LLOYD'S Agency

A Lloyd's List Intelligence solution

Cargo Claims and Recoveries



Introduction

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The Lloyd's Agency Department is committed to raising service standards and has devised two comprehensive marine cargo examination programmes which are compulsory for all Lloyd's Agents.

This publication, Cargo Claims and Recoveries – Module 3, covers three inter-related subjects:

- The handling and adjustment of claims under policies of insurance on cargo.
- The handling of recovery actions against third parties.
- General average and salvage.

This module and examination is aimed at those Lloyd's Agents who settle and/or adjust cargo claims or who undertake recovery actions on behalf of underwriters or other principals. It is however recommended that all Agents study for this examination as it will broaden their knowledge of cargo insurance and help them develop a clear understanding of what underwriters and other principals expect from a loss/damage survey.

This module gives Agents a sound knowledge of the main cargo clauses, an understanding of the correct principles to be used when adjusting and presenting a claim on the policy, a good working knowledge of the main liability regimes that apply in recoveries against sea, air and road carriers and a grasp of the principles that underlie general average and salvage.

The examination itself (that is only available to practising Lloyd's Agents) consists of two parts:

- Part one – A theoretical paper consisting of 50 multiple choice questions.
- Part two – A practical paper where the candidate is asked to adjust claims on cargo policies and carry out other practical exercises in connection with cargo claims and general average. For this part of the examination, candidates have available to them copies of the Institute Cargo Clauses (ICC) and other relevant information, such as the York/Antwerp Rules, to reflect conditions in an office environment.

Following numerous requests, Lloyd's has made the Cargo Claims & Recoveries – Module 3 educational material available to clients of the Lloyd's Agency Network. This module is also available online at www.lloyds.com/agency/training.

Lloyd's Agency Department would like to thank the Lloyd's Market Association (LMA) and the International Underwriting Association (IUA) for granting us permission to include the Institute Cargo Clauses within this publication.

Lloyd's would also like to thank Comité Maritime International for allowing us to include the York/Antwerp Rules 1994 in this material.

The Lloyd's Agency Department welcomes any comments and/or corrections to this educational material. Please email to Lloyds-agency-network@lloyds.com.

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KEY

		
Points to be aware of	Helpful hints and guidelines	Points to consider

Chapter 1

Cargo Clauses Cover Explained

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1.1. Introduction

All policies of insurance on cargo will set out the risks (perils) that the underwriters provide cover against. Sometimes the cover is very wide, encompassing most types of risk that a cargo might encounter during the course of its transit. Sometimes the cover is quite limited, with underwriters agreeing to insure the cargo against only a short list of named perils. Whenever dealing with a claim or potential claim under a cargo policy, the first things to establish are the terms and conditions under which the cargo is insured to check that the loss or damage is actually covered.

For cargoes insured at Lloyd's, or in the London market, it will usually be the case that the insurance will be subject to Institute Cargo Clauses (ICC). These are standard wordings agreed by the London market and are widely used, or closely copied, around the world. Except where stated, the content of this chapter assumes that Institute clauses apply.

In 1982, ICC underwent a substantial revision. The purpose was not to radically change the cover provided; it was to rewrite the clauses in simplified language that would be more easily understood by Assureds around the world:

a. who were not familiar with the legal and practical technicalities of marine insurance, and;
b. for whom English was not a first language.

The 1/1/82 clauses that resulted have been widely used around the world. The ICC were revised in 2008 and reissued as ICC 1/1/09 at the start of 2009.

Confusingly, both the old and the new clauses will exist side by side, although it is expected that the 1/1/09 version will be favoured by Assureds over the 1/1/82 version as they are more advantageous to Assureds. Whenever considering a claim it is therefore very important to ensure you know which version of the clauses will be applicable, which should be clear from the certificate or other evidence of insurance.

Fortunately, the differences between the two versions are not great. Most of the changes are cosmetic and are designed to add clarity. Cover has been changed in several important respects, however, and claims adjusters will need to be familiar with both sets of clauses. In this manual, references to Institute Cargo Clauses 1/1/82 are shown in this dark blue colour. References to Institute Cargo Clauses 1/1/09 are shown in this light blue colour. The 1/1/09 clauses are the ones quoted in this manual. Where they differ significantly from the 1/1/82 clauses, the differences are explained in the text. Otherwise, it may be assumed that the cover referred to is the same in both sets of clauses or that the differences in wording are so slight as to make no material difference to the meaning or application of the clause.

1.2. All Risks – Institute Cargo Clauses (A) (1/1/09)

The (A) clauses provide the widest cover of all of the Institute Cargo Clauses, stating:

"This insurance covers all risks of loss of or damage to the subject-matter insured except as excluded by the provisions of Clauses 4, 5, 6 and 7 below"

(Clauses 4, 5, 6 and 7 list certain types of loss or damage that are excluded (i.e. not covered) by the policy. These are dealt with in chapter 2 of this manual.

The term 'All Risks', although very wide, does have limitations. It does not mean that all loss or damage, however it occurs, is covered. 'All Risks' covers things that happen unexpectedly or by accident or by chance (ie fortuitous damage). It does not cover things that are inevitable or almost certain to happen or things that it would be within the control of the Assured to prevent.

What is covered is all risks of loss or damage. This means physical loss or damage and does not include purely financial or consequential loss. Thus, loss of market by goods not arriving in time for the Christmas sales would not be covered, even if it was a fortuitous, unexpected event that caused the goods to miss their market.

Furthermore, it is loss or damage to the subject- matter insured that is covered, i.e. not loss or damage to anything else. Thus, if the policy covers drums of oil and those

drums become damaged and leak, causing damage to an adjacent cargo, the liability for the damage to the adjacent cargo is not covered as that is not the subject-matter insured. Later in this chapter we will consider the situation where the cargo is not damaged but the packing material is, and what coverage there may or may not be for any associated costs.

Under an All Risks policy, there is no requirement for the Assured to show exactly how the loss or damage occurred. It only needs to be shown that the loss or damage is fortuitous. Thus, if cargo was shipped in sound condition and thereafter goes missing or is delivered in damaged condition, there is, on the face of it, a claim on the policy. The underwriter will avoid the claim only if it can be shown that the loss or damage was caused by one of the events listed in the Exclusions in clauses 4, 5, 6 and 7 (see chapter 2).

1.3. Restricted or limited conditions – Institute Cargo Clauses (B) and (C) (1/1/09)

An Assured who wishes to insure against serious events only may, for a cheaper premium, opt for the restricted cover that is provided in the (B) and (C) clauses. These, as can be seen from the table below, are named perils policies, i.e. there is a specific list of named perils, as compared with the (A) clauses which are all risks.

As discussed above, under the (A) clauses the insured only has to show that something occurred that was fortuitous, causing loss or damage to the goods. Under a named peril policy of any sort it has to be shown positively what happened to the cargo and how it can be linked to one of the named perils.

ICC B	ICC C
1.1 loss of or damage to the subject-matter insured reasonably attributable to: 1.1.1 fire or explosion 1.1.2 vessel or craft being stranded, grounded, sunk or capsized 1.1.3 overturning or derailment of land conveyance 1.1.4 collision or contact of vessel, craft or conveyance with any external object other than water 1.1.5 discharge of cargo at a port of distress 1.1.6 earthquake, volcanic eruption or lightning 1.2 loss of or damage to the subject-matter insured caused by: 1.2.1 general average sacrifice 1.2.2 jettison or washing overboard 1.2.3 entry of sea, lake or river water into vessel, craft, hold, conveyance, container, liftvan or place of storage 1.3 total loss of any package lost overboard or dropped whilst loading on to, or unloading from, vessel or craft	1.1 loss of or damage to the subject-matter insured reasonably attributable to: 1.1.1 fire or explosion 1.1.2 vessel or craft being stranded, grounded, sunk or capsized 1.1.3 overturning or derailment of land conveyance 1.1.4 collision or contact of vessel, craft or conveyance with any external object other than water 1.1.5 discharge of cargo at a port of distress 1.2 loss of or damage to the subject-matter insured caused by: 1.2.1 general average sacrifice 1.2.2 jettison

(The list of perils is exactly the same in the 1/1/82 (B) and (C) clauses.)

It can be seen from the above that the three perils in 1.1.6, plus washing overboard in 1.2.2 and the perils in both 1.2.3 and 1.3 are in the (B) clauses but not in the (C) clauses, otherwise the two sets of clauses are the same.

In 1.1, it is loss or damage that is reasonably attributable to the perils named in that section that is covered. These words can be given a wider construction than if it merely said caused by. If it is reasonable to attribute the loss or damage to one of the listed perils, then it falls within the policy. Normally the concept of proximate cause applies in insurance where you have to identify the dominant and effective cause of the loss. The use of the words “reasonably attributable” makes it far easier for an insured to show how the ultimate damage to the cargo was somehow linked to a named peril, as the link can be far looser than with words such as caused by.

This is best illustrated by some examples.

Example one

The cargo is in a storage shed at an intermediate place on the insured transit. A fire in part of the shed causes the roof to collapse, damaging the cargo. The cargo itself is not touched by the fire. The damage to the cargo is thus not caused by fire but is reasonably attributable to the fire.

Example two

An earthquake beneath the seabed causes a tidal wave that rolls for a hundred kilometres across the sea. The vessel on which the insured cargo is stowed is tossed violently on the wave, causing the stow to collapse, damaging the cargo. The damage is not caused by the earthquake but is reasonably attributable to it.

Example three

The railway wagon carrying the insured cargo is derailed. There is no damage to the cargo from the derailment. The cargo has to be transferred to a lorry to continue its transit to the port. Some of the cargo is stolen while being transferred from the derailed train to the lorry. This is a loss by theft which is not one of the perils insured against under B or C clauses. However, it is reasonable to attribute the theft to the derailment of the train and the Assured should therefore recover as a loss 'reasonably attributable to derailment of land conveyance'.

These are fairly extreme examples. What is reasonable in any particular case will always depend on the circumstances of that case and may sometimes be a matter of opinion. The examples demonstrate that the term 'reasonably attributable to' is capable of being given quite a wide interpretation.

Part of the surveyor's role will be to find evidence of what actually happened so that the story can be pieced together.

When cargo is insured under the (B) or (C) clauses, the burden of proof is always on the Assured to show that one of the specifically named perils has operated to bring about the loss.

If the Assured has no idea how a loss occurred (for example, a package has simply gone missing and nobody knows how or where it went missing), then the Assured will not be able to show that the loss was caused by one of the specified perils and will be unable to recover under the policy. Similarly, if a package is delivered wet-damaged but nobody knows how or why the package became wet, the Assured will be unable to recover because it will not be able to be shown that one of the specified perils caused the loss. Unlike the A clauses, the insured has to do some work to show what has happened, rather than just having to show the operation of a fortuity and nothing else.

1.4. Trade and special clauses

A number of trade associations have negotiated variations of Institute Cargo Clauses (A), (B) and (C) for use within their own particular trades. There are tailored clauses for:

- Frozen foods
- Coal
- Bulk oil
- Commodity trades
- Jute
- Natural rubber
- Oils, seeds and fats
- Frozen meat
- Timber

These are all closely modelled on the standard Institute Cargo Clauses but with adaptations relevant to the particular trades concerned. To go into each set of trade clauses in detail would be beyond the scope of this work. However, as examples of the types of specific variation involved, the Coal Clauses cover spontaneous combustion, the Rubber Clauses cover sling and hook damage, and the Timber Clauses provide different levels of cover depending on whether the cargo is being carried on deck or under deck.

However, the Bulk Oil Clauses do warrant some attention given the rather particular problems that can arise with this type of cargo.

1.5. Institute Bulk Oil Clauses (1/2/83)

Although designed for use with bulk crude oils and other liquid petroleum products, these clauses are sometimes used to cover other types of oils, such as bulk palm oil. The nature of the cargo means that the insured transit has to be described in a different way. The insurance therefore attaches …

"… as the subject-matter insured leaves tanks for the purpose of loading at the place named herein for the commencement of the transit …"

and terminates …

"… as the subject-matter insured enters tanks on discharge to place of storage or to storage vessel at the destination named herein."

This wording makes far more sense than a general warehouse to warehouse type wording and is particular to a liquid cargo. There is no coverage while the oil is in static storage prior to the commencement of loading. There has to be a movement of the oil out of the storage tank for the purposes of loading in order for the risk to attach. At destination, as soon as the oil enters a tank for static storage on discharge, the risk will cease. A loss of cargo through leaking connecting shorelines would be covered, but a loss of cargo from a leaking storage tank ashore would not.

With regard to the perils insured against, the Bulk Oil Clauses quite closely follow the restricted perils approach of the Institute Cargo Clauses (B) and (C), adapted to suit the nature of the cargo. What is covered is the following:

1.1 loss of or contamination of the subject-matter insured reasonably attributable to

1.1.1 fire or explosion

1.1.2 vessel or craft being stranded, grounded, sunk or capsized

1.1.3 collision or contact of vessel or craft with any external object other than water

1.1.4 discharge of cargo at a port or place of distress

1.1.5 earthquake, volcanic eruption or lightning

1.2 loss of or contamination of the subject-matter insured caused by

1.2.1 general average sacrifice

1.2.2 jettison

1.2.3 leakage from connecting pipelines in loading, transhipment or discharge

1.2.4 negligence of Master, Officers or Crew in pumping cargo ballast or fuel

1.3 contamination of the subject-matter insured resulting from stress of weather.

Because of the restrictive nature of the perils insured against, many Assureds in the oil business prefer to insure under All Risks conditions.

One of the known problems with bulk oil is the difficulty of obtaining accurate measurements. A further problem is that water in suspension in crude oil can 'settle out' during the voyage with the effect that there can appear to be an increase in water content (or Bottom Sediment and Water (BSW)) and reduction in quantity of oil between loading and discharge. Most if not all oil cargoes will have some impurities in them, and free water apparent even when loading, and it is the increase in the apparent water content combined with a reduction in the apparent quantity of oil which is the problem caused if water, held in suspension so effectively invisible other than by testing, separates out of the oil during the voyage, thus being able to be measured as a separate item.

