

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

***ALIGNING THE KENYAN MARINE INSURANCE LAW WITH THE BEST
PRACTICE OF OPEN COVER POLICIES***

**THESIS SUBMITTED IN PARTIAL FULFILMENT OF MASTER OF LAWS
DEGREE**

**UNIVERSITY OF NAIROBI
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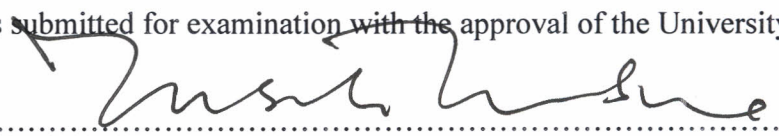
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DECLARATION

I LYDIA WAITHERERO MWIRIGI do declare that this is my original work and has not been submitted and is not being submitted for a degree in any other university

SIGNED.....
LYDIA WAITHERERO MWIRIGI
OCTOBER 2014

This Thesis is ~~submitted~~ for examination with the approval of the University supervisor

SIGNED..... 1/12/14.

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DEDICATION

To my father, George Mwirigi Kamau, who set a good foundation in me and for his encouragement to pursue this course;

To my husband Geoffrey Cheruiyot for the moral and material support in writing this thesis;

To my sons Kibet and George for their understanding during my time of research.

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3. Insurance Act Chapter 487 Laws of Kenya 1984
4. Maritime Code of the People's Republic of China 1992
5. Marine Insurance Act Chapter 390 Laws of Kenya 1968
6. UK Marine Insurance Act 1906

LIST OF ABBREVIATIONS

AKI	-	Association of Kenya Insurers
EU	-	European Union
ICC	-	International Chamber of Commerce
IRA	-	Insurance Regulatory Authority
ICC CCS	-	International Chamber of Commerce Commercial Crime Services
LAPSSET	-	Lamu Port and South Sudan Ethiopia Transport
MIA	-	Marine Insurance Act

ABSTRACT

Increased international commercial transactions draw nations closer to each other each day. This necessitates the creation of better and efficient telecommunication and transport sectors. For facilitation of convenience and security, the role of insurance cannot be underestimated. In the case of transportation of cargo and passengers on the high seas, marine insurance plays a critical role. This paper examines the practice of marine open cover policies in cargo insurance. The paper examines the legislative framework and whether there is variance with the practice in regard to marine open cover policies. The study primarily focuses on Kenya and briefly compares the practice with other jurisdictions, looking at various aspects of marine insurance especially in relation to the best practice on marine open cover that Kenya can borrow from. In Kenya, the practice of marine insurance is mostly broker driven. The use of marine open cover policies is common and considered convenient especially for persons dealing with large number of shipments over a long period of time. The Marine Insurance Act Cap 390 of 1968 remains the main governing legislation on marine open cover policies in Kenya. It mandates the assured:-

Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment; and must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.¹

¹ Section 29(3) Marine Insurance Act Chapter 390 of 1968 Laws of Kenya

The leeway to rectify omission or erroneous declaration after the loss or arrival of the shipment has resulted in the abuse of open cover policies and marine insurance fraud. There exists a mismatch between the law and the practice in the operation of marine open cover policies and there should be review of the marine legislative framework in Kenya.

The study is premised on the hypothesis that, the current legislative framework in Kenya may be outdated and does not efficiently and effectively serve the insurance industry in the practice of marine open cover policies. The author concludes by making recommendations that she believes will bring the legislation in line with the practice in regard to marine open cover policies.

CHAPTER ONE

ALIGNING THE KENYAN MARINE INSURANCE LAW WITH THE BEST PRACTICE OF OPEN COVER POLICIES

1.0 Background

Marine insurance business is international in nature and subject to laws and international regulations in every stage of its operation.² Kenya adopted the English Marine Insurance Act of 1906³ and enacted the same as Marine Insurance Act 1968, Chapter 390 Laws of Kenya. The legislation was a mere word-for-word adoption of the 1906 Marine Insurance Act of UK. No addition, alteration and amendments were made to the statute. Since the commencement of the Kenyan Act on 22nd November, 1968 there has been no changes, legislative or otherwise to its provisions and to the schedules to the Act.⁴ In Kenya, insurance penetration has remained low at 3.1% of the country's GDP as at August 2012 despite the social, economic and political changes experienced in the country in the last 10 years.⁵ In 2012, the insurance industry recorded a gross written premium of Kshs. 108.54 billion. The gross written premium for non-life insurance was Kshs. 71.46 billion. It is worth noting that motor private, motor commercial, fire and medical

²Guria RC, 'Laws, Rules and Regulations Governing Marine Insurance' IRDA Journal Vol vi, No. 4, 2008. Available at <http://www.irdaonline.org/irdacontent/journals/irda_mar08.pdf> (accessed 29 July 2014)

³ UNCTAD notes that numerous countries rely on the Marine Insurance Act 1906, of the United Kingdom as the basic legislative regulation of the marine insurance contract. See, UNCTAD, 'Legal and Documentary Aspects of the Marine Insurance Contract.' Available at <<http://www.fortunes-de-mer-com/documents/pdf/divers/unctad/20legal/20aspects/20marine/20insurance.pdf>> (accessed 2 August 2014)

⁴ 2Paul M., The Chairman of the task force on review of Maritime Laws in Kenya in his "Background paper on the law of Marine Insurance (unpublished)" dated 30th August 2002.

⁵ Kamau George, 'Factors Contributing to Low Insurance Penetration in Kenya' Vol 1, Issue 2, 2013 International Journal of Economics and Finance. Available at <http://www.ijssse.org/articles/ijssse_VI_i2_463_469.pdf> (accessed 4 October 2014)

insurance recorded gross premiums of over Kshs. 8 billion each and accounted for eighty percent (80%) of the total gross premium. The other classes of insurance (marine insurance) accounted for the balance. Further, in 2012, the insurance industry incurred claims amounting to Kshs. 29.7 billion with marine insurance recording a total of Kshs. 1,272,150,423.⁶

The practice of open cover policy is governed by section 29 of the Marine Insurance Act of 1968 Cap 390 Laws of Kenya. The section does not make a direct reference to open cover policy but refers to floating policy. A floating policy is a first type of umbrella arrangement to be developed that describes the insurance in general terms and leaves other particulars to be defined by subsequent declaration. Floating policies traditionally provided cover up to a specified maximum aggregate value which was exhausted by subsequent declaration.⁷ In practice today, the use of floating policies has been replaced by open cover policies. An open cover policy resembles and fulfills a similar function to a floating policy but has no maximum aggregate value and are issued for specified periods or until cancelled by either party and secondly, that the premium is payable as and when declarations are made.⁸ Marine insurance like other classes of business in Kenya is mainly broker driven. The insurance broker acts as an agent of the assured but in marine insurance, the broker is also an agent of the Insurer. The marine open cover policies are effected through the broker with an insurer. Section 29(3) of the Marine Insurance Act provides that an omission or erroneous declaration may be rectified even after the loss or arrival of the shipment, provided the omission or declaration was made in good faith.

⁶ Association of Kenya Insurers, 'Insurance Industry Annual Report 2012' Available at <http://www.akinsure.com/component/docman/doc_download/26-2012-akiinsurance-industry-report?Itemid=> (accessed 4 October 2014)

⁷ Bennett Howard, *The Law of Marine Insurance*, 2nd Edition (Oxford University Press, 2006)

⁸ Merkin Robert and Summer Judy (ed) *Colinvaux's Law of Insurance*, 9th Edition (Sweet and Maxwell, 2010, England)

There however exists disconnect in practice with regard to the use of open cover policies and the stipulation of the law. The role of the broker has been critical because more than not, declarations are made to them by the assured and premium charged and paid for the risk. However, the broker deliberately fails to declare to the insurer and will usually hold the declaration until the arrival of the shipment. Where the shipment arrives safely, the broker withholds the declaration and in case of a loss, the broker will make declaration. The brokers have abused the provisions of the law resulting to selective declaration and marine insurance fraud. Such practice is evidence of a deviation from the legislative requirement. It therefore poses the question as to the efficiency of the existing legislative framework with regard to marine open cover policies.

Another common practice in Kenya with regard to marine open cover policies is that the assured may operate more than one open cover at the same time. It therefore becomes a challenge for one insurer to carry out an audit of declarations in the assureds books since different declarations are effected through different insurers. Such a practice has become a challenge in the insurance industry in Kenya.

1.1 Statement of the problem

It is a real challenge for the insurance industry in Kenya to handle the emerging fraud in marine open cover policies. Marine open cover fraud has and still continues to be on the rise because the existing practice is not in line with the legislative requirement. In order to address this challenge, it is important to have necessary amendments to the current law with regard to open cover policies.

Increased fraud in the marine insurance business may be seen as one of the factors contributing to the low growth and penetration in the marine insurance business. Perhaps it may also be argued that the high net claims incurred in the marine business are a result of fraud especially with regard to marine open cover policies. As evidenced above, many investors are moving away from the marine insurance business and taking up other insurance businesses such as motor and medical. It therefore needs no emphasis that necessary reforms are needed to streamline marine insurance in Kenya.

In addition to amendments to the current existing legislative framework, it is prudent to also improve on the practice and capacity of the insurance practitioners especially brokers since they are the main drivers of marine business in Kenya. Strict supervision and monitoring of broker activity will yield good professionalism especially in the marine insurance business.

1.2 Research Objectives

The main objective of this study is to examine the legal framework governing open cover policy and the practice in Kenya.

Other specific objectives of the study include:

- (a) To examine the efficiency and effectiveness of the legal framework governing marine open cover policy.
- (b) To establish whether there is variance between the legislative framework and the practice of marine open cover policies and to examine best practices from selected jurisdictions that Kenya can borrow.
- (c) To make proposals that can be adopted so as to bring the practice in line with the legislative framework on marine open cover policies in Kenya.

1.3 Research questions

1. What is the current legislative framework for marine open cover policies in Kenya?
2. Is the practice on open cover policies aligned to the current legislative framework and does the current state of affairs serve the industry efficiently and effectively?
3. What are some of the best practices in selected jurisdictions that Kenya can borrow from and the necessary reforms that can be made to bring the practice in line with the legislative framework on marine open cover policies?

1.4 Hypotheses

This study is premised on the hypotheses that the current legislative framework in Kenya is not effective in regulating the practice and use of marine open cover policies and therefore is in urgent need for reform.

1.5 Literature review

Limited literature exists with regard to the practice of marine open cover policies in Kenya. The existing literature as reviewed below was useful in providing insights in various aspects of this study.

Marine Insurance:⁹ Ivamy defines floating policies as those in which the class of the subject-matter insured is named, and also the maximum limit of value fixed but the specific things insured and their value individually have to be subsequently declared by the assured. He alludes to the advantages of such policies to be that goods may be dispatched to a merchant at his risk; and until he is notified by his consignor, and that he may be ignorant of the fact that the

⁹ Ivamy Hardy, *Marine Insurance*, 3rd Edition (Butterworths Publishing Ltd, London, 1979)

consignment has been forwarded, and have no knowledge of its value or of the ship by which the carriage is effected, nevertheless, he is able to protect himself from the consequences of loss by effecting an insurance in the form of floating policy.

The author emphasizes the point that every shipment must be declared, for the assured is not entitled to be his own insurer as to some or any of the shipments. Additionally, declarations must be made as soon as possible and the obligation to do so is not dispensed with by a term in the policy requiring declarations to be made within a certain time of shipment from an intermediate port.

This literature is useful and relevant to the study as it gives an examination of the nature and advantages of floating policies. It however limits itself to the provisions of the English Marine Insurance Act 1906 and does not focus on the Kenyan practice and legislative framework on open cover policies. This study not only looks at the legislative framework governing marine open cover in Kenya but also in the UK, China and Sweden as jurisdictions with developed practices and legislative frameworks on open cover policies.

The Law of Marine Insurance¹⁰Bennett has outlined the floating policy as a first type of umbrella arrangement to be developed that describes the insurance in general terms and leaves other particulars to be defined by subsequent declaration. He further explains that floating policy traditionally provided cover up to a specified maximum aggregate value which was exhausted by subsequent declaration.

The book differentiates floating policy from open cover policy and emphasizes that the term open cover is not a term of art of marine insurance law and is found nowhere in the marine

¹⁰ Bennett Howard, *The Law of Marine Insurance*, 2nd Edition (Oxford University Press, 2006)

insurance Act 1906. The author poses the question as to whether an open cover can be a floating policy to attract the provisions of section 29.

The book is relevant to this study as it brings out the fine distinction between floating policies and open cover policies and the essence of declaration under both. It focuses on with the UK legislative framework and practice in marine insurance but does not focus on the Kenyan legislation and practice which this study has done.

The Modern Law of Insurance:¹¹In analyzing marine insurance McGee notes that, marine insurance is unique in being the only area of insurance contract law which is the subject of comprehensive codification. He posits that many of the most important provisions of the Marine Insurance Act of 1906 are commonly treated as being applicable also in non-marine insurance.

