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CHAPTER 16

CARGO INSURANCE IN THE MULTIMODAL CONTEXT: FULL AND COMPLETE COVER?

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INTRODUCTION

The rise of multimodal transport coincides with the container revolution in the 1950s. Today, as a result of the remarkable development of terminal infrastructure and state-of-the-art container handling facilities, particularly in key trading states,¹ multimodal transport has gained a predominant role in international trade and contributes to the global economy by reducing the duration of transportation and its cost dramatically. Multimodal transport operators offer cargo interests (shippers and/or consignees) the prospect of entering into a single carriage contract covering different legs of the transit, and this has a certain degree of appeal for the cargo interests as it provides simplicity in terms of the legal regime regulating their contractual dealings with various carriers. However, in light of the fact that different legal regimes might still apply compulsorily under a multimodal carriage contract, depending on the stage at which the loss or damage is sustained² and the unpredictability of the liability regime that will govern, the need for obtaining insurance from the market for cargoes carried by multimodal transport operators has not diminished.

For cargo interests the main purpose of purchasing insurance is to subscribe to a risk distribution mechanism that does not contain any gaps in terms of cover from the moment the goods are placed at the disposal of the carrier until they are re-delivered at the agreed destination. However, in practice this is very difficult to achieve, essentially due to the language and structure of the standard cargo insurance clauses that are commonly used in the market. Furthermore, applying various provisions of the Marine Insurance Act (MIA) 1906 in the multimodal context often creates curious results given that the origins of relevant provisions in the MIA 1906 can be traced to a period of time when this kind of transport was not even in existence. Last but not least, gaps in insurance coverage might arise and cargo interests might end up bearing

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1. In 2010, Shanghai International Port handled over 29 million TEUs whilst over 28 million TEUs passed through PSA Singapore during the same period. In Europe, the Port of Rotterdam was far the busiest, dealing with just over 11 million TEUs in 2010 (the data has been obtained from the website of World Shipping Council: <http://www.worldshipping.org/about-the-industry/global-trade/top-50-world-container-ports> (last tested on 1 November 2012)).

2. A network liability regime is the preferred solution adopted by most multimodal transport contracts. Under this regime, where it can be established at what stage of the transit the particular loss or damage has occurred, the liability of the carrier is regulated by the relevant international convention or national law that applies compulsorily to that particular mode of transport. In other cases, the liability of the carrier is determined by the regime stipulated in the contract.

the risk for a certain period of time before the insurance comes into force, due to the nature of the sale contract in question.

The purpose of this chapter is to analyse to what extent standard contemporary cargo insurance policies afford complete coverage to cargo interests involved in multimodal transport. The findings of the analysis will reveal the gaps that exist in the standard cover, and it is intended to point out how such gaps can best be filled by making use of tailor-made clauses.

TRANSIT CLAUSE

The duration of cover in standard cargo policies has been extended from warehouse to warehouse since the turn of the twentieth century.³ The relevant clause, also known as the "transit clause", has evolved over the years and a more contemporary version of it, which appears in Institute Cargo Clauses (ICC) 1982,⁴ is still in regular use worldwide. Clause 8 of the ICC 1982 stipulates:

This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either

- on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein,
- on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either for storage other than in the ordinary course of transit or for allocation or distribution, or
- on the expiry of 60 days after completion of discharge overseas of the goods hereby insured from the overseas vessel at the final port of discharge, whichever shall first occur.

If, after discharge overseas from the overseas vessel at the final port of discharge, but prior to termination of this insurance, the goods are to be forwarded to a destination other than that to which they are insured hereunder, this insurance, whilst remaining subject to termination as provided for above, shall not extend beyond the commencement of transit to such other destination.

This insurance shall remain in force (subject to termination as provided for above and to the provisions of clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.

3. The warehouse-to warehouse clause, which first appeared in Institute Cargo Clauses 1912 was worded in the following fashion: "Including (subject to the terms of the Policy) all risks covered by this Policy from shippers' or manufacturers' warehouse until on board the vessel, during transshipment if any, and from the vessel whilst on quays, wharves or in sheds during the ordinary course of transit until safely deposited in consignee's or other warehouse at destination named in the policy."

4. 1/1/82.

This clause also appears in standard Institute Cargo Clauses (Air) (excluding sendings by post)⁵ and is often incorporated into insurance policies drafted by insurance companies for carriage by road and rail (inland transit). At first sight, one might get the impression that it provides comprehensive coverage and is ideally suited for multimodal transport. However, on closer scrutiny it becomes apparent that this is far from being the case. The transit clause will be closely scrutinised next with specific reference to multimodal transport operations.

Attachment of Risk

Under clause 8 of the ICC 1982, the cover attaches from the moment the insured cargo leaves the gate or the doorway of the warehouse for the commencement of transit. It becomes immediately apparent that as a result of this formulation, the cargo interests will find themselves without insurance cover in a number of instances. For example, any loss or damage sustained before or during loading will not be recoverable under the ICC or ICC (Air) 1982. Likewise, there will be no cover until the goods leave the warehouse if the insured goods are loaded into a lorry which then remains on the premises overnight.⁶ It does not matter that the goods in that case are handed over to the control of the carrier and the cargo interests have little or no control over the goods. The transit clause perceives “leaving of the warehouse” as the triggering point for the attachment of the risk.

The wording of the clause might also create uncertainty as to what point the risk attaches, particularly in cases where the goods are shipped from unconventional places of storage. For example, if the goods are in a warehouse that is located on the top floor of a multistory building and they are loaded into a lorry parked at the entrance of the building by means of giant cranes, would the cover attach as soon as the goods are lifted off the warehouse floor? Alternatively, it can equally be argued that the parking lot near the building is viewed as an extension of the warehouse and accordingly the risk attaches only after the lorry drives away. Similarly, it is not clear whether cover will be available if pharmaceutical products insured under ICC (Air) 1982 are stolen by a group of armed men in the elevator after being collected by the carrier from the office of the shipper located on the fifth floor but before they are taken out of the building.

At this juncture, it should be stressed that the transit clause has gone through another transformation in the most recent version of ICC and ICC (Air) released in 2009.⁷ In essence, the coverage has been extended to include the process of loading and unloading. Under clause 8 of ICC 2009, the cover “attaches from the time the subject-matter is first moved in the warehouse or place of storage for the purpose of immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit”.⁸ There is no doubt that the new wording addresses most of the difficulties that have been identified above but one will be ill-advised to assume that it affords complete coverage to the cargo interest. There is no coverage for loss

5. See cl. 5 of (1/1/82).

6. In an American case, *Brammer Co v Holland America Insurance Co* 228 NYS2d 512 (1962), [1962] AMC 1584, the Supreme Court of New York, whilst construing the meaning of the transit clause, held that the cover did not attach, as loading of lorries within the building did not constitute “transit” until there was movement out of the building. See also *Kessler Export Co v Reliance Insurance Co of Philadelphia* 207 F.Supp. 355 (1962), [1962] AMC 2429.

7. (1/1/09).

8. Clause 6 of the new ICC (Air) is worded in the same fashion.

or damage that arises prior to the movement of the insured cargo. For instance, if a forklift truck crashes into the pallet it was meant to pick up and destroys the contents, such loss of insured cargo will not be covered. Similarly, in a case when the goods are moved in a waiting area within the warehouse for shipment, the goods will not be covered during that pre-transit movement nor for the time they are held in the pre-transit waiting area.

