CHAPTER 16

Insuring cargoes in the new era – impact of the Insurance Act 2015 on standard cargo clauses/wordings

*Professor Barış Soyer**

16.1 Introduction

The Insurance Act 2015,[1] which received Royal Assent on 12 February 2015,[2] introduces significant changes to English commercial and marine insurance law by amending the provisions of the Marine Insurance Act (MIA) 1906 concerning the duty of utmost good faith and warranties and other risk control clauses.[3] The purpose of this article is to deliberate the potential impact of this piece of law reform on warranties and other risk-control clauses in cargo insurance, especially standard cargo clauses.[4] A good starting point for an analysis of this nature will be to identify the main changes introduced by the Insurance Act 2015 in this field:

i) Section 10 abolishes any rule of law to the effect that a breach of a warranty in a contract of insurance results in the discharge of the insurer's liability.[5] Instead, in case of breach of a warranty, the liability of the insurer will be suspended but the risk will reattach, in most instances, once the breach is remedied. By virtue of s. 10(2), however, if loss arising after remedying the breach is attributable to something happening during the period of suspension, the insurer has no liability. This subsection recognises the fact that the risk in some cases might acquire new characteristics as a

* **Director of Institute of International Shipping and Trade Law, Swansea University.**

1 The Act is one of the main outcomes of the reform initiative led by the English and Scottish Law Commission (Law Commissions) which commenced in 2006 with a scoping paper. In the course of nine years, a series of Issues and Consultation Papers have been published by the Law Commissions. The final report of the Law Commissions on the subject was published in 2014: *Insurance Contract Law: Business Disclosure;Warranties; Insurer's Remedies for Fraudulent Claims; and Late Payment*, Cm 8898, SG/2014/131. The project has also led to the enactment of the Consumer Insurance (Disclosure and Representations) Act (CIDRA) 2012 which came into force on 6 April 2013 (SI 405/2013).

2 The Act will enter into force on 12 August 2016.

3 The 2015 Act also provides new rules replacing those available at common law in respect of the effect on the insurer's liability of an assured making a fraudulent claim under a policy (see ss. 12–13). Furthermore, it introduces highly technical changes to the Third Parties (Rights against Insurers) Act 2010 aimed at removing drafting errors that had so far prevented that Act being brought into force (ss. 19–20).

4 The potential impact of the reform on various aspects of duty of utmost good faith will not be deliberated here. The 2015 Act introduces significant changes in this field by changing the main parameters, and these changes will have impact on pre-contractual good faith duties of the assured; but these are extra-contractual issues which will not form part of the discussion in this article.

5 This is the remedy stipulated in s. 33(3) of the MIA 1906.

result of the breach, and, therefore, the breach might have an everlasting impact on the insurer's original risk assessment.

ii) Section 11 stipulates that if compliance with a term of a contract of insurance would tend to reduce the risk of i) loss of a particular kind, ii) loss at a particular location or iii) loss at a particular time, a breach of that term will not suspend liability if the assured shows that non-compliance with the term could not have increased the risk of the loss that actually occurred in the circumstances in which it occurred. The objective of this provision is to prevent insurers from denying a claim that arises during a period when the insured is in breach of warranty, if compliance with the warranty would not have had any impact on the loss occurring. This provision gives additional protection to the assured in cases where the warranty breached was not designed to deal with the risk which caused a particular loss. It applies not only to warranties as traditionally understood but also to other risk control clauses such as condition precedents to liability, suspensory provisions and exclusion clauses.

iii) Nevertheless, s. 11 is subject to a major exception: it does not apply to a warranty or term that serves the purpose of describing the limits of cover as a whole. This is because such a term will have a general limiting effect and is not linked to a specified risk. Therefore, if a policy stipulates that the insured cargo will be carried in a watertight container and loss arises at a time when it is not carried in such a container, s. 11 will provide no relief to the assured, who will be deprived of indemnity for the loss emerging.

iv) For commercial and marine policies, the relevant provisions of the Insurance Act 2015 can be excluded subject to important transparency safeguards as set out in s. 17.[6]

This brief introduction sets the scene for a detailed analysis of potential impact of the changes introduced by the Insurance Act on cargo policies which will follow.