The author states that, “floating policies are obviously commercially convenient, but the law is quite strict about insisting on prompt and accurate declarations. The requirement to include all relevant goods appears to prevent the former practice of choosing which one or more floating policies should cover for a particular consignment.” The author notes that the requirement of good faith is an essential qualification since, open covers by their nature offer the assured ample opportunity for abuse by declaring only those consignments on which losses occur.

The book is relevant to this study as it gives analysis of the practice of floating policies under the English Marine Insurance Act of 1906. This study has endeavored to analyze legislation in Kenya and in other selected jurisdictions.

¹¹McGee Andrew, *The Modern Law of Insurance*, (Butterworths publishers, 2001)

Colinvaux's Law of Insurance:¹² This book juxtaposes the floating policy and the open cover policy. The author opines that a floating policy resembles and fulfills a similar function to an open cover.

The author posits that the main differences between a floating policy and an open cover are, first, that the floating policy is for a fixed sum rather than for a specified period, so that a floating policy will become exhausted by declarations, and secondly, that the premium under a floating policy is payable in advance rather than as and when declarations are made.

With regard to declarations under Section 29 (3) of the English Marine Insurance Act, he notes that honesty is paramount in the making of such declarations and that non-disclosure or misrepresentation does not afford a ground for the insurer to avoid the policy.

The book is greatly instrumental to this study as it expounds on open cover and floating policies under the English Marine Insurance Act 1906.

Colinvaux's Law of Insurance:¹³ Merkin in this book gives a synopsis of the English Marine Insurance Act 1906. He analyses Sections of the Act which are not reflected in non-marine insurance law. He draws the conclusion that many of the principles contained in the Act are equally applicable to other forms of insurance. The author further analyses the Act vis-à-vis the principles governing general insurance such as the duty of disclosure and utmost good faith which are important with regard to declarations under open cover policies just like any other field of insurance law.

¹² Merkin Robert and Summer Judy (ed) *Colinvaux's Law of Insurance*, 9th Edition (Sweet and Maxwell, 2010, England)

¹³ Merkin Robert, *Colinvaux's Law of Insurance*, 7th Edition (Sweet and Maxwell 1997)

This book is relevant to the current study as it helps in appreciating the principles of disclosure and utmost good faith in the best practice of open cover policies. The book however does not offer any examination from any other marine legislative framework on any other jurisdiction.

Arnould's Law of Marine Insurance and Average¹⁴ the book highlights on the role of insurance brokers in marine insurance business in the UK. The authors point out that most marine policies are effected by insurance brokers, whose business is to act as middlemen between those merchants and the private underwriters or public insurance companies.

The authors argue that marine insurance market is vast and highly specialized that the usage of the London insurance market has introduced modes of transacting business between insurance brokers and underwriters intended to facilitate the transaction of insurance business on an extensive scale.

This book is important to this study as it gives a general overview of the course and practice of marine insurance business as carried on in the UK and the relative rights, duties and liabilities of insurance brokers and their principals as affected thereby. The book does not however highlight on such practices of brokers in other jurisdictions apart from the UK.

Maritime Law and Policy in China:¹⁵Kx Li and Ingram analyse maritime policy and legal system in China. They note that China has emerged as one of the major maritime nations and that one of the pillars of the legal system is the Maritime Code 1992.

Significantly, the book gives some of the factors that contributed to the success of the drafting of the legislation is that, China has a group of professional Maritime law experts who are familiar

¹⁴ Mustil Michael and Gilman Jonathan, *Arnould's Law of Marine Insurance and Average*, Vol 1 (Stevens and Sons, London, 1981)

¹⁵Li Kx and Ingram CWM, *Maritime Law and Policy in China* (Cavendish Publishing, Britain, 2002)

with both international maritime law and the Chinese legal system and that the government accords a top priority to the maritime industry.

The book's importance to this study cannot be ignored as it has provided insights into the Chinese legislative framework and practice of marine insurance as a leading maritime nation. The book however, does not focus on other jurisdictions and in particular Kenya which this study has done.

Cases and Materials on Marine Insurance Law:¹⁶ Hodges emphasizes on the importance of utmost good faith in insurance especially with regard to disclosure. The author argues that the notion of utmost good faith is the cardinal principle governing the marine insurance contract and further points out that it includes; the duty of the assured and the broker to disclose material circumstances, and to avoid making misrepresentations.

The author points out that the obligation to disclose and to abstain from misrepresentations constitutes the most significant manifestations of the duty to observe utmost good faith and furthermore, the extent and scope of the duty is all-embracing, capable of covering a wide range of subjects, including a continuing duty of disclosure and a duty not to make fraudulent claims.

The author's insights about the duty of utmost good faith are greatly relevant to this study especially when it comes to declarations under open cover policies. The book however does not directly link the duty of utmost good faith with the practice of declarations under open covers policies.

¹⁶ Hodges Susan, *Cases and Materials on Marine Insurance Law* (Cavendish Publishing Limited, London, 1999)

The Development of the Principles of Insurance Law in the Netherlands from 1500-1800:¹⁷

The author analyses marine insurance in Netherlands and examines floating policies from a Roman-Dutch law perspective. The author is of the view that marine insurance was by far the most prevalent form of insurance in Netherlands prior to the eighteenth century and as such, it also had the most fully worked out substratum of legal rules and principles. Additionally, the principles of non-marine insurance emerged by analogy to those of marine insurance.

The author introduces the concept of insurance of goods 'on an unnamed ship or ships' or insurance '*in quovis*' and equates the same to floating policies. The author observes that since the use of such forms of insurance policies was necessary and useful in practice, there had to be regulation which was necessary as a precaution to prevent frauds being perpetrated upon insurers. Further that apart from frauds flowing directly from insurance on unnamed ships alone, the position of insurers was even more critical, if, in addition to the name of the ship and her master, other information was omitted at the same time.

This book is of great relevance to this study as it alludes to the fraud likely to be perpetrated by the use of such open cover policies. It also underscores on the importance of recognition and regulation of the practice with regard to the use of floating policies. The book is however only limited to one jurisdiction and it does not capture the changes that might have occurred with regard to the practice and use of floating policies after the eighteenth century.

Birds' Modern Insurance Law:¹⁸ Bird in analyzing intermediaries in insurance law in general, points that the law concerning insurance intermediaries is of special importance since in effect all insurance business is conducted through the medium of agents of one sort or another. The opines

¹⁷ Niekerk Van *The Development of the Principles of Insurance Law in the Netherlands from 1500-1800*, Vol 1 (Juta and Co Ltd, South Africa 1998)

¹⁸ Birds John, *Birds' Modern Insurance Law*, 7th Edition (Sweet and Maxwell, London, 2007)

on the importance of insurance agents in the insurance business by stating that most insurers are and have to be companies or, in exceptional cases, other corporate bodies or associations and such bodies can of necessity act only through agents, ranging from directors and senior management down to junior employees.

The author argues that a wide variety of types of insurance intermediary raises important questions concerning their suitability and qualifications, and how to respond with the conflicts of interest that may arise, for example, where insurance is sold on a commission basis, the intermediary may well try to persuade the client to accept the policy that pays him the best rate of commission, rather than that which is best suited to the client's needs.

This book is relevant to this study as it offers insights on intermediaries that are greatly important as they offer ideas that the author has adopted in an aim of introducing reforms in Kenya since marine insurance in Kenya is mostly broker driven. The book is also important as it briefly examines the behavior of intermediaries which influences insurance business.

1.6 Theoretical framework

The paper adopts the contract theory. In economics, contract theory studies how economic actors can and do construct contractual arrangements, generally in the presence of asymmetric information.¹⁹To this end, this theory underscores the importance of availability of information to both parties in an insurance contract. Such transmission of information between the two is dependent on the duty of non-disclosure, both before and after the making of the marine insurance contract. Economics have formalized the insurance companies' information problems

¹⁹ As with so many major concepts in economics, contract theory was introduced by Adam Smith who considered the relationship between peasants and farmers through this lens. See David Martimort, 2002 'Contract Theory' 60, 416-427 Journal of Economic Theory, Available at <http://www.idei.fr/doc/by/martimort/contract_theory.pdf> (accessed 16 September 2014)

and, in the process developed what has come to be known as the economics of information, additionally, the insurer's inability to monitor its customers' behavior after they buy insurance leads to moral hazard.²⁰ The economic analysis approach to insurance law employs the efficient insurance contract paradigm, that is, insurance law should be viewed as doing not much more than protecting insureds and insurers from contracting inefficiently due to transaction costs primarily in the form of each other's strategic behavior and hidden characteristics.²¹

This paper also adopts the objective theory of contract. This theory was adopted in the 19th Century to accommodate the needs of the commercial classes by reducing business risks and enhancing predictability of effect of transactions. The theory fitted with the basic abstraction of contract law. It stipulates that the intentions of the parties to a contract are to be ascertained from their words and conduct rather than their unexpressed intentions.²² To this end, the marine insurance contract is directly affected by the acts of the parties involved, for instance, the insurance broker plays a crucial role as an intermediary between the insurer and the assured. Declarations made under open cover policies have a significant impact on the marine insurance contract in that any false or fraudulent declarations by the assured will obviously affect the contract.

²⁰ Baker Tom and Siegelman Peter, 'Behavioral Economics and Insurance Law: The Importance of Equilibrium Analysis' 2013 Available at <<http://www.law.upenn.edu/cf/faculty/thbaker/workingpapers/Baker/Siegelman/BE/Insurance/SSRN.pdf>> (accessed 18 September 2014)

²¹ Information that insurers and insureds possess will inevitably end up being imperfect or asymmetric. Asymmetry of information leads to the problem of adverse selection, that is, the phenomenon of high-risk parties who, knowing their 'type' seek more insurance coverage than low-risk parties See Ronen Avraham, 'The Economics of Insurance Law' Vol 19.1, 2013 Connecticut Insurance Law Journal. Available at <<http://www.insurancejournal.org/wp-content/uploads/2013/04/8-Avraham.pdf>> (accessed 17 September 2014)

²² Perillo Joseph M, 'The Origins of the Objective Theory of Contract Formation and Interpretation' Vol 69.2 2000 <http://www.ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3672&context=flr.pdf> (accessed 25 November 2014)

1.7 Conceptual framework

During the last few years, the insurance industry has undergone a series of changes through financial reforms, advancement of communication and information technologies, globalization of financial services and economic development; those changes have had a considerable effect on efficiency, productivity change, market structure and performance in the insurance industry.²³ Efficient legislation is necessary for addressing key issues in any functional legal system. This study discusses the basic concepts of floating policy and the open cover policy.

1.7.1 Floating Policy

This is an umbrella arrangement which describes the insurance in general terms and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.²⁴ The assured is obliged to declare all eligible risks and the insurer has no option to decline a declaration. It provides cover up to a specified maximum aggregate value which is exhausted once the cumulative value of risks declared by the assured reaches that aggregate limit and the amount of premium depends on the risks declared.²⁵ The existence of an obligation on the assured to declare all cargoes within the terms of the cover prevents the selective declaration in peril or already the subject of a casualty.

The difficulty in running floating policies was that the assured could continually be alert to the cumulative value of declared risks for fear of exhausting cover and running uninsured risks. As a

²³ Sammy M Kiragu, 'Assessment of Challenges Facing Insurance Companies in Building Competitive Advantage in Kenya: A Survey of Insurance Firms.' *International Journal of Social Sciences and Entrepreneurship*, 1 (11) 467-490. Available at <<http://www.ijssse.org/articles/ijssse-vi-ill-467-490.pdf>> (accessed 1 August 2014)

²⁴ Bennett Howard, *The Law of Marine Insurance*, 2nd Edition (Oxford University Press, 2006)

²⁵ *Ibid*

result, the market developed a form of umbrella cover with no maximum aggregate but that covered all risks within the terms of the cover and termed it as an open cover.

1.7.2 Open Cover Policy

The term open cover is not a term of art of marine insurance law and is found nowhere in the Marine Insurance Act 1906. However, an open cover can be a floating policy attracting the provisions of section 29 of MIA 1906 as it responds to the basic definition of floating policy bearing the key concept of the obligatory nature of the cover.²⁶ This study therefore adopts the definition of the open cover to be that of floating policies. It follows that, the provisions governing floating policies under the Kenyan Marine Insurance Act have been equally applied in this study to open cover policies.

Marine insurance is a specialized field and tests the skills of underwriters not merely in the area of insurance but in a host of other aspects as well-ranging from their knowledge of geography and sea-routes, further, they need to update their skills with regard to global trends and keep track of the vulnerabilities associated with this business.²⁷ It needs no emphasis that where the policing or supervision is weak, there is preponderance of fraudulent activities and historically, fraudulent elements have been taking advantage of the not-so-strict rules of a particular region to push their interests.²⁸ Amendments and an aggressive regulatory body will contribute greatly to the improvement of the situation in Kenya. Stringent measures need to be put in place in order to avert further incidents of marine insurance fraud especially relating to open cover policies.