A more difficult case will arise when the goods are loaded into a container, which is sealed, but loading of the container onto the lorry is then delayed due to the weekend holiday. In that case, does the risk attach as soon as the goods are moved to be loaded into the container or does it attach when the container is first moved to be loaded onto the lorry? The answer to this question is likely to have serious implications from the perspective of multimodal transport operations, and it largely depends on whether the term "other conveyance" in cl. 8 is intended to include the containers. Placing weight on the fact that the transit clause links the "first movement of goods" with the "immediate loading" and not "immediate commencement of transit", one might be tempted to argue that the risk should attach as soon as the goods are moved with the intention of being loaded into a container. However, it is submitted that such a construction might be at odds with the terminology used throughout the rest of the standard clauses. In cl. 5.1.2 of the ICC 2009, for instance, it is stated that the policy will not cover loss, damage or expense arising from "unfitness of container or conveyance for the safe carriage of the subject-matter insured". This very strongly indicates that in the eyes of the draftsman there is a difference between a "container" and a "conveyance". Taking this to its natural conclusion, one can forcefully argue that if it had been, in fact, the intention of the draftsman that the risk attaches as soon as the goods are moved to be loaded into a container, the word "container" should have been specifically used in cl. 8. Clause 3.5 of the ICC (Air) 2009 is worded in a similar fashion and clearly draws a distinction between conveyance and container. The matter is an important one which carries significant consequences but has not yet been resolved.

This analysis reveals that under the transit clause that appears in standard cargo policies, the assured involved in multimodal transport might find himself bearing the risk of loss for longer than he wishes or expects. In particular, it is evident that even the use of 2009 version of the transit clause will leave the cargo interest exposed to perils that could strike before loading starts, during the pre-transit waiting period and even possibly during the process of stowing the insured goods in a container. The gap in terms of cover for this period could be filled by supplementing standard cargo policies with "typed clauses" extending the cover to a point in time before the goods are moved for the purpose of immediate loading or before they have left the warehouse. Such clauses are commonly referred to as "voyage clauses" and are occasionally incorporated into insurance contracts. For example, in *Eurodale Manufacturing Ltd v Ecclesiastical Insurance Office plc*⁹ the policy, which contained the 1982 version of the transit clause, also stipulated that "cover attaches from the time the Assured accepts the delivery of the goods and continues during the transit". After a consignment of mobile telephones was delivered to the warehouse of the assured's agents over a bank holiday weekend, they were stolen before the insurance attached under the ICC 1982, as the goods had not left the "warehouse" for the purposes of those clauses. There

9. [2003] EWCA Civ 203; [2003] Lloyd's Rep IR 444 (CA).

was a clear inconsistency between the printed transit clause and the typed clause, but the Court resolved the dispute by giving priority to the typed clause, and holding that the assured was covered as he accepted delivery of the goods within the terms of the typed clause.

Ordinary Course of Transit

Both the 1982 and 2009 versions of the transit clause stipulate that cover is provided against insured perils arising during the “ordinary course of transit”. The reason for restricting the cover to losses that arise during the ordinary course of transit is to show consideration for the risk assessment exercise undertaken by the insurer at the outset. The point was put elegantly by Lord Mansfield in *Pelly v Royal Exchange Assurance Co*¹⁰:

The insurer, in estimating the price at which he is willing to indemnify the trader against all risques, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Every thing done in the usual course must have been foreseen and in contemplation, at the time he engaged. He took the risque upon a supposition that what was usual or necessary would be done.

This restriction in cover is a legitimate cause of concern for any cargo interests obtaining insurance on standard terms from the market given that they have usually no control over the manner in which the carrier performs the voyage. The matter is probably more acute for cargo interests who rely on multimodal transport operators (or freight forwarders) to carry their goods from their warehouse to the place of destination by making use of several modes of transport. This has been taken into consideration by cl. 8.3 of the ICC, which stipulates that the cover will continue even if the ordinary course of transit is interrupted by a number of events, namely “delay beyond the control of the assured, any deviation, forced discharge, reshipment or transshipment and during any variation of adventure arising from the exercise of a liberty granted to carriers under the contract of carriage”. Put another way, cl. 8.3 could be viewed as an exception to cl. 8.1 in keeping the insurance cover intact during events falling outside the “ordinary course of transit”. For the purposes of this chapter, it is vital that two issues receive a thorough analysis: (i) Beyond the events specified in cl. 8.3, which instances take the goods outside the “ordinary course of transit”? (ii) What will the legal consequence of this be?

There is little or no direct English authority on the meaning of the phrase “ordinary course of transit”. In a slightly different context in *SCA (Freight) Ltd v Gibson*, Ackner J said¹¹:

Goods cease to be in transit when they are on a journey which is not in reasonable furtherance of their carriage to their ultimate destination. Obviously a detour which is reasonably necessary to enable a driver to obtain food or rest would be in furtherance of the safe and expeditious carriage of the goods to their ultimate destination. It would be an ordinary incident in the transit of goods by the plaintiff's vehicles. . . A deviation which is wholly unrelated to the usual and ordinary method of pursuing the adventure would prevent the goods being “in transit” within the meaning of the policy.

10. (1757) 1 Burr 341, at 348.

11. [1974] 2 Lloyd's Rep 533, at 535.

It is virtually impossible to provide an exhaustive definition of the term "transit". However, the test laid down by Ackner J provides a good starting point as it acknowledges the fact that it is not essential that the goods shall be in motion at all times. Any transit can be interrupted (and will possibly be interrupted in practice) but an interruption takes the goods outside the "ordinary course of transit" only if it cannot be justified on the basis that it was essential for reasonable furtherance of their carriage to their ultimate destination.

Indisputably, it is a question of degree as to what is or is not in reasonable furtherance of the carriage of the goods. It is apparent that an interruption of transit for the commercial convenience of the assured or consignee is not within the ordinary course of transit. In *Allied Leisure Industries v American Mutual Liability Insurance Co*,¹² 34 amusement machines were sent in a container from a plant in Florida to Port Jacksonville for export to Japan. The period of the coverage was stated in the policy to be "from the time such property leaves the factory, store, or warehouse at initial point of shipment until such property is delivered at its destination, including while in or on docks, wharfs, piers, bulkheads, depots, stations and platforms, while the property is in due course of transit in the custody of a common carrier incidental to transportation". For certain reasons involving the credit status of the intended Japanese buyers, the assured decided not to ship the machines and was allowed to keep them at the docks while they attempted to find an alternative buyer. After two weeks of futile attempts to find an alternative buyer, the assured transported the machines back to its plant. Upon arrival, it was discovered that the machines suffered water damage whilst at docks in Port Jacksonville. The assured's claim for indemnity was turned down essentially on the ground that the insured goods were not in transit while they remained on the docks under the control of the assured awaiting its decision and direction for the recommencement of the transportation. The outcome is likely to be same if the insured goods are left for an extended period of time in the customs office for commercial convenience¹³ or they are deposited at an intermediate warehouse for a period of time with the intention of avoiding the payment of storage fees.¹⁴

Also, it is abundantly clear that the goods will be taken out of the ordinary transit when the transport is interrupted by the actions of the carrier or his employees unconnected to the furtherance of the carriage. In *SCA (Freight) Ltd v Gibson*,¹⁵ the assured obtained a haulier liability policy protecting him against legal liability under the CMR Convention. The policy covered goods "whilst in transit per insured's vehicles" and extended to goods "whilst in the normal course of transit". The assured sent two lorries to collect a consignment of books in Rome. After one lorry was fully loaded and the other one was half loaded, in the evening the drivers of the lorries took

12. 342 So.2d 54 (1977) (D.Ct App Fla).

13. *Safadi v Western Assurance Co* (1933) 46 Lloyd's L.L.Rep 140. Whilst the case is not decided on this point, there are clear signs in Roche J's judgment that leaving goods in the customs office for commercial convenience would not be viewed as an action compatible with the ordinary course of transit. In a South African case, *Fedsure General Insurance Ltd v Carefree Investments Pty Ltd* [2001] 2 ZASCA 88; [2002] 1 All SA 379 (A) (CA South Africa), a similar view has been taken when a containerised consignment of fabric imported from Korea was stolen from the warehouse at the port of Durban. Upon arrival of the goods in Durban, the assured decided to leave the goods in the port warehouse for some time as he had some cash flow problems and was not in a position to pay tax duty. It was held that the goods were not in the ordinary course of transit at the time of the loss.

14. *Miruvor Ltd v National Insurance Co Ltd* [2003] HKEC 237.

