

Susanna H. MARSDEN

BA (Hons) Oxon, LLM (Swansea)

The Institute Cargo Clauses (A) 2009: Recontextualized

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SUMMARY

The Institute Cargo Clauses 1982 were widely used and despite changes to their context, they have remained a perennial staple. While it remains to be seen whether the revised 2009 clauses will enjoy the same loyalty, it is submitted that the revised terms suggest that welcome attention has been paid to trends and shifts in trade and politics over the preceding 25 years. The following decades will almost certainly demand further amendments in order to keep this standard form part of standard cover, however.

Key words: The Institute Cargo Clauses, insurance, cargo, english law, marine insurance

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Preveo: prof. dr Slobodan Jovanović,
e-mail: nsbob@sezampro.rs

Susanna H. MARSDEN*

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“One of the definitions of what is called deconstruction would be the effort to take this limitless context into account, to pay the sharpest and broadest attention possible to context, and thus to an incessant movement of recontextualization. The phrase which for some has become a sort of slogan...of deconstruction (‘there is nothing outside the text’), means nothing else: there is nothing outside context.”

Jacques Derrida – *Of Grammatology* (1967)

Abstract

In this article, I hope to provide a commentary on the main changes introduced in the Institute Cargo Clauses 2009, the reasons for their introduction as well as some analysis of their potential impact in the current unstable economic and political climate facing the insurance market and an analysis of the recent common-law jurisprudence around the revisions clauses. While not an exhaustive discussion, the identification of recurrent themes shows the concerns at the back of the revisions introduced prior to their publication.

Key words: Institute Cargo Clauses, Insurance, Cargo, English Law, Marine Insurance

1. CHANGING THE GOALPOSTS

The publication of the Institute Cargo Clauses (ICC) 2009 was the product of a Joint Cargo Committee Working Party headed by Nick Gooding which had been set up to revise the ICC(A) 1/1/1982 commencing in 2006, with final distribution of the revised document in 2008 before the new clauses began to be used on 1/1/2009.

* BA (Hons) Oxon, LLM (Swansea). With thanks to Baris Soyer, Theodora Nikaki for their help and comments. E-mail: susie_marsden@hotmail.com.

While some of the revisions introduced by the JCC, although hardly unwelcome, are little more than superficial alterations designed to render the new form palatable to an international base of users who are unfamiliar with the arcane terminology¹ prevalent in English law, this article aims to look deeper into the changes introduced, their potential implications for cover, and the motivations behind their incorporation – it is hoped that this will show that the revised ICC(A) is largely a product of context representing an attempt to respond to industry concerns about the cover offered under the 1/1/82 clauses in order to preserve the primacy of the ICC form in the cargo insurance market. The nature of the modifications to the standard form can be generally said to equate to extensions of cover that are broadly to the assured’s advantage.²

Additionally, the author hopes to assess whether the revised ICC(A) Clauses are fit for the realities of the current insurance market, taking into account the case law emerging after half a decade of cover under the revised wording.³ It is not intended as a survey of minutiae (since this has been amply fulfilled by other texts).⁴

¹ Rodas Paredes, Paola. „El seguro marítimo de mercancías después de las institute cargo clauses 2009 (A) Nuevas propuestas y viejos problemas”, *Revista de Derecho del Transporte*, No. 8, 2011, p. 81-97 esp. at pg. 84-85.

² Munro, Christopher. „Cargo Insurers Take Up Cargo Clauses”, *Insurance Day*, 23/10/2009.

³ Some of the case law relates to disputes taking place under the 1982 form but has continued relevance to the 2009 version.

⁴ Vishwanath, K. S. (2010) *Insuring Cargoes: A Practical Guide to the Law & Practice*, Witherby, London; Dunt, John. (2012) *International Cargo Insurance*, Informa, London; Hudson, Geoffrey, Madge, Tim, Sturges, Keith. (2012) *Marine Insurance Clauses*, Informa Law, Routledge, inter alia.

2. ALL RISKS?

All risks cover, although not actually underwritten with the intention to insure every possible risk⁵ has obvious attractions to several groups of commercial consumers. Most obviously, those with an interest in insuring themselves against the occurrence of damage to particularly sensitive goods may prefer to insure on 'All Risks' terms, rather than other available covers such as the ICC(B) and (C) terms, or indeed the ICTC clauses which are designed specifically for the commodities trades.

It has been noted⁶ that there is now a greater pressure emanating from international consumer markets for high-quality, unblemished goods⁷, and this appears to have driven the demand for increased coverage offered by policies such as the ICC(A) clauses, as opposed to the more limited, 'named perils' terms offered by the B and C clauses as well as the ICTC clauses, all of which have reportedly lost ground to the ICC All Risks policy. Were the unthinkable to occur, the risk that the goods will become unsellable, though the damage incurred is but superficial or cosmetic, has clearly become so unacceptably high that more cargo interests are seeking to transfer it by procuring increased coverage provided by all risks insurance at greater cost.