These problems have given rise to the term 'paper losses' where the buyer receives less oil than has been paid for without there being any apparent physical loss of cargo during the voyage. The Institute Bulk Oil Clauses seek to shield underwriters from such paper losses by incorporating an Adjustment Clause. This provides that claims for leakage and shortage recoverable under the insurance are to be adjusted as follows:

Gross volume (or weight) of oil, including free water and BSW, loaded from shore tanks

less …

Gross volume (or weight) of oil, including free water and BSW, received into shore tanks

equals … Net shortage of oil

The practical effects of this clause are demonstrated in the following example:

Example

Gross quantity measured at loading	650,497 bbls
BSW (by analysis)	340 bbls
Net quantity loaded	650,157 bbls
Gross quantity measured at discharge	645,100 bbls
Less: Free water drained from shore tanks	1,384 bbls
	643,716 bbls
Less: BSW (by analysis)	324 bbls
Net quantity delivered	643,392 bbls

(bbls = US Barrels at 15 degrees C (or 60 degrees F) which is the common measurement of volume in the oil trade.)

Any loss arising from an insured peril would be based on a comparison of the gross volume shipped (650,497 bbls) and the gross quantity delivered (645,100 bbls), which produces a net loss of 5,397 bbls.

The inherent problem with this method of adjustment is that oil traders usually buy and sell in net quantities, not gross quantities. The receiver of the above cargo will most likely have paid for 650,157 bbls but received only 643,392 bbls, with the result that the loss is the difference between the two, or 6,765 bbls. The Assured will therefore consider that the above Adjustment Clause has failed to properly compensate the loss.

This type of anomaly has resulted in the frequent addition to policies of insurance on bulk oil of 'guaranteed outturn' clauses. These provide for shortages to be calculated on a comparison of net loaded and net delivered volumes or weights in the manner above that fully compensates the receiver for their financial loss.

1.6. Institute Bulk Oil Clauses (1/8/19)

A new set of clauses was issued in August 2019. The new clauses are aligned closely with the ICC (A). It means that the coverage afforded is "all risks" and the burden of proof shifts from the Assured to the Insurers to disprove a claim.

Exclusions are similar to the ICC (A) wording, however the mention of "ordinary leakage" in exclusion 4.2 has been deleted, as well as the entirely of clause 4.3 "loss damage or expense caused by insufficiency or unsuitability of packing".

A provision for guaranteed outturn can be purchased for an additional premium, effectively providing coverage for "ordinary loss of weight", otherwise called "paper losses". Storage extension can also be bought by the Insured for an additional premium.

1.7. Damage to machines / manufactured items

It sometimes happens that, when only part of a machine is damaged, the Assured will want to 'write off' the whole machine and claim for a total loss, even though the machine could be repaired. The desire to write off the machine is often a commercial one, especially if repairing it would invalidate the manufacturer's warranty. Underwriters take the view that their role is to cover physical loss or damage only and that any commercial or economic losses are a matter for the Assured. The Institute Replacement Clause was introduced to set out clearly what underwriters are prepared to pay for when a machine is damaged and can be repaired. This clause will be additional to the main clauses that cover the machine (usually ICC (A), (B) or (C)). The most recent version of this clause reads as follows:

"In the event of loss of or damage to any part or part(s) of an insured machine or other manufactured item consisting of more than one part caused by a peril covered by this insurance, the sum recoverable shall not exceed the cost of replacement or repair of such part(s) plus labour for (re)fitting and carriage costs."

The words 'other manufactured item consisting of more than one part' were new when this version of the clause was introduced at the end of 2008. Thus, the clause was extended to cover things such as furniture, which is a manufactured item consisting of parts assembled together, but which is not a machine. The clause refers to 'loss or damage … caused by a peril covered by this insurance …' so it is still necessary for the claims adjuster to refer to the risks or

perils covered by the main clauses to be satisfied that the damage is covered by the policy. This clause will then guide the adjuster on how to calculate the claim, i.e. it will be limited to:

- The cost of replacing or repairing the damaged part.

- The cost of labour for fitting the new part or refitting the old part after repair.

- Costs of carriage, if a replacement part has been shipped in or if the repaired part had to be sent somewhere else for the repair to be carried out.

The clause goes on:

"Duty incurred in the provision of replacement or repaired part(s) shall also be recoverable provided that the full duty payable on the insured machine or manufactured item is included in the amount insured."

When calculating the claim, the adjuster will need to check what was included in the original insured value. If it included the import duty payable on the machine or item then any duty incurred on importing a replacement part, or on reimporting the part after it has been sent away for repair, can be included in the claim; otherwise, it must be excluded.

The clause finishes with a proviso that "… the total liability of insurers shall in no event exceed the amount insured of the machine or manufactured item." This places a limit on the amount underwriters will pay. It is perhaps more relevant to second-hand machines where the cost of repair or replacement parts is more likely to be disproportionate to the second-hand value of the machine.

There is a variant of this clause:

Institute Replacement Clause – Proportional Valuation provides that "… the sum recoverable shall not exceed the proportion of such cost of replacement or repair of such part(s) as the amount insured bears to the new cost of the machine or manufactured item …" but is otherwise the same as the standard Institute Replacement Clause. It would seem that this version of the clause is intended specifically for use when the machine or item insured is second-hand, and the underwriter does not want to pay a disproportionate amount for the cost of a new replacement part. In this case, if the cost of a new replacement part was equivalent to, say, 10% of the cost of a new machine, then the claim for the new part under this clause would be limited to 10% of the insured value of the second-hand machine in the policy.

Example

Second-hand machine with sum insured of $500,000.

It arrives damaged due to an insured peril and the estimate for a new part to be manufactured is $100,000.

The cost of a new machine would be $1,000,000. Cost of part is therefore 10% of value of new machine.

Amount payable under this clause would be 10% of sum insured ($500,000) = $50,000

There is also an endorsement which can be added to the policy whenever either of the above Replacement clauses is used:

Institute Replacement Clause – Obsolete Parts Endorsement

"In the event of a claim recoverable under this policy necessitating the manufacture of any new part(s) for the repair of an insured machine or other manufactured item, the sum recoverable shall not exceed the manufacturer's list price for the year of manufacture of the lost or damaged part(s), uplifted for inflation. Inflation shall be determined by reference to the Retail Price Index, or other officially published data of the country of manufacture of the insured machine or manufactured item, up to a maximum total uplift of 25%.

If no such manufacturer's list price is available, the total liability shall in no event exceed the amount insured of the machine or manufactured item."

If this endorsement is added to the policy, it will apply only when a new part has to be specially manufactured to replace a damaged part. It will necessitate the claims adjuster having to establish the list price for that part for the year in which the machine or item was

manufactured, then uplifting (increasing it) it to take into account inflation in the intervening period.

1.8. Theft, pilferage and non-delivery

An Assured under Institute Cargo Clauses (A) would have no need of additional cover against these risks as they would fall within the cover provided by an 'All Risks' insurance. The position is different for Assureds under the restricted conditions of the (B) and (C) clauses. The Assured under these clauses would be able to recover for a lost or missing package only if it could be shown that its loss was reasonably attributable to (or caused by, as the case may be) one of the named perils in those clauses. Theft is not one of the specifically-named perils in the (B) or (C) clauses (which can come as something of a surprise to an Assured who is not familiar with insurance).

For an additional premium, an Assured under those limited conditions can add to the cover the Institute Theft, Pilferage and Non-Delivery Clause, which provides:

"In consideration of an additional premium, it is hereby agreed that this insurance covers loss of or damage to the subject-matter insured caused by theft or pilferage, or by non-delivery of an entire package, subject always to the exclusions contained in this insurance."

The word 'theft' is given a limited meaning in the laws in England relating to marine insurance and would only cover theft on a significant scale. The word 'theft' alone would not cover, for instance, a member of the ship's crew secretly breaking open a case and stealing part of its contents – that is considered to be 'pilferage' – i.e. the secret taking of small quantities – and the loss would not be covered if the policy covered 'theft' alone. To overcome this particular provision of English law, the drafters of this clause used the words 'theft' and 'pilferage' to make it clear that the clause was intended to provide cover for cargo that was stolen or taken unlawfully, whatever the circumstances in which it was stolen.

With regard to non-delivery, it has to be an entire package that is missing, not just part-contents of a package. Some caution has to be taken when dealing with a claim for non-delivery of a package under this clause. The purpose of this part of the clause is to cover the loss of any package which simply disappears 'without trace', the assumption being that it was probably stolen somewhere in transit. There will be circumstances when a case is not delivered but it is known what happened to it.

Example one

A package is accidentally left on board the vessel or mis-delivered to another port. This is not non- delivery within the terms of this clause. The package in these circumstances is not lost to the Assured; the Assured (or the shipowner) merely has the inconvenience of having to recover it and return it to the rightful place of delivery – not covered.

Example two

The carrying vessel has to put into a port of refuge to discharge and reload part cargo following movement of the stow in severe heavy weather which has caused the vessel to become unstable. A package of cargo insured under (B) clauses with the Theft, Pilferage and Non-delivery clause attached is found to have become completely crushed by the collapsed stow. It is useless and therefore disposed of at the port of refuge. So far as the Assured of this cargo is concerned, this package will have been 'non-delivered' at destination. However, the Assured will not be able to recover under this clause; the circumstances which caused the package to be non-delivered are precisely known and clearly the package has not been stolen – not covered.

1.9. Alternatives and adaptations to Institute Cargo Clauses

Institute Cargo Clauses provide a ready-made and widely understood set of insurance conditions for cargo underwriters and Assureds in the London market and around the world. Their use, however, is not compulsory – even in the London market – and other forms of cargo insurance conditions will be encountered from time to time. Most established insurance markets around the world do have their own forms of cargo conditions. The American Institute of Marine Underwriters (AIMU) issues its own versions of clauses for all the major marine risks and these are in common usage. To examine all variations of cargo clauses would be beyond the scope of this manual. They are unlikely to differ significantly from Institute clauses but may have small adaptations peculiar to the market that issues them. Should a claims adjuster encounter an unfamiliar set of clauses, it is likely that a copy of those clauses could be found by a simple internet search.



Check www.fortunes-de-mer.com for many international clauses – not just for cargo, but for hull and machinery, war, liabilities, loss of earnings, etc.

It is also common practice for brokers to add special clauses to a policy for particular types of goods or Assureds, sometimes to extend the cover and sometimes to amend or clarify the terms of cover. There are no 'standard' broker clauses, although each major broking house tends to have established wordings for most situations where additional clauses are needed.

A policy might begin by saying that the terms of insurance are, for example, Institute Cargo Clauses (A) 1/1/09. However, the claims adjuster needs to check the whole policy in case there are additional clauses which extend, diminish or otherwise vary the cover. Certain typically used additions are incorporated on the certificates, so both sides of that document should be carefully studied.

1.10. Insurable interest and assignment

It is appropriate to insert here a few comments about insurable interest. Under English law, to recover under a policy of marine insurance a person must have an insurable interest in the marine adventure or the property in the adventure.

Under the Marine Insurance Act 1906, a person has an insurable interest … "where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss or by damage thereto, or by the detention thereof, or may incur liability in respect thereof."

The Assured, or the person to whom the claim is ultimately payable, does not need to have an insurable interest when the insurance is taken out, but does need to have an insurable interest at the time of the loss and that is clearly stated in all Institute Cargo Clauses.

This is relevant to a cargo Assured who purchases on terms such as FOB (Free On Board) and arranges their own insurance. Under FOB terms, the purchaser has no interest in or ownership of the cargo until it is on board the ship. Up to that point, ownership (and therefore any risk of loss) is with the seller. Thus, although the buyer's insurance is likely to have a standard 'warehouse to warehouse' clause (purporting to cover the goods from the seller's warehouse), the buyer would not be able to claim on that policy for a loss occurring prior to loading to the vessel because there would have been no insurable interest at that point. There will be other terms of sale, for example FAS (Free Alongside Ship), where the buyer does not acquire an interest in the goods until some point after the transit has started. The claims adjuster therefore needs to examine the invoice or other terms of sale and be aware of the standard Incoterms issued by the International Chamber of Commerce.

Insurable interest should not be confused with assignment of interest. Any person who has a right to recover under an insurance policy may assign that right to somebody else. It is common for a shipper of goods to

arrange the insurance then sell the goods to a buyer under CIF (cost, insurance and freight) terms. The shipper (being the original Assured) will assign the interest in the insurance to the buyer by signing an endorsement on the back of the insurance certificate. This has the effect of passing rights under the insurance from the shipper to the buyer. There are some commodities which are customarily 'sold on' during transit, sometimes more than once. With each on-sale, interest in any insurance would simultaneously be assigned to the new buyer.

1.11. Institute Cargo Clauses (Air)

Although not a marine risk, mention is made here of the Air Clauses as cargo these days is regularly transported by air freight. The Institute Cargo Clauses (Air) provide 'All Risks' cover and are closely modelled on the Institute Cargo Clauses (A). Coverage remains on a 'warehouse to warehouse' basis, the only difference being that the main part of the voyage is on board an aircraft rather than an ocean-going vessel. In all key respects, the two sets of clauses are identical. The clauses are not reproduced here. Any claims adjuster familiar with Institute Cargo Clauses (A) should have no difficulty in adjusting a claim under Institute Cargo Clauses (Air).

1.12. Packaging

It sometimes happens that cargo itself is sound but the packaging it is contained within suffers damage by an insured peril. Can the Assured recover for the cost of repackaging? This is likely to depend on the circumstances, as the following examples will show. The key question is often whether the end customer will be buying the goods in the packing or whether the packing will be removed before final sale:

Example one

The insured cargo is flat-pack furniture which the consignees will sell to retail furniture stores at destination, which will sell the cargo to their customers still in its packaging. In these circumstances, the packaging is clearly a part of the thing that is insured, and the consignees would not be able to sell the cargo at normal price to the furniture retailers. The cost of repackaging would therefore be recoverable.

Example two

The insured cargo is a consignment of books wrapped in plastic and packed 100 books to a cardboard box. It is consigned to a book seller who will display the books individually on the shelves in their bookshop. During transit, the cardboard box becomes stained by the leakage of an adjacent cargo but is still fit to contain the books without causing them any damage. In these circumstances, the cardboard box is clearly not a part of the thing insured. It is merely something that is used to transport the subject-matter insured (the books) and will probably be thrown away once the cargo has been delivered at destination. The Assured would not be able to claim for damage merely to the packaging.