16.2 The potential impact of sections 10 and 11 of the Insurance Act 2015 on common warranties in cargo policies

Although standard cargo clauses do not contain any express warranties,[7] it is the invariable practice to incorporate several of them into cargo policies, depending on the nature of the cargo and risk insured against. Given the drastic nature of the changes introduced by the Insurance Act 2015, one might assume that the legislative reform will lead to significant changes in this practice. This is true to a

6 Conversely, for consumer policies, the rules mentioned above will be mandatory in the sense that a contract term which would put the assured in a worse position than under the Act will not be permitted at all (s. 15 of the Insurance Act 2015).

7 As discussed below, it has been suggested by Australian authorities that cl. 18 of the Institute Cargo Clauses (ICC) (both 1982 and 2009 versions), which deals with delay in the performance of the voyage, can be viewed as a warranty, but this is far from settled as far as English law is concerned.

certain extent, but it is submitted that as far as some types of warranties are concerned, there will be no drastic change in the legal position.

16.2.1 Cargo warranties – instances where no significant change is expected

Alteration of the remedy in case of breach of a marine warranty will in most cases work in favour of the assured, in that they will be able to bring themselves back within the policy coverage as long as the breach is remedied. However, there will be frequent instances where the nature of the warranty is such that it will not be possible to remedy the breach during the currency of the policy. For instance, if a warranty affirms that the insured cargo is 'current season's crop' but this does not hold true, breach will result in the insurer never coming on risk, as compliance with this kind of warranty is likely to be treated as a condition precedent[8] to the attachment of the risk.[9] Here, the warranty in question is one that relates to a period before the attachment of the risk. In other words, the risk attaches only if the warranty is satisfied. The function that a warranty of this type serves is to assist an underwriter in rating the scope of the proposed insured risk, and the underwriter agrees to undertake the risk by relying on the contractual undertaking that forms the basis of such a warranty. In case of breach, therefore, it is understandable why they will not come on risk at all, and the Insurance Act 2015 is not expected to alter the common law position with regard to such warranties.

Similarly, no substantial deviation from the current legal position will arise if a warranty is breached and there is no realistic prospect of remedying the breach at a later stage. For example, if a warranty that requires the insured cargo to be stuffed into the container by the manufacturer is not complied with, the cover, assuming that it starts when the goods are moved in the warehouse for the purpose of immediate loading,[10] will be suspended from that point onwards and it will not be practically possible to remedy this breach at a later stage.[11]

16.2.2 Cargo warranties where a different outcome could be expected

The position is likely to be different when dealing with future warranties that relate to a period after the attachment of the risk. Imagine that a cargo policy contains the following term: 'Warranted printing machinery to be carried from port of discharge to final warehouse in a low bed multi-axle trailer'. If the forwarder arranges an ordinary lorry to carry the machinery from the port of discharge and the insured cargo is lost following an accident caused by the driver suffering a heart attack at

8 See comments made by Lord Mansfield in *De Hahn v Hartley* (1786) 1 TR 346, at 345–346.

9 A similar legal outcome will also follow if the following term, which is regularly incorporated into cargo policies, is not complied with: 'Warranted surveyor to approve vessel(s), tug(s), barge(s), towing arrangements, all other carrying conveyances and all lifting equipment including cranes required for loading/unloading operation prior to attachment.'

10 See cl. 8 of the ICC 2009. Compare, however, cl. 8 of the ICC 1982.

11 In a similar vein, if a warranty requires insured cargo to be transported in 'new bags', a warranty which is often used when insuring cargoes such as coffee, the cover will be suspended from the moment when the goods are put into old bags, with no prospect of remedying such breach at a later stage.

the wheel, under the traditional warranty regime the assured will not be able to recover, as the insurer will be discharged from liability automatically after the breach regardless of whether the breach is material to the loss or there is any causal link between the loss and the breach.[12] However, the position might well be different under s. 11 of the 2015 Act. The assured in such an instance could contend that compliance with the warranty in question would tend to reduce the risk of loss of a particular kind (e.g. risk of loss caused by the hazard that the insured property is unwieldy or top-heavy) and non-compliance with the warranty could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred. Put differently, the assured could argue that during the period of breach of this particular warranty, the insurer's liability in respect of hazards created by carrying an oversized cargo without using an appropriate truck is suspended. However, for losses associated with other hazards (e.g. the driver suffering from a heart attack and losing the control of the truck), the insurer's liability remains intact under s. 11. The burden of proof is on the shoulders of the assured.[13] This section has been introduced to prevent insurers from relying on breaches of irrelevant warranties – that is, where the type of loss which occurred is not one which compliance with the warranty could have any chance of preventing.[14]

A similar outcome could follow in a case where a warranty requires the IMDG Code for Dangerous Goods to be complied with at the time of loading. If this requirement is not complied with but the cargo is lost when the vessel sinks following (say) a collision, it is possible that s. 11 could provide a lifeline to the assured, who might be entitled to indemnity by showing that non-compliance with a warranty could not have increased the risk of loss which actually occurred in the circumstances in which it occurred.