15. [1974] 2 Lloyd's Rep 533.

them to Rome for a joyride. During that ride, one of the lorries overturned and its cargo of books was damaged. When the assured made a claim under the policy, the key question was whether the goods were in "transit" when the accident occurred. The court ruled in a negative fashion.

One should, however, not lose sight of the fact that in *SCA (Freight) Ltd v Gibson* the policy in question was a goods in transit policy. If a similar situation arises under a policy that incorporates the ICC 1982 or 2009, it is debatable, at least, whether a similar outcome will follow. That is because under cl. 8.3 of the ICC, the cover continues even though the transit is interrupted by "deviation". The actions of the lorry drivers who decided to take the lorries for a joyride in Rome did not technically amount to deviation within the meaning of the MIA 1906 given the fact that by virtue of s. 46, deviation seems to be restricted to events occurring at sea.¹⁶ However, it should be open to the assured in that case to argue that the term "deviation" in cl. 8.3 of the ICC has not been used in its technical sense and, therefore, covers any situation where the carrier of the insured goods changes the course of the contemplated journey. What lends support to this argument is the fact that in the corresponding part of the ICC (Air), cl. 6.3, it is also stated that the policy remains in force in case of a "deviation". Given that a cargo policy providing cover against risks in air transport would not come under the scope of the MIA 1906,¹⁷ making reference to "deviation" in cl. 6.3 could be viewed as a clear manifestation of the intention of the draftsman to employ the word "deviation" in a non-technical sense.

The next question is what legal consequence follows when the insured goods are taken out of the ordinary transit. Imagine that the goods are insured for a voyage from Carmarthen in Wales to Bremen in Germany, but on arrival at the port of Swansea for shipment to Hamburg, are held there for five weeks on the orders of the assured due to space constraints at the consignee's warehouse in Bremen. The goods then start their sea voyage to Hamburg but en route there is a loss attributable to a peril insured against. Will it be possible for the insurer to deny liability for the loss due to the fact that the extended period of stay at Swansea has taken the goods out of ordinary transit? Or will it be the case that the goods are not insured during the period when they were out of ordinary transit – that is, when they were awaiting transshipment at the port of Swansea – but the cover is reinstated with the commencement of the voyage to Hamburg? The answer to this question depends on the legal status of cl. 8.1 and its interaction with other clauses of the ICC.

16. Section 46(1) of the MIA 1906 stipulates: "Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs."

17. Section 3 of the MIA 1906 reads as follows:

- (1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.
- (2) In particular there is a marine adventure where—
 - (a) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property"; . . .

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detentions of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

There is room to argue that cl. 8. 1 of the transit clause is a provision describing the duration and boundaries of the cover, akin to cl. 9 of the Institute Container Clauses (Time) which stipulates that each container is covered only when on deck and within the territorial limits specified in the schedule of the policy.¹⁸ The language used in cl. 8.1 of the ICC lends considerable support to this construction and if adopted, this will mean that the cover is not available only for the period when the goods are taken outside the ordinary course of transit. This line of reasoning has found judicial support in *Fedsure General Insurance Ltd v Carefree Investments Pty Ltd*.¹⁹ After concluding that the insured goods were not in the ordinary course of transit during the period when they were kept in a warehouse for an extended period by the assured for commercial purposes, Howie JA commented:²⁰

Loss occurring within the period of such delay or interruption will not be covered by this policy . . . The reason is not that the insurance has come to an end (for it remains in existence), not that the transit has come to an end (for the journey is not yet finally over) but simply that the insurance pertains to the ordinary course of transit and what is outside the ambit of that course cannot, logically, be within cover.

On the other hand, it is also true that there is no suggestion in the wording of cl. 8. 1 that the cover should reattach as soon as “the ordinary course of transit” is resumed.²¹ This might be the angle that the insurers could take in arguing that once the cover has ceased due to an interruption to the ordinary course of transit, there will be no possibility that the cover can be later reviewed when transit is resumed.

Both arguments are plausible, but in assessing the legal consequence of interrupting the ordinary course of transit, various statutory and contractual provisions should not be overlooked. A specific provision in the MIA 1906 calls for special mention here.²² Section 48 of the MIA 1906 stipulates:

In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

This provision, which is relevant in the context of voyage policies, operates in a similar manner to a marine warranty in that in case of its breach the insurer is discharged from liability prospectively from the date of breach.²³ There are reported cases before the MIA 1906 came into force where the insurer was held to be discharged from liability in instances where the commencement of voyage

18. (1/1/1987).

19. [2001] 2 ZASCA 88; [2002] 1 All SA 379 (A) (CA South Africa).

20. *Ibid.*, at [12].

21. J Gilman et al., *Arnould's Law of Marine Insurance and Average* (17th edn) (Informa 2008), [13-39]-[13-40].

22. Although the matter has not been directly raised before in English law, it is very likely that a policy covering land transit from one place to another under a warehouse to warehouse insurance is a “voyage” policy within the meaning of the MIA 1906 which s. 2(1) of the MIA 1906 makes reference to. This section reads: “A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.” A similar view has been expressed in the South African case of *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129.

23. See *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233; [1991] 2 Lloyd's Rep 191 and also s. 33(3) of the MIA 1906.

was delayed considerably.²⁴ However, it is a requirement for the application of this section that the delay becomes unreasonable.²⁵ This might impose a serious restriction to the application of the section. When cargoes were facing considerable delays during the Second World War awaiting convoys, the reaction of the market was to introduce an avoidance of delay clause, which became the standard form of cover for cargo policies in March 1952.²⁶ This clause lays emphasis on the need for the assured to act with reasonable despatch; but no mention is made of the need for the delay to become unreasonable for the clause to operate in cases where the assured fails to do so. It could, therefore, be justifiably argued that the clause gives the insurer a defence in such cases which is more extensive in scope than s. 48 of the MIA 1906. This is so, despite the fact that the consequence of breach of s. 18 of the ICC has not been expressly spelt out. The use of the words "condition of this insurance" in cl. 18 is an indication that the consequences for breach are likely to be termination of cover,²⁷ and it is not beyond the bounds of possibility that the term will be construed to be a marine warranty on the basis that it is a promissory undertaking on the part of the assured.²⁸

For the purposes of the current debate, it is obvious that there is an organic relationship between cl. 8.1 and cl. 18 of the ICC; and in cases where an interruption in the ordinary course of transit arises as a result of the assured's decisions (for example, delaying shipment for commercial considerations), the insurers could raise breach of cl. 18 as a defence.²⁹ The position will likely to be the same for cargoes insured under ICC (Air) even though s. 48 of the MIA 1906 will not be effective with respect to such policies essentially due to the fact that an avoidance of delay clause worded in the same fashion appears in such policies as well.³⁰ However, in a cargo policy insuring goods against inland risks (road and rail only) the position might be different especially if the policy does not contain an avoidance of delay clause. Assuming that the MIA 1906 will not be applicable to a contract of that nature, the insurers need to convince the court to imply a term similar in nature to s. 48 of the MIA 1906. Suffice to say that in the past courts have been extremely reluctant to

24. *Company of African Merchants v British Insurance Association* (1873) LR 8 Ex 154.

25. The question of what is reasonable is a question of fact (s. 88 of the MIA 1906).

26. *Historic Records Report* HR5, at pp. 70–71 and 74. The most recent version of this form appears in cl. 18 of the ICC 2009 (exactly the same wording has been used in ICC 1982): "It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control."

27. The term "condition" is used in a wide range of senses in common law. However, in the context of insurance law, where the provision that contains the word "condition" is used to describe the obligations of one of the parties, usually the assured, in a precise manner, courts often have treated such clauses as "condition precedent to liability" of the assured; see *Pilkington United Kingdom Ltd v CGU Insurance plc* [2004] EWCA Civ. 23; [2004] Lloyd's Rep IR 891 and *Shinedean Ltd v Alldown Demolition (London) Ltd (in liquidation) and Axa Insurance UK plc* [2005] EWHC 2319 (TCC). In those instances, the obligation is one which "goes to the root of the contract", as underlined by Mackinnon LJ in *Welch v Royal Exchange Assurance* [1939] 1 KB 294, at 312.