Example three

Circumstances as in two, but this time the box is likely to break apart if used for the remainder of the transit, thereby risking damage to the books themselves. The consignee instructs the agent at the discharge port to repackage the books into a new box. In these circumstances, the cost of repackaging would be recoverable under the policy. This is not because the packaging in this example is a part of the subject-matter insured; it is because it has been replaced for the sole purpose of preventing the books becoming damaged in subsequent transit.

It is therefore recoverable as the cost of "averting or minimising a loss that would be recoverable …" under the policy. Such costs are recoverable under the Duty of Assured Clause (see chapter 6).

Thus, whenever the claims adjuster is faced with a claim for the costs of repackaging, both the nature of the subject-matter insured and the circumstances in which the costs were incurred will need to be carefully considered before deciding whether or not to allow them as part of the claim under the policy.

Chapter 2

Cargo Clauses Exclusions Explained

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2.1. Exclusions

Chapter 1 dealt with the positive cover provided by standard Institute Cargo Clauses. This chapter concentrates on the exclusions in Clauses 4, 5, 6 and 7 of the (A), (B) and (C) clauses, ie the types of loss or damage which underwriters expressly do not cover, and also indicates for the war and strikes exclusions how some cover can be bought back under specialist wordings.

Basic Concepts

Exclusions always take preference over the insured perils. Thus, if the loss is caused by an insured peril but one of the exclusions has also operated to cause the loss, then underwriters can rely on the exclusion and avoid paying the claim.

2.2. Clause 4 – General exclusions

The clause begins "In no case shall this insurance cover …" and then proceeds to list things which are not covered by the insurance. These are generally things that it is within the control of the Assured to avoid or which are largely inevitable or non-fortuitous.

4.1 loss damage or expense attributable to wilful misconduct of the Assured 'Wilful misconduct' means an action taken by the Assured either deliberately, knowing it to be wrong, or recklessly, without caring whether it is right or wrong. Any loss, damage or expense which can be attributable to such an action by the Assured is excluded from the cover. For example, if the Assured shipped goods knowing they did not meet quarantine regulations in the country of destination, with the result that customs authorities seized

and destroyed the goods, that would be wilful misconduct of the Assured and this exclusion would prevent them from recovering under the policy.

4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured

Certain types of cargo have a natural tendency to leakage or loss in weight or volume during the course of a voyage. For example, white rice bran is shipped with a moisture content of around 15% and will be subject to a natural loss in weight during transit. Such ordinary leakage or loss is expected to happen and is therefore not accidental or fortuitous. Where such a cargo is delivered with a higher than expected loss, difficulties can occur in deciding whether this is still an ordinary or normal loss or whether something fortuitous has happened to make the loss greater than anticipated. To overcome such problems, an insurance on a cargo that is susceptible to normal voyage loss will usually contain an agreement to pay losses in excess of a certain percentage, the compromise being that any loss below that percentage will be deemed normal and any loss above it deemed fortuitous.



Consider all the types of cargo seen by your Agency and what their natural behaviour might be, whether it is to lose moisture or to evaporate – talk to colleagues about what they have seen as well.

Ordinary wear and tear is the deterioration that something will suffer through use over a period of time. Parts on a machine, for example, will gradually wear out over time and may even fail, causing the machine to break down. If the subject-matter Assured was a second-hand machine and, on arrival at destination, the machine did not work because a part had failed simply because it was old and worn, this would be ordinary wear and tear and the cost of replacing the worn part would be excluded by this clause.

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where such packing or preparation is carried out by the Assured or their employees or prior to the attachment of this insurance …

Insurers expect cargo to be packed or prepared in a manner that makes it capable of withstanding the ordinary or expected rigours of the voyage to be undertaken. This is a relative concept as packing that is appropriate for one cargo will be excessive for another, or inadequate for yet another.

If the packaging is not up to standard, underwriters will not respond for any loss, damage or expense that results. The clause goes on to make it clear that "… 'packing' shall be deemed to include stowage in a container …" and also that "'employees' shall not include independent contractors".

Claims arising from the poor stowage of a container by a freight forwarder at an intermediate point of the transit would thus not be excluded by this clause – the freight forwarder's negligence would be a fortuitous circumstance, so far as the Assured is concerned.

The wording of this clause is quite different from its equivalent in the 1/1/82 clauses, although the rewording was simply to add clarity and did not change the meaning or purpose of the exclusion in any way.

To summarise, if loss or damage is caused by insufficiency of packaging/poor stowage of the container:

- This exclusion will apply if the packing/stowage was carried out by the Assured or their employees [because it was within the Assured's control to prevent this].

- This exclusion will apply if the packing/stowage was carried out by anyone before the insurance attached [because the thing that caused the loss existed before the insurance even started].

- This exclusion will NOT apply if the packing/ stowage was carried out after the insurance attached by a freight forwarder or other independent contractor [because the Assured personally was innocent of any wrongdoing].

4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured.

Inherent vice means a natural condition or characteristic within the cargo itself which can bring about its deterioration without any external accident or casualty whatsoever. It is the natural behaviour of the cargo, given the expected conditions in which it will be carried. For example, fresh fruit will naturally decay over a period of time and iron-based metals will oxidise and rust. This is not fortuitous – it is something that is expected to happen, although it can be controlled.

Underwriters will expect to see that the carriage of such cargoes manages their natural behaviour in the appropriate way whether by temperature control, or by ensuring that the iron cargo is not exposed to the atmosphere.

4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above) Marine underwriters traditionally do not cover loss or damage that arises from delay. That is the case even when the delay itself is caused by a peril insured against. By way of example: a vessel is badly damaged by heavy weather (an insured peril under an 'All Risks' policy) and has to put into a port of refuge for repairs. A perishable cargo on board decays as a result of the delay. The proximate cause of loss to the perishable cargo is the delay, not the heavy weather, and the Assured will not be able to recover from their underwriters.

[The reference to Clause 2 is a reference to general average (dealt with in chapter 9). When involved in a case of general average, cargo owners will pay a contribution towards the general average expenses incurred by the shipowners. This contribution is recoverable under a standard policy on cargo. The general average will often include expenses incurred at a port of refuge which may be deemed to arise from delay. The extra words in this Clause 4.5 make it clear that the delay exclusion is not intended to be applied to any part of a general average contribution recoverable under Clause 2.]

4.6 loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage.

This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought

or agreed to buy the subject-matter insured in good faith under a binding contract.

When introduced into the Institute Cargo Clauses in 1982, this exclusion read:

"loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel"

In that form, it caused a certain amount of resentment. Its intention was to exclude the costs of recovering and forwarding cargo to destination where the voyage is abandoned at an intermediate port solely on account of the shipowner's financial difficulties. It was felt to be harsh as cargo interests have no control at all over a shipowner's financial situation. For this reason, the exclusion was softened considerably in the separate trade clauses negotiated by the various trade associations. However, it still exists in the 1/1/82 version of the Institute Cargo Clauses (A), (B) and (C) and will operate to exclude claims by a cargo Assured where the voyage ends prematurely on account of the vessel owner's/operator's financial problems.

Now that the additional wording has been added in the 1/1/09 version of the clauses, an innocent Assured, or an innocent buyer to whom the insurance has been assigned, will enjoy greater protection against the operation of this exclusion than an Assured under the 1/1/82 clauses.

4.7 loss damage or expense directly or indirectly caused by or arising from the use of any weapon [of war] or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

The words "directly or indirectly caused by or" and "or device" have been introduced into the 1/1/09 clauses and the words 'of war' (which were in the 1/1/82 clauses) have been removed. In the 1/1/82 clauses, this exclusion is limited only to atomic/ nuclear weaponry and would not rule out a claim where damage or contamination is caused by a leak from, or other accident to, a nuclear power station. The revised exclusion in the 1/1/09 clauses makes a significant difference as such a claim would now be ruled out as being caused by a 'device employing atomic or nuclear fission', etc. The revised exclusion in the 1/1/09 clauses is thus far more wide-reaching.

The above exclusions are all in the (A), (B) and (C) clauses. The following exclusion is in the (B) and (C) clauses only (and appears in those clauses as 4.7, with the above nuclear exclusion renumbered as 4.8):

4.7 [in (B) and (C) clauses only] – deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons

This is a wide-ranging exclusion that prevents recovery of any type of deliberate or malicious damage to the insured cargo.



Exclusions always take preference over the perils covered by the policy. Thus, if somebody intentionally sets fire to the insured cargo, although the resulting damage would be a loss by fire (one of the named perils in the (B) and (C) clauses), the claim would be defeated by this exclusion.

For an additional premium, Assureds under the (B) and (C) clauses can extend the cover to include the Institute Malicious Damage Clause, which has the effect of deleting this exclusion and expressly providing cover against "… loss of or damage to the subject-matter insured caused by malicious acts, vandalism or sabotage, subject always to the other exclusions contained in this insurance".

2.3. Clause 5 – Unseaworthiness and unfitness exclusion

All marine insurances on cargo are voyage policies, i.e. they cover the cargo for a particular voyage from one place to another, including a period at sea. Even a cargo insurance written on an open cover which exists for a period of time is deemed a voyage policy as it is the individual declarations to that open cover that are the actual contracts of insurance for the cargo being shipped. The open cover is a facility – a contract for insurance rather than a contract of insurance, and of course it might be that

no cargoes are shipped or insured under that contract.

Under the Marine Insurance Act (1906), the provisions of which apply to Institute Cargo Clauses because they are subject to English law (unless that wording is deleted), there are implied warranties in a voyage policy that a) the ship is seaworthy at the commencement of the voyage and b) the ship is reasonably fit to carry the goods to destination.

Warranties in English law are construed very strictly – if the warranty is breached, the underwriter is entitled to avoid (MIA 1906) or suspend (Insurance Act 2015) the contract from that moment on – (see chapter 4). Yet, the condition of the ship at the start of the voyage is something over which a cargo Assured generally has no control. The effect of this exclusion in the Institute Cargo Clauses is not to enforce the implied warranties of seaworthiness and fitness of the ship – it is to soften their effects on an innocent cargo Assured. This is easier to understand by looking at the last part of the exclusion first:

5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination [unless the Assured or their servants are privy to such unseaworthiness or unfitness].

Under the 1/1/82 clauses, which contain the bracketed words shown in dark blue, underwriters will ignore any breach of these warranties unless the Assured knew the ship was unseaworthy or unfit. These bracketed words have been removed from the 1/1/09 clauses, the effect being that underwriters under the 1/1/09 clauses will waive any breach of the said warranty even where the Assured did know. This is important: when a warranty is breached, underwriters are entitled to avoid the policy from that moment on and are entitled to reject any claims that arise following the breach, even if the loss or damage that is the subject of that claim had nothing whatsoever to do with the breach of warranty itself. Thus, under 1/1/82 clauses, if the Assured knowingly allowed their goods to be loaded to an unseaworthy ship, underwriters would have been entitled to immediately avoid the policy and would not have been liable for damage that occurred to the cargo, say, while on a lorry between the port of discharge and the consignee's inland warehouse.

Under 1/1/09 clauses, that will not be the case. This may be more easily understood once chapter 4 on warranties has been studied.

It needs to be understood that the removal of those words regarding the Assured's privity (or knowledge) of the unseaworthiness does not mean that underwriters will now pay claims that arise from unseaworthiness where the Assured knew the vessel was unseaworthy or unfit. They will not, and the first part of Clause 5 makes that clear:

5.1 In no case shall this insurance cover loss damage or expense arising from

5.1.1 unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

5.1.2 unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out prior to attachment of this insurance or by the Assured or their employees and they are privy to such unfitness at the time of loading.

The exclusion will not apply to an innocent Assured who had no knowledge of the unseaworthiness or unfitness. Note that the 'unfitness' part of the exclusion applies to all forms of carriage and not just the ship.

With regard to unseaworthiness/unfitness of the vessel or craft, a new concession has been introduced into the 1/1/09 clauses whereby the exclusion in 5.1.1 shall not apply "...where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract". Thus if the original Assured was privy to unseaworthiness or unfitness of the vessel at the time of loading but a consignee to whom the insurance was assigned was not, then underwriters will not apply the exclusion in.

5.1.1. This brings considerable comfort to a claimant who has purchased under a CIF contract and who has no control whatsoever over the choice of vessel or craft used for carriage.

2.4. Clause 6 – War exclusion

This exclusion is largely self-explanatory and reads:

6. In no case shall this insurance cover loss damage or expense caused by

6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

6.2 capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat

6.3 derelict mines torpedoes, bombs or other derelict weapons of war.

Clause 6.3 makes it clear that the exclusion applies not only to war and war-like perils but also to any mines, weapons, etc that might still be lying around long after the war has ended.

The words 'piracy excepted' are extremely important, particularly in the light of serious piracy problems that persist in various parts of the world. By inserting these words, underwriters make it clear that piracy is not to be excluded by this clause, i.e. that piracy is to be treated as a marine peril, not a war peril. However, the words 'piracy excepted' appear in this exclusion only in the (A) clauses; they are not in the (B) or (C) clauses. The effect is that an Assured under the (B) and (C) clauses has no cover whatsoever against piracy, either in the marine policy or the War Risks Clauses, if added.

The War Clauses, however, do not offer cover on quite such wide terms as the exclusion removes.

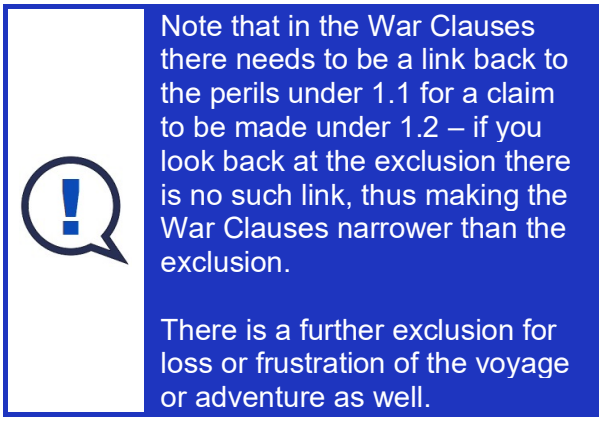
Institute War Clauses 1/1/2009

This insurance covers, except as excluded by the provisions of Clauses 3 and 4 below, loss of or damage to the subject matter insured caused by

1.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

1.2 capture seizure arrest restraint or detainment, arising from risks covered under 1.1 above, and the consequences thereof or any attempt thereat

1.3 derelict mines torpedoes bombs or other derelict weapons of war.