16.2.3 Cargo warranties – position unclear

Section 11 is relevant in the context of a warranty (or term) that aims to reduce the impact of a particular risk-increasing event or circumstance. On the other hand, as mentioned above, it is not applicable when loss arises following breach of a warranty (or term) that serves the purpose of describing the limits of the cover as a whole. The reason is that such a term will have a general limiting effect not linked to a specific risk.[15]

A clause commonly used in cargo insurance is the Institute Classification Clause, which requires the cargo to be carried only on board vessels classed with an approved

12 Section 33(3) of the MIA 1906.

13 Section 11(3) of the Insurance Act 2015.

14 However, it is likely that s. 11 will create uncertainties, as identifying whether compliance with a warranty could have increased the risk of the loss which occurred in the circumstances in which it occurred might not be a straightforward task. In the example above, the insurer could potentially argue that the warranty has been introduced to reduce the risk of loss caused by traffic-related incidents. It is a genuine concern that the test introduced has the potential to increase transaction and litigation costs by leaving enough room to parties argue in opposite fashion.

15 *Insurance Contract Law: Business Disclosure;Warranties; Insurer's Remedies for Fraudulent Claims; and Late Payment*, Cm 8898, SG/2014/131, at paras. 18–35.

classification society and within the age limits specified.[16] If the insured cargo is carried on a vessel that does not qualify, the cover is suspended. The Classification Clause is a term that aims to describe the limits of the cover as a whole; that is, cover is only available when the insured cargo is carried on board a vessel that is in compliance with the Clause. This means that s. 11 will have no application, so if a loss follows breach of the Classification Clause, no cover will be available even if the non-compliance in no way increased the risk of the loss which actually occurred in the circumstances in which it occurred. A similar outcome should follow in a case where, for example, a warranty requires the carrying vessel to be ISM Code–compliant. If cargo is lost when carried on board of a non-compliant vessel, no cover will be available and s. 11 of the 2015 Act will be of no avail for the assured, given that such a warranty is designed to describe the risk in a general manner.

So far so good; but in some cases, difficulty is likely to arise in identifying whether the term in question is one that aims to describe the risk in a general way or whether it aims to minimise a particular risk-increasing event/circumstance.[17] One example that immediately springs to mind is s. 41 of the Marine Insurance Act 1906, which implies a warranty of legality in marine policies. This section imposes two types of obligations on the part of the assured. The marine adventure must not only be legal at the inception of the policy,[18] but it must be also performed legally, so far as the assured can control the matter.[19] Assume that the assured obtains insurance for a cargo of medicines for a legal voyage from the UK to Jamaica, but their agents use fraudulent documents to load the cargo on the carrying vessel in contravention of a statute that prohibits export of such cargoes without the permission of the Department of Health. Assume too that the cargo is lost as a result of the carrying ship sinking following a collision. It is evident that s. 41 is breached; but it is also indisputable that the breach could not have increased the risk of loss which actually occurred (as a result of perils of the seas) in the circumstances in which it occurred. Would the implied warranty of legality be treated as a provision designed to describe the risk as a whole, or as one intended merely to minimise the effect of a particular risk – namely, possible seizure or bureaucratic hold-ups? Naturally, the insurer and assured are likely to have different views as to the nature of the legality warranty, with the insurer arguing for the former interpretation and the insured for the latter.[20]

16 Under the present law, this effectively operates as a warranty and there is no cover if the vessel carrying the cargo does not qualify, whether or not this is causative of any loss. See the decision of the Singapore Court of Appeal in *Everbright Commercial Enterprises Pte Ltd v AXA Insurance Singapore Pte Ltd (The Sirena 1)* [2001] 2 SLR 316 and the Hong Kong High Court in *Nam Kwong Medicines & Health Products Co Ltd v China Insurance Co Ltd and the People's Insurance Co Ltd (The Pacifica)* [2002] 2 Lloyd's Rep 591.