²⁶ *Ibid*

²⁷ Mustil Michael and Gilman Jonathan, *Arnould's Law of Marine Insurance and Average*, Vol 1 (Stevens and Sons, London, 1981)

²⁸ *Ibid*

1.8 Research methodology

The study is based primarily on secondary research methods which involves an in depth desk and internet based research on books, journals, reports and various online articles.

Owing to the complexity of marine insurance business and limited materials with regard to the practice of open cover policies in Kenya, much reliance was placed on primary data research methods. The technique employed was target respondent interviews. Marine insurance is a specialized class of business and not many individuals in the insurance industry understand the concept of marine open cover policies leave alone marine insurance in general. Further, not all insurance companies underwrite marine insurance due to lack of the technical skills in this line of business. The technique therefore had its targeted respondents as specific marine underwriting managers in the insurance industry in Kenya.

The snowball technique²⁹ was also employed in getting respondents to be interviewed. This was by asking a contact person in the main marine insurance company to refer the author to the other specific marine underwriters to interview the underwriting managers for purposes of obtaining accurate information. The methodology adopted helped a great deal in soliciting for data in this study.

²⁹ This is a special non-probability method for developing a research sample where existing study subjects recruit future subjects from among their acquaintances. Because sample members are not selected from a sampling frame, snowball samples are subject to numerous biases. For example, respondents who have many links are more likely to be recruited into the sample. See Hagai Katz, 'Global Surveys or Multi-national Surveys? On Sampling for Global Surveys' 2007 Available at <http://www.global.ucsb.edu/orfaleacenter/conferences/ngoconference/Katz_for_UCSB-data-workshop.pdf> (accessed 4 October 2014) See also Rowland Atkinson and John Flint who note that snowball can be placed within a wider set of methodologies that takes advantage of the social networks of identified respondents, which can be used to provide a researcher with an escalating set of potential contacts and further that snowball sampling is something of a misnomer for a technique that is conventionally associated more often with qualitative research and acts as an expedient strategy. See Rowland Atkinson and John Flint, 'Snowball Sampling' in 'The Sage Encyclopedia of Social Science Research Methods' 2004 Available at <<http://www.srmo.sagepub.com/view/the-sage-encyclopedia-of-social-science-research-methods/n931.xml>> (accessed 5 October 2014)

1.9 Limitations

Limited materials exist touching on open marine cover policies especially in Kenya. Limited literature exists in this field especially in relation to Kenya. This proved to be a handle for the author in soliciting for information and data touching on the research. The limited comparative analysis conducted in this paper by examining the best practices in two other jurisdictions is based on the author's bias and preference, so the discretion limits the scope of study to only the selected jurisdictions studied. The few jurisdictions selected are not enough to highlight on the wide practice of marine open cover policies. The study was also limited to the data collected.

1.1.0 Chapter breakdown

Chapter one; is the introductory part of this research. It gives a brief background to the study. In addition, it contains the statement of the problem, the objectives, research questions, hypotheses, literature review, theoretical framework, methodology and the limitations.

Chapter two; takes an in depth analysis of the current legislative framework and practice of marine open cover policies in Kenya. The chapter highlights on the variations in the legislative framework and in practice of marine open cover policies in Kenya.

Chapter three; this contains a comparative analysis of selected jurisdictions which the author considers to be the best in marine open cover practice. The chapter looks at the legislative frameworks in the said jurisdictions and corresponding practice of marine open cover policies..

Chapter four; is a summary of the data collected in the field with regard to this research. It is an analysis of the data collected through target respondent interviews and the snowball technique.

Chapter five: this is the final chapter of the study. It has the Summary of Findings, Conclusions and Recommendations. The recommendations will greatly contribute to the best practice of marine open cover policies in order to promote the growth of marine insurance business in Kenya.

CHAPTER TWO

THE VARIANCE IN PRACTICE OF MARINE OPEN COVER POLICIES AND THE LEGISLATIVE FRAMEWORK IN KENYA

2.0 Introduction

This chapter analyses marine insurance legislative framework and practice in Kenya especially with regard to marine open cover policies. The main objective of this chapter is to examine whether the practice of the marine open cover policies is in tandem with the legislative requirement. It examines the current legislative framework and the practice of marine open cover policies. It highlights the variation in practice and the legislative framework of marine open cover policies in Kenya. The deviation in practice of marine open cover policies from the legislative requirement has slowed the growth and penetration of marine insurance business. The current legislative framework allows the assured to rectify omission or erroneous declaration of shipment even after the loss or arrival provided that the omission or declaration is made in good faith. The provision gives a leeway for abuse and fraudulent activities in the manner declaration of shipments are made. The insurance industry is facing a big challenge in handling marine open cover policies. This has been an impediment to the growth of the marine insurance business with most companies recording low written premiums compared to other classes of business. Data obtained from the field indicates that most insurance companies recorded written premium of between 10 – 30% in marine insurance compared to other classes of insurance. The data in this section is mostly dependent on the research findings of the study. The names of the respondents and their respective companies have been changed for anonymity. The first part of this chapter examines the sources of marine insurance law governing open cover policies in Kenya. The

second part examines the practice of marine open cover policies and the third part discusses the role of the insurance brokers in effecting marine open cover policies. Next is a discussion on the variance between the legislative requirement and the practice of marine open cover policies and finally is the conclusion.

2.1 Sources of marine insurance law governing open cover policies in Kenya

Marine insurance is (as old as seafaring) centuries old aid to the conduct of sea trade and its objective is to enable the ship-owner, the buyer and seller of the goods to operate their respective businesses while relieving themselves the burden of financial consequences of their property being lost or damaged in course of a maritime adventure.³⁰ Marine insurance in Kenya is governed by the Marine Insurance Act Cap 390 Laws of Kenya.

The Kenyan Marine Insurance Act is basically a replica of the Marine Insurance Act 1906 of UK. The memorandum of objects and reasons presented to parliament accompanying the bill which laid the foundation for the Act stated thus:

*“The law governing marine insurance, that is to say, the insurance of ships and their cargoes is contained in the Marine Insurance Act 1906, of the United Kingdom. It is desirable that this law should be replaced by an Act of the Kenya Parliament, and the object of this Bill is to make comprehensive provision in relation to Marine Insurance and to repeal the United Kingdom Act in its application.”*³¹

³⁰ UNCTAD notes that numerous countries rely on the Marine Insurance Act 1906, of the United Kingdom as the basic legislative regulation of the marine insurance contract. See, *ibid* 2

³¹ Gazette Notice of 28th May, 1968

Some scholars have taken the view that the upshot of the above excerpt from the memorandum indicates a strong desire to legislate a ‘homegrown’ Marine Insurance Act indeed³². On the contrary, the legislation came into force and was a mere word-for-word adoption of the 1906 Marine Insurance Act 1906 of the UK. No addition, alteration and amendments were made to the statute. Since the commencement of the Kenyan Act on 22nd November, 1968 there have been no changes, legislative or otherwise to its provisions and to the schedules to the Act.³³ In Kenya, the British introduced commercial practices similar to those in Britain when Kenya became a protectorate and English law was made applicable.³⁴ Additionally, insurance business in Kenya was introduced by the British and the Marine Insurance Act of Kenya is a carbon copy of the English Marine Insurance Act 1906.³⁵ This therefore, denotes that the Kenyan legislation with regard to the use of open covers is basically similar to that in the UK.

Section 29 of the Marine Insurance Act Cap 390 provides that:

- (1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.*
- (2) The subsequent declaration or declarations may be made by endorsement on the policy, or in other customary manner.*
- (3) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment; and must, in the case of goods, comprise all consignments within*

³² *ibid*

³³ *Ibid*

³⁴ The reception clause that made English law applicable to Kenya made it clear that it was only the English statutes of general application, the substance of the common law and the doctrines of equity in force in England as at 12th August 1897; that would apply. See Momanyi Bwonwong’a *Procedures in Criminal Law in Kenya* (East African Educational Publishers Ltd, Kenya, 1994)

³⁵ Alfred Koffide, ‘Insurance Law’ Available at <<http://www.gkkoffidelaw.blogspot.com/2014/04/insurance-law.html>> (accessed 29 August 2014)

the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy provides, where a subsequent declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

The MIA Cap 390, therefore, like the UK Act of 1906 provides that the assured is obliged to declare all eligible risks and the insurer has no option to decline a declaration. It follows from the obligatory character of a floating policy that it constitutes an immediate contract of insurance and that there is no duty to disclose material circumstances that come to light after conclusion of the floating policy but before any individual declaration.³⁶ Again, the existence of an obligation on the assured to declare all cargoes within the terms of the cover prevents the selective declaration of only those cargoes in peril or already the subject of a casualty.

Section 29(3) provides that the assured may rectify the failure to declare even after loss or the expiry of the insured adventure provided the error or omission was in good faith meaning not fraudulently³⁷.

The declaration under the law should serve the essential contractual process of informing the insurer of the risks covered in order to enable the insurers to calculate and collect premiums and determine the extent of exposure under the cover.

2.2 The practice with regard to the use of open cover policies in Kenya

³⁶ Ivamy Hardy, *Marine Insurance*, 3rd Edition (Butterworths Publishing Ltd, London, 1979)

³⁷ *Ibid*

To this end, the study equates the open cover³⁸ policy to floating policies as defined under the Kenyan Marine Insurance Act. An open cover policy refers to a formal policy document giving legal validity to a long term marine insurance contract in cargo open cover.³⁹ The policy contains the details of the parties, the rates applicable, the deductibles, general terms and conditions. However, the open cover policy leaves the rest of the details to be supplied to the insurers by the assured during declarations. Once a declaration has been made the details of the cargo, sums insured, the name of the vessel, port of loading and port of discharge are normally supplied to the insurer by the assured. The insurer issues a marine certificate⁴⁰ upon the declaration of the shipment by the assured. The marine certificate is essential as evidence of insurance cover for the goods declared under open cover policy. Firstly, it is used by the assured to fulfill a requirement by the bank that a policy be deposited with the bank as collateral security for advancement for the goods. Secondly, it serves as proof of insurance which the consignee has paid or will pay the premium for. Thirdly, the marine insurance certificate may be used as one of the documents to clear the goods from the port.

The open cover policy is a legal instrument acting as a vehicle for the declarations of many shipments. It is issued by the insurer and held by the assured or the broker on behalf of the assured for purposes of declarations and claiming.

³⁸The term 'open cover' is not a term of art of marine insurance law and is found nowhere in the MIA 1906 but an open cover responds to the basic definition of floating policy in section 29(1).

³⁹Open policies provide for all risks of a certain type during a set period of time. The sum insured is then adjusted for the actual total sum insured. This type of policy is commonly used for marine cargo policies and construction policies. See National Insurance Brokers Association, 'Insurance Glossary' Available at <<http://www.niba.com.au/html/38731.cfm>> (accessed 7 September 2014)

⁴⁰This is a document issued by an Insurance Company certifying that an insurance policy has been bought and shows an abstract of the most important provisions of the insurance contract. See , 'Business Dictionary' Available at <<http://www.businessdictionary.com/definition/certificate-of-insurance-COI.html>> (accessed 30 August 2014)

2.2.1 Underwriting marine business through Insurance broker

The origin of contemporary insurance is traced to the UK where the early maritime trade led to birth of marine insurance underwriting and the establishment of the Lloyd's Underwriters complete with own agents as intermediaries.⁴¹ The insurance broker⁴² in Kenya drives the process of the use of open cover policies and subsequent declarations. Most insurance companies issue brokers with cover-note booklets containing serial numbers with a requirement that the broker issues the assured with the cover note and makes declaration in order of the serial numbers but most of the time this is not done.⁴³ Insurance brokers are registered with the Insurance Regulatory Authority⁴⁴ and obtain their license from the regulator. Minimum qualification standards are set for brokers; however, there are no specific requirements for brokers underwriting marine insurance. This is a specialized class of business and most brokers in the industry are not conversant with marine insurance law and lack the technical skills in the field.⁴⁵

A broker receives instructions for a particular shipment from the assured under open cover and immediately sends the client their own debit note stating the amount of premium to be paid by

⁴¹ Fredrick Mwendwa, Humphrey Muriuki, Oddillia Nabwire, Geoffrey Kipchirchir, Mwawuganga Mwambota and Muna Abdalla, 'Comparative Analysis of Environmental Influence on Growth of Low vis-à-vis High Performing Agents in Mombasa County Kenya' Vol 4, No. 19, 2013, Research Journal of Finance Accounting. Available at <http://www.iise.org/Journals/index.php/RJFA/article/download/9496/9818> (accessed 22 September 2014)

⁴²In Kenya, the insurance brokers are under an umbrella of Association of Insurance Brokers of Kenya which is a professional association for all insurance brokers in Kenya. See, 'Association of Insurance Brokers of Kenya – AIBK' Available at <http://aibk.co.ke/> (accessed 2 September 2014)

⁴³ Interview with Lee who has been an Underwriting Officer for an insurance company in Kenya for the last three years 17 October 2014 Nairobi

⁴⁴This is a statutory government agency established under the Insurance Act (amended) 2006, CAP 487, to regulate, supervise and develop the insurance industry of Kenya. See, 'Insurance Regulatory Authority' <http://www.ira.go.ke> (accessed 3 September 2014)

⁴⁵Tee argues that brokers lack in marine knowledge and that this is one of the setbacks in the marine insurance field. Phone interview with Tee a risk surveyor in one insurance company for over 5 years

the assured. The broker subsequently issues the assured with a risk note which acts as evidence of insurance.⁴⁶ The broker chooses what to declare and what not to declare. The broker may hold declarations for certain shipments until the cargo has arrived at the assureds' premises. In the event the cargo arrives in damaged condition or the shipment is lost in the course of maritime adventure, the broker sends a copy of the risk note immediately to the underwriter for issuance of marine certificate. Once the broker has been issued with the certificate, then a claim is lodged with the insurance company. In most cases, the assured may not be aware of the fraudulent acts of the broker but in some instances, the assured may also engage in the fraud by selective declaration of the shipments.⁴⁷

Section 156 of the Insurance Act Cap 487 Laws of Kenya provides that:

- (1) *No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit of a prescribed amount, is made in advance in the prescribed manner.*
- (4) *A premium collected by an agent or a cheque received by him shall be deposited with, or dispatched and received by the insurer before the commencement of the insurance cover.*

Clause 42 of the Insurance Regulations additionally provides that:

For the purposes of section 156 (4) of the Act, the premium collected by an agent or a cheque received by him shall be deposited with or dispatched to the insurer immediately upon receipt thereof.