28. Rix LJ in *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co and Others* [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep, at [101] proposed that a term in an insurance contract is a warranty if (a) if it goes to the root of the contract; (b) if it is descriptive of risk or bears materially on the risk of loss; and (c) if damages would be an inadequate or unsatisfactory remedy for the breach. The obligation expressed in cl. 18 compares favourably to the characteristic properties of marine warranties identified by Rix LJ.

29. It is appreciated that the scope of cl. 18 is much wider given the wording used and it might apply in instances other than delays in executing the transit.

30. Clause 16 of the ICC (Air) (1/1/09).

imply obligations into non-marine contracts by making reference to those that appear in the MIA 1906.³¹

Termination of Risk

The transit clause identifies a number of eventualities that will bring the insurance cover to an end. This part of the transit clause has given rise to complications and there is a significant volume of jurisprudence on the matter. For the purposes of this paper, reference will be made only to certain parts of the clause that might have an impact on the duration of the insurance cover in a manner that a cargo interest involved in multimodal transport would not ordinarily expect. There is a difference between the 1982 and 2009 versions of the transit clause in this respect, and we shall start our deliberation with the former.

Under cl. 8.1.1 of the ICC 1982, the insurance cover terminates on delivery of the insured goods “to the Consignee’s or other final warehouse or place of storage at the destination” specified in the policy.³² The precise meaning of the words “final warehouse or place of storage” have caused some controversy but it is now clear that holding areas such as transit sheds³³ or customs compounds³⁴ cannot be described as a final place of storage.

More significantly, for the risk to terminate, the insured goods must be delivered at the final place of storage to the assured or the consignee. The interesting issue is identifying the meaning of the “delivery” for the purposes of this provision. Imagine a situation where the goods arrive at the warehouse outside working hours and the vehicle is left parked in the car park. Does this amount to delivery within the meaning of the transit clause? What constitutes “delivery” should be considered in the context of practices in the relevant trade and customs at a particular location but it certainly should involve some kind of “handing over” of the goods to the consignee or those in charge of the warehouse. Put differently, some degree of involvement of the employees of the warehouse is required. In the example above, it is difficult to show that such a handing over has taken place; but it might be a different outcome if the vehicle is allowed into an attached parking area by the nightwatchman. Similarly, if the insured vehicle is left in the car park of the final place of storage overnight and in the morning before the arrival of the driver the unloading process starts, the cover is likely to be terminated at that point even though a delivery note might not yet have been signed.³⁵ Also, depositing the goods at the place indicated by the consignee – for example, depositing pharmaceutical products into a storage bank – might amount to delivery for the purposes of the transit clause.

31. See *Euro-Diam Ltd v Bathurst* [1987] 1 Lloyd’s Rep 178 where Staughton J refused to imply a warranty of legality, similar to the one in s. 41 of the MIA 1906, into a motor insurance policy.

32. The position is the same under the 1982 version of the ICC (Air).

33. *John Martin of London Ltd v Russel* [1960] 1 Lloyd’s Rep 554.

34. *Bayview Motors Ltd v Mitsui Fire & Marine Insurance Co Ltd* [2002] EWCA Civ 1605; [2003] 1 Lloyd’s Rep 131.

35. See *First American Artificial Flowers v Afia Worldwide Insurance and St Paul Fire & Marine Insurance Co* [1977] AMC 376, where it was held that assured’s accepting of the goods brought the cover to an end even though the vehicle was parked outside the warehouse. Under the transit clause, in that case cover could be said to come to an end by regarding the car park of the warehouse as a place of storage elected by the Assured (cl 8.1.2 of the ICC 1982 or 2009).

A trickier question arises when the goods are delivered to the assured's designated storage, but this storage is a bonded warehouse subject to the jurisdiction of the customs authorities. In those circumstances, the consignee has custody but not the right to obtain the goods until they are cleared by customs. In that case, does the cover terminate at the moment of delivery or is the delivery of the goods under the transit clause delayed until they are cleared? This poses a difficult question, as the assured could well argue that although the goods are in his custody he has no right to make use of them, so in that regard no distinction can be made between this case and a situation where the goods are in the customs house. Despite the fact that the argument has an instinctive appeal, it makes commercial sense to restrict the cover offered by cargo policies to the delivery of the goods in the physical sense. In practice, there might be liens or other charges that might restrict the right of the consignee to make full use of the goods, but this is not a matter of concern for the insurer who provides cover against physical risks associated with the transit. A contrary solution would mean that the duration of the cover is extended contrary to reasonable expectations of the insurer. As a final point, it should be stressed that under the 1982 version, the transit clause does not offer cover to any loss or damage sustained by the goods during the unloading process.

The new version of the transit clause³⁶ extends the duration of insurance cover until the completion of unloading from the carrying vehicle or other conveyance. This is a welcome development but it still means that any loss or damage to the goods while de-stuffing containers following their discharge from the carrying vehicle will not be covered. The position might be different if the container is de-stuffed while it is still on the carrying vehicle. In that case, given that the policy remains in force until the completion of unloading, the process of de-stuffing will be covered. It is doubtful whether the draftsman had intended a variation of this nature in the cover, but as discussed above, it is very unlikely that a container will be regarded as a conveyance for the purposes of this clause. One way of addressing this anomaly and affording protection to cargo interests would be to extend the cover provided by standard cargo clauses to include not only unloading but also unpacking with a tailor-made clause. That way, the goods will remain insured until the container is de-stuffed whether de-stuffing takes place before or after the container is taken off the carrying vehicle.

As a final point, it is worth highlighting the restrictions on cover imposed by the so-called long-stop provision of the transit clause. By virtue of cl. 8.1.4 of the ICC 2009,³⁷ if the goods are not delivered to a final place of storage or place of storage elected to be used by the assured as storage other than in the ordinary course of transit or for allocation or distribution, the cover will terminate "on the expiry of 60 days after completion of discharge overside of the subject-matter insured from the oversea vessel at the final port of discharge".³⁸ The potential impact of this provision on multimodal transport is evident in two instances.

First, the long-stop provision imposes a time restriction to the cover (60 days) during the transshipment period if different legs of the transit are insured by different policies. Imagine a situation where the goods are carried from A to C via B. If the insurance for each leg is obtained separately (assuming that both insurances are based

36. Clause 8.1.1 of the ICC 2009.

37. The same provision appears as 8.1.3 in the ICC 1982.

38. Clause 6.1.4 of the ICC (Air) 2009 is worded similarly except it allows only 30 days after the completion of unloading of the subject matter insured from the aircraft at the final place of discharge.

on the ICC Clauses), and on arrival at B the goods are kept in the transshipment area, the cover under the first policy (from A to B) continues until the goods are first moved for the purpose of the commencement of the second leg of the journey.³⁹ This is a commercially convenient solution for the assured, as otherwise it would have been necessary for him to arrange a separate cover for the period pending transshipment. However, the cover at the port of transshipment is restricted to 60 days by virtue of the long-stop provision. If the goods remain at the port of transshipment more than 60 days, they remain uninsured for the period after 60 days.⁴⁰ Needless to say, the position would be different in a case where the goods are insured from A to C via B but under the same insurance policy. In that case, the cover at the transshipment port would not be restricted to 60 days as long as time spent at the transshipment port could be viewed justifiably as part of the ordinary course of transit.