⁵ See *British & Foreign Marine Insurance v Gaunt* [1921] 2 AC 41 wherein Lord Sumner clarifies that the right of indemnity thereunder is established by the assured when it is proved on the balance of probabilities that the loss suffered was due to the occurrence of a casualty, rather than inherent vice or wear and tear. This was reiterated in *The Popi M* [1985] 1 WLR 948. If the insurer wishes to plead that the loss falls under an exclusion, the burden of proof will reverse and fall on him to demonstrate that the proximate cause was an excepted peril, per *Slattery v Mance* [1962] 1 Lloyd's Rep 60. See more recently the summary judgment given in *AXL Resources v Antares Underwriting Services* [2010] EWHC 3244 (Comm).

⁶ *Commodity Contracts, Risks for Insurers & Traders*, 9. 11. 2010 lecture given by Sleightholme and Steer. -Sleightholme, J., Steer, Jonathan. *Commodity Contracts, Risks for Insurers & Traders*, 9.11.2010

⁷ See for example Munich Re *TopicsMagazin*, January 2013 pg.7-12, „Kumulrisikengeschicktschiffen“, especially p. 9 et seq. Also illustrative is the decision of Thomas J in *Quorum v Schramm* [2002] 1 Lloyd's Rep 249 which seems to evidence a judicial recognition of the importance placed on market perception of damage by the English courts, with damages awarded in relation to an elevated risk of deterioration caused by what was characterized as merely sub-molecular malice to the Degas image at issue by fire, although in the rather singular context of the exceptionally sensitive market in fine art, see particularly [pg. 260-1/[92]] and see commentary in Dunt *Op.Cit.* Ch.3 and see also the discussion of amended delay exclusion *infra* at note 30.

Moreover, advances in logistical efficiency have meant that modern-day supply chains are often longer, more fragmented and increasingly time-sensitive affairs compared to those common a quarter of a century ago. This is reflected in the case law, where it will be seen that recent seams have centred around all risks insurance taken out for the international transit of delicate components that would probably previously have been assembled within the same four factory walls.⁸

Meanwhile for insurers and reinsurers, the ceiling of potential loss caused by delays at key nodal „choke“ points⁹ in the supply chain, such as ports and inland terminals, seems to stretch ever higher; essential parts may be delayed, which can lead to production having to be halted entirely¹⁰ and the nature of „just-in-time“ manufacturing models can see the value of cargo attached under the terms of the policy fluctuating greatly. Current concerns have centred around risk aggregation and it will be seen that the need to ensure avoidance of same has become a familiar refrain amongst insurers.¹¹

As will be seen from the below, global political developments have also left their mark- not only has the definition of terrorism¹² been widened to effect a wider exclusion, but contemporary concerns about nuclear threats emanating from terrorists have seen a similar expansion of the exclusion. Those wishing their cargo loss to be secured against lone gunmen, dirty

⁸ For example the transformer transported in *European v Chartis* [2012] EWHC 1245 (Comm).

⁹ Wordley, Paul, Savage, Toby. „Recent challenges to the mining sector“, *Insurance Day*, 26.2.2013.

¹⁰ Note the difficulties caused to some American factories by the Japanese earthquake. - „Crises in Japan Ripple Across the Global Economy“, *New York Times* of 20. 3. 2013. Available at.

http://www.nytimes.com/2011/03/21/business/global/21econ.html?pagewanted=all&_r=0.

¹¹ In this context, the increasing tonnage of container vessels has provoked particular interest, since the potential losses for insurers could be huge. See for example: Mulrenan, Jim. „Insurers fear big claim from 'Emma Maersk' engine room flood which reported industry concerns about potentially very large general average claims related to her grounding in the Suez Canal“, *Tradewinds*, 8. 3. 2013, which reported industry concerns about potentially very large general average claims related to her grounding in the Suez Canal. Furthermore; there has been a marked increase in external pressure on insurers from key European regulatory instruments such as Solvency II as well as bodies such as EIOPA which have performed stress tests on European insurers to try and prevent future financial crises by quantifying risk exposure in the sector with a view to imposing mandatory capital buffers. See https://eiopa.europa.eu/fileadmin/tx_dam/files/Press-Room/StressTest-QA-Document-Set6.pdf, and Munich Re article *Op. Cit.* at note 8.

¹² See Cl. 7.4 of the revised ICC(A) cover.

bombs and even inconvenient radioactive leaks must now purchase extra covers. Piracy, the scourge of the last few years, is still conspicuously covered under Cl. 6.2 of the revised form¹³, although underwriters would be forgiven for judicious *ad hoc* deletions to contrary effect given the compensation that may become due in the wake of a piratical hijacking!

