonists of this view would tend to conclude that even though it is to be held that 'Tsunami' is initiated by earthquake that occurred in the sea bed, losses would still be regarded as having been 'proximately caused' by 'perils of the seas' and not by earthquake.

It may be further argued that usually a gap of thousands of miles would separate the epicenter of an earthquake from the areas impacted by 'Tsunami', which is caused by the very same quake. In the event, will it be justifiable to call 'earthquake' to be the 'proximate' or the most 'dominant', 'efficient' or 'effective' cause for losses taking place in an area where even shocks of the quake or tremors were never felt and the damages were directly caused by 'tidal waves' or 'Tsunami' ? To cite a practical example, 'Tsunami', which struck the far off coast of Male, Maldives recently, brought about massive destructions insofar as marine losses are concerned but there were no losses due to earthquake, which triggered this 'Tsunami'. In contrast, Myanmar, Malaysia and Singapore, which were very close to the epicenter of earthquake, did not even experience the wrath of 'Tsunami'. Therefore, supporters of this view contend that proximate cause of 'Tsunami' is 'peril of the seas' though initiated by earthquake. In the case at hand, by treating earthquake to be the proximate cause, are we not trying to delve into the 'cause of the cause' or 'causa causans' as opposed to the dictum 'causa proxima non remota spectator' (the proximate and not the remote cause is to be considered) ?

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In case 'Tsunami' is to be treated as proximately caused by 'peril of the seas', policies where 'perils of the seas' are specifically covered or are deemed covered as under Builders' All Risks policies, loss of or damage to the subject matter insured, caused by 'Tsunami', would be payable even though earthquake be and excluded peril. Under these policies earthquake would then be deemed to be remote cause and, hence, ignored. In such cases, loss or damage caused by 'Tsunami', though initiated by an earthquake, cannot be disallowed under the pretext of an 'Earthquake Exclusion Clause' being incorporated in the Policy.

As regards the intention of the framers of Institute Clauses, it may be pointed out that in the previous Institute Clauses for Builders' Risks (1.12.72), the Earthquake Exclusion Clause (Paramount Clause) read as follows:

"warranted free from all claims arising from earthquake or volcanic eruption or tidal waves arising therefrom".

However, in the revised wordings dated 1.6.88, exclusion of claims attributable to "tidal waves arising therefrom" (i.e. from earthquake or volcanic eruption) were omitted.

The omission of this expression probably also indicates the intention of the drafters to cover loss or damage by tidal waves arising from earthquake/volcanic eruptions rather than exclude it under the "Earthquake and Volcanic Eruption Exclusion Clause". If the damage due to a 'Tsunami' were to be excluded, the policy should have been specific on the points as in the Builders' Risk Clauses dated 1.12.72. Thus, loss or damage by 'Tsunami', though initiated by earthquake, should not fall within the purview of the Earthquake Exclusion Clause.

However, till the time the intention is not clarified by the framers of the clauses, the insurance fraternity is likely to remain polarized on the issue as both the views have their intrinsic merits. We, therefore, look forward to the Joint Hull Committee, London to address the issue so that uniformity in approach could be achieved amongst insurers. Going by the rapidity in which the South East Asian countries are experiencing tremors, the sooner a clarification is issued, the better.