⁴⁶Mawi further notes that this should not be recognized as evidence of insurance as most brokers are misusing the same by not recording correct information. Interview with Mawi a claims manager in one of the insurance companies in Kenya for over 10 years Nairobi

⁴⁷Bree further points out that in some instances, the brokers even collude with clients and then they share the premium received.

It may be argued that this provision was put in place to ensure that insurance brokers do remit premiums timely and immediately upon the receipt from the clients. Further, it can be argued that this is to enhance business efficiency, transparency and convenience. Due to the nature of marine insurance business, the insurance brokers abuse the practice of issuance of cover notes in marine open cover policies from their end and fail to declare to the underwriters all shipments held covered. As a result the brokers fail to remit all collected premium from the assured and do so at their own convenience or at the time of the claim.⁴⁸

During clearing of the goods from the port, the Kenya Revenue Authority may require proof of insurance cover where the terms of trade is not Cost Insurance and Freight⁴⁹ in order to determine the actual value of the goods and the amount of insurance paid in computing the duty and other customs charges. The Kenya Revenue Authority has in the past recognized the debit notes and risk notes issued by the brokers to the assureds as evidence of insurance. This practice has made the use of marine open covers even worse from an insurer point of view. This is because the assured does not require the marine certificate from the insurer to clear the goods but can make use of the brokers debit or risk note to serve the same purpose.⁵⁰

⁴⁸*Ibid*

⁴⁹When a sale of goods contract takes on the nature of “cost, insurance and freight” terms, the seller delivers when the goods pass the ships rail in the port of shipment. The seller must pay the cost and freight necessary to bring the goods to the named port of destination but the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, is transferred from the seller to the buyer. In CIF contracts, the seller also has to procure marine insurance against the buyer’s risk of loss of damage to the goods during the carriage. See, Yin Yanan, ‘Entitlement to Insurable Interest in Stoppage of Transit under English and Chinese Law: A Comparative Study’ *International Law Review*, Spring 2008, *Tulane Maritime Law Journal*, Available at <<http://www.lup.lub.lu.se/record/1712332/file/1712334.pdf>> (accessed 5 September 2014)

⁵⁰ Interview with Walter an executive director and a cargo surveyor in one of the marine loss adjusting firms in Kenya noted that most assureds produce brokers debit note for cargo clearance at the port and the assured normally submit the debit note to the cargo surveyors in support of a claim or for cargo surveillance at the port. Interview on 17October 2014

2.3 Deviation in practice from the legislative framework

The key issues to be examined specifically are:

- Time for making declarations
- Rectification of the declarations
- Role of the insurance brokers in regard to marine open cover policies

2.3.1 Time for making declaration

Evidence available shows that the assureds and the insurance brokers do not make declarations under the open cover policies in order of dispatches and or shipments as required by the law. 30% of the insurance companies interviewed admitted to receiving declarations timely and in order of shipments as required by law while 50% admitted to not receiving the declarations timely or in order of shipments. A few companies however admitted to there being no consistency in terms of making the declarations in that the clients at times make the declarations quite on time while at other times they do not.⁵¹ In practice therefore there is no consistency in making declaration and the insured and or brokers make declaration at their own convenience even after the loss or the expiry of the insured maritime adventure.

2.3.2 Rectification of Declarations

There is wide selective declaration of shipments in peril or already the subject of a casualty under open cover policies in Kenya. The insured and or the broker hold on to declaration until the arrival of the shipment and if the goods are received in damaged condition, the declaration is made with the insurance company and a claim is lodged immediately thereafter. In the event the shipment is received intact, that particular shipment may not be declared and the insurance

⁵¹ See elaborated findings in Table B in chapter four.

company. This practice has resulted to selective declaration and denies insurance companies premium hence a hindrance to growth of marine insurance business in the country⁵² In addition, the insurers are left exposed to a large extent since they are unable to make reinsurance arrangement before the loss or arrival of the shipment. The provision that allows the assured to rectify an omission or erroneous declaration after the loss or the arrival of the shipment has been abused and has resulted to marine insurance fraud. It is difficult to distinguish those shipments that are genuinely omitted from those that are intentionally not declared. The aspect of good faith has no place in the practice of open cover policies in the Kenyan market.⁵³

2.3.3 The role of the broker

Marine insurance business is mainly carried out through insurance brokers. The role of the broker is very critical because the broker is the one in contact with the assured and negotiates the terms for the open cover policy with the insurance company on behalf of the assured.⁵⁴ One claims officer notes that most assureds think the brokers are the underwriters.⁵⁵ Once declaration of shipments are made to the broker by the assured, the broker may choose to hold on to the declaration until the arrival of the shipment at the final warehouse. Selective declaration of the shipments is mainly done by the brokers who appropriate the premium without the knowledge of

⁵² Tee was of the view that brokers are not keen and serious when it comes to declarations. one reinsurance manager for over six years in one of the insurance companies noted that the brokers should obtain the cover notes from the insurers after which they should raise their own risk notes. Phone interview on 19 October 2014

⁵³Bree is a reinsurance manager for over six years in one of the insurance companies noted that the brokers should obtain the cover notes from the insurers after which they should raise their own risk notes. Phone interview on 19 October 2014

⁵⁴ Jay argues that clients are ignorant and the brokers take advantage of this fact and thereby control the whole process in their own terms. Interview with Jay a Branch manager for over fifteen years in one of the insurance companies in Kenya 17 October 2014 Nairobi

⁵⁵ Interview with Bree a claims officer for over 10 years in one of the insurance companies in Kenya 18 October 2014 Nairobi

the insurers and the assured.⁵⁶ The involvement of the broker has been a hindrance in the practice of the marine business and more so marine open cover policies. In addition the broker may obtain more than one open cover policy on behalf of the assured with different insurance companies. This makes it very difficult for an insurer to audit assureds' records of shipments in line with the law.⁵⁷

2.4 Conclusion

Marine insurance is a specialized class of business. The insurance companies in the industry lack the technical skills to adequately handle this class of business. The brokers and assureds have taken advantage of this inadequacy to their benefit as they are rarely challenged even when the abuse of open covers is evident. The practice of the open cover policies should be in tandem with the legislative framework to facilitate the growth of the marine cargo insurance business and to serve the industry effectively and efficiently. There should be collaboration between the KRA and IRA in recognition of the insurance certificates issued under open cover policies by underwriters as the only proof of insurance. This will eliminate the use of brokers risk notes and ensure immediate declaration before the loss of the shipment or the arrival of the vessel. Further, the underwriters will have the opportunity to make reinsurance arrangements for particular risks before the loss and at the same time collect adequate premiums to pay the claims. Kenya is a growing marine market and the law should be amended to bring it in line with the practice of open cover policies. A lot needs to be done to rectify the current problem. This chapter as it can be seen has shown that there is some deviation in practice from the legislative requirement. The

⁵⁶ Mawi further points out that in some instances, the brokers even collude with clients and then they share the premium received.

⁵⁷ The research findings indicated that most of the insurance companies were of the view that there should be a centralized data system and an information sharing system for all the insurers so as to monitor and avoid the practice of the assured taking an open cover policy with more than one insurance company.

practice with regard to the use of open cover policies is not in line with the legislative requirement more so that of making timely, consistent declarations and in order of shipment. The challenge can be said to be on the insurers who lack the proper mechanisms to monitor the brokers and the assureds on declarations made. Most insurance companies interviewed herein cried foul blaming the insurance brokers who do not adhere to the requirements of the law.

CHAPTER THREE

A Case Study of Selected Jurisdiction with Regard to the Practice of Marine Open Cover Policies

3.0 Introduction

This chapter is a selected case study of different legislation of marine insurance and in particular marine open cover policies. All civil law countries seem to have some sort of public legislation concerning insurance contracts, either incorporated in a more general commercial (code) act or as a specific act for insurance contracts, however, the legislation is either directory for marine insurance in general or directory as a starting point with a few exceptions.⁵⁸ This study presents the different marine open cover systems of the chosen countries and briefly discusses the outstanding features of the respective marine open cover systems.

In marine open cover policies, declaration of shipments is an essential part of the contractual machinery since it informs the underwriter of what risks have attached to the cover and enables the underwriter to calculate the necessary and collect premium due. The importance of declarations cannot therefore be underestimated as they enable the insurer to get the necessary information of the quantity and the insurable value of the shipments, determine the premium as well as to ascertain the risks undertaken in order to decide in time whether reinsurance is

⁵⁸The CMI also noted that throughout the 19th century, marine insurance law was practiced under the influence of the 1906 UK Act and further that, regional initiatives such as those in Scandinavia have made their mark in seeking both certainty and reform. The CMI further points out that for many countries that inherited the 1906 Act directly or indirectly, marine insurance law has remained static and relatively stable, and that stability has been reflected in the comparative paucity of reported marine insurance cases in most maritime jurisdictions. Comite Maritime International, 'CMI Yearbook 2000: Marine Insurance' Available at <<http://www.web.uct.ac.za/depts/ship/law/fultext/singapore.pdf>> (accessed 13 September 2014)

necessary. In addition, declarations may affect recovery prospects for cargo that may be lost or damaged in course of transit. This chapter reviews the legislative framework and the practice of marine open cover policies in the United Kingdom, China and Sweden, a Scandinavian nation. The study of the United Kingdom is influenced by the fact that the UK has for a long time developed and specialized in its practice of marine insurance, moreover, most common wealth countries' Marine Insurance Acts have borrowed heavily from the Marine Insurance Act 1906 of the UK. The choice of China and the Sweden was motivated by the fact that the two have adopted marine insurance legislation and practice that is slightly different from that of the UK and various common wealth countries. Insurance regulation in Sweden originates from the common Nordic insurance contracts Act, which is also in force in Denmark.⁵⁹ This chapter examines the legislative framework and practice with the aim of identifying the best practice that Kenya can borrow from. The key issues to be examined in this chapter specifically are:

- Time for making declarations
- Rectification of the declarations
- Role of the insurance brokers in regard to marine open cover policies

⁵⁹ Johan Erauw, Vesna Tomljenovic and Paul Volken (eds), *Liber Memorialis Petur Sarcevic: Universalism, Tradition and the Individual* (European Law Publishers, 2006) it has also been pointed out that in the scandinavian countries, the conditions of marine insurance have traditionally been incorporated into an extensive private codification. See Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contracts: A Comparative Approach* (Springer, Berlin, 2007)

3.1 Marine insurance practice in regard to the use of open cover policy in the United Kingdom

The London market and United Kingdom have been the leading influence in the global marine insurance market.⁶⁰ The origins of marine insurance can be traced to the mercantile practices in London during the sixteenth century; it is not surprising that the development of marine insurance as a business took place in London so that, by the middle of the 17th century, many financiers were specializing in the underwriting of marine adventures. In London, the insurer and broker prefer valued policies for marine insurance because the value is conclusive and makes for simplicity in the operation of the settlement of claims.⁶¹

3.1.1 Sources of marine insurance law in the UK

The Marine Insurance Act of 1906 remains the main source of marine insurance law. Howard points out that the first key feature of the 1906 Act is its nature as a codifying Act as it represents the final flowering of the Victorian movement for the codification of English law.⁶²

On making Declarations

The MIA 1906 of the UK makes no reference to declarations under marine open cover policies and there is assumption to be equally applied to both floating policies and open cover policies. The assured under a cargo open cover policy will receive a supply of insurance certificates, in which he must insert details of the particular shipments; one certificate will be issued in respect

⁶⁰ Australian Law Reform Commission, 'Review of the Marine Insurance Act 1909.' Available at <<http://www.airc.gov.au/sites/default/files/pdfs/publications/airc91.pdf>> (accessed 30 August 2014)

⁶¹ Robert H. Brown, *Marine Insurance- The Principles* (Witherby and Co Ltd, 1968)

⁶² Howard Bennett, 'The Marine Insurance Act: Reflections on a Centenary' 18 (2006) Singapore Academy of Law Journal Available at <<http://www.sal.org.sg/digitalibrary/Lists/SAL%20Journals/Attachments/409/2006-18-SAcLJ-669-Bennett.pdf>> (accessed 12 September 2014) pg 2

of each risk to be declared under the open cover. A declaration under an open cover policy is usually made by the assured sending a copy of the insurance certificate to the insurers (either directly or via his brokers) for administrative convenience; provision is often made for declarations to be made periodically. The copy of certificates would usually be accompanied by a schedule, setting out the relevant details of shipments made in the particular period. An open cover is negotiated as a long-term insurance. It may be for a specified period but, more usually, remains open indefinitely and has no renewal date; it can only be terminated by one party serving notice of cancellation.⁶³

Section 29 of the MIA 1906 provides that:

- (1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship and other particulars to be defined by subsequent declarations.*
- (2) The subsequent declaration or declarations may be made by endorsement on the policy or in other customary manner*

Firstly, the above provision does not provide for the point of time the assured is required to make declaration. It can therefore be assumed that there is an implied obligation to make declaration within reasonable time. It is only when the declaration is made too late or goes beyond the extent of reasonableness that such a declaration may be regarded as not having been made in good faith and rejected by the insurer. Secondly, the provision does not specifically state what is supposed to be mentioned and only leaves it at the name of the ship and provides for other particulars to be made in subsequent declarations.