17 For a more comprehensive discussion on this point, see B. Soyer 'Risk Control Clauses in Insurance Law: Law Reform and the Future' (2016) 75 Cambridge Law Journal 1, at pp. 121–122.

18 A marine adventure can be rendered illegal by various means – by statute, common law, prize law, orders made by the Queen and other international rules.

19 In *Ingham v Agnew* (1812) 15 East 517, although the adventure insured was lawful at its outset, it was not performed legally, as the assured sailed without a convoy, in violation of a statute which prohibited sailing without a convoy.

20 This will, undoubtedly, necessitate an enquiry as to the reasons for the implementation of the relevant statute.

If the assured's contention finds judicial support, in the scenario above the loss would be recoverable despite the fact that the voyage has not been executed in a legal fashion by virtue of s. 11 of the Insurance Act 2015. It is submitted, however, that the function of the warranty of legality is to assist risk assessment, and this term in all probability relates to the contract (and risk) in a more general fashion. Therefore, in case of its breach the risk assessment undertaken by the insurer at the outset is in tatters, and for that reason s. 11 should have no role to play in this context. A contrary solution would also reduce the role that this warranty is expected to play, affording an assured a potential defence in cases where the insured's adventure is performed in an illegal fashion under their control. This could be said to be inconsistent with public policy. That said, due to the fact that no attempt has been made to describe these key concepts in the Insurance Act 2015, disputes of this nature are likely to arise.[21]

16.3 The potential impact of sections 10 and 11 of the Insurance Act 2015 on implied voyage conditions

In the absence of a contrary provision in the policy, it is trite law that a policyholder after attachment of the risk is entitled to alter the nature of the risk without the consent of the insurer.[22] In voyage policies, in order to protect the insurer against this eventuality, implied terms (also known as voyage conditions) have been introduced into contracts by virtue of ss. 42–48 of the Marine Insurance Act 1906. Historically these provisions have played a significant role in determining the scope of the cover, although their significance has declined in contemporary practice, especially in the context of cargo insurance, as a result of held-covered clauses and other clauses that have been employed to ameliorate harsh consequences of breach of these provisions.

Some of these so-called voyage conditions operate in the same way as continuing warranties (especially s. 45 (change of voyage),[23] s. 46 (deviation)[24] and s. 48 (delay

21 Similar debates could arise in the context of the implied warranty of 'seaworthiness', but this warranty is invariably waived in standard cargo clauses; see for example cl. 5.1 of the ICC 2009.

22 Pollock CB in *Baxendale v Harvey* (1849) 4 H & N 445, at 449, 452, famously said: 'If a person who insures his life goes up in a balloon, that does not vitiate his policy. . . . A person who insures may light as many candles as he please[s] in his house, although each additional candle increases the danger of setting the house on fire.'

23 By virtue of this provision, a change of voyage occurs if after the commencement of the risk the destination of the ship is voluntarily changed from the destination contemplated by the policy.

24 Section 46 of the MIA 1906 stipulates:

> (1) 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.
> (2) There is a deviation from the voyage contemplated by the policy –
> (a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or
> (b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.
>
> (3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

in voyage)[25]), in the sense that breach of any of these conditions entitles the insurer to discharge themselves from liability prospectively under the contract without prejudice to liability for previous losses, although they are not technically speaking classified as warranties.[26] Similarly, some of these conditions have the same effect as a breach of a warranty that needs to be complied with before the attachment of the risk – especially s. 43 (alteration of port of departure)[27] and s. 44 (sailing for different destination),[28] and hence any breach prevents the risk from attaching.[29]

During the process of consultation, the implied voyage conditions stipulated in ss. 42–49 received little attention. Some of those consulted suggested that their impact on contemporary practice is so limited that abolishing them would not create any difficulty.[30] Others, such as the Law Reform Committee of the Bar Council and Royal and Sun Alliance, argued for their retention.[31] In the end, the Law Commissions took the view that no specific arrangement with regard to the implied voyage conditions was needed in the new legislation, and the relevant provisions of the 1906 Act have been left untouched.[32] Furthermore, the Commissions concluded that the changes in this area to be implemented through ss. 10 and 11 of the 2015 Act would not have any impact on voyage conditions, as they were expressed as conditions precedent to attachment of the risk, rather than warranties.[33]