Secondly, the long-stop provision might work against the interests of the assured especially in cases where the insured goods, which are subject of a contract of sale, are rejected after inspection at the port of discharge. The inspection process and its aftermath might be a lengthy one and following rejection the owner will require time seeking alternative options. The goods might eventually be returned to their place of origin or alternatively redirected to another potential buyer in a different country. It is evident that in both instances the original cover does not insure the goods for the perils that might be encountered in the return voyage or voyage to an alternative buyer. However, the insurance policy remains in force and provides cover to the cargo interest for losses that might arise⁴¹ during the period when the goods are held at the port of discharge. However, the cover will be available only for 60 days. Afterwards, the assured is his own insurer for losses that might arise.⁴²

Change of Destination and Transit Clause

An interesting question arises as to what happens when the insured goods after arriving at the port of discharge depart for a destination other than the one stipulated in the contract of insurance. This used to be a considerable problem in the 1980s and 1990s, in particular when criminal gangs used phantom ships to steal cargoes belonging to innocent shippers or consignees. Such gangs are capable of creating the impression that everything is in order and they issue bills of lading which on the face of it look legitimate. After the cargo is loaded, the phantom ship sails for a destination other than stipulated in the bill of lading and normally nothing is heard of the vessel again. By the time the shipper or consignee becomes aware of the fraud, the fraudsters would have already sold the cargo to an innocent third party under

39. Clause 8.2 of the ICC 2009 comes into operation in this case:

If, after discharge overseas from the overseas vessel at the final port of discharge, but prior to termination of this insurance, the subject-matter insured is to be forwarded to a destination other than to which it is insured, this insurance, whilst remaining subject to termination as provided in Clauses 8.1.1 to 8.1.4, shall not extend beyond the time the subject-matter insured is first moved for the purpose of the commencement of transit to such other destination.

40. See *Bayview Motors Ltd v Mitsui Fire & Marine Insurance Co Ltd* [2002] EWCA Civ 1605; [2003] 1 Lloyd's Rep. 131 which provides a good illustration of this.

41. In practice theft and pilferage are common occurrences in those instances especially in certain ports.

42. This point was highlighted in a slightly different context in *Hibernia Foods plc v McAuslin General Accident Fire & Life Insurance Corp plc (The Joint Frost)* [1998] 1 Lloyd's Rep 310.

a contract previously agreed. The phantom ship, depending on her state, is either scuttled or changes her name ready to be used in another venture with an intention to steal the cargo belonging to another innocent shipper or consignee.⁴³

In the context of multimodal transport, imagine a scenario where the goods are insured from inland Vietnam to Hamburg. They leave the warehouse in Vietnam and are carried by lorries to the discharge port of Qui Nhon. The goods are then loaded on a ship which turns out to be a phantom ship which is diverted elsewhere and disappears. If the goods are insured under ICC 1982 (A), one would naturally expect the loss to be recoverable given that the insurance attaches under the transit clause from the moment the goods leave the warehouse in Vietnam. However, the transit clause seems to be at odds with s. 44 of the MIA 1906 which stipulates that "Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach".

In this case of fraud, this is exactly what happens. The goods leave the warehouse and when they are loaded on board the carrying vessel, her destination is different than the one stipulated in the insurance contract, Hamburg. Assuming that s. 44 is relevant in this context, it is difficult to comprehend how a policy that is attached once the goods leave the warehouse can later be unattached on sailing to a different destination. One possibility is that s. 44 of the MIA 1906 is confined to a policy "from" a named port and is not made applicable to an "at and from" policy, that is, a policy that provides cover "from warehouse to warehouse". It might, however, be very difficult to sustain this argument in the light of the fact that s. 25 of the MIA 1906 defines a voyage policy as a policy that insures the subject matter "at and from" or "from one place to another or others". Clearly, the Act treats both types of voyage policies in the same manner; therefore, it is hard to justify why s. 44, which intends to apply to all voyage policies, should only be applicable to a certain type of voyage policy, namely a policy from a named port. On the other hand, it could equally be contended that there is nothing, either statutory or contractually, which prevents the application of s. 44 to phantom ship frauds. Even though cover is extended to cover land risks in modern cargo policies by virtue of "warehouse-to-warehouse" clauses, the substance of the policy is that the maritime risk and the character of the

43. There has been a considerable decline in the number of reported phantom ship frauds at the turn of the millennium essentially due to various international developments. In 2002, the Assembly of the International Maritime Organisation (IMO) adopted a resolution urging governments to review their ship registration procedures to ensure that adequate safeguards are in place to prevent the registration of phantom ships (Resolution A. 923(22)). There is anecdotal evidence to the effect that most ship registers now insist on seeing evidence that the previous registration of the ship has been deleted or consent from the previous register has been obtained for the transfer of the ship's registration. Similarly, several changes to the Safety of Life at Sea (SOLAS) Convention 1974 have been made in recent years with a view to enhancing maritime security. A new Chapter XI-1 to the SOLAS Convention 1974 requires (i) the installation of Automatic Information System (AIS) in most vessels (Regulation 19 of Chapter XI-1); and (ii) vessels to be marked with their IMO Identification number in a permanent manner (Regulation 3 of Chapter XI-1). Although these measures have originally been implemented to provide assistance in identifying, tracking and apprehending vessels that have been the subject of hijacking or acts of piracy, it is evident that they also make it very difficult for crime syndicates to use any random ship in a phantom ship fraud. However, it is premature to suggest that the phantom ship fraud has been eliminated entirely from the shipping sector. It is still possible to obtain provisional registration in respect of a ship from some flag states with relative ease. Also, it should not be assumed that port security applies with the same intensity throughout the world. There are ports which take a rather relaxed view of maritime security or favourable treatment can be secured from the officers through bribery. Such ports provide fruitful hunting ground for organised crime syndicates.

preliminary conveyance before the ship is reached must be determined by that of the voyage on which the goods are actually shipped and the goods must, until shipment, be taken to have started for the voyage for which they are afterwards in fact shipped.⁴⁴ The effect of this would be that sailing for a destination other than the one specified in the policy would trigger s. 44, and both the sea leg and land leg, which is incidental to the sea leg, would fail. This argument presupposes that the land part of the voyage cannot have a life of its own and is dependent on the sea leg, which forms the main part of a marine policy. Support for this contention could be drawn from the fact that in marine policies where the risk is extended to cover land risks, such a risk is regarded as incidental to the sea voyage by s. 2 of the MIA 1906.

In two cases decided at the turn of the millennium by courts in different jurisdictions, the courts have preferred to follow the later approach. In *Nam Kwong Medicines & Health Products Co Ltd v China Insurance Co Ltd*,⁴⁵ the assured, Nam Kwong, obtained insurance cover from China Insurance Co Ltd on ICC (A) for 15,788 drums of refined bleached and deodorized palm olein valued at US\$2,442,000. The cargo was bought from Pao Sang on CIF terms and was shipped on board the vessel *Pacifica* on 1 June 1998 at Pasir Gudang in Malaysia destined for Beihei in China. The voyage to Beihei should have taken eight to ten days, but the *Pacifica* never arrived. Ship-to-shore cables purporting to be from the vessel were received indicating distress said to be caused by bad weather, and on 19 July 1998 Guangxi Radio in China received a message indicating that she had been abandoned. It was the general feeling that *Pacifica* was a phantom ship. The defendant underwriters denied liability, arguing, *inter alia*, that the risk never attached by virtue of s. 44 of the MIA 1906. Stone J held in favour of the underwriters. He said:⁴⁶

A voyage policy is no more than insurance on a particular risk. It is evident that if in actuality the voyage performed is not the voyage described in the policy, then equally clearly it is not the risk that the insurer has bargained to cover. In other words, the scope of the cover from shipment is defined by reference to the voyage so specified, and it is not easy to see why cl. 8 of the ICC (A) should circumvent, or be regarded as circumventing, that situation. The fact that "all risks" are to be held covered from the time of leaving the warehouse in itself cannot be determinative of insurance cover if the ocean leg of the transit is not that specified in the policy. All risks are held covered if in actuality the transit, of which the specified ocean leg is the major part, takes place as contemplated, and I am unable to see any residual inequity if cover is regarded as lapsing if in fact the vessel promptly sails for somewhere else.