⁶³ Lord Justice Mance, Iain Goldrein and Robert Merkin (eds) *Insurance Disputes*, 2nd Edition (Informa Publishing Ltd, London, Hong Kong, 2003)

On rectification of declarations

The MIA 1906 of the UK at Section 29 (3) provides that:

Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy and the value of the goods or other property must be honestly stated but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

This provision is to the effect that in the event of inconsistency with the order of shipments, the assured is allowed to rectify the declarations and make them correspond with the actual order of shipment. The Act provides that the assured may rectify the failure to declare even after loss or the expiry of the insured adventure.⁶⁴ In principle therefore, rectification affords the assured the benefit of full cover for the risks as they should have been declared. In case of high valued shipments, declaration after the loss by the assured may have significant consequences where the insurer may suffer loss for failing to arrange for reinsurance for that shipment and bears the full loss on its own account.

On the role of the brokers in effecting marine open cover policies

A broker administering open cover policies has the responsibility to make declarations on receipt of information from the policyholder. In the UK, the nature of the notification obligation depends upon the form of the policy. If the policy is obligatory for both parties, the risk will attach as soon as it is accepted by the policyholder, and any notification provision is for information only, this may take the form of informing the underwriters at agreed intervals of the new risks

⁶⁴ MIA 1906, s 29(3), *Stephens V. Australasian Insurance Co* (1872) LR 8 CP 18

accepted by the assured or reinsured and declared to the policy. On the other hand, if the policy is non-obligatory from the point of view of the assured or reinsured, then the making of declaration is essential to secure the attachment of the risk. Additionally, if the policy is non-obligatory from the point of view of both parties, then the submission of a notification will be fatal in the first case if the information provision is a condition precedent to the attachment of liability.⁶⁵ What the above denotes is that the insurance broker acts as the intermediary between the insurer and the assured and once any shipment has been dispatched, the insured notifies the broker who in turn, depending on the type of open cover policy, notifies the insurer through the making of declarations. In this regard, the type of open cover policy dictates whether it is necessary for the broker to make a declaration under it.

3.2 Marine insurance practice with regard to open cover policies in China

3.2.1 Source of marine insurance law in China

Chinese national rules on marine insurance are contained in the Maritime Code of People's Republic of China (MC).⁶⁶ Since 1980, China has endeavored to enact a comprehensive insurance law to regulate insurance activities with the development of insurance market. In October 1995, the insurance law was enacted. It is the first national legislation to address insurance matters comprehensively.⁶⁷ In the context of marine insurance, there is no separate

⁶⁵ *ibid* 9

⁶⁶ It is titled as XII "Contract of Marine Insurance" See <<http://www.fortunes-demer.com/documents%20pdp/legislation/Etrangere/Chinese%20Contract%20of%20Marine%20Insurance.pdf>> (accessed 22 August 2014)

⁶⁷ The Insurance Law of 1995 was the first national legislation that provided a framework for understanding China's insurance regulation. See Kuan-chun Chang, 'Commentaries on the Recent Amendment of the Insurance Law of the People's Republic of China Regarding Insurance Contracts from the Perspective of Comparative Law,' Asian Law Institute, Working Paper, Series No. 011. Available at <<http://www.law.nus.edu.sg/asli/pdf/WPS011.pdf>> (accessed 14 September 2014)

legislation and only a few provisions relating to marine insurance are laid down in Chapter 12 of the Maritime Code of the People's Republic of China. Further, the laws made by the Chinese legislature relating to the maritime or admiralty area mainly include, Maritime Code of the People's Republic of China, General principles of the civil law of the People's Republic of China.⁶⁸ China formally joined the WTO in 2001 and started opening the market for life insurance, non-life insurance, reinsurance and insurance brokerage. The Chinese insurance market became part of the world insurance market and there were international players that entered the market. Additionally, Chinese Insurance regulations are evolving and China is opening up to more foreign businesses and investors.⁶⁹ It is worth noting that, The People's Republic of China (mainland only, not including Hong Kong, Macau and Taiwan) bears material differences from those countries imbued with common law principles. A major difference between the Chinese legal system and the common law system is that precedents are not binding, although the interpretation of law by the Supreme Court of China is an important influence and source. Another unique characteristic of the Chinese legal system is that the law emphasizes 'substantive justice' over 'procedural fairness.'⁷⁰ Various scholars have pointed out that in 2001, after China joined the World Trade Organization, the insurance strategy was changed from "quantitative expansion, extensive operation" to "quality and quantity, intensive operation." In

⁶⁸ Juntan Huang, 'Approaches to Marine Insurable Interest' Available at <<http://www.qr.jur.lu.se/quickplace/jasm01/Main.nsf/0/B144DE59F22AEDAAC1257B0034E071/file/Approaches%20to%20marine%20insurable%20interest%203rd,%20Juntan%20Huang.pdf>> (accessed 9 September 2014) pg 32

⁶⁹ Ming Wang, Jerome Yen and Kin Keung Lai, *China's Financial Markets: Issues and opportunities* (Routledge, New York, 2014) pg 103

⁷⁰ Wei Song, 'The Extent of the Insured's Duty of Disclosure: A Comparative analysis of the Disclosure Obligations of Insured in Australia, Singapore and China' Queensland University of Technology Available at <<http://www.eprints.qut.edu.au/54638/>> (accessed 8 September 2014) pg 73

January 2003, the new insurance law was promulgated and it reflected three features: deregulation, strengthening supervision, and establishing the credit of insurance companies.⁷¹

Article 153 of the Chinese Insurance Law provides that the Maritime Code of the People's Republic of China shall be applicable to marine insurance and for matters where the Maritime Code does not specify, the Chinese Insurance law shall apply.

3.2.2 Chinese law on Open Cover policies

Article 231 of the Maritime Code provides that:

“The insured may conclude an open cover with the insurer for the goods to be shipped or received in batches within a given period. The open cover shall be evidenced by an open policy to be issued by the insurer.”

On making declarations

Article 233 of the Chinese Maritime Code provides that:

“The insured shall notify the insurer immediately on learning that the cargo insured under the open cover has been shipped or has arrived. The items to be notified of shall include the name of the ship, the voyage, the value of the cargo and the insured amount.”

In this regard, there is an obligation on insured to make declarations immediately upon learning that the cargo insured under the open cover has been shipped or has arrived. Furthermore, it is worth noting that the Chinese Maritime Code specifies items to be notified to include; the name of the ship, the value of the cargo and the insured amount. These must be provided in one

⁷¹ Cecelia Kempler, Michel Flamee, Charles Yang and Paul Windels (eds) *Global Perspectives on Insurance Today: A Look at National Interest Versus Globalization* (Palgrave Macmillan, 2010)

particular declaration as stipulated. It therefore means that if no declaration is made, then there is no cover for that specific shipment that was omitted or erroneously declared.

On rectifications of declarations

The Chinese Maritime Code and insurance law in general does not recognize the practice of making rectifications on declarations once made. The Chinese laws are silent in this regard and so it can be implied that the laws do not provide for such rectifications.

On the role of the brokers in the effecting marine open cover policy

Article 126 of the Chinese Insurance Law defines a broker as an entity that, in the interest of the applicant, provides intermediary services between the applicant and the insurer for the conclusion of an insurance contract and receives commission thereof in accordance with the law.

Under the Chinese system, marine insurance business is not mainly broker driven as compared to the practice in other jurisdictions. In regard to open cover policy, the brokers play limited roles and the insurers mainly oversee the whole process. The nature of the arrangement is that which makes the insurer control the whole open cover process thereby limiting the role of brokers.

3.3 Marine insurance with regard to open cover policies in Sweden

Sweden

Swedish laws on Marine Insurance, in principle; are covered by the relevant insurance Acts but allow contracting out, additionally, in practice marine insurance is governed by special marine insurance plans.⁷²

3.3.1 Marine insurance practice with regard to open cover policies in Sweden

Insurance is generally governed by the Insurance Act of 2006. Marine insurance is governed by The Swedish Marine Insurance Plan of 2006.⁷³ There is no direct provision with regard to open covers in this legislation. An inference may however be made by a plain reading Clauses of the Plan that deal with indemnity.

On making declarations

In Sweden, the Insurance Plan does not make a direct reference to open cover policies and declarations therein. This may however be inferred from certain clauses. For instance,

Clause 12.1 is to the effect that: *when a loss has occurred or may be expected to occur, the insured shall, as soon as possible but not later than six months after he became aware of his right to claim against the insurer, give written notice of the loss to the insurer. If notification is given later, the insurer is under no obligation to indemnify the loss.*

⁷² Hugh Beale and HazraKhanom, 'What is Scandinavian Law? English Lawyers Look at Swedish and Norwegian Insurance Law' Available at <<http://www.scandinavianlaw.se/pdf/50-4.pdf>> (accessed 10 September 2014)

⁷³ 'General Swedish Marine Insurance Plan of 1 January 2006' Available at <<http://www.svenskforsakring.se/Statistics/SjoassVillkor/SPL-English/SPL-English.pdf>> (accessed 1 September 2014) it is argued that although there are many similarities between English and Swedish marine insurance laws, there are also great differences between these legal systems

Clause 12.2 further provides that: *unless otherwise prescribed by the insurance contract or unless the insurer otherwise gives notice in conjunction with the notice of the occurrence of the loss, it is an obligation of the insured to document the loss with the purpose of determining its cause and loss.*

Clause 13.1 provides that: *when the insured wishes to claim insurance indemnity he shall, without unreasonable delay, give written notice of his claim to the insurer. In conjunction with this, the insured shall show that a loss has actually occurred and also prove the amount of the claim.*

It is an obligation of the insured to assist the insurer with all necessary documentation, witness details, other evidential material and such information of which the insured is aware and the insurer needs for the adjustment of the claim and recourse.

If the insured delays with presenting a claim, the claim may be time barred and the right to indemnity may lapse.

Clause 13.7 further places a limit on the making of claims. It is to the effect that:

Any person who wishes to make a claim for insurance indemnity or premium return, will lose his rights in relation to the insurer unless he makes a claim against the insurer through arbitration proceedings according to Clause 16 within three years from when he learned that the claim could be made and, in any event, within ten years from when the claim could at the earliest have been made. if he has presented a claim to the insurer within this period, the time limit according to the first sentence is six months from when the insurer has declared that it has adopted a final position on the claim.

The above provisions denote that upon the occurrence of any loss with regard to any cover taken, the insured is under an obligation to notify the insurer of the same within a reasonable time which is not later than six months and further document the same, this documentation is aimed at providing assistance to the insurers in regard to details for indemnification purposes and any adjustments and investigations of the loss.

On rectification of declarations

Under the Sweden legislation, there is no provision in regard to making rectifications on any claims that have been made after loss has occurred. The law only provides for the making of declarations at an early stage when entering into an insurance contract.

Clause 4.3 provides:

“If the policyholder realizes that the insurer has received information that is erroneous or incomplete and of importance for the assessment of risk, he shall rectify the information without unreasonable delay.”

This is to the effect that the law allows for rectification of information that was earlier on given in respect of entering and making the insurance contract.