It is clearly correct to suggest that ss. 43 and 44 (and possibly s. 42(1)) of the 1906 Act, which need to be satisfied in order for the risk to attach, are unlikely to be affected by the Insurance Act 2015. Since ss. 43 and 44 are conditions precedent to the attachment of the risk, it follows that if the implied obligations they create are not satisfied, no risk ever attaches, so there can be no issue of a loss within the scope of the policy in the first place. Despite the fact that the matter is complicated due to the introduction of the remedy of avoidance, a similar observation is in order with regard to s. 42(1). If, after the formation of the policy,

25 Section 48 of the MIA 1906 stipulates that the insurer is 'discharged from liability as from the time when the delay became unreasonable'.

26 As they are not 'promissory' in nature.

27 This section stipulates that:

Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.

28 Section 44 of the MIA 1906 reads:

'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.'

29 The consequence of s. 42, which deals with delay in commencing the insured adventure, is a curious one, as it enables the insurer to avoid the policy.

30 See in particular the submission made by the City of London Society.

31 For a summary of submissions made, visit: http://www.lawcom.gov.uk/wp-content/uploads/2015/06/duty-of-disclosure_responses_warranties.pdf (last visited on 1 January 2016).

32 Conversely, the Australian Law Reform Commission, when considering a possible reform of the Marine Insurance Act 1909 (Cth) (ALRC Report 91), proposed that the provisions of the MIA 1909 relating to change of voyage, deviation and delay should be repealed, permitting these concepts to be dealt with as express terms of the contract. This Report was not acted upon and can be found at: http://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc91.pdf (last visited on 1 January 2016).

33 Paragraph 16.24 of *Insurance Contract Law: the Business Insured's Duty of Disclosure and the Law of Warranties* (2012) LCCP 204/SLCDP 155.

the commencement of the adventure insured is delayed unreasonably, the insurer could opt to avoid the policy; and if this option is exercised there can be no liability under it.

However, it is submitted that the position might be different with regard to other voyage conditions, notably change of voyage (s. 45), deviation (s. 46) and delay in the course of the voyage (s. 48). These provisions are certainly not 'conditions precedent to attachment of the risk'. On the contrary: they closely resemble continuing warranties, given that in case of their breach the remedy stipulated in the relevant provisions of the 1906 Act is prospective discharge from liability. The reach of s. 11 of the 2015 Act is broad, in that it applies not only apply to marine warranties but to any other term, whether express or implied, other than a term defining the risk as a whole. There is, therefore, ample scope to argue that it does affect implied voyage conditions that no deviation should take place during the execution of the insured voyage, or that the insured voyage should not be delayed unreasonably, or that the destination of the ship should not be voluntarily changed from the destination contemplated by the policy after the commencement of the voyage. That is because it can be plausibly argued that compliance with s. 46 would tend to reduce the risk of loss at a particular time (i.e. during the period of deviation). Similarly, compliance with s. 45 aims to minimise the risk of loss of a particular kind (caused by diverting the vessel to a different location than that agreed in the contract), while compliance with s. 48 aims to reduce the risk of loss of a particular kind (caused by delay).

Assuming that ss. 45, 46 and 48 of the MIA 1906 can be viewed as provisions that are designed to minimise the risk of loss of a particular kind, at a particular location and/or at a particular time, this opens the door for s. 11 of the Insurance Act 2015 to be relevant in a case where loss arises following breach of these provisions. If so, the crucial question will be to identify whether this could create unforeseen consequences for parties using standard cargo clauses as the basis of their agreement. This issue will be analysed next.

Let us start with s. 46, which stipulates that the insurer is discharged from liability as from the time of deviation. In a voyage hull policy, s. 11 might potentially be a game changer. For example, if there is a deviation within the meaning of s. 46, and a loss arises immediately afterwards due to a reason that is not connected with the deviation (e.g. a fire in the engine room due to a latent defect), then, assuming that s. 11 is relevant, the assured can argue that the deviation could not have increased the risk of loss which actually occurred in the circumstances in which it occurred (loss as a result of a latent defect in the machinery). This could potentially provide them with a useful new lifeline. However, this will not be a plausible eventuality under a cargo policy using standard Institute Clauses as the basis of cover. By virtue of cl. 8.3 of ICC 2009 (A, B and C),[34] the insurance policy shall remain in force, *inter alia*,[35] in case of 'any deviation'. The clause is