Another major change, though it hits less at the structural integrity of the market, relates to emerging markets and the need for modernization in the face of globalisation. Ensuring that the standard terms of cover continue to secure a widespread appeal amongst both cargo owners and other connected parties ordinarily reliant upon the procurement of insurance such as CIF sellers now requires that those clauses present assureds, some of whom may have little prior experience with commercial insurance, with cover that is both user-friendly and comprehensible in terms of the limits it outlines. This requires clauses that take account not only of changing trends in the types of *goods* being carried, but also the types of *vessel* carrying them as well as their *packaging*, and ultimately the attitude of the consumer market towards the quality or perceived value of goods.

Insurers are increasingly marketing cover on the basis that it is 'seamless', leaving neither gaps nor overlaps in coverage, and traditional cargo insurance policies may therefore compete against more comprehensive (though possibly dearer and less tried-and-tested) forms of cover such as stock throughput insurance.

3. TERMINOLOGICAL INEXACTITUDES

The language in the revised clauses has been modernized- lift-vans¹⁴ are out, and cover 'inures' no longer in clause 15 of the 2009 ICC! The substitutions make the new cargo clauses look somewhat more sleek and modern and avoid giving the impression of a pre-war England, replete with butlers and curious apparatus. The linguistic refurbishment has allowed the Institute Cargo Clauses to keep up with other available terms such as the Norwegian CEFOR cargo insurance clauses, which at one time presented more readable conditions expressed in fluid paragraphs as opposed to the ICC's stilted phrasing.¹⁵

¹³ This is worded as a war and strikes exclusion, which may be provided as an extra cover under the ICC War Clauses 1/1/2009 and have been drafted as seamless bolt-ons to the amended 2009 form.

¹⁴ Employed, for example in the 1982 clause 4.3 covering „Insufficiency of Packaging”.

¹⁵ See for example a recent Colombian guide to transport insurance which apparently regarded the revised clauses as

The changes introduced by the new policy appear in large part cosmetic, and there is little to argue with the JCC's decision to swap terms such as „servants” for „employees” and „shipowners” for „carriers”, when even the English layman might find himself thinking of scullery maids in *Downton Abbey* rather than workmen heaving boxes around a port storage warehouse when faced with the term „servants”, while the multimodal reality of today's international transport operations may mean that the „shipowner” in fact plays a relatively minor part in what may be a multimodal transit agreement performed primarily by road, rail, or air.¹⁶

As such, these changes have much to recommend them in view of the changing demand for commercial cargo insurance. The much-vaunted rise of economic powerhouses in emerging markets such as the BRIC¹⁷ countries has led to a need for policy terms that are ergonomic, and require less specialist knowledge of legal niceties. A case in point is the replacement of „servants” with „employees”, which prevents complications when trying to distinguish between who is deemed a servant as opposed to an independent contractor, a question which may prove difficult enough to answer when the assured's staff are working in exotic jurisdictions. Similarly, the former „Held Covered Clause” at Clause 10 of the revised 2009 clauses addressing situations where there is a change in voyage when placed side-to-side with the ICC 1982, reveals a clause spelling out the circumstances in an assured will continue to be covered, albeit studiously avoiding the term „held covered”, thereby evidencing a clear intention to prevent unwary assureds from being misled.¹⁸

This transparency drive is to be encouraged, if only to make the limits of cover understandable and in order to render the policy wordings accessible and user-

'simple and short'. - Concha, Angela, Umaña, Leonardo, Vargas, Maria José. „Fasecolda 35 años; El Seguro de Transporte de Carga”, Junio de 2011, available at: <http://www.fasecolda.com/fasecolda/BancoMedios/Documentos%20PDF/el%20seguro%20de%20transporte%20de%20carga.pdf>, 20.3.2013. at pg. 345.

¹⁶ Note that the trend is entirely new- see s.2(1) of the Marine Insurance Act 1906 – which permits a marine policy to be extended to cover land risks. For a more modern example, see the decision of *Clothing Management v Beazley Solutions* [2012] EWHC 727, in which the policy had been specially modified to cover not only marine transit but also the period of storage. Other all risks forms- particularly the US AIMU All Risks Cargo cover, elect to modify the limits of cover in the case of air transport; hence Cl. 6(A)(1)(c) of the 2004 AIMU form which terminates cover after 30 days, rather than the standard 60 as under Cl.8 of the ICC(A) cover.

¹⁷ Brazil, Russia, India and China.

¹⁸ Vishwanath, K.S. Op.Cit. at 294.

friendly to potential or newly-won assureds covered by the London Market, some of whom may never have had reason to take out such cover before, or may have found themselves contractually obliged to procure insurance by reason of the terms of the sale agreed.¹⁹ Added to that the concern not to find that the coverage period overlaps with existing policies, which may well have been agreed under domestic law.