On the role of brokers in marine open cover policy

In Sweden, the use of intermediaries is still quite rare meaning that most of the business is made directly between the insurer and the insured, within arm's length.⁷⁴ Moral hazards are prominent both in cargo and hull insurance since a marine underwriter often depends on the statements of both cargo and ship owners in regard to the condition of the insured property, furthermore, in

⁷⁴ Christian Carl, 'Warranties in Marine Insurance: An Unpleasant Necessity? 2010 Available at <<http://www.diva-portal.org/smash/get/diva2i290549/FULLTEXT01.pdf>> (accessed 23 October 2014)

respect of cargo, the underwriter must rely almost entirely on the integrity of the insured and on the willingness to bring forth unusual circumstances connected with the insured shipment since he normally cannot directly investigate the cargo.⁷⁵ To this end therefore, it can be said that the effecting and use of open cover policies in Sweden does not place much reliance on the services of the brokers.

3.4 Conclusion

It is difficult to overestimate the influence of the Marine Insurance Act 1906 of the UK; many of those countries that did not actually use it as a model for their own statutes have adopted the Standard Institute Clauses which are subtitled as being “subject to English law and practice”.⁷⁶ The Marine Insurance Act of 1906 is not nearly as comprehensive in its scope as most continental codes and, in the opinion of many of those well qualified to judge, a number of its provisions are stated in terms that leave many issues open to argument.⁷⁷ It is my view that the area of marine open cover policies is one of such. Kenya can borrow from the Chinese or Sweden for instance, in adopting a strict policy towards declarations and rectifications with regard to open cover policies. The Maritime Code of Chinese law under Article 233 obligates the insured to notify the insurer immediately on learning that the cargo under the open cover policy has been shipped or has arrived. The aspect of immediate notification is quite different from that of the Kenyan and British system. In Kenya the notification is left at the discretion of the insured thereby allowing him/her to make it within any reasonable time at his/her convenience. In the

⁷⁵ Gustav Jakob Petersson, ‘Swedish Marine Insurance between the World Wars’ Occasional Papers in Economic History, No 16/2010 Available at <http://www.diva-portal.org/smash/get/diva2:390994/FULLTEXT01.pdf> (accessed 22 October 2014)

⁷⁶ Richard Cornah, ‘The Marine Insurance Act Centenary A Cause for Celebration?’ Available at http://www.seatransport.org/seaview_doc/sv_78/the%20Marine%20Insurance%20Act%20A%20Cause%20for%20Celebration.doc (accessed 16 September 2014)

⁷⁷ Barrie Jervis, *Reeds Marine Insurance* (Adlard Coles Nautical Publishers, London, 2005) pg 16

UK however, it depends with the type of open cover policy. Notably, the Chinese and the Scandinavian legal systems, Sweden in particular, do not place much reliance on the services of insurance intermediaries such as brokers. This may perhaps be argued to be as a result of the strictness of the legislation governing open cover policies that gives the insurers an upper hand and more control over the whole open cover policy system. Kenya can perhaps borrow from the United Kingdom on the aspect of having various types of open cover policies which specify on whether and when declarations are necessary. This will enable the insurers to know which open cover policies to effect at any given time. Another aspect that Kenya can borrow especially from Sweden is that of having a strict time limitation for making claims. This will facilitate the making of declarations under the open cover policies quite on time and as one author puts it “An open cover is not a policy but an agreement binding in honour and thus, the insurer would insure all shipments and the insured will similarly be bound to declare each shipment.”⁷⁸

⁷⁸ M Gupta ‘Basics of Marine Insurance’ Available at <http://www.slideshare.net/smgupta1947/marine-insurance?next_slideshow=2> (accessed 24 October 2014)

CHAPTER FOUR

FIELD DATA ANALYSIS

4.0 Introduction

This chapter offers an analysis⁷⁹ of the field data. One of the methodologies adopted was primary data collection through interviews.⁸⁰ The technique employed was the target respondent interview where the author targeted experienced marine underwriters in the insurance industry. This was due to the nature of marine insurance which is a specialized class and not all the insurance companies underwrite marine insurance business. In addition, not all the professional insurance underwriters are conversant with marine insurance and in particular the operation of marine open cover policies. The interviews were conducted through face to face interaction with the respondents and through telephone calls. This methodology was advantageous as the author targeted persons that she knew had the required knowledge, experience and were conversant with the operation of the open cover policies and therefore was able to get accurate and reliable information from the insurance industry. The snowball technique was also employed in getting respondents to be interviewed. This was by asking a contact person in the main marine insurance company to refer the author to the other specific marine underwriters to interview the underwriting managers for purposes of obtaining accurate information. The methodology also

⁷⁹Russel points out that an important part of all analysis, qualitative and quantitative, is the production of visual displays, laying out your data in table or matrix form. See Russell Benard, *Social Research Methods: Qualitative and Quantitative Approaches* (Sage Publications, 2000) pg 423

⁸⁰One author notes that interviews allow researchers to find out about people's ideas, their thoughts, their opinions, their attitudes, and what motivates them. Interviews complement observations. Observations give us a sense of context but not an understanding of how people think and feel. The biggest advantage of interviews is the ability to record them for later analysis. See Shay Sayre, *Qualitative Methods for Market Place Research* (International Educational and Professional Publisher, Thousand Oaks, 2001) pg 134

came in handy as it provided the author with the opportunity to get more respondents especially those engaged in marine insurance business. Additionally, the telephone interviews used were cheaper and easier to administer. The target population of this study comprised of persons engaged in underwriting, claims handling and reinsurance of marine insurance business who are conversant with the operation of the marine open cover policies in the insurance industry in Kenya. Out of the 48 Companies that are licensed to carry out insurance business in Kenya, only 33 carry out marine insurance business.⁸¹ The author was able to interview representatives from ten insurance companies conducting marine insurance business. The criterion employed in choosing the ten companies to be interviewed was by way of looking for those companies that had more than 10% of their gross written premium from marine business.⁸² Non-probability sampling method was employed by the author in selecting a sample that was a representative of the insurance industry because the focus of the study on the operation of marine open cover policies required an in depth information. Purposive sampling technique came in handy as it allowed the author to use respondents that had the required information with respect to the practice of open cover policies in the industry and therefore the respondents were handpicked because they were informative and possessed the knowledge and experience in the operation of marine open cover policies. The Snowball sampling technique was also employed whereby the initial respondents with the knowledge and experience in marine open cover policies identified using purposeful sampling technique, named others that they knew have similar knowledge and experience in the insurance industry until the author got the number of respondents interviewed. It is worth noting that, empirically supported generalizations are usually based on partial information because it is often impossible, impractical, or extremely expensive to collect data

⁸¹ Association of Kenya Insurers, *Insurance Industry Annual Report 2013*, Published (at hand with the author)

⁸² *Ibid*

from all the potential units of analysis covered by the research problem and further, researchers can draw precise inferences on all the units (a set) based on a relatively small number of units (a subset) when the subsets accurately represent the relevant attributes of the whole set.⁸³

It suffices to note that however the sample size used in this research may not offer the true features and findings that is representative of the whole marine insurance business in Kenya. As it has been noted the danger with small samples is that they do not reproduce the salient characteristics of the accessible population to an acceptable degree.⁸⁴ Demographic outlooks of this study were based on the position of respondents in their respective organizations, the number of years of experience and the frequency of effecting marine open cover policies. This was important as it adds value and authenticity of the findings.

4.1 Findings

The research mainly sought to prove the assumptions of this study. The main questions were on the effectiveness of the current legislative framework in the practice of open cover policies, whether there is need for amendments and the effects of the brokers' involvement in the operation of marine open cover policies among others. The respondents interviewed were picked from different insurance companies and job positions with different years of work experience in handling marine open cover policies. 50% of the respondents admitted to have been involved in the practice of open cover policies for more than ten years and therefore accurate and reliable. Their views were however supplemented by those of the other remaining respondents whose experience is not as vast.

⁸³Chava Frankfurt and David Nachmias, *Research Methods in the Social Sciences*, 5th Edition (St Martin's Press, London, 1996) pg 179

⁸⁴ Olive Mugenda and Abel Mugenda, *Research Methods: Quantitative and Qualitative Approaches* (African Centre for Technology Studies Press, Kenya 1999) pg 42

4.1.1 Demographic findings

The table below represents the percentage in the frequency of issuance of open cover policies, job positions of the respondents, the number of years they have worked, and the amount of marine business in relation to gross written premium. The aim of getting the information with regard to the job position and the number of years of work experience was to analyse the suitability of the respondents on the ground that they are well conversant with the practice of open cover policies. The aim of getting information in regard to the frequency of issuance of open cover policies and amount of marine business in relation to gross written premium was to analyse the frequency of use of marine open cover policies in Kenya and the frequency of underwriting marine insurance business.

Table A

Frequency of issue of open cover policies (in percentage)	Job position of respondent	Number of years of work experience in that position	Amount of marine business in relation to gross written premium (in percentage)
Above 50	Claims Officer	Over 10 years	Over 30
Above 50	Underwriting Officer	3 years	Over 30
Above 50	Branch Manager	Over 15 years	10 – 30

Above 50	Claims Manager	10 years	Over 10
Above 50	Marine	18 years	Over 30
30 – 40	Reinsurance Manager	Over 6 years	30 -40
Above 50	Underwriting Officer	5 years	10 -30
Above 50	Underwriting and Reinsurance Manager	Over 10 years	10 – 30
Above 50	Risk Surveyor – Marine	Over 5 years	Over 30
Above 50	Underwriting Manager	Over 10 years	10 -30

Table A above shows the demographic findings with regard to the respondents interviewed. Their vast experience in the marine insurance business and their job positions make the information solicited greatly credible and reliable. The findings also confirm the frequency in percentage of the quantity of marine business that is transacted through marine open cover policies in the insurance industry in Kenya. The table shows the amount of marine business effected through open cover policies is more than the business effected on single or voyage policies.

The respondents interviewed admitted that they always issue marine open cover policies at more than fifty percent and further confirmed that marine insurance business is mainly transacted through marine open cover policies. Interestingly however, the respondents noted that marine written premium has continued to remain low recording small growth annually and much of the gross written premium is generated from other classes of business. The table also shows that all the representative companies underwrite not more than thirty percent of their gross written premium. This was attributed to low penetration levels of insurance products in the country and the malpractices affecting marine insurance and in particular open cover policies.

4.1.2 Making of declarations

The Marine Insurance Act of Kenya obligates the insured to make declarations under open cover policies in order of shipment in a timely manner without any delays. The insured is required to notify the insurer once any shipment has been effected. To this end, this research sought to examine whether clients make declarations under the open cover policies in order of shipments timely and effectively as required of them under the Marine Insurance Act of Kenya. The

assumption of the study was that the practice of making such declarations was not in line with the requirements under the Marine Insurance Act of Kenya.

Table B

Response	Frequency	Percentage
Yes	3	30
No	5	50
Not consistent	2	20
Total	10	100

The above table shows that about 30% of the companies interviewed receive declarations under open cover policies timely and effectively in order of shipments as required by law. These were respondents in companies which underwrite small volume of marine business and are able to monitor all marine transactions in their respective organizations. 50% on the other hand admitted to not receiving declarations timely and effectively from their clients whom they have issued open cover policies. These are companies with big marine portfolio through big insurance brokers whom they have business arrangements mainly affecting declarations. 20% of the interviewed respondents admitted to there being no consistency with regard to the declarations being made by their clients. These respondents attributed it to a business mix of small and big intermediaries but blamed inconsistency in declarations on the big brokers.

4.1.3 Involvement of insurance brokers

As was discussed elsewhere in this study, the practice in regard to the effecting of marine open cover policy in Kenya is mostly broker driven. The brokers influence the whole process from the initiating of the marine insurance contract to the making of declarations under the open cover policies. The research thereby sought to examine the implications of broker involvement in marine insurance and specifically, whether broker involvement in effecting of marine open cover policies undermines the practice of marine open cover policies.

Table C

Response	Frequency	Percentage
Yes	9	90
No	0	0
Did not know	1	10
Total	10	100

The above table indicates that an overwhelming number of the respondents admitted that the insurance brokers' involvement in effecting marine open cover policies has undermined the practice of marine open cover policies. Some of the arguments put forward include; that the brokers may withhold declarations until such a time after the loss or the arrival of shipment, that brokers are not serious and keen on declarations and their main concern is in collection of

premium, that most brokers lack marine technical skills and knowledge, that the broker involvement normally prolong the time taken for insurer to receive declarations, that the brokers intentionally interfere with the declaration process in order to withhold the premium collected from the clients, that the brokers lack knowledge in understanding the essence of declarations and the consequences thereof, that the big brokers arm twist the insurers by dictating terms of business including when to make declarations, some brokers make declarations in volumes where a broker holds declarations for various clients for a period of one month and then makes the declaration at the end of the month, in this regard the late declarations are mixed with current declarations, that the brokers are in direct contact with the clients and understand the operations of the clients so they decide what to declare, that the market is very competitive and the insurers are at the mercy of the big brokers, that the big brokers are issued with booklets of cover notes with serial numbers which they should issue to the clients and declare back to the insurers serially which they do not do and lastly in some instances the brokers collude with client not to declare certain shipments and then they share the premium. All the respondents interviewed confirmed that they carry out marine business through the brokers. The above findings points to the conclusion that marine insurance is broker driven and that the brokers are really important especially with regard to the practice of open cover policies but at the same time their efficiency, effectiveness and utmost good faith is not guaranteed.