34 Clause 8.3 of the ICC 1982 stipulates in the same manner.

35 For example, if there is delay beyond the control of the assured, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.

not dependent on any action on the part of the assured and cover is, therefore, extended automatically in case of deviation, negating the effect of s. 46. The reason why such an extension is granted automatically is that in contemporary shipping practice, cargo interests would normally have no control over the course of the voyage, or in most instances knowledge of the identity of the vessel on board of which the assured's goods will be loaded, once they are collected from their factory or warehouse. It is, therefore, safe to say that in case of deviation in a cargo policy, the cover would remain in place, as the application of s. 46 of the MIA 1906 in such a policy has been negated by cl. 8(3) of the ICC 1982 or 2009.

A similar outcome is likely to arise when a change of voyage takes place in a cargo policy. That is because cl. 10(1) of the ICC 2009 (A, B and C) stipulates that in a case when the destination is changed after the attachment of the policy, in breach of s. 45 of the MIA 1906, cover will nevertheless be extended as long as the assured gives prompt notice to the insurer and additional premium and terms are agreed.[36] This provision is essentially a held-covered clause, and it is clear that cover will be extended as long as it is available 'at a reasonable commercial market rate on reasonable market terms'.[37] Section 11 of the Insurance Act could, however, be relevant in a case where it is not possible to extend the cover under cl. 10(1). There is authority to the effect that the additional risk contemplated by a held-covered clause must be one that is capable of being placed in the market at a reasonable commercial rate.[38] If not, a held-covered clause could not be operated. The reason for this is that the undertaking given by the insurer under a held-covered clause is subject to an implied condition that the additional risk is one that has a market value.[39] Therefore, if notice is not given promptly or the change of voyage is so extreme (e.g. changing the destination to a port located in an area which is a hotspot for pirates) that no cover would be available in the market at a reasonable rate or on reasonable terms, cl. 10(1) would have no effect, and in that case potentially s.45 of the 1906 Act and s. 11 of the Insurance Act 2015 could be relevant. In this example, if the cargo is lost after the destination is changed as a result of fire on board, attributable to negligence of the crew, by

36 Clause 10 of the 1982 version of the clauses is drafted in a similar manner.

37 It is evident that cl. 10(1) will come into play even if the cargo suffers a loss before notice is given – as long as, of course, the assured could demonstrate that they were not aware of the change in destination prior to the loss, and they gave notice as soon as they became aware of it. Hamilton J, in *Mentz Decker & Co v Maritime Insurance Co* [1910] 1 KB 132, at 134, stipulated: '. . . I do not think the words "due notice" can be read as meaning that no notice is to be considered as "due" unless it is given at a time when the underwriter can still protect himself by reinsurance. I think the clause must be read as an agreement to hold the assured covered subject to a proviso which is satisfied by the giving of such notice as the assured could give after advice of deviation, and that, there being nothing predictable to be done on the receipt of the notice under the circumstances of the present case, the notice was given sufficiently early at the time when it was in fact given.' See also *Greenock Steamship Co Ltd v Maritime Insurance Co Ltd* [1903] 1 KB 367, at 376, per Bigham J.

38 *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep 560, at 568, per Donaldson J. This was followed in phantom ship cases in Singapore and Hong Kong: *Everbright Commercial Enterprise Pte Ltd v AXA Insurance Singapore Pte Ltd (The Sirena 1)* [2001] 2 SLR 316 and *Nam Kwong Medicines & Health Products Ltd v China Insurance Co Ltd (The Pacifica)* [2002] 2 Lloyd's Rep 597.

39 Clause 10(1) of the new version of ICC 2009, dealing with change of voyage, makes this expressly a part of the held-covered clause.

utilising s. 11 of the 2015 Act, the assured could potentially contemplate that change of voyage could not have increased the risk of loss which that actually occurred in the circumstances in which it occurred (i.e. negligence of the crew).