The judgment clearly indicates that a cargo policy, even though being extended to cover the land leg of the voyage by virtue of the "warehouse to warehouse" clause, is essentially a policy controlled by the sea leg; if the sea leg falls for any reason, the rest falls with it. Clause 8 of the ICC and the fact that the attachment of the risk has been equated with the act of insured goods leaving the warehouse do not have any impact on this outcome. In reaching this decision, the judge made no attempt to discuss the position of the assured who might lose his goods before they arrive at the ship's rail. In that case, there is no doubt that the goods are on the insured voyage at the time of the loss. Interestingly, when determining whether the vessel sailed for the contemplated

44. *Simeon Israel & Co v Sedgwick* [1892] 62 LTMS 352, at 353-4.

45. [2002] 2 Lloyd's Rep 591 (Hong Kong High Court).

46. *Ibid.*, at 600.

voyage, the judge took into account the state of mind of fraudsters instead of the assured. On the minds of assured (and underwriters as well), the *Pacifica* had sailed for Beihei, which was the voyage stipulated in the insurance policy.

In the same year, almost a month after the judgment of the Hong Kong High Court, it was the turn of the English Court of Appeal to consider the same matter in *Nima SARL v Deves Insurance Public Company Ltd (The Prestroika)*.⁴⁷ The claimants, Nima SARL, a company incorporated and resident in Mali, purchased a cargo of some 5500 tonnes of rice valued at about £1.5 million from Central Rice Co Ltd of Thailand under a CIF contract to be delivered at Dakar in Senegal. In accordance with the sale agreement, a vessel, *Prestroika*, was chartered by the sellers of the cargo. The cargo was loaded onto the *Prestroika* in Kohsichang in Thailand in early March, after having been inspected, but the vessel did not, in fact, sail until 28 March 1999 as she was undergoing engine repairs. In the meantime, insurance was arranged for the cargo from an insurance company based in Thailand under ICC (A). The policy was then assigned to Nima SARL. The vessel should have arrived at Dakar at the beginning of May 1999. Faxed communications concerning the progress of the vessel were received by the agents on paper bearing the letterhead of "Prestroika Maritime Ltd. (Penang Representative Office)" and signed by "Eddy" of that office who stated that the owners were in touch with the vessel on a daily basis. On 22 April, they advised she had been delayed owing to her speed and on 24 April gave an estimated arrival time at Dakar of 20/21 May. On 13 May, the owners advised that the vessel would be in Dakar within 15/17 days, having been slowed down by engine trouble. On 20 May, the owners advised that the vessel had not been heard from for seven days. The last message from the owners was received on 24 May reporting the vessel's position as at 22 May and stating that her main engines had failed and she was drifting southward about 44 miles a day in very heavy weather. The vessel never arrived in Dakar and no trace of her or her cargo was ever found. All that is known with certainty is that the cargo was loaded on the vessel at the loading port, but did not arrive at the discharge port. On the face of it, therefore, the cargo was totally lost in circumstances, *prima facie*, covered by the All Risk Policy.

The insurers denied liability on the ground that the cargo had been stolen by persons purporting to be the owners of the *Prestroika*, who had planned their crime prior the voyage. It was contended that the risk under the policy had never attached by virtue of s. 44 of the MIA 1906. The Court of Appeal concurred. Their reasoning is, somehow, similar to the reasoning of the Hong Kong High Court. In the view of the Court of Appeal, the existence of a "warehouse to warehouse" clause, which allows an extension to the marine cover so as to protect the assured against losses on any land risk incidental to any sea voyage, does not alter the fundamental nature of the marine policy as being a policy covering the interests of the assured in a marine adventure which is defined in the case of a voyage policy by its two marine termini. If that adventure is never, in fact, embarked upon, the insurer will not be liable.⁴⁸

Having decided in favour of the insurers, Potter LJ, who delivered the judgment of the Court of Appeal, made an attempt to rationalise the relationship between cl. 8 of the ICC and s. 44 of the MIA 1906. His view is that both provisions could coexist side

47. [2002] EWCA Civ 1132; [2003] 2 Lloyd's Rep 327.

48. *Ibid.*, at [53]–[54], per Potter LJ.

by side and cl. 8 provides indemnity to the assured in cases where the cargo leaves the warehouse, destined for a phantom ship, but becomes a total loss en route or in the course of loading. Section 44 comes into equation only when the vessel sails for an entirely different destination than the one expressed in the policy. In that case, the cover, which attaches when the goods leave the warehouse, is invalidated retroactively (*ex post facto*).⁴⁹ This is a pragmatic solution and could possibly be explained by arguing that the policy contains an implied term giving the underwriter a right to invalidate the policy, attached originally when leaving the warehouse, retroactively if the ship sails to a different destination than the one stated in the policy. Taking this analysis to its natural conclusion, it is clear that an assured will not be able to recover for his loss if he suffers a partial loss during the land leg of the transit, which has not been repaired or otherwise made good, in a case where the cargo sails to a different destination on board of a phantom ship. This is because s. 77 of the MIA 1906 allows recovery only in respect of the total loss in a case where a partial loss, which has not been repaired or otherwise made good, is followed by a total loss. In this example, the total loss arises only after the policy is retrospectively invalidated.

Providing a cogent legal justification as to why s. 44 should take precedence over the transit clause in cases where the cargo is stolen by criminal organisations by using sophisticated methods is no consolation for innocent cargo interests whose goods are loaded on a phantom ship without their knowledge at the loading port. The outcome might be defensible from a legalistic point of view but it disregards the realities of contemporary shipping practice by presupposing that the assured, particularly those involved in multimodal transport, could determine which vessel his cargo will be loaded on. More significantly, it undermines the conscious decision taken to extend the cover beyond the commencement of the sea leg by incorporating "warehouse to warehouse" clauses into modern cargo policies. The 2009 version of the ICC attempts to offer a solution to the problem caused by the line taken by the judiciary in these two recent cases discussed above. Clause 10.2 of the ICC 2009 A, B and C reads as follows:⁵⁰

Where the subject-matter insured commences the transit contemplated by this insurance (in accordance with clause 8.1), but, without the knowledge of the Assured or their employees the ship sails for another destination, this insurance will nevertheless be deemed to have attached at commencement of such transit.

The effect of this clause is to reverse the impact of the decision in *The Prestrioka* by giving precedence to the "warehouse to warehouse" clause in the contract over s. 44 of the MIA 1906 in cases where the cargo is put on board a phantom ship, as long as the assured or his employees are not privy to the fact that the vessel has sailed to a destination other than the one stipulated in the policy. This is a positive development which will offer further protection to assureds finding themselves victims of phantom ship frauds.

Given that the MIA 1906 does not apply in the context of air carriage, there should be no potential conflict with s. 44 of the MIA and the transit provision that extends

49. [2002] EWCA Civ 1132; [2003] 2 Lloyd's Rep 327, at [56].

50. It is not clear why there is a need to incorporate this clause into ICC B and C given that loss caused by phantom ship frauds would not be covered under those policies anyway.

the coverage to the incidental land risks. However, the 2009 version of ICC (Air) leaves nothing to chance and specifies expressly that in cases where “the aircraft leaves for another destination, the insurance will nevertheless be deemed to have attached at the commencement of such transit as long as the assured or their employees were not aware of the change in destination”.⁵¹

A more difficult question arises when the cargo is picked up from the warehouse by fraudsters who pretend to be the actual carrier. The outcome might be different depending on which version of the transit clause is used. For example, under the 1982 version of the transit clause, both ICC and ICC (Air), recovery is very unlikely in that case because for the risk to attach it is essential that the goods leave the warehouse. If the fraudsters take possession of the goods at the warehouse, the loss takes place before the policy is attached.⁵² In stark contrast, the assured will possibly be able to recover when the goods are insured under the 2009 version of the transit clause. In that case, the risk attaches as soon as the goods are moved in the warehouse for loading and, therefore, misappropriation by the fraudsters takes place after the attachment of the risk. Taking the reasoning of Potter LJ in *The Prestrioka* to its natural conclusion, s. 44 of the MIA would not play any role in this context as it is relevant only to the sea leg of the transport. The loss arises at an earlier stage and there will be recovery under the transit clause.