4. PACKAGING, INHERENT VICE & PROXIMITY

Some of the most telling and important amendments to the 2009 ICC(A) form concern insufficiency of packaging and related exclusions included in Clause 4. The rise and rise of containerised cargo transport has presented challenges to contemporary transport law and in the common law jurisdictions alone, it seems to have taken some time to properly process the reality of goods being transported in these by now ubiquitous boxes²⁰; a wide variety of possible cargoes undergo lengthy periods of transit and storage thanks to the efficiencies of standardised metal structures.²¹

One rather obvious disadvantage of containerisation is that, while the traditional pilfering is made a much more onerous operation for the casual thief, there are less opportunities for goods in transit to be surveyed even for obvious faults or damage, which can make it difficult to determine causation when cargoes eventually arrive damaged at a discharge point or warehouse. Questions then inevitably arise as to how the damage occurred, and one obvious suspect is often

¹⁹ As required under the standard terms of a CIF sale under Incoterms 2010, for example, which specify Institute Cargo Clauses (C) as the minimum insurance coverage required for a compliant CIF (or the new multimodal CIP variant) sale contract. See: Coetzee, Juana. (2010) *INCOTERMS as a form of standardisation in international sales law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk*, Stellenbosch University.

²⁰ Vishwanath, K.S. Op.Cit. at 19, who notes the decision of the Australian NSWCA in *NSW Leather v Vanguard* [1991] 25 NSWLR 669 and discusses the difficulties of trying to make decisions about containerized goods by applying precedents relating to individually packaged items.

²¹ Even liquids are not excluded from the list of possible container packages- the flexitanker has received some unwelcome attention in this regard, note for example the recent report by the German Transport Information Service, which suggested the imposition of weight restrictions on such cargo to avoid damage to containers and ships, as much as the cargo carried. - Available at: http://www.tis-gdv.de/tis_e/containers/fl_exitanks/fl_exitankuntersuchung.htm.

the „insufficient” packaging. Another possible culprit may be native to the goods themselves, which may then be alleged to have fallen foul of their own inherent vice.²²

Packaging and inherent vice are by their very nature issues that shade into each other²³, and can deal a fatal blow to the assured's claim where one or the other exclusion included in the policy is invoked by the insurer in order to deny a duty to indemnify, since this makes it impossible for the assured to meet the necessary test for causation, „proximate” cause, which remains the default²⁴ evidentiary standard in English insurance law. Where loss may be due either to inherent vice or a packaging defect, it necessarily becomes more difficult to meet the requisite balance of probabilities” bar if only one of the two possible or concurrent causes is not covered under the policy²⁵, although admittedly, the case-law in that area has seen clear development in the years since the last ICC clauses were released.²⁶

²² Defined in *Soya v White* (1983) 1 Lloyd's Rep 122 by Lord Diplock at 126 as „the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.” See also *Noten BV v. Harding* (1990) 2 Lloyd's Rep 283. Lord Diplock's definition was recently endorsed by Lord Mance in *The Cendor Mopu* [2011] UKSC 5 at [18], and echoed by Popplewell in *European v Chartis*, discussed infra [2012] EWHC 1245 at [138].

²³ Indeed, there is still a degree of uncertainty regarding the way in which the law should regard cargo packaging, see further Hudson, Madge, Sturges, Op.Cit., who suggest that the jarring precedents in this area have been overlooked due to a general attitude in the London Market that packaging is something separate to the insured cargo, following the approach in *Vacuum Oil v Union Insurance* (1925) 24 LIL Rep 188, rather than the later decision in *Berk v Styles* [1955] 2 Lloyd's Rep 383 which seemed to see goods and packaging as one entity.

²⁴ *Proxima causa* is enshrined in the Marine Insurance Act 1906, s. 55(1), although it is possible for the parties to exclude its application and nominate another standard of proof to establish causation, as accepted for example in *Coxe v Employers' Liability Assurance Corp'n* [1916] 2 KB 629, at 634 and *King v Brandywine Reinsurance* [2004] 1 LR&IR 554 at [235]. - Lowry, John, Rawlings, Philip, Merkin, Robert. (2011) *Insurance Law: Doctrines and Principles*, Hart Publishing, Oxford, p.275, and generally Ch.9.

²⁵ As accepted by Popplewell J in *European v Chartis* [2012] 2 Lloyd's Rep 117, [2012] EWHC 1245 at [79], see also the casenote by Heridan in *Shipping & Trade Law*, 28. 8.2012.