2.5. Clause 7 – Strikes exclusion

7 In no case shall this insurance cover loss damage or expense

7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

7.2 resulting from strikes, lock- outs, labour disturbances, riots or civil commotions

7.3 caused by any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted

7.4 caused by any person acting from a political, ideological or religious motive.

It is not only damage caused by the persons taking part in strikes, lock-outs, etc that is excluded. Any loss, damage or expense resulting from a strike, lock- out, etc is also excluded. Underwriters in London do not normally cover war risks on land. Although possibly engaged in war-like activities, terrorists and those acting from a political

motive are more likely to cause problems on land than at sea, so cover for those risks is included in the Strikes Clauses (which do provide cover on land) rather than the War Clauses. For consistency, the exclusion of these perils comes within Clause 7 (Strikes) rather than Clause 6 (War).

The above Clauses 7.3 and 7.4 did not appear in the 1/1/82 clauses. Those clauses merely said:

7.3 caused by any terrorist or any person acting from a political motive.

The wording has been changed to coincide with the wording used in the Institute Strikes Clauses (Cargo) 1/1/09 but does not appear to have altered the meaning or purpose of the exclusion.

Institute Strikes Clauses (Cargo) 1/1/09

The clauses cover loss of or damage to the subject- matter insured caused by:

1.1 strikers, locked-out workmen or persons taking part in labour disturbances, riots or civil commotions

1.2 any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted

1.3 any person acting from a political, ideological or religious motive.

So far as concerns Clause 1.1, it is important to understand that it is not enough for there simply to have been a strike (or labour disturbance, riot or civil commotion) to trigger a claim. It is only loss or damage that is caused by persons taking part in those activities that is covered. Thus, the cover provided by these Strikes Clauses does not exactly mirror the risks that are excluded under the Strikes exclusion in Clause 7 of the ICC. The exclusion in ICC of loss, damage or expense “resulting from strikes, lock-outs, labour disturbances, riots or civil commotions” is not reinstated in the Strikes Clauses. Therefore, if cargo sustains loss or damage by reason of there having been a strike, etc, but it is not caused by the persons taking part in that activity, the Assured will thereby be unable to claim under either the ICC or the Strikes Clauses.

Damage caused by a terrorist or person acting from a political (etc) motive would seem, at first sight, to be more suited to the war risks cover. The reason this peril is in the strikes risks cover is that it is a type of loss most likely to occur on land – London marine insurers provide cover against strikes risk on land but, as above, do not normally cover war risks on land. Unlike the previous 1/1/82 version of these clauses, the 1/1/09 version now contains a definition of ‘terrorism’ (in 1.2) and separates it from ‘motive’ (in 1.3) which is now expressed as ‘political, ideological or religious motive’ rather than just ‘political motive’, as it was previously expressed. These changes appear to be for clarity rather than to extend or diminish the cover.

2.6. Concurrent causes

It sometimes happens that there can be more than one cause of a loss, ie two separate perils acting together, or in sequence, to bring about loss or damage. It may be that, in the circumstance of the particular case, one cause is clearly the one that brought about the loss and the other is merely incidental. The incidental cause can then be ignored, the other cause being the effective or dominant cause. In other cases, it might not be so clear and both causes may be deemed to have played an equal or nearly equal part. This is best demonstrated by way of an example.

Example

A cargo is discharged from the vessel and put into store in the port area where it is to be loaded to a lorry the next day for onward carriage to final inland destination. As a result of a strike breaking out at the port, the cargo becomes trapped in storage there for several weeks. At the end of the second week, torrential rain causes floodwater to enter the warehouse and damage the goods. Two things have happened to bring about this loss – 1) it is a loss that would not have happened but for the strike (the cargo would have been removed from the warehouse before the flooding occurred), and 2) it is a loss caused by floodwater entering the warehouse.

The questions the claims adjuster must consider are these:

a. Was the damage caused by (or did it result from)

the strike?

b. Was the damage caused by floodwater entering the warehouse?

The answer to a. has to be 'No'. Although the cargo would not have been in the warehouse at the time of the flood had the strike not happened, there was no inevitability whatsoever that the happening of the strike would lead to damage to the cargo. The strike is merely a remote cause which did not, in itself, cause damage to the cargo.

The answer to b. has to be 'Yes'. It was the floodwater entering the warehouse that caused the damage to the cargo. That was the direct (or proximate or effective) cause of the loss.

What if there are two separate causes of the loss and both have had an equal or nearly equal effect in causing the loss? Certain rules have evolved as a result of legal decisions:

If one cause is a peril insured against and the other is not mentioned at all (either as a peril or as an exclusion) then the Assured will recover everything under the policy.

However:

■ If one cause is an insured peril and the other is expressly excluded, then underwriters can take advantage of the exclusion and avoid paying the claim as a whole.

2.7. When an exclusion is deleted

It sometimes happens that an underwriter agrees to delete an exclusion (remove it) from the policy. It is often mistakenly thought that this has the effect of providing positive cover against the thing that would have been excluded had the exclusion not been deleted. This is not the case. The effect of deleting an exclusion is that underwriters can no longer rely on that exclusion to reject a claim that would otherwise be recoverable under the policy. The loss or damage that is the subject of the claim must still be caused by a covered peril. Consider the following examples.

Example one

The subject-matter insured is a perishable cargo insured under ICC (B). Underwriters have agreed to delete the exclusion of 'loss, damage or expense caused by delay…'.

The vessel carrying the cargo suffers an engine breakdown in the middle of the ocean. It takes several weeks for a salvage tug to reach the stricken vessel, take her in tow and get her to a place of safety. During this time, the quality of the cargo deteriorates. This is a loss by delay, but underwriters have deleted that exclusion. Can the Assured recover under the policy? The answer is 'No'. The loss still has to be caused by one of the perils named in the policy. The Assured cannot recover under the (B) clauses for a loss reasonably attributable to the breakdown of the vessel's engine because that is not one of the specifically-named perils in the policy. Neither can the Assured recover it as a loss caused by delay because simply deleting the exclusion of delay does not have the effect of converting delay into a named peril. Now consider the next example.

Example two

The circumstances are exactly the same as the above, but this time the loss of the vessel's motive power is caused by the vessel's propeller striking a submerged rock and suffering severe damage that prevents the vessel from proceeding. Now the cargo Assured can cite loss or damage "reasonably attributable to … (1.1.4) contact of the vessel … with … any external object", etc as the named peril in the policy under which to recover. Although the deterioration to the cargo is a loss by delay, because the delay exclusion has been deleted from the policy the underwriters can no longer rely on it as a defence and the Assured can recover under the policy.

Chapter 3

The Insured Transit

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3.1. The Transit Clause

All cargo insurances will have clauses that set out the points at which the insured adventure will attach, the points at which the insured adventure will cease and the circumstances under which the cover might terminate prematurely. When establishing whether loss or damage is covered by the policy, the adjuster or claims settler must not only be satisfied that it was caused by a peril insured against, but there must also be satisfaction that it occurred at some point on the insured transit and that the person making the claim had an insurable interest at the time of the loss.

Most cargo insurances are on a 'warehouse to warehouse' basis, i.e. the insured transit is from seller's warehouse to buyer's warehouse. There can be variants to this depending on the nature of the cargo (e.g. bulk liquids are normally insured from one tank to another tank).



Always remember that insurable interest is relevant to transit. Although the insurance wording might say warehouse to warehouse, an insured transit can only occur when someone has an insurable interest. For example, in an FOB sale contract, the buyer will only obtain the insurance interest at the point that the goods are on board the ship (INCOTERMS 2010).

This chapter deals with the Transit Clause in the Institute Cargo Clauses (A), (B) and (C). It is Clause 8 and is identical in each set of clauses. The chapter also deals with the circumstances in which cover might cease prematurely – (Clause 9 of the (A), (B) and (C) clauses).

3.2. Where the risk starts

The point at which the risk commences is set out in Clause 8 of the Institute Cargo Clauses (A), (B) and (C). In the 1/1/82 clauses, it read:

8.1 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, …

For the insurance to attach under the 1/1/82 clauses, the goods must leave the warehouse. This denotes that the goods must have physically started moving on the adventure for the insurance to start. Thus, if goods are loaded to a lorry at the seller's warehouse and are then destroyed by fire before the lorry has started on the journey to the port, the Assured would not be able to recover under the policy.

The position is a bit different under the 1/1/09

clauses, as follows:

8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit …

The insured transit therefore starts earlier under the 1/1/09 clauses and would cover, for example, damage to a case that is dropped while being taken off the shelf at the warehouse for loading to a lorry. (Clause 11 relates to insurable interest and the words merely emphasise the need for the claimant to have an insurable interest for the insured transit to commence at that point.)

3.3. While on risk

Clause 8.1. goes on "… continues during the ordinary course of transit …" These are very important words. When an underwriter agrees to insure a cargo from point A in one country to point B in another country, the Assured is expected to do whatever is necessary to make sure that the cargo travels by a reasonably direct route and without any unreasonable or unnecessary delay. For as long as the goods are travelling by a reasonably direct route, or by a route which the underwriter might reasonably expect the goods to take, then they are deemed to be 'in the ordinary course of transit'. As soon as the Assured causes the goods to deviate from what is a reasonable course, trouble could arise, as the following example (a true case) demonstrates.

Example

Goods were insured from a warehouse in Italy. En route to the port of loading, the lorry driver decided to take a detour through the centre of Rome to do some sightseeing. During this detour, the lorry overturned and the goods were damaged. The Assured was unable to recover from the underwriters as the detour to Rome was a 'joy ride' that had no connection to the carriage of goods to destination and was therefore not within the ordinary course of transit.



Think about the cargoes that you see. What is their normal journey and what would you consider to be the ordinary course of their transit? Consider feeder services for container shipments – how long will those cargoes wait at the transhipment port? How about cargo travelling by rail – is there a time when it is waiting in sidings to join another train?

3.4. Where the risk ends

8.1 …and terminates either

8.1.1 on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance

This is the first of several circumstances in which the insured transit will terminate, and is the most common one. Under the 1/1/82 clauses, the point of termination was "on delivery to the consignees' or other final warehouse". Thus, once the lorry or container carrying the goods had arrived at the Assured's final warehouse, the insured transit ceased. If the goods were damaged during unloading of the lorry or unstuffing of the container, the Assured would not be able to recover under the marine policy as the risk would already have terminated. Under the 1/1/09 version of this clause, the transit period is extended and ceases only on completion of unloading from the carrying vehicle, etc at final destination.

8.1.2 on completion of unloading from the carrying vehicle or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance, which the Assured or their employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution...

(In the 1/1/82 clauses, the equivalent clause said "… on delivery to any other warehouse …", etc)

Sometimes goods are consigned to shippers' agents in country of destination, for the agent to sell to final buyers. In such circumstances, the shipper's agent may initially receive goods into a storage facility and then allocate to final buyers from there. The clause makes it clear that the insurance will cease as soon as unloading of the goods is completed at the warehouse from which they will be allocated. Furthermore, if the Assured puts the goods into any place of storage which is not contemplated by underwriters as part of the ordinary course of transit, the insurance will thereupon terminate. An example of this might be where the Assured leaves the goods sitting at the port of discharge solely to defer having to pay import duty until a more convenient time. By doing so, the Assured may have inadvertently caused their insurance cover to terminate prematurely.

An additional point of termination (not in the 1/1/82 clauses) is referred to in the 1/1/09 clauses:

8.1.3 when the Assured or their employees elect to use any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit...

Thus, it is not just storage for the Assured's own convenience at an intermediate warehouse or place of storage that will cause the insurance to terminate prematurely. The same will also apply if the Assured, for their own convenience, chooses to leave the goods in a container or on a storage vehicle. This would also be the case where that container or storage vehicle had actually arrived at the warehouse at final destination but the Assured decided to unreasonably delay unloading it.

Finally, there is a 'cut-off' point where the insurance will automatically terminate prior to arrival at the insured destination:

8.1.4 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

This is an automatic cut-off point and will apply even if the goods have not reached their final inland destination by the 60th day after discharge at the port of arrival (unless the Assured has negotiated an extension of this period with the underwriters).

… whichever shall first occur.

The foregoing incidences of termination of risk in the Transit Clause are not a menu of options from which the Assured can simply choose – the risk will end immediately if any one of the above circumstances happens.



Think about the cargo consignee's business. Some of these activities might be practical options the owner chooses as part of the business without thinking whether they will have an impact on insurance cover.

3.5. Voluntary change of destination

Clause 8.2 will operate where, at some time after the commencement of the insured transit but before its termination in any of the circumstances under 8.1, the Assured decides to change the final destination to which the goods are to be carried. This may happen in certain bulk trades where goods are sometimes sold on during the insured transit and the buyer may wish to have them forwarded to a different destination. The clause reads:

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

The intention is clear. As soon as the Assured changes the course of the insured transit from that originally agreed by the underwriters, the risk will cease. Slightly different wording is used in the 1/1/09 clauses, but the effect is the same.



Example – the goods are insured to Chicago and will be discharged at New York for onwards transit. On arrival at New York the consignee decides that the goods are needed in Philadelphia and so orders them to be taken there. As soon as the goods start to move in New York for the journey to Philadelphia, insurers are off risk.

3.6. Enforced change of destination

Whereas Clause 8.2 deals with a change in transit brought about by the Assured's own actions, Clause 8.3 deals with a situation where the course of the transit is changed by events which are outside the Assured's control, viz.:

8.3 This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to carriers [shipowners or charterers] under the contract of carriage [affreightment].

This clause provides considerable protection to an innocent Assured, notwithstanding that the insured transit may take on a route or character that was not originally contemplated by underwriters when accepting the risk. Clause 9 refers to a situation where the carrier terminates the contract prematurely and is dealt with below.



It is important to note that this clause is only saying that insurers will stay on risk, not that they will necessarily cover any loss, damage or expense incurred. The normal coverage and exclusions will still apply.

3.7. When the adventure terminates prematurely

9. If owing to circumstances beyond the control of the Assured …

It is straightaway apparent that this clause does not apply to events that are within the Assured's control. The clause then sets out the two circumstances in which it will apply.