LOSS CAUSED BY DELAY

In the context of cargo insurance a degree of uncertainty exists as to what extent loss or damage caused by delay is covered. Reinforcing s. 55(2)(b) of the MIA 1906, cl. 4.5 of the ICC 2009⁵³ stipulates that “loss, damage or expense caused by delay, even though the delay be caused by a risk insured against” is excluded from the cover. It is obvious that this exclusion would mean that the cargo insurer will be able to exclude his liability for financial losses that might arise as a result of a delay in the arrival of the insured cargo. For example, if the insured cargo is delayed for a few weeks due to perils of the seas and as a result the market rate of the goods decline, the cargo interest would not be able to recover his financial loss. The same is true for seasonal goods. Late arrival of cargo consisting of Christmas decorations might mean that the cargo insurer faces a financial loss, but that will not fall under the cargo policy.

So far so good. But the tricky question is what happens where perishable cargoes suffer physical loss or damage due to delay. Some authorities are adamant that this kind of loss is also excluded from the cover under standard insurance clauses.⁵⁴ Reference is made particularly to two nineteenth-century authorities on this point. In *Taylor v Dunbar*,⁵⁵ due to extensive delays caused by adverse weather, the insured cargo, pig and cattle carcasses became putrid and had to be thrown overboard.

51. Clause 8.2 of the ICC (Air) 2009.

52. See the judgment of Staughton J in *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Andreas Lemos)* [1982] 2 Lloyd's Rep 483 where it was held that in the context of a marine insurance policy theft is completed as soon as the property is appropriated with the intention of depriving its rightful owner of it permanently.

53. Clause 4.5 of the ICC 1982 and cl. 3.6 of the ICC (Air) are both worded exactly in the same manner.

54. See, for example, NG Hudson, T Madge and K Sturges, *Marine Insurance Clauses* (5th edn) (Informa, 2012), at pp. 21–22.

55. (1869) LR 4 CP 206.

It was held that this was not a loss occasioned by perils of the sea on the ground that the immediate cause of the loss was delay. *Pink v Fleming*⁵⁶ concerned an insurance policy that was effected in respect of a cargo of fruit. Following a collision, it became necessary to discharge the goods from the ship to facilitate the repairs, and after the completion of repairs the goods were reshipped and sent to their destination. On arrival at the port of destination, it was discovered that the cargo deteriorated. It was held that the loss of cause was delay and, as such, was not recoverable, even though the delay was caused by a peril insured against, that is, the collision.

If this represents the correct legal position today, particularly in the context of multimodal transport, it will mean a serious restriction on the cover afforded for the cargo interests. It is submitted that *Taylor v Dunbar* and *Pink v Fleming* should be viewed with caution given that they were decided at a time when "the last in time" approach was a dominant theory in identifying the proximate cause of loss in insurance cases. In fact, Lord Esher MR in *Pink v Fleming* was very explicit on this point:⁵⁷

According to the English law of marine insurance only the last cause can be regarded. . . . To connect the loss with any mentioned in the policy, the plaintiffs must go back two steps and that, according to English law, they are not entitled to do.

However, in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*⁵⁸ the House of Lords disregarded the "last in time approach" and indicated that in identifying the proximate cause of a loss, the courts' task was to look for the dominant or efficient cause.⁵⁹ Applying the new causation test in this context, it is very difficult to see how delay could ever be considered as the *proximate* cause of loss when the insured cargo suffers physical loss or damage due to the fact that it is subjected to marine perils longer than anticipated. Of course a layperson might well blame delay for the physical loss, but delay is always caused by a peril whether insured or not and is not a peril itself. For example, if following a terrorist attack security measures are heightened in a port causing considerable delays for the vessels entering that port and a cargo of animals insured against are lost as a result, the apparent cause of the loss might at first sight look like "delay" but the efficient cause, the cause without which the loss would not have happened, is certainly the cause that brought about the delay, in this case increased bureaucracy due to the threat of terrorism. Put another way, delay in this scenario is not a risk or peril but

56. (1890) 25 QBD 396.

57. *Ibid.*, at 398.

58. [1918] AC 350.

59. Lord Shaw summarised his understanding of the law on this point in the following fashion, *ibid.*, at 369: To treat *proxima cause* as the cause which is nearest in time is out of the question. Causes are spoken of as if they were distinct from another as beads in a row or links in a chain, but—if this metaphysical topic has to be refereed to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet, it is for the judgment as upon a matter of fact to declare which of the *proximate* and which was the remote cause. . . . What does "*proximate*" here mean? To treat *proximate* cause as if it was the cause which is *proximate* in time is, as I have said, out of the question. The cause which is truly *proximate* is that which is *proximate* in efficiency.

is the result of a peril and it is unthinkable that under the test laid down in *Leyland* case any judge will view delay as the cause of the loss.⁶⁰

It is very encouraging to see that American courts have embraced the change in causation test introduced by the *Leyland* case in cases relating to cargo insurance. In *Lanasa Fruit Steamship & Importing Co Ltd v Universal Insurance Co (The Smaragd)*⁶¹ the insured cargo of bananas deteriorated during a period of delay following on from a stranding. Having considered the above mentioned English authorities on the matter, the Supreme Court of the United States found "stranding" to be the proximate cause of the loss and refused to follow the approach that was adopted in *Pink v Fleming*. In the course of its judgment, the Supreme Court by making reference to the decision of *Leyland* case indicates clearly that it will be against the spirit of the judgment in that case to follow "the doctrine of *Pink v Fleming*".⁶² Again, in *Brandyce v United States Lloyds (The Corsicana)*⁶³ the New York courts in a case concerning loss caused by delay that occasioned from an insured peril followed the causation test laid down by the *Leyland* case. There, the insurance was on a cargo of potatoes. After the carrying vessel was involved in a collision with an unidentified object, she was put into Charleston for repairs. There it became necessary to discharge the cargo. After the repairs the vessel resumed her voyage, but on account of the delay, the potatoes because of sprouting and rot had to be sold. The court found the collision as the proximate cause of the loss. The judgment was later affirmed by the Court of Appeals of New York.

The current editors of the *Arnould* see this as a plausible standpoint but point out that there is at least equal force in the counterargument to the effect that given that the MIA 1906 is a codifying statute intending to codify the common law as it stood at the time the Act was passed,⁶⁴ s. 55(2)(b) is intended to enact the delay cases of *Taylor v Dunbar* and *Pink v Fleming* on the basis of the then prevailing "closest in time" approach to proximate cause.⁶⁵ The problem with this argument is that it presupposes that the "last in time" was the dominant theory with regard to causation matters. This is certainly not the case. In the course of the nineteenth century, the law with regard to causation was in a state of flux and numerous decisions exist where courts were prepared to search for the efficient cause of the loss rather than settling for the last

60. A similar view has been expressed by J Dunt, *Marine Cargo Insurance* (Informa 2009), pp. 121. See, also, the contribution written by K S Selmer, "Delay in Cargo Insurance" in *Cargo Insurance and Modern Transport* edited by K Grönfors (Akademiförlaget Gumperts 1970).

61. 302 US 556 (1938), [1938] AMC 1.

62. There are other American cases where delay has not been regarded as a cause of loss in cases where the insured goods suffer loss or damage as a result of the voyage taking longer than contemplated. For example, in *Williams v Smith 2 Caines 1* (1804) a cargo of naval stores was insured for a voyage from New York to Algiers. The carrying vessel experienced severe weather which resulted in serious damage on her hull and she was put to Cadiz for repairs. While there an epidemic fever broke out which prevented all business and made it impossible to obtain permits for taking the cargo from the place where it was put temporarily to facilitate the repairs on the vessel. Meanwhile the vessel was driven to sea by a storm and sustained further injuries and on returning to Cadiz it was discovered that the cargo, both on shore and on board, was deteriorated more than one half of its original value due to the heat of the climate and violence of the gale. The assured was allowed full recovery and the New York court indicated that "if the consequence of delay was a deterioration of the subject insured, the insurer must be answerable for the loss". See also *Cory v Boylston Insurance Co* 107 Mass. 140 (1871).