²⁶ Duelling approaches in case law were apparent throughout the turn of the 20th century, with key cases such as *Leyland v Norwich Union* [1918] AC 350 applying the now current efficient „cause” test (see for example the speech of Lord Shaw in that case at 369), while others preferred a „last-in-time” view of causation, as is evident in Lord Escher's speech in *Pink v Fleming* (1890) 25 QBD 396 at 397. The efficient cause view seems now to be the preferred view and was firmly endorsed by the Supreme Court

Cue the new packaging clause 4.3, designed to tackle several recognized problems relating to these issues. Firstly, an exclusion only afforded to containers under the 1982 ICC(A) clauses is extended to normal packaging. The clause provides cover where the assured has used third party contractors to package goods in the period after the attachment of cover.²⁷ As discussed above, questions remain surrounding the ease with which employees will be distinguished from independent contractors, as well as the inevitable grey areas in situations where independent contractors act under the precise instructions of the assured²⁸ and whether this would constitute a failure to sue and labour²⁹ or a failure to mitigate their losses.

In fact, the text of the Cl. 4.4 inherent vice exclusion has not been altered; but the close relationship between packaging and inherent vice means that altering one will inevitably affect the province of the other. The mere fact that the ICC clauses separate the two issues is in itself significant in that packaging deficiencies cannot be used by the underwriter to allege that damage occurred due to inherent vice in the cargo, where the insured can show that the packaging was carried out by independent contractors after the attachment of cover.

It must be said that the updates have been somewhat overtaken by the relevant case-law emanating from the English courts over the course of the last half-decade given that Cl. 4.3 was originally drafted as a response to the decision in *Mayban*³⁰ which was subsequently

decision in *The Cendor Mopu Op.Cit.*, and subsequent decisions, such as *European v Chartis* [2012] EWHC 1245. See Lowry, *ibid* at 271-3.

²⁷ Rodas Paredes, P. Op.Cit. at 87.

²⁸ As was the case in the recent Australian Federal Court of Appeal decision in *Alstom Limited v Liberty Mutual Insurance Company (No 2)* [2013] FCA 116. It was accepted by Siopis J that the co-assured tasked with packaging the transformer in that case had done so inadequately which was held to be the proximate cause of the damage to the cargo, and it was alleged by the respondent that this was due to deficiencies in Alstom's monitoring systems, although ultimately the assured was found on the facts not to have been privy to that failure (see 178-9) as it had no actual knowledge of the deficiencies in the packaging. The case itself related to the ICC(A) 1982 clauses and was somewhat singular in that the packaging clause in the policy allowed the assured to claim for unsuitability of packaging where this had not arisen due to Alstom's fault or with their knowledge and consent.

²⁹ Although it should be noted that it is ordinarily difficult to topple a covered peril with a failure to sue and labour, see for example *Clothing Management Technology v Beazley* [2012] EWHC 729, citing the Court of Appeal in *Netherlands v Youell* [1998] 1 Lloyd's Rep 236 at 245.

³⁰ *Mayban General Assurance BHD v Alstom Power Plant* (2004) EWHC 1008. See discussion of the decision in Rodas

overruled by the Supreme Court in 2011 in *The Cendor Mopu*.³¹ 4.3 accordingly adds that any packaging must be able to "withstand the ordinary incidents of insured transit" in a clear nod to the former decision, which had examined that phrase and in which Mr Justice Moore-Bick denied a duty on the underwriter to indemnify the insured, given that the rough seas leading to cargo damage were to be expected. Whatever the state of the law on the subject, it is probably preferable to have such a standard explicitly articulated within the wording of the policy, if only for the sake of clarity- the assured, it seems, will have to make efforts to match any packaging requirements to the voyage he has insured. Whether packaging normal for that trade or industry can be equated with the phrase remains to be seen- it may be that assureds will be expected to make greater efforts in preventing packaging malfunctions and develop appropriate testing and vetting procedures to ensure that for example free spaces are identified in order to prevent goods being overly shaken, or that possible difficulties with handling equipment are foreseen and prevented if possible.

The Cendor Mopu ruling saw the Supreme Court faced with the need to define where inherent vice ended and the perils of the sea insured against began under the terms of an ICC(A) policy, given that the underwriters in that case were already privy to the records relating to the track record of the jack-up rig. In doing so, the court paid particular attention to the nature of fortuity, since what was required was "fortuitous" damage to the jack-up rig, as well as to the general purpose of cargo insurance. As is clear from, for example, the speech of Lord Saville³², the rationale behind insuring cargo in transit is that it may be subject to hazardous conditions that will result in damage. As such it would deprive such cover of any sensible purpose to refuse to indemnify assureds in respect of damage caused by expected sea conditions. This can be contrasted with more sensible parameters such as exclusions for ordinary wear and tear³³ and inherent vice, which allow the retention of the core functionality of insurance given that both exclude what could be described as inevitable deterioration of cargo over time.

Paredes, P. Op.Cit. at 87, published prior to the decision in *The Cendor Mopu*, and Sleightholme, Steer. Op.Cit. also Vishwanath, K.S. Op.Cit., at 275-7.

³¹ Op.Cit.

³² At [34-9], and see [89].

³³ Normally excluded under s.55(2)(c) of the Marine Insurance Act 1906.