… either the contract of carriage is terminated at a port or place other than the destination named therein or …

… the transit is otherwise terminated before unloading [delivery] of the subject-matter insured as provided for in Clause 8 above, …

The clause then sets out what will happen in either of those circumstances …

…then this insurance shall also terminate …

On the face of it, that is quite dramatic. Fortunately, underwriters soften the position by adding, in italicised letters:

…unless prompt notice is given to the Insurers and continuation of cover is requested …

…when this insurance shall remain in force, subject to an additional premium if required by the Insurers …

Thus, provided the Assured requests continued cover and pays an extra premium if the underwriter demands it, cover will continue unbroken. Note, however, that in the absence of this specific request by the Assured, the insurance will terminate automatically. The clause then goes on to describe the circumstances in which the cover will continue.

…either

9.1 until the subject-matter insured is sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the subject-matter insured at such port or place, whichever shall first occur…

This contemplates the goods not being forwarded from the place at which the adventure has prematurely ended. They remain insured until sold there or for 60 days from the moment of arrival there, if they haven't been sold in that time.

… or

9.2. if the subject-matter insured is forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named in the contract of insurance or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

The other alternative is that the goods will be forwarded, in which case this part of the clause applies. Because the insurance will automatically cease 60 days after arrival (as in 9.1 above), the Assured must specifically request more time if forwarding cannot take place within that time. The goods will be insured through to their original destination, or to any other destination agreed with the underwriters.

3.8. When the Assured changes the destination

If, after the risk has already started, the goods are sent to a different destination port to that agreed with the underwriters, that is known as a change of voyage. In English law this would automatically discharge underwriters from liability for any loss or damage occurring after the decision to change the voyage has been made. The reason for this is that the adventure is no longer the one originally contemplated by the underwriters when they agreed to take on the risk.

In the ICC, underwriters soften the position where there is a change of voyage, viz.:

10.1 Where, after attachment of this insurance, the destination is changed by the Assured, this must be notified promptly to Insurers for rates and terms to be agreed. Should a loss occur prior to such agreement

being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable market terms.

Thus, the insurance will not automatically terminate if the Assured changes the voyage, but the underwriters must be notified of the change as soon as possible and they are entitled to renegotiate the premium and terms of cover to reflect the fact that the risk has now changed. This is italicised in the printed clauses to emphasise its importance.



This is another example of where the insured can be caught out if the right is exercised to make a business decision to change the journey, entirely without thinking about the impact that it will have on the insurance if the insurers are not advised promptly.

3.9. When the carrier changes the destination

Clause 10 has traditionally dealt only with the situation of the Assured changing the destination. A new sub-clause has been introduced in the 1/1/09 clauses to deal with the situation where it is the carrier who (without the Assured's knowledge) changes the destination.

10.2. 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.

This fills what was perceived to be a gap in the 1/1/82 clauses and makes it clear that the cover will be unaffected – and there will be no need to renegotiate terms – if the Assured is completely innocent of the change of destination.



Think again about the practicalities. If the cargo is a small parcel loaded on a large vessel and the carriage documents have a liberty clause in them, the carrier essentially will be free to undertake a journey that is in some way different to the one originally anticipated, and the cargo interests will have little or no ability to object, or to control the journey.

Contrast this with the situation where the amount of cargo is substantial and in fact fills the entire ship. The cargo interests are in a far stronger position, although if they have still entered into a carriage contract (for example a voyage charter) which has such liberty provisions, they will potentially find the same problems occurring.

3.10. Summary

From chapters 1, 2 and 3, it should be apparent that the claims adjuster needs to be satisfied of several things before approving a claim:

- That the loss or damage was caused by a peril covered by the policy.
- That the peril operated during the period the insurance was in force.
- That the claim is not defeated by one of the exclusions in the policy.
- If there were circumstances that might have caused the insured transit to terminate prematurely, that the loss or damage did not occur after that termination.

Chapter 4

Warranties

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4.1. Introduction

There are certain terms in a policy that are not perils or exclusions but have a serious impact on whether a claim might be covered or not. These are known as warranties, and in this chapter, we will be reviewing what warranties are, why insurers use them and what the impact will be if they are breached. English law in this area changed in August 2016, and insurance contracts for non-consumer or business clients created after that time can be subject to either the "old" law or the "new" law at the parties' choice. In this context a non-consumer is an insured who purchases insurance relating to their trade, business or profession.

In this material both legal positions will be explained as their impact on claims will be different. Within the module, the content will be clearly labelled old law and new law.

Additionally, English law has also changed in relation to the requirement for the insured to provide information to the insurers at the time of placement. The old law referred to a duty of utmost good faith and the new law uses the notion of duty of fair presentation. Both of these concepts will be discussed later in this module.

It is always important to remember that many of these requirements exist only if a policy is subject to English law, and care should be taken to check the applicable law of any policy. The Institute Cargo Clauses have an inbuilt provision that they will be subject to English law, but this can be overridden by either party as part of the contract.

4.2. Types of warranty

Warranties in insurance contracts are very important. Breach of a warranty can have disastrous consequences for an Assured. So, what is a warranty? In very simple terms it is either:

- A promise to do something.
- An agreement not to do something.

Old law position – MIA 1906

The fundamental English law on warranties was contained within The Marine Insurance Act (1906), the provisions of which apply to Institute Cargo Clauses (because they incorporate an English law provision) which defines a warranty as follows:

MIA Section 33

(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the Assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negates the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

Some typical examples are:

- 'Warranted only new jute bags to be used'.
- 'Warranted loading and discharge to be supervised by surveyors approved by underwriters'.
- 'Moisture content not to exceed 12% at time of loading'.

The word warranty or warranted does not necessarily have to appear, provided the intention is clear that some particular thing is to be done (or not done, as the case may be) or that some particular condition is to be met.

Most warranties are express warranties. This means that the terms of the warranty are expressly set out in the contract, as per the examples above.

There are some implied warranties, too. These are warranties that are automatically assumed to apply to the contract without having to be specifically mentioned. The most important implied warranties so far as cargo is concerned are:

- that the ship shall be seaworthy at the commencement of the voyage;

- that the ship is reasonably fit to carry the goods to destination;
- that the adventure insured is a lawful one.

MIA Section 39

(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

MIA Section 40

(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

MIA Section 41

There is an implied warranty that the adventure insured is a lawful one, and that, so far as the Assured can control the matter, the adventure shall be carried out in a lawful manner.



What this means is that some of these promises do not actually have to be written into the policy.
However, the insured is still expected to know what they are and what they need to do in order to comply – a good broker should ensure that their clients know what they have to do.

4.3. Breach of warranty

Where a warranty exists in the contract, the Assured must comply with it exactly, otherwise the warranty is said to have been breached and the following will apply:

Old law position – MIA 1906

- Underwriters are entitled to avoid the policy as from the moment the breach occurred.
- Underwriters would remain liable for any loss or damage which occurred before the breach happened.

However:

- They would not be liable for any loss or damage which occurred after the breach happened, even if the loss or damage was itself completely unconnected to the breach.

MIA Section 34

(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the Assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

Once the breach has occurred, the Assured loses all rights under the contract from that moment on. The fact that they may subsequently remedy the breach and put things right does not alter the situation. Neither does the fact that the breach might have been entirely innocent. A breach of warranty is fatal to any claim that occurs subsequent to the breach.



Think about this example. There is a warranty about the use of new jute bags – the insured actually uses second-hand bags, which has had no impact on the loss at all. However, because the warranty or promise has not been exactly complied with, underwriters are discharged from liability from the moment the warranty was breached – which might be the inception of the policy if the goods went only into the second-hand bags.

Consider this second example. The insured started loading the cargo into the second-hand bags but then found out about the warranty, so immediately started moving the cargo into new bags. It was after that was done that the loss occurred. Unfortunately, sorting the problem out is not enough in law and underwriters are still discharged from liability.

The underwriter may, however, choose to waive the breach and treat the contract as if the breach had not happened. This is a matter of choice for the underwriter – it is not binding that the breach be waived.

With regard to the implied warranties of seaworthiness of the ship and fitness of the ship to carry the goods to destination, it has long been recognised that these are matters which are largely beyond the control of the cargo Assured. As seen when dealing with exclusions in chapter 2, the application of these warranties of seaworthiness and fitness is softened in the Institute Cargo Clauses.



Can you remember how the clauses soften the position in relation to unseaworthiness? If not, refer back to chapter 2 to refresh your knowledge.

New law position – Insurance Act 2015

Following the coming into force of the Insurance Act 2015 on 12th August 2016, the provisions of the MIA 1906 relating to warranties have been amended.

The concept of promissory warranties can be express or implied still exist, and the main changes are:

- Breach leads to the policy being suspended rather than ending altogether
- A concept of materiality between the breach and any loss has also been introduced.

The key provisions of the Insurance Act read as follows:

S 10 (2)

“An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.”

Therefore, if a loss arose during the time the policy was suspended then insurers might not have to pay, however there is a caveat in that under the new law S 10 (3), the insured can show that there was no link between the breach and any loss that occurred then insurers cannot decline the claim.

The actual wording of S 11 of the Insurance Act 2015 is this:

“(1) This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following—

(a) loss of a particular kind,

(b) loss at a particular location,

(c) loss at a particular time.

(2) If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or

discharge its liability under the contract for the loss if the insured satisfies subsection (3).

(3) The insured satisfies this subsection if it can show that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred."

So how will the new law work in practice and how might a Lloyd's Agent be asked to think about this?

If the insurer puts a warranty on a cargo policy about how the goods should be labelled, and that warranty is not complied with, under the new law the policy will suspend, but if the insured can show (and it is for the insured to prove) that the loss that did happen would have happened in any event, notwithstanding the breach of warranty then insurers cannot decline the claim.

The challenge with this change in the law is that there now has to be a causal link between the breach and the loss for insurers to exclude, limit or discharge its liability and this depends on the insured being able to prove that non-compliance would not have increased the risk of loss which actually occurred. S 11 of the Insurance Act 2015 does not apply to "terms that define the risk as a whole." This is because the term it has failed to comply with is one that defines the risk as a whole and not one which would reduce the risk of the loss. However, until matters are tested in court it might not always be entirely clear as to which term in a contract falls within this category!

What insurers have been recommended to do is to put clearly any requirements in the policy and also to make clear what the resulting impact will be of non-compliance, so it is obvious to all parties involved.



From an Agent's perspective, you might be asked whether something impacted on the loss that did occur, but you should not have to consider the impact on the insurance. If you have claims settlement authority, and are in any doubt, always refer to your principals for guidance.

4.4. Providing information to insurers when the insurance is being purchased

This area of English insurance law has also changed under the Insurance Act 2015, and as with warranties, the parties to the insurance contract can agree to use old law if they prefer so both positions will be discussed now.

Old law position – MIA 1906

4.3.1 Utmost good faith

A contract of insurance is considered to be a contract made in the utmost good faith (the legal term used is uberrimae fidei). In other words, both parties to the contract are expected to act honestly and openly towards each other. When an underwriter is considering whether or not to insure a particular risk, two important decisions must made:

a. Is the risk one that the underwriter is prepared to take at all?

b. How much premium should be charged and what terms and conditions should be applied?

To answer these questions, the underwriter is wholly reliant on the information provided by the Assured, and is therefore entitled to think that the information is honest and complete. If it is not, then the validity of the contract may be affected, and the underwriter may be entitled to avoid paying any claim that subsequently arises under the contract.

There are several circumstances in which the insurance contract might be at risk because of things that were not made known to the underwriter at the time it was negotiated.

4.3.2 Non-disclosure

The Assured has to disclose to the underwriter anything which it is important for the underwriter to know in assessing whether to insure the risk.

The information which the Assured must disclose is known as 'material facts' and a fact is material if it would influence the judgement of the underwriter with regard to

4.3.1 points a) and b). The Assured is expected to know every material fact that an Assured in that particular line of business should reasonably know.

If an Assured fails to disclose a material fact before the insurance contract is concluded, the underwriter is entitled to avoid the contract (i.e. treat it as never having come into effect). Non-disclosure does not automatically mean that the policy is void. The underwriter may choose to ignore the fact that something material was not disclosed and carry on as normal.

Whether any particular fact is material or not would depend on the circumstances. Failing to disclose that there has been a history of losses on the particular risk being insured has been held to be non-disclosure.

4.3.3 Misrepresentation

Misrepresentation is where the underwriter has been given a fact that is relied on in deciding whether to insure the risk, but which then turns out to be untrue. Even if there has been an innocent declaration of something as 'fact' when it is not true, it will be deemed to be misrepresentation and entitle the underwriter to avoid the contract. The only exception to this is where the Assured, acting in good faith, makes it clear that something is believed to be true or that some particular thing is expected to happen, but which then turns out not be true or not to happen.

A point to remember here is that the broker is considered to be the agent of the Assured. Generally, if the broker fails to disclose a material fact or misrepresents something that is material, this will be deemed to be non-disclosure or misrepresentation as though by the Assured and the underwriter is still entitled to avoid the policy.

The broker has a separate and positive duty of utmost good faith under the Marine Insurance Act 1906, and therefore should ensure that there is liaison with the client in relation to any information in the client's possession that does not appear to have been disclosed to the insurers already.

Whereas non-disclosure and misrepresentation apply while the contract is negotiated, the duty of good faith applies throughout, even after the policy has come into force. Thus, if there is a clause in the policy that says a particular circumstance, if it arises, will be held covered on payment of an additional premium and the Assured, hoping to avoid that additional premium, delays notifying the underwriters of its happening 'to see how things turn out', this would be a lack of good faith on the part of the Assured. Again, where there has been a lack of good faith by the Assured, the underwriter may choose to avoid the contract.



Insurers have to make a choice one way or the other about avoidance, and this must be done as soon as possible. There will inevitably be a delay while the insurers gather evidence and decide what to do, and it is very important that nothing is done in relation to the claim which might give the consignee a false impression about the situation (whether that be positive or negative). Once the Agent is made aware that the insurers are considering this matter they should wait for further instruction from the insurers.

Where the underwriter chooses to avoid the contract in any of the above circumstances, it is usual for the premium to be returned to the Assured and the policy treated as never having existed.

An exception to this is where the Assured has acted fraudulently or illegally: in such circumstances there would be no return of premium.



It is usually the case that concern about a potential breach of the duty of utmost good faith will arise at the time of a claim, where information presented suggests to the insurer that the risk was not entirely in accordance with their expectations

The Lloyd's Agent will not have been involved in the placement of the risk so will be highly unlikely to be able to comment either way on the subject and whether the duty has or has not been complied with. However, should any Agent have grounds for belief or concern about anything relating to the risk, then they should draw it to the insurer's attention immediately and seek their guidance.