4.1.4 Effectiveness of the current legislative framework

This study is premised on the assumption that the current legislation governing open cover policies is not serving the industry well as the practice is not in line with the legislative requirement. The research therefore sought to get the views of the key players on the

effectiveness of the legislative framework and its efficiency. The table below denotes the findings in that regard.

Table D

Response	Frequency	Percentage
Yes	0	0
No	7	70
In between	3	30
Total	10	100

The above table shows that 70% of the respondents were of the view that the current legislative framework does not serve the industry effectively and efficiently in the operation of the marine open cover policies. Some of the reasons given included; that the law does not specifically provide for immediate declaration and so the insured think they can declare at any time. That the law does not specifically mention open cover policies and should do so since this is what is practiced in the industry. That the law is not water tight with regard to declarations, that the law is unfair as it provides for a loophole where late declarations are made after the loss or arrival of the vessel. It was also argued that there is a vacuum in that it is difficult to determine what was done in good faith especially with the rectification of erroneous or omission in declarations. Some were of the view that the current law is not strict as to obligate the making of immediate

declarations for it has left an opening for declarations to be made after knowledge of loss. Additionally, that the law has left the mode of declaration open to abuse as some people do not make declarations intentionally. 30% on the other hand were however of the opinion that the law is half effective and half ineffective. Some argued that some clients may have genuine omissions but others are intentionally abusing the process of declarations with regard to open cover policies. Some were of the view that the law is just effective in that their clients make declarations in line with the provisions of the law.

4.1.5 Need for amending the current existing laws

Based on the assumption that the current legislative framework is not efficient, the research also sought to examine whether there is any need for making changes to the current existing laws in regard to open cover policies. To this end, it was important to get the varied opinion from the key players more so those engaged in the practice of effecting open cover policies. The research therefore sought to specifically investigate on whether there is need for amendments to the current legislative framework regarding marine open cover policies. The results are tabulated below.

Table E

Response	Frequency	Percentage
Yes	10	100
No	0	0

Did not know	0	0
Total	10	100

The above table shows the fact that an overwhelming number of the respondents interviewed are dissatisfied with the current legislative framework governing marine open cover policies. Some of the reasons put forward include; that the law as it is does not provide for compulsory declarations and so the requirement of 'good faith' is being misused more so by brokers. That the law is not strict as to bar the making of declarations after the happening of an incident giving rise to a loss, that the law does not bar the payment of claims in respect of undeclared shipments. The law governing marine open cover policies is not like the one governing motor vehicle insurance where there must be cover before the claim is lodged. That the law does not provide for a specific time as to when declarations should be made. That the law as it is does not mandate the insurers to inspect the clients books of records of shipments. The law does not hold the broker responsible in declarations considering the nature of business and that the law does not place a time frame for making declarations.

4.1.6 Other Relevant findings

The respondents interviewed gave propositions as to what they feel should be done in an attempt to improve the use and operation of marine open cover policies. The propositions advanced included an amendment to the law so as to provide for immediate declarations. An amendment to the law so as to give reference to open cover policies instead of floating policies in order to conform to the practice. An amendment to bar late declarations. An amendment to provide that

an assured can only operate one open cover policy in the industry at any given time. An amendment so as to allow for sharing of information amongst the players in order to capture data in regard to the assureds who abuse open cover policies. A requirement for brokers to have the necessary skills in marine insurance in order to serve the industry effectively in the open cover policies. A penalty for assureds with more than one open cover. The insurers should adopt a general practice with regard to late declarations of shipments in self-regulation, that the issuing of open cover policies should only be limited to clients with huge shipments and a minimum number of shipments to be set per month. The insurance industry to lobby the Kenya Revenue Authority not to recognize broker's risk notes as evidence of cover. Sharing of information by the insurance companies so as to black list clients who abuse the use of the open cover policies and that the brokers should always be held liable for non-declaration of shipments in order to discourage the habit of making selective declarations. In addition to the above, one company specifically lamented that the insurance companies are slaves to the brokers and that there is no unity amongst the underwriters for everyone is only concentrating on cut throat competition and making profits.

4.2 Conclusion

Among the objectives of this study was to establish whether there is variance between the legislative framework and the practice governing marine open cover policies in Kenya. These findings confirm my hypothesis that the practice governing marine open cover policies is in variance with the legislative framework and this therefore implies that something needs to be done. Additionally, these findings answer the research question on whether the practice of open cover policies is aligned to the current legislative framework and whether the current state of affairs serves the industry efficiently and effectively. As the above findings show, most of the

insurance companies interviewed are dissatisfied and they see the need for urgent amendments. Most of them admit to the importance of insurance brokers in the marine insurance business especially with regard to the use and operation of open cover policies but at the same time concede that these brokers are a hindrance particularly with regard to making of declarations honestly and timely and that they should be held responsible for their actions. All in all, the findings of this study have proved the hypotheses of the study and confirm that indeed some legislative measures among other changes need to be put in place in order to improve the practice of marine open cover policies in Kenya.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMEDATIONS

5.0 Summary of Findings

The main objective of this study was to examine the legal framework governing open cover policies and the practice in Kenya. To establish whether there is variance between the legislative framework and the practice governing marine open cover policies and to make proposals that can be adopted to bring the practice in tandem with the legislative framework on marine open cover policies in Kenya.

This study has shown that:

- The marine open cover policies are of fundamental importance in international trade and majority of marine insurance business in Kenya is placed by way of open cover policies.
- The current marine legislative framework does not serve the insurance industry efficiently and effectively in the practice of marine open cover policies because the legislative requirement of making timely declarations in order of shipments is not followed in practice;
- Marine insurance business is mainly broker driven in Kenya and the Insurance brokers are an impediment in the practice of open cover policies since their involvement has hindered compliance with the legislative requirement in declaration of shipments.
- Most insurance brokers involved in marine insurance business are not well conversant with marine insurance laws.

- Majority of the marine insurance underwriters are dissatisfied with the current legislative framework and that there is a lacuna that needs to be filled so as to bring the practice of marine open cover policies in tandem with the legislative requirement; and
- Most insurance companies admitted that there exists a real problem that the law needs to address by introducing changes in order to promote best practices of marine insurance business especially the operation of open cover policies in Kenya.

5.1 Conclusions

The relationship of marine insurance to overseas trade is intimate and to suggest that overseas trade could not function without it would be an overstatement, but commercial development would be very much hampered in the absence of marine insurance.

Additionally, trade itself has sufficient element of risk to satisfy the desires of the most romantic and adventurous, and it is for this reason that almost universally recourse is had to marine insurance.⁸⁵ As global maritime trade grows and the carriage of goods by sea involves vast distances and long supply chains, the probability of fraud cases to occur rises in tandem and fraudsters have also grown in sophistication and boldness in committing their dirty deed, and have become adept at identifying regulatory loopholes and capitalizing on the 'soft points' in the maritime trade system.⁸⁶ The Kenyan brokers and assureds have taken advantage of the inadequacy of the current legislative framework on open cover policies to their benefit. The current practice adopted especially by brokers has opened gates to possibility of fraud in terms of

⁸⁵ Victor Dover, *A Handbook to Marine Insurance*, 7th Edition (Witherby Ltd, London, 1970) pg 89

⁸⁶ The risk of financial losses from fraud on maritime commerce has also grown in proportion to the growing volume and value of global seaborne trade. See Rakish Suppia and Nazery Khalid, 'Catch Me if You Can' 2009 Available at <<http://www.mima.gov.my/mima/wp-content/uploads/fraud/in/maritime/commerce/29jan09.pdf>> (accessed 14 October 2014) pg 2

making declarations. Fraud increases the cost of insurance, resulting in insurers losing to their competitors, and at the same time, policyholders paying higher premiums, further, organizations are waking up to the fact that frauds are driving up the overall costs of insurers and premium for policyholders, which may threaten their viability and also have a bearing on their profitability.⁸⁷ To this end, it is important to put in measures that will help curb existing and emerging fraudulent activities.

The practice of the open cover policy should be in tandem with the legislative framework so as to facilitate the growth of the marine cargo insurance in the country. Kenya is a growing marine market and the law should be amended to bring it in line with the practice of open cover policies. Insurance penetration remains dismally low in Kenya by international standards, in spite of wealth of insurance packages and agents.⁸⁸ Insurers are, by definition, selective and cannot be expected to insure all risks.⁸⁹ It therefore follows that the government in partnership with various stakeholders in the insurance industry in Kenya should strive to improve the marine insurance business environment. A lot needs to be done to rectify the current problem. This study has shown that there is some deviation in practice from the legislative requirement. It therefore calls for amendments and changes so as to try and cure the lacuna. Another challenge can be said to be that most insurers lack proper mechanisms to monitor any cargo or examine the authenticity of declarations made. In Kenya, most insurance companies place much reliance on insurance brokers and intermediaries. Perhaps Kenya can borrow from the Chinese and the Sweden legal

⁸⁷ Ernst and Young, 'Fraud in Insurance on Rise, Survey report 2010-11' Available at <http://www.ey.com/Publication/vw.LUAssets/Fraud_in_insurance_on_rise/File/Fraud_in_insurance.pdf> (accessed 16 September 2014)

⁸⁸ Tom Jackson, 'The Top 10 Insurance Companies in Kenya' 2012 Available at <<http://www.Ventures-africa.com/2012/08/the-top-10insurance-companies-in-kenya/>> (accessed 10 September 2014)

⁸⁹ Evan Mills, 'A Global Review of Insurance Industry Responses to Climate Change' 34, 323-359 (2009) Geneva Papers Journal. Available at <http://www.palgrave-journals.com/gpp/journal/v34/n3/full/gpp200914a.html>> (accessed 6 October 2014)

systems, which do not place much reliance on the services of insurance intermediaries such as brokers. It may be argued that this stems from the strictness of the legislation governing open cover policies that gives the insurers an upper hand and more control over the whole open cover policy system. Kenya can also borrow from the United Kingdom on the aspect of having various types of open cover policies which specify on whether and when declarations are necessary. An improvement in the legislative framework and practice of effecting marine open cover policies will encourage the growth and penetration of the marine insurance business in the country. Promoting professionalism among the brokers and encouraging cooperation amongst various insurance companies will also be a great step in the improvement of the marine insurance industry. Aligning the Kenyan marine insurance practice with best international practices remains the key solution.

5.2 Recommendations

Legal reforms

The study recommends an amendment to Section 29(3) of the Marine Insurance Act of Kenya 1968. It provides inter alia thus:

“Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment; and must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith”.

The section should be amended to provide for immediate declaration in order of dispatches or shipments honestly by the insured and/or the broker upon the loading of the shipments on the

carrier and not later than seven days. There has been development in communication and technology in the area of internet and courier services and the seven days period is adequate enough for the assured to have received all the details of the carrier including a bill of lading in order to make declaration of the shipments. The carriage of goods by sea take several days from the port of loading to the final port of discharge and the seven days period will afford the assured and or broker sufficient time to make declaration before the arrival of the carrying vessel at the final port of discharge. Such a provision will also ensure that the broker is legally involved in the process of declarations under the open cover policies and can be held responsible for their actions in withholding declarations. However, the seven days period may face the challenge from insurance brokers who may not have sufficient time to process their debit notes and risk notes within the seven days period but this problem can be solved by an understanding between the insurers and the brokers where the assured will declare directly to the insurance company with a copy to the broker and in that way the insurers will have control of declarations.

Another amendment should be to the effect that no claim should be made payable arising from a loss or damage to a shipment that was declared after the loss or the arrival of the vessel at the final port of discharge. Such a provision will seal the loophole of the rectification of omission or erroneous declarations after the loss or the arrival of the shipment. This will also avert selective declaration of shipments by brokers that are subject of casualty or loss. The provision will go a long way to compel the brokers and the insured to make declarations for all the shipments to avoid being prejudiced at the time of a claim. It will also contribute to genuine declarations being made because as it stands now, it is hard for insurance companies to authenticate which rectification is made in good faith. Perhaps in this regard, we can borrow from the Maritime Code of Peoples Republic of China 1992 Article 233 which provides:-

“The insured shall notify the insurer immediately on learning that the cargo insured under the open cover has been shipped or has arrived. The items to be notified of shall include the name of the carrying ship, the voyage, the value of the cargo and the insured amount”.

This provision gives a direct reference to open cover and immediate declaration of shipments. It does not recognize or provide for rectification of declarations.