5. STANDARDS OF CAUSATION

The 1982 ICC(A) clauses contained a similar mixture of standards of causation, not all of which constituted evidence of any particular decision on the part of the drafters to signal a shift in the evidentiary burden demanded by the clause in question.

Some echoed the statutory standard expressed in the Marine Insurance Act 1906³⁴, while others do show a clear intention to change the applicable standard of causation³⁵, thereby widening or narrowing the exclusion in question.

The variation in the causality demanded between clauses may confuse those assureds new to the market, particularly where different phraseology employed leads to the same test being applied.

6. DELAYED GRATIFICATION?

Cl. 4.5 contains a broad exclusion relating to losses caused by delay, from which the word “proximately” has been deftly excised as of 2009. This is possibly another attempt at composing clearer exclusions that avoid giving the wrong impression to assureds, although given recent upheavals relating to the English-law view of proximity³⁶ as well as industry concerns over risk aggregation, this may be another sign of more risk-averse times; certainly the likelihood of the courts allowing what would amount to solely financial loss seems very slim in the wake of *Masefield v Amlin*.³⁷ Since the ICC(A) clauses were last revised, there has been increased interest in ensuring risk is managed appropriately along supply chains³⁸, with a better

³⁴ As in the wilful misconduct exclusion in Cl.4.1.

³⁵ For example the nuclear device exclusion in Clause 4.7 where „arising from” has been replaced with „caused by”; see *infra*.

³⁶ As „last-in-time” causation is no longer in vogue.

³⁷ [2011] EWCA Civ 24, and see commentary by Dunt, J. Op.Cit. at 3.51-2 who notes that the situation may be more flexible in the US, noting the Supreme Court decision in *Lanasa Fruit v Universal Insurance* (1938) 302 U.S. 556 where stranding had led to delay and the losses due to delay were deemed sufficiently proximate to the original stranding to be recoverable by the assured. By contrast, it has been reiterated on several occasions in the English courts (see *inter alia Coven v Hong Kong Chinese Insurance Co* [1999] Lloyd’s Rep IR 565) that economic losses or market devaluations will not be recoverable under cargo cover.

³⁸ Note the interesting study of this area by Nilsson, F. and Ekwall, D. of Lund University, which notes the elevated vulnerability to ruptures in supply chains as a by-product of increased logistical efficacy and efficiency, and a corresponding

repository for such cover perhaps to be found in stock throughput or possibly business interruption policies, though even these have their limits.³⁹

7. INSOLVENCY – IGNORANCE IS BLISS

The credit crunch and assorted financial crises have placed a greater number of shipping companies at risk of insolvency in recent years – with some undergoing liquidation it is unsurprising that a clause should have been amended in the 2009 revision to reassure assureds. Unlike the 1982 version, the 2009 ICC(A) insolvency exclusion only operates to preclude indemnity if assureds are privy to (that is they are or “should be aware” of the insolvency or financial default) at or before the time of loading of cargo. Previously, the 1982 wording merely targeted what one commentator referred to as “rust buckets”⁴⁰, excluding any loss due to insolvency. The revamped 4.6 borrows from the Institute Commodity Clauses to extend a robust protection for the unknowing consumer. Moreover, in relation to the ignorant *bona fides* buyer, the clause is inoperative, which must certainly set the minds of CIF buyers or sellers in a string at rest.

Incentivizing correct vetting procedures must lie at the heart of loss-prevention, especially in the light of the current economic problems besetting global business, and the clauses seem to have achieved a fair balance between protecting unwitting assureds and deterring reckless commercial decisions. A convincing argument can even be put that compliance will be encouraged more by such a qualified exclusion than by the previous blanket refusal to indemnify, and in this regard it may be pointed out that similar exclusions exist in other jurisdictions, notably in the German market⁴¹, and the

need for „clear and distinct borders of responsibility.” - Ekwall, Daniel, Nilsson, Frederik. „Reallocation of risks within supply chains: the practice of enhanced liability clauses”, available at: www.lunduniversity.lu.se/o.o.i.s?id=12683&postid=2968331, 23.3.2013.

³⁹ See, for example the judgment of Mr Justice Hamblen in *Orient-Express v Generali* [2010] EWHC 1186 in wherein the court sought to limit loss, reasoning that the correct coverage in the policy was for property damage „not all economic effects of a major catastrophe”, or indeed lost profit as the claimant hotel submitted.

⁴⁰ Vishwanath, K.S. Op.Cit. at 279-81.

⁴¹ Cross-fertilisation and outright competition between policies have become more prominent in recent years (c.f. F.Flach’s comments on recent German insurance reforms in *TranspR-2-2008* at 59) and it may be that it is no coincidence that the DTV Cargo cover published in 2004 places a similar duty of “due diligence” on insured parties.

inclusion of the new exception may provide evidence of a healthy rivalry between international insurance markets looking to win over assureds.