63. 147 NE 201 (1924), [1924] AMC 365.

64. Section 91(2) of the MIA 1906 states: "The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance."

65. J Gilman *et al.*, *Arnould's Law of Marine Insurance and Average* (17th edn) (London 2008), [22-33].

one in time. For example, in *Hahn v Corbert*,⁶⁶ following grounding of the carrying vessel due to a storm, the insured cargo was seized as a prize by Spanish royalists. The loss here was put down to perils of the sea not loss by war or civil war, which was the last peril occurring in time.⁶⁷ Therefore, how can it be argued that the law as it stood before the codification favoured one of the dominant causation theories, namely "last in time", so today we are still bound by those decisions when it comes to cases concerning physical loss caused by delay? It is submitted that the correct position is to view causation issues in the light of the *Leyland* case and on that basis it is hard to envisage how delay can be viewed as the proximate cause of the loss given that the cause of delay is inevitably another peril whether insured or not.

In the absence of any binding judicial authority on the matter, where do we stand today? The truth of the matter is that in contemporary practice the overwhelming majority of cargo policies are underwritten under the assumption, at least on the part of the underwriters, that physical losses associated with delay will not be insured against and often extra premium is required to provide cover against such eventualities. In the light of the analysis carried out in this part, it is submitted that this might not represent the correct legal position. It is, of course, possible for the underwriters to remove any doubt on the matter and exclude physical losses or damage associated with delay by using an alternative causation formulation. For instance, cl. 4.7 of the ICC 2009 excludes from cover "loss, damage or expense directly or indirectly caused by or arising from the use of any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter". It has been acknowledged that with this kind of formulation a more remote link in the chain of causation is contemplated than proximate and immediate cause.⁶⁸ By using a similar formulation in cl. 4.5, it is, therefore, possible to exclude losses associated with delay in cargo policies.

As it currently stands, evidently there is a remarkable disparity in the manner that underwriters perceive the law to be and what it actually is on the matter. This might work against assureds particularly in the context of multimodal transport where there is a greater risk of delay given the involvement of numerous carriers and subcontractors.

GAPS IN COVER IN STANDARD CARGO CLAUSES DUE TO THE NATURE OF THE INTERNATIONAL SALE CONTRACT

It is often overlooked that parties enter into multimodal transport arrangements in order to fulfil their obligations emerging out of international sale contracts. The point of time at which the risk of loss passes to the cargo interest depends entirely on the type of the sale contract in question. It is, therefore, perfectly possible that the cargo interest will start bearing the risk of loss long before the cover under the cargo insurance policy attaches under the standard transit clause. An example would suffice to illustrate the point. Let us assume that a cargo of canned mushrooms is sold by

66. (1824) 2 Bing. 205.

67. See also *Bondrett v Hentigg* (1816) Holt N. P. 149 to the same effect.

68. *Coxe v. Employers Liability Assurance Corp Ltd* [1916] 2 KB 629, at 634, per Scrutton J.

a Chinese seller on Ex Works terms.⁶⁹ The buyer engages a multimodal transport operator who agrees to carry the goods from the premises of the seller in inland China to Bremen in Germany. Let us also assume that the buyer arranges insurance cover for this carriage under ICC 1982 which incorporates the earlier version of the transit clause. Under the sale contract, the risk of loss passes to the buyer when the goods are placed at his disposal on the day agreed. On the other hand, the insurance cover under the ICC 1982 attaches only when the goods leave the warehouse in China. If, therefore, the buyer cannot take the delivery of the goods at the agreed time, the risk will, nevertheless, pass on to him⁷⁰ despite the cargo insurance not being in force at that point in time. Accordingly, any loss arising whilst the goods are in the premises of the seller will need to be borne by the buyer.⁷¹

Needless to say, it is open to parties to draft tailor-made clauses to extend the cover to the point in time when the risk passes to the buyer. Courts will invariably give effect to such clauses. For instance, in *Wünsche Handelsgesellschaft v Tai Ping Insurance Co Ltd*,⁷² the Court of Appeal had no difficulty extending the insurance cover to the time when the goods left the canning factories in China heading towards a warehouse in Shenzhen that was used as a hub for sorting and packing the goods in containers with a view of shipping them to Europe. A term in the cargo policy read "Ex factory in the People's Republic of China to warehouse in Hamburg. Warehouse to warehouse and risks of transshipment included."

Another instance where cover provided under standard cargo policies will not be of much use to the assured occurs when the goods are lost or damaged before the risk is passed on to the cargo interest. Again a hypothetical scenario will help to illustrate this point. Imagine that the goods are sold to the buyer on FOB terms. In that case, the risk passes to the buyer only after they are loaded onto the carrying vessel. If the goods are lost or damaged en route to the departure port, even though the cargo insurance by virtue of the transit policy will be in place, it will not be possible for the buyer to make a claim under the policy, as at the time of the loss he did not have an insurable interest in the goods.⁷³ Generally speaking in those circumstances, the buyer would not suffer any loss, as he would be in a position to reject the damaged goods under the sale contract. However, claiming under the cargo insurance might still be a better option for him if the loss sustained does not justify rejection of the goods. Likewise, relying on the cargo insurance policy might be the only option open to the buyer, especially if he has paid for the goods in advance and the seller is now insolvent. Lack of the buyer's insurable interest in the goods at the time of the loss is likely to prove something of a stumbling block, but it can be overcome if the insured policy contains a "lost or not lost" clause which enables the assured to recover even though no interest in the subject-matter of insurance was acquired until after the loss

69. Under INCOTERMS 2010, when goods are sold Ex Works, the seller's obligation is to make the goods ready for collection at his premises (works, factory, warehouse, plant) on the date agreed upon. The buyer pays all transportation costs and also bears the risks for bringing the goods to their final destination.

70. This will also be the case under art. 69 of the United Nations Convention on Contracts for the International Sale of Goods 1980.

71. The outcome would have been the same under the ICC 2009 which incorporates the most recent version of the transit clause.

72. [1998] 2 Lloyd's Rep. 8.

73. Section 6(1) of the MIA 1906 requires the assured to have an insurable interest in the subject-matter insured at the time of the loss.

CONCLUSION

occurred, unless the assured knew of the loss and the insurer did not at the time of conclusion of the contract.⁷⁴ Standard cargo clauses do not contain a "lost or not lost" clause,⁷⁵ so it needs to be individually negotiated into the contract by the parties.

The example provides a useful illustration of the limitations of the standard cargo clauses. A similar difficulty arises again when goods are sold on FOB terms but it proves impossible to demonstrate when the loss occurred. In that case, the buyer will not be able to prove a breach of the sale contract by the seller to be able to reject the goods. In the light of the fact that there is no remedy under the sale contract, the only option available to the buyer will be to seek indemnity under the cargo insurance policy; but he will face the difficulty of proving that he had insurable interest at the time of the loss in the absence of a "lost or not lost" policy.

CONCLUSION

The survey carried out in this chapter reveals that standard cargo clauses available in the insurance market might not offer the protection that cargo interest involved in multimodal trade would require. Several instances have been identified where cargoes remain uninsured for a considerable period of time when standard cargo clauses are used as the basis of cover. It has also been illustrated that various provisions of the MIA 1906 might militate against the interests of the assured particularly in the multimodal context.

Almost all the difficulties identified in this chapter can be avoided and a comprehensive cover obtained for those who transport their goods by using various modes of transport if individually negotiated clauses are incorporated into the contract. Insurers would undoubtedly require additional premium for such tailor-made clauses, but that is the only way to ensure that the cover is full and complete in multimodal context. As is often said: "There is a price for everything!"

74. See, s. 6(1) and Sch 1, r. 1 of the MIA 1906.

75. Clause 11 in both the ICC 1982 and 2009 versions is not a "lost or not lost" clause.