The position is more complicated in cases where an unreasonable delay arises which amounts to breach of s. 48 of the MIA 1906. This is because cl. 18 of the ICC 2009 seems to introduce a similar requirement to s. 48. The clause carries the title of 'avoidance of delay', and is worded: 'It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.' It is not clear whether this clause requires anything more arduous from the assured than s. 48 of the MIA 1906 does. Put differently, is the assured simply expected to proceed expeditiously with the voyage to the extent that matters are in their control, or does the clause impose a more general requirement on the assured to act without delay during the currency of the policy?[40] It might be possible that the clause has been introduced to replicate the statutory provision just in case the 1906 Act does not apply to periods of land transit under a policy affording warehouse-to-warehouse cover,[41] although this is unnecessary given the fact that by virtue of s. 2, a policy extended by its express terms 'so as to protect the assured against losses on inland waters or any land risk which may be incidental to any sea voyage' is a marine policy coming under the scope of the Act. If, on the other hand, the purpose of cl. 18 is to replicate s. 48, it is rather curious that the drafter felt the need for a contractual solution given that s. 48 was well-equipped to deal with the issue. In addition, the legal standing of this contractual provision (i.e. whether it is a warranty or innominate term) is uncertain. The use of the words 'condition of this insurance' in cl. 18 could be taken as an indication that the consequences for breach are likely to be termination of cover,[42] 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.[43] Two Australian cases on the matter seem to suggest that cl. 18 is a

40 The matter has been deliberated in J. Dunt, *Marine Cargo Insurance* (2nd edn, Informa Law, 2016), at [11.40], who seems to be of the view that the clause requires the assured to pursue the voyage or land transit without unreasonable delay.

41 This was the view of the majority in *Verna Trading Pty v New India Assurance Co Ltd* [1991] VR 129 SC (Vict, Aus).

42 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.

43 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) 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. This was also the view of J. Dunt in the first edition of his book, *Marine Cargo Insurance*, although in the second edition, influenced by the current editors of *Arnould*, at [11.39] he seems to suggest that it is most unlikely that this clause will be construed as a 'promissory warranty'.

warranty. In *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd*,[44] it was held that the 'condition' imposed by the clause effectively operated as if it were a promissory warranty because the 'policy extends only during transit prosecuted with reasonable despatch'. Similarly, in *Verna Trading*,[45] it was held that there was no cover when the assured failed to act with reasonable despatch.

Regardless of the precise nature of the relationship between cl. 18 and s. 48 of the MIA 1906 in cargo policies, it is submitted that any delay in prosecution of the voyage within the control of the assured will have a detrimental effect on the cover for losses that arise as a result of such delay. This is because cover under cl. 8.1 of ICC 2009 continues only 'during the ordinary course of transit'. There is little or no direct English authority on the meaning of the phrase 'ordinary course of transit'. In a case involving construction of a carrier's goods in transit policy, *SAC (Freight) Ltd v Gibson*,[46] Ackner J said:

> 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.[47]

This test provides a good starting point as it acknowledges the fact that it is not essential that the goods 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.[48] On that basis, it is a plausible standpoint to argue that any delay of the voyage that is within the control of the assured takes the goods outside the 'ordinary course of transit', and if any loss which is associated with the delay arises, there will be no cover. It is unlikely that ss. 10 and 11 of the Insurance Act 2015 will alter the position, given that cl. 8.1 is a provision which describes the risk in a general manner and if it is not complied with no cover will be available.

But what if the delay comes to an end and the contemplated voyage restarts? In that case, would the assured be able to recover for a loss arising after the resumption? Assuming that cl. 18 can be viewed as a promissory warranty, under the traditional warranty regime the insurer would be discharged from liability from

44 [1970] 2 NSWR 77, at 81.
45 [1991] 1 VR 129.
46 [1974] 2 Lloyd's Rep 533
47 [1974] 2 Lloyd's Rep 533, at 535.
48 In a South African case, *Fedsure General Insurance Ltd v Carefree Investments Pty Ltd* [2001] 2 ZASCA 88; [2002] 1 All SA 379 (A) (Sup Ct CA South Africa), containerised consignment of fabric imported from Korea was stolen from the warehouse at the port of Durban. Upon arrival of the goods to 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.

the date of delay without any prospect of the risk reattaching. However, under s. 10 of the Insurance Act 2015 the new legal remedy in that case is suspension of the cover during the period of delay. Therefore, once the ordinary course of transit is resumed, cover will be reinstated and any loss emerging thereafter should be recoverable. The introduction of the new remedy of 'suspension of cover' would, therefore, work in favour of the assured in those instances.