However, when making such a referral, the Agent should not disclose the reason for any such communication and related delay to the consignee or any other cargo interests without the insurer's permission.

New law position

As with the law on warranties the provisions of the Insurance Act 2015 amend the old law contained in the Marine Insurance Act on the duty of fair presentation. The new law keeps the historic idea of having to share material information with the insurers but does several key things:

- Does not distinguish between disclosures and representations and combines them both into a duty of fair presentation.

- Makes clear that the insurers also have to ask questions about what they are shown and follow up on things – but must be given information in a clear and accessible manner.

- The law now expressly creates a set of proportional remedies to a failure to comply with the new duty of fair presentation rather than offering one remedy only which the old law does.

Finally, what the new law does is make clear what the insured and insurer know, ought to know or are presumed to know.

The key provisions of the new law contained in the Insurance Act 2015 are as follows:

Section 3 – Duty of fair presentation

Includes sub sections 1-6

"Subsection (1)

Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk."

"Subsection (3)

A fair presentation of the risk is a presentation:

(a) which makes the disclosure required by subsection (4),

(b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and

(c) in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith."

"Subsection (4)

The disclosure required is as follows, except as provided in subsection (5):

(a) disclosure of every material circumstance which the insured knows or ought to know, or

(b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances. "

"Subsection (5)

In the absence of enquiry, subsection (4) does not require the insured to disclose a circumstance if:

(a) it diminishes the risk,

(b) the insurer knows it,

(c) the insurer ought to know it,

(d) the insurer is presumed to know it, or

(e) it is something as to which the insurer waives information."

Section 4 – Knowledge of Insured

Includes sub sections 1-8

Knowledge of insured gives some guidance as to what efforts the insured must make to look for relevant information.

Subsection (6)

Whether an individual or not, an insured ought to know what should reasonably have been revealed by a reasonable search of information available to the insured (whether the search is conducted by making enquiries or by any other means).

In subsection (6) "information" includes information held within the insured's organisation or by any other person (such as provided by the contract of insurance).

As with the old law, the broker's role is very important as their knowledge will be assumed to be within the insured's knowledge (as the broker is the agent of the insured). Whilst it is not a separate duty of disclosure which exists in the old law, the broker should always make sure that all relevant information is shared with the insurers.

So, if there is a potential breach what are the new remedies? The starting point has to be a consideration of whether the breach was done deliberately or recklessly. If insurers can prove this, then they can cancel the insurance from inception and keep the premium.

If it is more likely the breach was not deliberate or reckless but merely accidental or careless then there are three remedies which are based on what the insurers would have done had they received all the information at the start.

■. If they would not have written the risk at all, then the risk can be cancelled from inception, but the premium must be returned.

■. If the risk would have been written but on different terms or conditions (not including premium) then the contract can be effectively rewritten including those other terms from inception.

■. If the risk would have been written but a higher premium would have been charged, then the remedy is that any claims arising will be reduced in a proportionate basis. The proportion will be the proportion that the premium paid represents of the premium that should have been paid. Therefore, if the insurer would have charged GBP 100 of premium had they known about the new information but only charged GBP 80, then only 80% of the value of any claims will be paid. From a practical perspective, this will be a harsher penalty on an insured than just paying the additional premium, so some negotiation will probably take place if such a situation arises – however that is the strict legal position.

If the issue arises in relation to a change in the insurance during the currency of the policy, then the same provisions apply – the insured has a duty of fair presentation and there will be a number of remedies available:

■ If the breach was deliberate or reckless – the contract can be cancelled from the time at which the variation was made with no return or premium.

■ If the breach was neither deliberate or reckless then the remedy as with original contract creation depends on what the insurers would have done had there been no breach.

■ If they would have not agreed to any variation to the contract then the contract will be treated as if no variation had been made – but insurers have to return any additional premium paid.

■ If they would have agreed different terms (including an increase in premium) then the contract will be treated as if those different terms apply.

■ If the change made resulted in a reduction in premium then the insurer will be able to proportionately reduce any claims payments

.



So, what does it mean for a Lloyd's Agent in practice? The fact that something may not have been advised to insurers at the time the risk was placed is often highlighted at the time of a claim, so it might be that a survey report brings the problem to the insurers' attention.

In terms of deciding what was or was not advised to insurers, only they will know the answer and so this should never be a decision that an Agent has to make. For those agents with claims settlement authority, should something come to your attention during the survey or adjustment process which you think might be relevant to this point, refer it to your principals immediately.

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Chapter 5

Types of Loss and Measures of Indemnity

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5.1. Introduction

In this chapter we will look at the various types of loss that can arise to cargo and consider how the type of loss affects how the claim will be adjusted.

5.2. Partial loss

The only definition of 'partial loss' is the one which appears in the Marine Insurance Act 1906. It is not a particularly helpful definition as it says simply that a partial loss is any loss that is not a total loss. In practice, there will be a partial loss where the subject-matter insured has suffered loss or damage but:

- it still retains some measure of value, or;
- only a part of it is lost or damaged, the rest being sound.

Where there is a partial loss of goods, it will usually be dealt with in one or more of the following ways:

- The surveyor will agree the amount of depreciation (usually expressed as a percentage of value).
- The goods will be sold and a percentage depreciation determined by a comparison of sound market value and sale value.
- The goods will be reconditioned or repaired and the claim will be based on the charges incurred in so doing.

Partial loss – measure of indemnity

a. Agreed depreciation

Where the surveyor agrees a depreciation with the Assured, this would normally be expressed as a percentage of value. The claim on the policy would be that percentage applied to the insured value, as follows:

Example one - All cargo damaged

60 cases of Fizzles are valued at CIF $60,000 and insured for $66,000. All 60 cases are delivered wet- damaged by an insured peril. The surveyor agrees a 25% depreciation with the Assured. The claim is:

Insured value of 60 cases $66,000 x 25% depreciation	$16,500

Example two – Cargo partially damaged

If only 37 of the 60 cases had been delivered damaged and the rest were sound, the percentage depreciation would be applied only to the insured value of the 37 cases, as follows:

60 cases insured value	$66,000
37 cases insured value in proportion ($66,000/60 x 37)	$40,700
Depreciation thereon at 25% ($40,700 x 25%)	$10,175



Always remember to apply the depreciation only to the proportion of the insured value that relates to the damaged cargo.

b. Damaged goods sold at auction

In many cases, the surveyor will be unable to agree an allowance or percentage depreciation with the Assured. The amount of loss then needs to be ascertained by offering the damaged goods for sale to the highest bidder. The resulting claims will then be calculated as follows:

Example one - All cargo damaged

60 cases of Fizzles are valued at CIF $60,000 and insured for $66,000. All 60 cases are delivered wet-damaged by an insured peril. The goods are sold at auction for $40,000. The amount the Assured receives after sale charges of $1,200 is $38,800. The claim on the policy is:

60 cases value in sound condition	$60,000
Sold for gross proceeds of	$40,000
Depreciation is	$20,000
or	33.33333%

The claim on the policy is the insured value of $66,000 x 33.33333%	$22,000
Plus sale charges	$1,200
Claim on the policy	$23,200

Note that it is always the gross proceeds that are used when calculating the percentage depreciation that arises from a sale. The sale charges are added at the end of the claim as an extra charge.

Example two - Part cargo damaged

If only a part of the goods was damaged and sold, the same principles would apply. Thus, if only 15 cases had suffered damage and these were sold for gross proceeds of $10,000, with the Assured receiving $9,700 after deduction of sale charges of $300, the claim would be calculated as follows:

60 cases CIF value $60,000
Insured value $66,000

15 cases in proportion – CIF value Insured value $16,500	$15,000
15 cases sold for proceeds of	$10,000
Depreciation is	$5,000
or	33.33333%
The claim on the policy is the insured value of	
$16,500 x 33.33333%	$5,500
Plus sale charges	$300
Claim on the policy	$5,800

Always remember to calculate the depreciation in relation to the portion of the CIF value if the calculation is being done using gross proceeds following a sale. For an agreed depreciation, you can just apply the agreed percentage directly to the insured value.

Important things to consider when dealing with depreciation calculations

a. Like-for-like comparison

When calculating a claim for depreciation on goods that are sold for proceeds, it is important to ensure that 'like is compared with like'. In other words, the gross proceeds that are obtained must be compared with what the goods would have been worth in sound condition at the place and on the day the sale took place (which is not necessarily the pure CIF value).

There are certain things that may need to be taken into account. The first of these is customs duty. If the goods have already been imported into the country and the sale takes place inland, it is likely that the Assured will have become liable for customs duty at the time of removing the goods from the port area.

Example

If Fizzles attract customs duty at 3% and the sale has taken place at final inland destination, this needs to be taken into account when calculating the figure.

Thus, our 60 cases of Fizzles have an actual sound value at the time and place of sale of:

CIF Value	$60,000
Plus duty at 3%	$1,800
Sound value on date of sale	$61,800
Gross proceeds of sale	$40,000
Depreciation	$21,800
or	35.27508%
The claim on the policy is the insured value of	
$66,000 x 35.27508%	$23,282
Plus sale charges	$1,200
Claim on the policy	$24,482

(Cents have been ignored for convenience)

b. Rising and falling markets

The next thing to bear in mind is that certain commodities can rise or fall in value depending on demand and other market conditions. These variations in value can happen even on a daily basis. Therefore the sound market value at the time and place of the sale may be substantially different from the invoice value, and hence the invoice value should not be used as the basis of the depreciation calculation.

It follows from this that, when the price of a particular commodity is high, so the value of that commodity in damaged condition will also be correspondingly higher, and vice

versa. It is therefore very important to check the local market for the commodity you are dealing with to find out what the actual market value is on the appropriate date.

Example - Rising market

Let us assume that our claim is for wet-damaged bulk Fizzle Powder. The Assured purchased 10,000 tons at a CIF price of $200 per ton. The insured value is $2,200,000. The market for Fizzle Powder had been rising and the 10,000 tons were sold in damaged condition at auction for $180 per ton. The sound market value on the day of sale was $240 per ton. The claim would be calculated as follows:

10,000 tons Fizzle Powder insured value $2,200,000	
Sound market value	$240 per ton
Gross proceeds of sale	$180 per ton
Depreciation	$60 per ton
or	25%
The claim on the policy is the insured value of $2,200,000 x 25%	$550,000

Example - Falling market

However, if the market for Fizzle Powder had been falling, then the value of this commodity in damaged condition would also have fallen. Let us suppose that the sound market value on the day of sale was $190 per ton and that the proceeds of sale in damaged condition were $142.50 per ton. The claim would then be calculated as follows:

10,000 tons Fizzle Powder Insured value $2,200,000	
Sound market value	$190.00 per ton
Damaged Value	$142.50 per ton
Depreciation	$47.50 per ton
or	25%
The claim on the policy is the insured value of $2,200,000 x 25%	$550,000

It will be seen that the result in either case is the same. If the cargo has suffered a deterioration to the extent of 25%, then that is the amount the insurers should pay, regardless of whether the market is rising or falling. Comparing the gross proceeds of sale with the sound market value at the time and place of sale will shield insurers from market fluctuations. Such fluctuations are commercial risks, not physical risks.

5.3. Total loss

There are two categories of total loss:

- Actual Total Loss (commonly referred to as an ATL)
- Constructive Total Loss (commonly referred to as a CTL)

Actual Total Loss

An ATL occurs usually when the property insured is either:

- destroyed, or;
- so badly damaged that it ceases to be a thing of the kind insured.

There is also an ATL when the Assured is irretrievably (permanently) deprived of the insured property.

When there is an ATL of the subject-matter insured, the claim on the policy is for the full insured value thereof.

ATL through loss of specie

It sometimes happens that the insured property arrives at destination, and still has some value, but is no longer ‘a thing of the kind insured’. This is often referred to as a loss of specie.



Examples of loss of specie

Metal goods intended for use in manufacture have become damaged and are no longer fit for their intended purpose.

Wood that has burnt and has turned into charcoal.

The metal and wood in the examples above may, however, still have a value and be capable of fetching proceeds by way of sale.

In such a case, the claim on the policy would be for the insured value of the goods, but underwriters would be entitled to a credit for the net proceeds of sale.



Ask your surveying colleagues for examples of cargoes they have seen where they have been asked to assist with finding a salvage market on behalf of insurers who will take ownership of the cargo when they pay out a total loss.

Ideally the insurers would time the insurance payout to take the credit for net proceeds as part of the claims calculation, rather than having to pay out the full amount of a total loss and then separately have to organise the sale of the cargo.



Watch out for the situations (under partial loss) where goods that are still in specie (ie are still the same thing that was shipped) have suffered a deterioration and are sold as such. The distinction is sometimes a fine one in practice.

ATL through deprivation

There may sometimes be circumstances where the goods remain in perfectly sound condition but there is an ATL because the Assured is permanently deprived thereof. Such circumstances are likely to be rare, but an example would be the following.

Example

A ship is carried by a tidal wave and comes to rest inland at a remote, inaccessible place from which neither the ship, nor the cargo on board, can be rescued. The cargo may still be perfectly sound but the Assured is irretrievably deprived thereof. The claim would be for ATL and the policy would pay the full insured value. If, however, at some point the cargo could be rescued and sold, then the proceeds would be for insurers' account as they would have taken over the full rights in the cargo having paid a total loss.

Constructive Total Loss

A CTL occurs when the Assured reasonably abandons the property in circumstances where:

- an ATL seems unavoidable, or;
- the insured property cannot be preserved from an ATL without an expenditure which would exceed its value when the expenditure had been incurred.

CTL because ATL seems unavoidable

The first of these circumstances suggests a situation where the facts are not clear, i.e. it is not established beyond all doubt that the goods are an ATL but, on the balance of evidence, they probably are. Underwriters therefore give the Assured the benefit of the doubt and treat the claim as if it were an ATL.



A practical example might be a perishable cargo which is in a damaged ship and cannot be fully inspected at this point in time. Consider any other examples that you or your colleagues might have come across in the past.

CTL because preservation from ATL will be too costly

With regard to the second of the above circumstances, whether the property is worth preserving, recovering, or repairing will depend upon the facts of each case. In general, no prudent person would spend, say, $50,000, on reconditioning goods if their value once reconditioned would only be $40,000.