Of course, the larger the loss sustained due to such an insolvency, the more underwriters will be encouraged to try and invoke the exclusion such loss by arguing the assured was privy to such information and with the proliferation of companies as well as the sometimes deliberate obfuscation and mimicry employed by shipping companies, it may prove easier than anyone would like to think for an assured to entrust cargo to an ailing shipper; in the worst case he may find he is forced to take pot luck between carriers who are all known to be in dire straits financially. In this regard, restricting the required privity⁴² to the time the insured goods are loaded should provide only limited time for insurers trying to establish the existence of the necessary knowledge.

Similar concerns seem to have won the day with regard to Clause 5, which excludes unseaworthiness and unfitness of containers, where the assured is privy to these and/or in the case of containers if the container is faulty prior to the attachment of cover. Again, the privity required for an insurer to include cover is only of relevance on or before the time goods are loaded. 5.2 proceeds otherwise to derogate from the warranty of seaworthiness as articulated under the Marine Insurance Act, s. 39 and thereby carves another exception in relation to assignees.⁴³

Another child of context is the radioactivity exclusion in Cl.4.7 which, like the previous exclusion, excludes damage “directly or indirectly caused by” rather than “arising from.” The 2009 ICC(A) exclusion of any nuclear or atomic “weapon or device”, rather than 1982 term “weapons of war” apparently originates from concerns at the beginning of the decade surrounding possibly dirty bomb attacks by terrorists. Dirty bombs are an insurer’s worst nightmare in the sense that they may go undiscovered for a relatively long period of time, thereby exposing a large number of goods and premises to radioactive substances, potentially rendering them valueless and necessitating large-scale disposal or decontamination measures. The blanket exclusion seems rather prescient given the non-combative losses reaped by the catastrophe at the Fukushima power plant

⁴² The necessary privity is described in *The Eurysthenes* [1976] 2 Lloyd’s Rep 171, *The Star Sea* [2001] UKHL 1, and essentially comes down to knowledge or at least a strong suspicion of unseaworthiness.

⁴³ See also Cl. 15 modifies cover for assignees, who can be named as assureds in their own right; the wording has been changed to better define such assureds which is likely to be motivated by similar logic. – Rodas Paredes, P. Op.Cit. at p. 86.

during 2011, although the spectre of the dirty bomb has latterly come to look rather old hat.

8. GOODS IN TRANSIT – STORING UP TROUBLE?

An altogether more mundane, but nevertheless crucial question if assureds are to be able to plan seamless insurance cover is the transit clause 8 of the revised text. Identified as another apparent theoretical migration from other available international standard clauses⁴⁴, such as the Norwegian CEFOR cargo cover (soon to be replaced by the NordicPlan) the clause gives options for the termination of cover in 8.1 and preserves in 8.2 the extant 1982 exclusion text whereby cargo forwarded to a different destination than the one agreed will have cover terminated once that journey begins.

So far, so good; a clear articulation of cover period is crucial, so that assureds avoid offending double indemnity by having to take out overlapping policies. The situations which will bring about the termination of ICC (A) cover listed in 8.1 are all clear attempts to avoid the accumulation of risks in entrepôts and storage areas; hence 8.1.4 should terminate coverage at the latest 60 days post-discharge of the goods at port, and the preceding stanzas will terminate cover at the time the assured unloads or collects the goods in his vehicle.

However, dismantling the component parts of the clause, it is not completely clear the precise point at which cover will detach although that seems somewhat far-fetched as a valid criticism that could not be remedied without resort to a pedantic re-working of the clause. Nevertheless, a grey area can be said to exist in situations where, as does occur, goods are loaded in a warehouse or storage place and for some reason it transpires they cannot be transported out; such transit is far from “ordinary”, in the sense that *ordinarily* the vehicle would be moving.

Such hypothetical burning questions might begin to become genuine hot potatoes necessitating urgent clarifications if a catastrophe such as a tsunami were to occur, or less dramatically for example, if a fuel shortage were to leave loaded goods in vehicles left static inside the warehouse. Pedantic but not invalid are quibbles surrounding policy coverage where containerisation is taking place inside the warehouse; would that prompt a termination of cover by virtue of clause 8.1.3, especially where goods already packed were containerised?

⁴⁴ Vishwanath, K.S. Op.Cit. at 291.

Clause 8, especially in the context of Cl.8.1, again raises questions about the expected role to be played by employees; the revised clause imagines a new role for the employees of the assured, placing increased responsibility on choices made by servants *in situ* whereas it had previously appeared more concerned with the 'directing mind and will' of the company⁴⁵ than about what employees on the ground 'elect' to do with regard to goods. Once more, the onus is likely to be on the assured to meet the challenge posed by the revamped text and for head offices to employ increased scrutiny in regard to those activities undertaken by their colleagues at the logistical coalface.