One should, however, not lose sight of the fact that none of this is certain. An insurer could quite credibly deploy an opposite argument, to the effect that the purpose of ss. 45, 46 and 48 of the Marine Insurance Act 1906 is to define the limits of cover as a whole, and that they do not aim to reduce the effect of risk-increasing events or circumstances. There is no guideline in the Insurance Act 2015 as to how to distinguish between these two types of term; and if this standpoint describes the correct position of law, in case of its breach of these provisions, s. 11 will have no role to play.[49] This is a plausible argument, but the burden will be on the insurer to show that ss. 45, 46 and 48 of the 1906 Act indeed have this effect. All of these potential difficulties could have been avoided, had the drafter taken the opportunity to clarify the position of the voyage conditions in the context of the Insurance Act 2015. The Law Commissions' basic presumption that the 2015 Act would not apply to implied voyage conditions is clearly misguided, and the wording of s. 11 invites assureds to develop arguments to the effect that this section might be relevant in cases where the loss arises after a voyage condition is breached but before the breach is remedied.

16.4 Contracting out

The 2015 Act allows parties to a commercial insurance contract to contract out of most provisions of the Act, including ss. 10 and 11,[50] as long as they manage to overcome the 'transparency requirements' stipulated in s. 17: that is, (a) if the insurer takes sufficient steps to draw a disadvantageous term to the attention of the assured before the contract is entered into,[51] and (b) if such term is clear and unambiguous as to its effect.[52] The first hurdle is likely to be satisfied in many instances in the context of cargo insurance, given that it is very common that the wording of such policies is prepared by a broker, so that the broker's knowledge of such a disadvantageous term would be adequate to satisfy this requirement.[53] The second hurdle will be satisfied if the term contracting out of the Act is drafted in a clear manner expressly stipulating its effect. Again, invariably all insurers

49 *Insurance Contract Law: Business Disclosure;Warranties; Insurer's Remedies for Fraudulent Claims; and Late Payment*, Cm 8898, SG/2014/131, at [18]–[35].

50 It is not permitted to use basis of contract clauses even in non-consumer insurance policies (s. 16(1) of the Insurance Act 2015).

51 Section 17(2) of the Insurance Act 2015.

52 Section 17(3) of the Insurance Act 2015.

53 Section 17 (5) of the Insurance Act 2015 stipulates (emphasis added): 'The insured may not rely on any failure on the part of the insurer to meet the requirements of subsection (2) if the insured *(or its agent)* had actual knowledge of the disadvantageous term when the contract was entered into or the variation agreed.'

operating in the cargo market are sophisticated enough to be able to draft this clause to satisfy the requirements of s. 17.

The interesting question at this stage is to what extent cargo insurers in the London market will be tempted to contract out of the new law and insist on doing business under the unamended Marine Insurance Act. This is a difficult question to answer, and at the time of writing there was no clear indication from the market as to how matters will progress. However, it is conceivable that the premium level may be kept at the current levels only if the assureds are willing to contract out of the protections given by the Insurance Act 2015. There is no doubt that the changes introduced will alter basic parameters of risk assessment, but perhaps more fundamentally there will be a degree of uncertainty as to how the courts will handle some difficult provisions of the 2015 Act, such as s. 11, and it is possible that underwriters may prefer to manage the transition period by contracting out.

16.5 Conclusions

Like other types of insurance contracts, cargo policies are also expected to be affected by the introduction of a new remedy by s. 10 of the Insurance Act 2015, although probably the impact of the change will not be as dramatic as it would be for other types of insurance contracts, as most warranties used in cargo policies are warranties that need to be complied before the risk attaches. However, the potential impact of s. 11 of the 2015 Act in the context of cargo insurance is less certain and, as illustrated with examples in this paper, difficulties are likely to arise as to whether it will apply in various instances.

Also, the manner in which s. 11 is worded leaves open to debate whether it can be relevant in the context of implied voyage conditions stipulated in the MIA 1906, although for standard cargo policies the significance of such conditions has been extensively reduced.

It is the view of the author that it will take a while for courts to provide guidance as to how a term that describes the risk generally can be distinguished from one that tends to reduce the risk of loss of a particular kind or at a particular location or at a particular time. The distinction can be a fine one but will have a significant impact in determining the role that s. 11 of the 2015 Act will play in cases where a loss arises during the period of breach of a warranty or any other similar term.

It is too early to speculate at this stage whether cargo insurers will opt to contract out of the new regime or whether they will give an option to assureds to choose between the old and new regime with different levels of premium. However, one thing is clear: nothing will be the same again after the Insurance Act 2015 comes into force.