In the Marine Insurance Act 1906 (section 60) there are some practical examples of CTL which include:

■ Where insured is deprived of possession of goods by a peril insured against and it is unlikely that they will be recovered or the cost would exceed the value when recovered. (Note, the measure of deprivation for CTL is 'unlikely to recover', as opposed to 'permanent deprivation' which is required for ATL.)

■ Where the cost of repairing the damage to goods and forwarding them to their destination would exceed their value on arrival.

As with an ATL, the amount the policy pays in the event of a CTL is the full insured value of the subject- matter insured. Underwriters are entitled to a credit for any proceeds (net of sale charges) that may be obtained for whatever remains of the goods.

Notice of abandonment

The distinction between an ATL and a CTL is important. With an ATL there is certainty, i.e. the goods are totally lost as a matter of fact. This is not necessarily the case with a CTL, where things tend to hang in the balance, i.e. an ATL 'seems' unavoidable or the cost of saving damaged goods would exceed their value when saved. Both of these situations are likely to require some investigation before the true situation can be established.

For this reason (in English law at least), an Assured claiming for a CTL is required to give notice to the insurers that it is intended to abandon the subject-matter insured to them. This then gives the underwriters an opportunity to investigate the circumstances and to agree (or contest) that there is a total loss.

In practice, underwriters invariably decline to accept the abandonment as, to do so, might land them with liabilities that go with ownership – for example, the cost of removing the property from the place at which it has been abandoned. There is in addition the entirely practical issue of what insurers would do with the damaged cargo they now own.

There is nothing in English law that says the underwriters must take over ownership of the insured property in the case of a total loss, even when the Assured expresses the wish to abandon it to them. Underwriters are entitled to take over whatever remains of the insured property on payment of a total loss, but it is a matter for their discretion. As above, they invariably decline to do so, hence the practice of routinely refusing to accept the notice of abandonment.



The practicalities of tendering notice of abandonment are not usually something that the Lloyd's Agents will have to worry about. The broker will usually provide a formal notice to the insurers who will then formally decline (although in certain circumstances they might choose to accept).

5.4. Salvage loss

There is a further category of loss that is unique to cargo and that is a so-called 'salvage loss'. It is neither a partial loss nor a total loss and seems to have arisen as a matter of practice rather than law.

A salvage loss is a type of settlement that takes place when goods are sold at an intermediate place on the voyage, usually when goods are landed at a port of distress and are in damaged condition. The rationale is that, if they are forwarded to destination, they will either become a total loss by the time they arrive or will have deteriorated much further. On this basis underwriters are in favour of such action as by selling the goods for at least some value, the insurance claim is thereby reduced.

There is a difference between the calculations, which is why care must be taken to consider which is the appropriate calculation to use depending on where in the journey the goods were sold:

■ Salvage loss if sold at a port of refuge or other intermediate port on the journey, or;

■ Agreed depreciation or depreciation calculated through sale, if sold at the port of destination.

Salvage loss calculation

The practice in such circumstances is that the goods are sold, the Assured retains the net proceeds of sale and the underwriters pay the difference between the insured value and the net proceeds. Thus:

Salvage loss = insured value less net proceeds of sale.

Although not a total loss, it will be appreciated that the claim is calculated on the same basis as if there was a CTL. Many Assureds are under the impression that a claim should be calculated in the same way as when damaged goods are sold at final destination. That is not the case: the salvage loss basis of settlement is used only when damaged goods are sold short of destination.

5.5. Fear of loss

This is not a category of loss at all but is something that is commonly encountered when dealing with cargo claims.

Example

An Assured receives a bulk cargo that has been carried in three separate holds in the ship. On arrival of the ship, but prior to discharge, a strange smell or taint is noticed on the cargo in two of the holds but is not present in the third hold. Cargo from the third hold is discharged separately and kept apart from the cargo in the two affected holds. The cargo in the affected holds is agreed to be unfit for purpose and has to be sold at a loss. The cargo in the third hold, after examination or analysis, is found to be perfectly sound. However, the Assured may argue – with some justification – that, simply by association, the cargo in the third hold can no longer be deemed to be sound; that buyers will not be prepared to pay the full price for it 'just in case'.

In theory, the situation is quite simple. The Assured cannot prove there has been any physical loss or damage to the cargo in the third hold, therefore there can be no claim on the policy in respect of it. If buyers are unwilling to pay the full price for it, this is a commercial loss arising from fear and not an insured loss at all. In practice, the claim would probably be dealt with 'by negotiation'. A hard underwriter might refuse to entertain the claim but, if the Assured is an important one, the underwriter may well offer an 'ex gratia' settlement. (An ex gratia settlement is a payment made by the underwriters for purely commercial reasons, or out of sympathy, when no actual claim on the policy has been proven.)

In theory, though, underwriters have no liability where a loss is simply feared to be there but is not actually there, or cannot be proven.

Even those Agents who have authority to adjust claims should always refer any matter such as this to their principals for the final decision to be made – any decision made to pay the claim by the insurers will be entirely commercial in nature and it is not usual for Lloyd's Agents to make commercial decisions on the part of their principals.

5.6. Increased Value policies

Many bulk commodities are 'sold on' during the course of transit.

Example

The shipper sells on CIF terms to Trader A and assigns the original insurance to Trader A.

During the course of the voyage, Trader A sells the cargo on at a higher price to Buyer B

and assigns the original insurance to Buyer B.

However, by reason of Buyer B having paid a higher price than the original price paid by Trader A, the insurance is now unlikely to be sufficient in value to cover Buyer B's risk.

Buyer B may therefore desire to rectify this by taking out additional insurance and this will be in the nature of a 'top-up', ie for the difference between the original insured value and the new insured value that is necessary to fully cover Buyer B's needs.

This is known as an Increased Value policy. Such policies are quite common but create problems if, as often happens, the Increased Value insurance is with a different insurer to the one who underwrote the original policy. It is not unusual in some trades for ownership of the cargo to pass hands several times and there may be an original insurance and more than one Increased Value insurance, each with a different underwriter.

A clause (Clause 14) exists in the Institute Cargo Clauses to clarify how claims are to be dealt with in this situation. The wording in the 1/1/09 clauses differs to that in the earlier 1/1/82 clauses but the effect is the same.

The first part of the clause deals with the situation where the subject policy is the original or primary insurance.

14.1 If any Increased Value insurance is effected by the Assured on the subject-matter insured under this insurance, the agreed value of the subject-matter insured shall be deemed to be increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

Example

Insurer A provides the original insurance with an insured value of $2,000,000
Insurer B provides Increased Value for an insured value of $150,000
Insurer C provides Increased Value for an insured value of $50,000

The aggregate insured value is therefore $2,200,000

By virtue of this clause, Insurer A would pay 2,000,000 / 2,200,000ths (or 90.91%) of any claim, less any deductible provided for in that particular policy.

There is a second part to Clause 14 which applies when the subject insurance is itself an Increased Value policy. It reads as follows:

14.2 Where this insurance is on Increased Value the following clause shall apply:

The agreed value of the subject-matter insured shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the subject-matter insured by the Assured, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

Thus, if these were the conditions that applied to the policy issued by Insurer B in the above example, the claim on that policy would be for 150,000/2,200,000ths (or 6.818%) of the loss less any applicable deductible.



See that the policies all respond for their share, even though the loss might be for a value less than the sum insured on the primary or first insurance.

You should not, however, assume that the terms and conditions will be the same for all the policies. The perils and exclusions might be different, and a deductible might mean that one or more of the policies will not actually pay out. The other policies will not pay more just because this has happened, and it is a risk that the insured has to take.



The insured has the obligation to ensure that all the insurers under both the primary and Increased Value policies are aware of each other's existence, and a Lloyd's Agent when adjusting claims under any of the policies should always take this into consideration as the Agent might not be acting for all of the various insurers involved.

Chapter 6

Dealing with Charges

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6.1. Introduction

In this chapter we will review a number of different additional elements that can crop up in relation to a claim and consider whether they are items that insurers should be paying, or whether, and for what reason, they are items for the insured's account.

6.2. Charges in general

A claim on a cargo policy is likely to include not only the claim for loss or damage to the goods but also charges that the Assured has incurred in dealing with the situation. There is a natural assumption by many Assureds that all charges incurred once the cargo has become damaged will be covered by the policy. That is not always the case and the claims adjuster should make a proper examination of all of the charges being claimed.

As a general rule, charges are recoverable when they have been reasonably and specifically incurred to reduce the claim that will result under the policy. In other words, underwriters have derived a benefit from the charge being incurred and will therefore reimburse it. In nearly all cases, this will mean that the charge was incurred to repair or recondition damaged cargo and/or to make sure that the risk of further damage was minimised or avoided.

Practical examples to test this concept further

In each case, costs have been incurred to repair damaged packaging (bags) in circumstances where the original bags have become damaged by an insured peril during the insured transit.

Example one

The bags are being loaded to a lorry at a port warehouse for carriage to final inland destination when it is discovered that some of them are torn. The Assured claims for the cost of repairing the damaged bags or transferring the contents to new bags. This exercise has prevented further leakage or spillage of the cargo during the remainder of the insured transit (which would form a claim on the policy).

Who has benefited from this action? This benefits the underwriters, because it is preventing a future possibly large loss and it is therefore reasonable that they should reimburse the cost of repairing the bags.

Example two

The bags contain cargo that is to be used by the consignee in a manufacturing process at their own premises. When delivered to those premises – the point at which the insured transit ends – it is noticed that some bags are torn. The consignee incurs a cost in repairing them. Is it now reasonable for the underwriter to reimburse those charges?

Who benefits from the work? The insurers do not, as they are already off risk once the goods are delivered and anything done after that time cannot benefit them. It is now the consignee who has benefited from this charge being incurred, not the underwriter. It therefore follows that it is the consignee, not the underwriter, who should bear it.

Example three

The consignee has imported the bags of cargo for the purpose of selling them through their retail outlets. When the bags are delivered to the consignee's central distribution warehouse (at which point the insured transit ends) it is noticed that a number of bags are torn. The consignee has to incur the cost of rebagging the cargo into sound bags otherwise they cannot be sold through the consignee's retail outlets.

Who benefits from this action? It would appear that it is the consignee only, but actually the insurers do as well if the bags are in the format in which the ultimate retail sale will take place. Without rebagging the consignee cannot sell the goods as sound, and hence there might be a claim on insurers because the subject matter of the insurance is both the goods and the bags in which they are packed.

The distinction between examples two and three is a subtle but important one. Packaging is deemed to be part of the subject-matter insured when it forms an essential part of the thing that the Assured sells or trades. Certain goods for retail distribution have diminished or have no saleability if the packaging they are to be sold in is damaged. If the packaging is merely for protection and/or carriage of the goods during transit – but serves no other practical purpose – it is generally not considered a part of the subject-matter insured.



Think about various types of cargo where part of the packaging remains with the goods until the retail outlet – such as flatpack furniture or bagged rice. What other cargo do you see through your ports?

6.3. Forwarding charges

There will be occasions when the adventure comes to an end at a port or place short of destination. The cargo owner may then be faced with the expense of recovering the cargo and getting it to destination by some other means. This situation is dealt with in Clause 12 – the Forwarding Charges Clause – of the Institute Cargo Clauses. The wording of the clause is the same in the (A), (B) and (C) clauses and begins:

"Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance …"

These opening words make it clear that the clause only applies where the premature termination or abandonment of the adventure is caused by a risk that is covered by the policy.

In cases where the cargo is insured under All Risks conditions, as in the (A) clauses, this is unlikely to present any problems, unless the termination is caused by one of the events listed in the exclusions in Clauses 4, 5, 6 or 7 (see chapter 2 and also the latter part of Clause 12 shown below).

The situation is different where the cargo is insured under the restricted (B) and (C) clauses. As was shown in chapter 2 above, these clauses cover only a limited range of perils and the Assured may be in the position of having to prove that it was the operation of one of those perils which caused the premature termination of the adventure. Assuming that the Assured can satisfy the underwriter on this point, the clause then goes on to say what it will respond for, viz.:

"… the Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured."

There are certain qualifications.

- Firstly the charges must be extra, i.e. they must be charges of a type that the Assured would not normally incur in the usual scheme of things.

- Secondly, it is only the costs of unloading, storing and forwarding the cargo that are covered by this particular clause.

- Thirdly, it needs to be reasonable to incur those costs in the particular circumstances. If the costs incurred would exceed the value of the cargo once it has reached final destination then clearly it would not be reasonable to incur the costs in the first place.

- Finally, it is forwarding to the destination to which it is insured that is covered. Thus, if the voyage is prematurely terminated and the Assured's cargo is retrieved and forwarded to somewhere other than the originally intended destination, the costs of so doing are not automatically covered by this clause and the Assured should seek the underwriter's approval of the measures undertaken.



The Assured can recover costs under this clause even though the cargo itself has not suffered any damage. What is being avoided by incurring the costs is a claim on the policy arising from the failure of the goods to reach the destination to which they are insured.

The final part of the Forwarding Charges Clause makes it clear that:

"This Clause 12 … does not apply to general average or salvage charges …"



As will be seen when dealing with general average and salvage in chapter 9, there are circumstances when the costs of unloading and/or storing and/ or forwarding the cargo from an intermediate port or place will be general average expenses or salvage charges. This clause does not apply to any expenses or charges that fall within general average or salvage.

Additionally, Clause 12 …

"… shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their employees."

The Assured will not be able to recover under the Forwarding Charges Clause if the event that brought about the premature termination of the insured transit was one of the excluded events listed in Clauses 4, 5, 6 and 7.



Can you remember the detail of the exclusions? If not, refresh your memory by reviewing chapter 2 again.

Neither will the Assured be able to recover under the Forwarding Charges Clause if the event that caused the premature termination was caused by the fault or negligence of the Assured or their employees or because the Assured or their employees became insolvent or financially defaulted.



When dealing with any claim for the costs of unloading, storing or forwarding cargo from an intermediate port or place on the insured transit, the claims adjuster needs to be satisfied that:

a. the event which brought about the situation was a peril insured against, and;

b. the cause is not one that is excluded elsewhere in the policy.

6.4. Enhanced normal charges

As stated above, not all charges that flow from a cargo claim will be recoverable under the policy. There is a category of expense which underwriters customarily do not pay, known as enhanced normal charges. An enhanced normal charge is a type of expense that the Assured would bear even if the cargo had not suffered any damage at all but which has become enhanced (made bigger) by reason of damage.