9. MORE TOPICAL THAN THE MARIE CELESTE

Clause 10.2 responds to the concerns of consumers of commercial cargo cover surrounding so-called "phantom ship" situations in which cargo is spirited away on board a stolen ship. Such incidents seem to be a perennial problem in and around Asia and a number of decisions in the courts of, among others, Hong Kong⁴⁶ as well as on appeal to the Privy Council⁴⁷, held that since cover was prevented from attaching since it was not travelling in the ship specified in the policy, the assured was unable to recover under the ICC(A) clauses 1982 as although the cover under the earlier version was generally seen as warehouse-to-warehouse, s. 44 of what is called the *Marine Insurance Ordinance* in Hong Kong would act to prevent the attachment of cover leaving the assured empty-handed in such cases. Although amendments were produced to prevent this unintended short-circuit, the commentary around 10.2.9 has suggested that the real change in cover produced by the 2009 revisions was to the Asian market which had shown itself reticent to adopt the revised clauses as standard; the suggested extension had already been implemented in the London market cover.⁴⁸

⁴⁵ Thereby echoing the privity needed to establish breach of the statutory seaworthiness warranty under section 39(5) of the Marine Insurance Act 1906.

⁴⁶ *George Kallis v Success Insurance* [1988] 1 HKLR 13 in which the defrauded assured was denied indemnity because the insured cargo had been shipped on the wrong ship, see John Dunt's discussion of Hong Kong in particular, Op.Cit at 4.39.

⁴⁷ *Nam Kwong Medicines v China Insurance* [2003] 2 HKLRD 345.

⁴⁸ Dunt, J. Ibid.

10. CONCLUSION

While preceding paragraphs may have identified problems or lacunae with the new ICC clauses, it should be noted that extensions to cover are available on the open market⁴⁹, and when discussing the impact of the standard "All Risks" cover on the London Market it must be borne in mind that clauses are regularly amended, both formally by ICC amendment clauses⁵⁰, and informally by brokers and assureds. This lends the standard form insurance a certain flexibility that allows unexpected problems to be ironed out, unlike legislation or international conventions, where texts must either be set in stone or abandoned.

Another, perhaps more subtle theme of the 2009 clauses is a clear undercurrent emphasizing the importance of loss prevention. A number of exclusions encourage risk management by the assured to step in and use prudent judgment in order to minimize their own risk profiles⁵¹ by exercising due diligence to screen trading partners to check for insolvency, and overseeing packaging procedures more keenly if need be. It would seem preferable to insist upon such standard if only to avoid windfalls for assureds whose conduct has clearly fallen short of the prudence expected⁵² of commercial actors in the common law.

Healthy take-up of the clauses was reported in the industry press less than a year after their publication⁵³ which might suggest that the working party with Nick Gooding at the helm are to be congratulated on their ability to make the most of their context. However, judging the effectiveness of new contractual forms is often only possible after a number of years of use have allowed at least a few decisions to be reported in the courts. Nevertheless, it cannot hurt their popularity that the 2009 amendments are widely regarded as beneficial to assureds in that important exclusions have

⁴⁹ See lecture given by Sleightholme, J., and Steer J., which discusses options for cover extensions to indemnify in the event of delay.

⁵⁰ A case in point is the Institute RACE (radioactive contamination, chemical, biological, bio-chemical and electromagnetic weapons exclusion) clause ((CL 370) 10/11/2003), which came into currency as an amendment in 2003 before being inserted into the 2009 clauses. Text available at:

(<http://www.traderiskguaranty.com/Files/MarineCargoClauses/D-Cl370%20Institute%20RACE%20Clause.pdf>)

⁵¹ Duties already included in Marine Insurance Act 1906 statutory duty to sue and labour (s. 78), and within the common law duty to mitigate loss, as well as within the policy itself at Cl.16.

⁵² Vishwanath, K.S. Op.Cit. at p. 281.

⁵³ C.Munro. Op. Cit.

been widened; it is again laudable that the JCC working party has made clear efforts to listen to the concerns of brokers and insured parties.

For the moment, the challenge of making the ICC(A) clauses appeal to newly emergent markets seems to have been met by the JCC. But it must be borne in mind that it may yet prove difficult to preserve that cherished child of the common law, *consensus ad idem*, when their respective contexts and expectations are likely to be based on a fundamentally different view of business practice.

SUMMARY

The Institute Cargo Clauses 1982 were widely used and despite changes to their context, they have remained a perennial staple. While it remains to be seen whether the revised 2009 clauses will enjoy the same loyalty, it is submitted that the revised terms suggest that welcome attention has been paid to trends and shifts in trade and politics over the preceding 25 years. The following decades will almost certainly demand further amendments in order to keep this standard form part of standard cover, however.

Key Words: Institute Cargo Clauses, Insurance, Cargo, English Law, Marine Insurance

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