The role of the courts

The study additionally proposes the proactive involvement of the Kenyan courts more so in the curb and conviction of persons charged with offences in relation to fraud. It is argued that insurance transactions and institutions are often subject to judicial scrutiny and the decisions in these cases frequently have significantly affected the character of insurance transactions and institutions. The influence of the courts on insurance transactions through doctrinal development has sometimes been considerably more significant than the enforcement of regulatory measures by the commissioner of insurance.⁹⁰ In the past the courts have been handling insurance fraud arising from other classes of business such as motor and workmen fraud and experienced difficulties in convictions of persons charged with the fraud due to lack of proper prosecution and involvement of police.⁹¹ Looking at the UK, criminal prosecutions for insurance fraud, however, are relatively rare, so the burden of providing an effective deterrent lies with the civil law.⁹² The courts therefore have a huge task in ensuring growth in the jurisprudence and judicial

⁹⁰ Robert E. Keeton and Alan I Widiss, *Insurance Law, A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (West Publishing Co. Minnesota, 1988) pg 938

⁹¹ Standard Newspaper “Fraudsters milking insurance firms dry” 8 September 2012 Available at www.internewskenya.org/summaries/interviews50694a1ed9df0.pdf Accessed on 25 November 2014

⁹²The UK Law Commission further noted that, the issue of fraud is an element of the law best left to the courts to develop and it does not require statutory reform. See English Law Commission, ‘Law

pronouncements in matters touching on marine insurance open covers and the passing of harsh judgments on persons found guilty of marine insurance fraud. The courts should also pronounce harsh sentences on marine insurance fraudsters so as to deter such acts. This study recommends that the government partners with the judiciary through allocation of funds and the observance of the principle of separation of powers so as to enable it undertake its judicial roles. This will greatly enable the courts to play an active role in the growth and development of marine insurance in Kenya. The proactive involvement of the courts in marine insurance matters may however be seen by some as an over-step of the judicial system in its mandate. This should however be taken care of by the courts only restricting themselves in playing an adjudicatory role in solving marine insurance disputes.

Increasing the capacity of Warranty Surveyors

The study recommends that the government in collaboration with various stakeholders put in measures to increase the capacity of warranty surveyors. A warranty surveyor is sometimes called a “loss prevention engineer.”⁹³ In Kenya, such a function is played by Insurance surveyors.⁹⁴ There are insurance surveyors who have specialized in marine cargo survey and possess the technical skill and knowledge in marine insurance and carriage of goods by sea. In that regard, the government through the IRA should partner with various players in the insurance

Commissions Tackle ‘Confused’ Law on Fraudulent Insurance Claims’ 2010 available at <<http://www.out-law.com/page-11221>> (accessed 12 October 2014)

⁹³ His role is to reduce the possibility of losses to an acceptably low level, by the application of appropriate standards, by checking designs and procedures to ensure that they comply with the standards and by inspecting the readiness of equipment for an operation to begin, and monitoring the suitability of actual forecast weather conditions NaeguIonut Dragos, ‘Risk Control, Marine Warranty Survey.’ Vol 18 2012 No. 2 Journal of Engineering Studies and Research Available at <<http://www.pubs.ub.ro/dwn/.php?id=JESR201202V18S01A0010>> (accessed 14 October 2014)

⁹⁴ Section 1 of the Insurance Act 1984 Chapter 487 Laws of Kenya defines an insurance surveyor as a person who engages in surveying risks and in advising on the rate and terms and conditions of premiums including making suggestions for improvement of the risks, and, in the marine insurance business includes a person who surveys or assesses the losses on behalf of the insured.

industry to improve the capacity of such warranty surveyors. Increasing the capacity of such warranty surveyors will boost the practice of marine insurance business. The warranty surveyors are essential in claim processing and are appointed by the insurers to establish the cause and the extent of the loss.⁹⁵ They make independent opinion on liability and quantum and therefore can be instrumental in enforcing the law. Where there is late declaration after the loss, they shall not be expected to recommend settlement of the claim and this will enforce compliance with the legal requirements and develop uniform practice of marine open cover policies in the industry. In addition the warranty surveyors are in a position to advise the insurance companies of vessels that have suffered casualty in the high seas due to their large network of international marine surveyors and this will help the insurers identify declarations that are made already subject to loss or casualty. This will have an overall positive impact on the practice of marine insurance business in the industry and especially in the operation of marine open covers policies. This may however be hard to achieve since the adoption of new technologies and systems and training of the surveyors may have financial implications which may be hard for the government to meet owing to its prioritized budgetary allocations. Such a challenge may however be overcome through progressive realization.

A centralized data system unit for the insurance companies

The study proposes the setting up of a centralized data system unit in regard to transactions on open cover policies. Such a system should perhaps contain the name of the assured, marine open cover policy number, name of the underwriter, and number of declarations in a month among

⁹⁵ Interview with Walter an executive director and a cargo surveyor in one of the marine loss adjusting firms in Kenya confirmed that most of the local instructions are from insurance companies for cargo surveillance during discharge at the port of Mombasa and cargo survey at the final warehouse where the goods are received in damaged condition. Interview on 17October 2014

others. This will create some transparency in that the various insurance companies will act as watchdogs of each other in self-regulation and bring about a common practice in the operation of marine open cover policies. Such a centralized data system will solve the existing problem where the assured operate more than one open cover policy with different insurance companies. The insurance industry may borrow leave from the banking sector where the central bank introduced the credit reference bureau for sharing information to enable members make faster and more accurate decisions.⁹⁶ In addition, the central data system will act as a reference bureau where an insurer may conduct a background check and due diligence on credibility of a client before they issue open cover policies. Such a system may however be expensive to set up and may require new additional staff competent in Information Technology among others. This may however be addressed through progressive realization.

Training of Insurance brokers

The study further proposes for the compulsory training of insurance brokers in marine insurance for this will bring in professionalism in the industry. This may be achieved through training initiatives in the form of continuous education by insurance companies, Insurance Regulatory Authority and Association of Kenya Insurers for the brokers in the industry particularly in marine insurance in order to promote good practice and professionalism. This may however be hard to achieve owing to lack of interest in brokers in undertaking such trainings. This challenge may however be overcome by making high qualifications to persons wishing to engage in brokerage business more so in marine insurance.

Strengthening integration with the East African Community

⁹⁶ Central Bank Of Kenya 2009 Available at <https://www.centralbank.go.ke/index.php/bank.../credit-reference-bureaus> Accessed on 25 November 2014

The study recommends that Kenya does strengthen its ties with the East African Community so as to harmonize the marine insurance laws and practice of the member states. This will be beneficial in order to improve trade between the member states and set a platform for handling marine insurance fraud relating to open cover policies. The East African Community should seek more integration like the one in the European Union where the member states confer competences on the EU – such as the power to adopt legislation with a number of institutions such as the European Council, Council of Ministers, European Commission and the European Parliament acting together or separately to pass laws, regulations, directives or decisions.⁹⁷ Kenya is a main insurance player in the region and aligning its marine insurance laws to best practices will steer growth of marine business within the region. In addition, the opening of the Lamu Port and South Sudan Ethiopia Transport (LAPSSET) Corridor project⁹⁸ and the Lamu port⁹⁹ as a port of transshipment will attract many international shipping companies into the country probably resulting in increased business in marine insurance. It is therefore important for the country to remove the variance in the marine legislative framework and the practice of open cover policies in order to position itself in the region as a marine insurance hub. The harmonisation of the various member states laws on marine insurance may however be difficult to achieve owing to different countries preferences in their legislation and development plans.

⁹⁷ European Union Law and the balance of competences 2012 Available at < <https://www.gov.uk/eu-law-and-the-balance-of-competences-a-short-guide-...> > (accessed on 26 November 2014)

⁹⁸ Lamu Port and South Sudan Ethiopia Transport (LAPSSET) Corridor project was launched by H.E former President of Kenya Mwai Kibaki, General Salva Kiir of Southern Sudan and the late Ethiopian Prime Minister, Meles Zenawi on March 2, 2012. The LAPSSET project is Kenya's Vision 2030 flagship intended to foster transport linkage between Kenya, South Sudan and Ethiopia and to foster dynamic promotion of regional socio-economic development. See 'Kenya Vision 2030' Available at <<http://www.vision2030.go.ke/index.php/pillars/project/macro-enablers/181>> (accessed 26 October 2014)

⁹⁹ The port project is part of the LAPSSET corridor and at completion; the port will have 32 berths for an ideal export terminal. Available at <<http://blogs.wsj.com/frontiers/2014/08/03/chinese-firm-signs-478-9-million-kenya-lamu-port-deal>> (accessed 26 October 2014)

This challenge may however be overcome by the member states entering into a multilateral trade agreement in form of a developmental plan that will benefit all of them.

Corporation with various international bodies dealing with Insurance fraud

This study proposes that the government works together with various international bodies and players in the insurance field. For instance, we should co-operate with the International Chamber of Commerce Commercial Crime Services (ICC CCS),¹⁰⁰ this will greatly improve our capacity especially in the marine insurance field in tackling and dealing with marine insurance fraud issues. A challenge to this may be that various international corporations may not be willing to work or cooperate with Kenya. Also our leadership may lack the will to cooperate and work with some. Such a challenge may be overcome by having the various players in the insurance industry lobbying for such corporations with the various bodies.

Strengthening the Insurance Fraud Unit

The study also recommends that the Insurance Fraud Unit be strengthened. The Kenya Police Anti-Fraud Insurance Unit was launched in 2011 and was the fourth anti-fraud unit for Kenya's financial services sector that seeks to reduce incidents of fraud in the insurance industry.¹⁰¹ The establishment of an Insurance Fraud Investigation Unit in collaboration with the Kenya Police Service presents a ray of hope in the insurance field. The government in collaboration with various stakeholders in the insurance industry should endeavor to strengthen the Insurance Fraud

¹⁰⁰ This is based in London. It has specialist divisions that tackle all types of commercial crime. International Maritime Bureau is a specialized division of the International chamber of commerce and was established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice. See 'ICC Commercial Crime Services 1919' Available at <<http://www.icc-ccs.org>> (accessed 10 October 2014)

¹⁰¹ Business Today "Kenya's insurance industry gets police anti-fraud unit" 26 November 2014 Available at www.businesstoday.co.ke/news/2012/01/23/Kenya's-insurance-industry-gets-police-anti-fraud-unit Accessed on 25 November 2014

Unit further so as to increase its capacity in handling fraud matters including those relating to marine in the insurance industry. The Insurance fraud Investigation Unit should endeavour to play such a role as the one played by the Anti-Banking Fraud Unit in the banking sector. One key challenge in the strengthening of this Insurance Fraud Unit is that some view it as unnecessary as it amounts to duplicity of institution dealing in fraud more so in financial matters. This should however not be seen as a challenge but as continuing effort in curbing fraud in various fields. Furthermore, such institutions are efficient for they are sector specific.

Further research

The study also proposes that further research be carried out in this field of insurance so that many players can venture into this field of insurance and many articles be made available. The government in partnership with the various bodies in the insurance field should offer grants and loans among others so as to promote further research into the marine insurance field. This will go a long way as it will promote new discoveries and ideas that can be borrowed from other jurisdictions that will promote the development of the marine insurance industry. This may however be hard to achieve owing to the lack of research interest in this particular field. This may be overcome by the government offering grants and incentives to encourage such research.

APPENDIX 1

QUESTIONNAIRE

Introduction

The main objective of this study is to examine whether the legislative framework and the practice of marine open cover policies serve the industry efficiently and effectively in Kenya. It is a real challenge for the insurance industry in Kenya to handle the abuse and fraud relating to marine open cover policies. This has been attributed to the mismatch between the legislative framework and the practice of marine open cover policies. In order to address this challenge, it is important to make reforms to the existing law with regard to open cover policies.

Background information

- (d) Name of the respondent:
- (e) Name of Insurance Company:
- (f) Job position in organization:
- (g) Number of years of work experience in that job position:

* * *

1. What amount of marine business does your company write in a year in relation to the gross written premium? (Mark in the box)
Less than 10% [] 10% -30 % [] over 30% []
2. What is the percentage ofHow frequently do you issue marine open cover policies to your clients? (Mark in the box)
Below 20% [] 20% - 30%[] 30%-40%[] above 50%[]
3. How does your company effect marine open cover policies? (Mark in the box)

Directly [] Through Brokers []

4. Do your clients make declarations under the open cover policies in order of shipment timely and effectively?

YES/NO?

What percentage of shipments is made in good time?

Below 20% [] 20% - 30% [] 30%-40% [] above 50% []

5. Does your company always pay claims where the declarations are made after the loss of the arrival of the shipment? (Mark in the box)

Not often [] frequently [] very frequently []

7. Do you think the broker involvement in the effecting of marine open cover policies undermines the practice of marine open cover policies?

YES/NO?

Give reason/reasons.

8. In your opinion, does the current legislative framework governing marine open cover policies serve the industry efficiently and effectively?

YES/NO?

Give reason/reasons.

9. In your opinion, would you recommend amendments to the current legislative framework regarding marine open cover policies?

YES/NO

Give reason/reasons.

10. What are some of the proposals that you might like to put forth that you think might improve the insurance industry especially with regard to the use of marine open cover policies?

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