Example

In the normal course of events the Assured would bear the cost of discharging the cargo from barges. By reason of the cargo being wet-damaged these costs are 25% higher than normal.

The Assured is likely to say that this increase is in consequence of the cargo being damaged and that, therefore, the extra cost should be recovered from the underwriters. However, it has not been incurred with the intention of reducing the claim on the policy. It is not physical loss or damage and it is not the cost of putting right physical loss or damage.



For any charge being presented by the insured as part of the claim, ask yourself the question, do the underwriters obtain any benefit from this charge being incurred? If they do, then they are more likely to pay it. If, however, it is just a routine cost which happens to be higher because of damaged cargo, such as a discharging cost, then they obtain no benefit and hence will not usually pay it.

6.5. Extra charges

These will nearly always be charges that the Assured incurs in dealing with damaged cargo at destination, or after discharge at the final discharge port. They are 'extra' in the sense that they are of a nature that it was never envisaged would be incurred in the normal scheme of things, ie they are extraordinary (as opposed to the ordinary charges that have simply been enhanced, as in the previous paragraph). Some typical examples of extra charges are:

- Labour costs of sorting damaged cargo from sound in a port warehouse so it can be dealt with.
- Transport costs in taking damaged cargo to an unscheduled place for reconditioning.
- The costs of repairing or reconditioning the cargo.
- Costs of repackaging the reconditioned cargo for the purpose of transporting it from the reconditioning premises to the Assured's warehouse.
- Sale charges incurred in selling damaged cargo at auction.

The list is obviously not exhaustive; there could be many other types of extra charge depending on the circumstances. What should be apparent from this list is that all the charges shown:

- Are incurred solely because the cargo has suffered damage.
- Are incurred solely to deal with the damage with the aim of reducing the ultimate claim on the policy.
- Are extraordinary, as the consignee never envisaged at the time of buying the cargo that this type of expense would have to be incurred.

Generally, if the charges meet these criteria and it was reasonable to incur them (and, of course, the loss or damage resulted from an insured peril), then they will be recoverable under the policy.

6.6. Special or manuscript clauses

It is common practice for brokers to negotiate special clauses to be added to a policy to vary the cover. The type of clauses that might be added will depend on things such as the type of cargo being insured, the type of trade in which the Assured operates, the Assured's particular requirements, etc. Such clauses are usually intended to widen the cover or to provide clarity in circumstances where there might be uncertainty as to how a claim should be dealt with. These additional clauses are often referred to as 'manuscript clauses' or 'brokers' clauses'. There are no standard special clauses, each broker tending to have their own version, although there is a measure of similarity between them. Some of these clauses will deal with how the charges are to be dealt with in the event of a claim. The following are some examples.

Sorting Charges Clause

It is a general principle that underwriters do not pay for the cost of opening up packages to inspect for damage where no damage is found. There will be circumstances where, for example, some packages show signs of having been in contact with water. The Assured may incur costs in segregating these packages and opening them up for inspection, only to find that the contents are completely sound. A Sorting Charges Clause added to the policy would enable such charges to be recovered from underwriters.

Labels Clause

Such a clause will deal with the cost of removing damaged labels and applying new labels where the only damage is to the labels

and not to the cargo itself. An example might be where the labels on bottles of beer are wet-damaged but the bottles – and the beer inside – are completely unaffected.

Brands Clause

Branded goods are those bearing the name of a well-known manufacturer or producer, such as Nescafé or Coca-Cola. Problems are often encountered when dealing with claims on branded goods as the brand owners will want to protect their reputation. They may, for example, refuse to allow partially damaged goods to be sold, even though they still have significant value. Policies on branded goods will nearly always contain additional clauses setting out how different claims situations will be dealt with. Some of these additional clauses are likely to relate to the treatment of extra charges, and the claims adjuster needs to examine the policy and identify them.

Debris Removal Clause

The cost of disposing of worthless cargo or other debris resulting from cargo damage is not usually recoverable from underwriters. Some policies will contain a Debris Removal Clause which will specifically provide for disposal costs to be recoverable in certain circumstances.

The above list is not exhaustive. The claims adjuster needs to examine the policy carefully in each case and identify any special clauses which have a bearing on how the claim and any associated charges are to be dealt with.

6.7. Costs of proving claim

Although strictly not extra charges, there is an established custom for underwriters to pay the costs of proving claim, these being:

- Surveyors' fees.
- Cost of segregating damaged from sound cargo for the purposes of enabling the survey to take place.
- Adjusters' fees.

Chapter 7

Practical Claims Adjustment

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7.1. Introduction

In this chapter we will look at practical claim adjustments, how calculations should be done and how a good adjustment is laid out for presentation to insurers.

7.2. Presentation of the Statement of Claim (the adjustment)

Any claim adjusted and presented to underwriters for consideration needs to be set out in a clear and logical order. The style and content of the adjustment will obviously depend on the requirements of the principal and the nature of the claim. There will be circumstances where the surveyor is required to show an adjustment of the claim within the body of the survey report, and much of the relevant detail will already be shown in the report. Where the adjuster is presenting the calculation of claim as a separate document (or adjustment), the adjuster is likely to have their own style but there are certain rules that should always be followed.

Documentation

The underwriter will often trust the adjuster to have carried out a full examination of all the relevant documents and will not always wish, or have the time, to examine all the documents personally. The adjustment should therefore contain a signed declaration by the adjuster that there has been sight of all relevant documents in connection with the claim. In circumstances where the adjuster has not been able to sight a particular document, or is reliant on information that has been received verbally, there should be an appropriate note explaining that so that the insurer can decide as to whether to see any additional documents.

Suggested layout

Although you might expect that the underwriter will know all about the matter, it is always a good idea to make clear in the adjustment presented the details of the cargo that is the subject of the document, to ensure everyone is completely clear what is being discussed. There is no absolute requirement for the document to take any particular form, but what is shown below is the recommended order of information for logic and clarity.

Start with relevant information about the cargo and the insurance conditions:

Interest insured

This is a summary of the cargo that is the subject of the insurance, and will include, as appropriate:

- The number of packages or units, weight or volume of the cargo.
- A description of the cargo.
- The invoice value.
- Any other relevant details needed to accurately describe the cargo.

It should then show:

Conditions of insurance

This will include:

- The basic insurance clauses (e.g. Institute Cargo Clauses (A) 1/1/09) – always remember to reference the date of the clauses as well.
- Any other special clauses that have been added to the policy and which are relevant to the claim, such as warranties, brands clauses, etc.
- The insured transit as described in the policy, including the name of the vessel or vessels.
- The insured value.
- The deductible or excess.

Then move on to the presentation of the Statement of Claim (the adjustment):

Relevant facts and adjuster's notes

Sufficient detail needs to be shown so that all the relevant facts are at the underwriter's disposal. What is stated will obviously depend on the circumstances of the loss, but the summary is likely to include some or all of the following, as relevant:

- Specific details of the carriage throughout the insured transit (e.g. by road from the shipper's premises at named place, by vessel

from named port to named port, by barge to named final inland destination, etc).

■ Relevant dates in connection with the transit (eg when voyage commenced, when vessel sailed, etc).

■ Any other relevant dates in connection with the loss.

■ When and where the loss happened.

■ The circumstances in which the loss happened.

■ The extent of the loss.

■ What steps were taken to deal with and/or minimise the loss.

■ Whether the carriers or any other third parties have been held liable.

■ Why the adjuster considers the claim to be covered by the policy.

■ Any other details or issues the adjuster considers relevant to the claim.

Calculation of the claim

A detailed calculation of the claim, calculated in accordance with correct principles of indemnity and showing all the calculations used (see chapter 6). The adjuster should always add specific notes to explain particular allowances (or disallowances) to allow the underwriters to see exactly why things might have been included or not.

Extra charges

Details of all the charges being claimed by the Assured, showing which are allowed as part of the claim and which disallowed.

An example of a typical adjustment layout follows. The figures have been rounded to whole numbers for convenience.

Example

ADJUSTMENT OF CLAIM
on: 1,000 bags of Synthetic Jibble Pellets carried on the M/V 'SISI ESPI 3'

INTEREST INSURED

1,000 bags (2,000 kg) Synthetic Jibble Pellets in 1 x 20' container – CIF Value USD22,725 (duty unpaid)
Shipped under B/L No.: ABC123 dated 3 September 2009 from Antwerp to Casablanca

CONDITIONS OF INSURANCE

Institute Cargo Clauses (B) (1/1/09) Insured Value USD25,000
Institute Theft, Pilferage and Non-Delivery clause (1/12/82)
All claims subject to a deductible of USD1,500

RELEVANT FACTS AND ADJUSTER'S NOTES

On 4 September 2009, the M/V 'SISI ESPI 3' was in collision with the M/V 'BOY RACER' in the Bay of Biscay. The 'SISI ESPI 3' was holed below the water line but managed to make her way to Brest, a port of refuge. All cargo from the affected hold was discharged at Brest, including the container carrying the subject cargo. On survey it was found that all 1,000 bags were thoroughly soaked by water, the container having been fully submerged under the water that entered the hold. It was agreed with the consignees that the cargo was no longer fit for its intended purpose (stuffing children's toys) but might still have an outlet for other uses. The cargo was accordingly offered for sale by tender and was sold on 30 September 2019 for gross proceeds of sale of EUR7,500 with sale charges of EUR225.

In our opinion, this loss is covered by Institute Cargo Clauses (B) as a loss *reasonably attributable to collision vessel, craft or conveyance with any external object other than water* (1.1.4) or *caused by entry of sea, lake into vessel, craft, hold, conveyance, container, liftvan or place of storage* (1.2.3).

We confirm that we have sighted the originals of all documents customarily submitted in support of a claim of this nature.

CALCULATION OF CLAIM

1,000 bags Synthetic Jibble Pellets – insured value		USD25,000.00
Deduct: Net proceeds of sale which are:		
Gross proceeds of sale	EUR7,500.00	
Less: sale charges	EUR225.00	
	EUR7,275.00	
	(Exchanged at EUR1.443299 to USD1.00)	USD10,500.00
		USD14,500.00

EXTRA CHARGES

Surveyor's fees and expenses. (This amount has already been paid by the claimants)	USD475.00
	USD14,975.00
Less Policy deductible	USD1,500.00
TOTAL CLAIM ON THE POLICY	USD13,475.00

This adjustment example is a concise document. It contains all the information the underwriter needs to make a decision on whether to pay the claim and how much to pay, without having to go through the documents personally if there is not the time or inclination to do so.



There are several points to note in the way the claim has been adjusted:

1 Because the cargo has been sold short of destination, the claim has to be adjusted on a 'salvage loss' basis (see chapter 5.3).

2 Unless the underwriter requires otherwise, the claim is usually calculated in the currency of the policy.

3 If proceeds of sale are in a different currency to that of the policy or adjustment, the exchange rate used must be that pertaining on the date of sale.

4 The final total should represent the figure that the underwriter has to pay to the claimant. In this example, because the claimant has already paid the surveyor's fees, the fees should be shown as part of the claim with a note that they have already been paid. Where the survey has not been paid by the claimant, the practice should be to exclude it from the total claim and show it as a separate item with a note that it has not been paid (e.g. '(Unpaid)') alongside or underneath. Similarly, if you are including your adjustment or settling fee, this can be shown at the end of the document. Quite often this is a matter of individual style. What is important is that the underwriter knows exactly how much is to be paid to the claimant, how much to the surveyor (if anything) and how much to yourselves as adjusters/claims settlers.

Chapter 8

Recoveries

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8.1. Introduction

Whenever a person or party suffers a loss that is caused by the negligence or breach of contract of another, the wronged person or party will naturally look to receive compensation from the wrongdoer.

The situation is no different in cargo insurance. When cargo is lost or damaged through the fault of a third party, the owner of the cargo has an initial choice to make which is whether to claim on the insurance or to make a claim on the wrongdoer. Depending on the choice, either the owners, or the insurers after they have paid a claim, will normally attempt to make a recovery [get compensation] from the responsible third party.

Lloyd's Agents, when acting as cargo surveyors, are expected to understand the importance of ensuring that the prospects of making an eventual recovery from a responsible third party are maximised by:

- checking that the consignee has held that party liable in writing in a timely manner;
- properly investigating the cause and circumstances of the loss or damage and identifying third party fault where it is a cause, contributory cause or possible cause of that loss or damage, and;
- accumulating as much evidence and information as possible that will assist the client's prospects of making a successful recovery.

When establishing the cause, nature and extent of the loss or damage at a survey, the surveyor should bear in mind that the underwriter will also be interested in the prospects for recovery (or the prospects for defending the claim if the principal is a P&I Club).

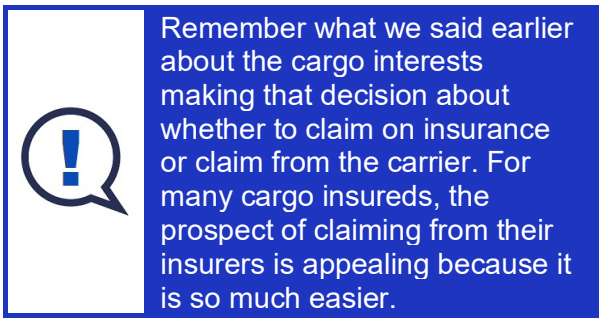
Information is much more easily gathered at the time of inspection and investigation immediately following the loss than later, when the trail has 'gone cold'. Lloyd's Standard Form of Survey Report does prompt the surveyor for information likely to be useful in any subsequent recovery action as well as recording (in section 18 of the Report) what actions the claimant has taken to hold the carrier or other third party liable. The surveyor, however, should confine their report to facts and findings.

Any opinions or potentially contentious comments which might be detrimental to the prospects of recovery (or the prospects of defending a recovery action if acting for a P&I Club) are best dealt with in separate, non-disclosable correspondence to the principal.

8.2. Who can make a recovery?

Generally, it is a party who has a contractual relationship with the wrongdoer or, where no direct contractual relationship exists, the party whose position has been financially prejudiced by the negligent actions of the wrongdoer. This will often be the receiver or owner of the cargo. (The position changes when underwriters have paid a claim under a policy of insurance. This is dealt with in 8.2).

A common difficulty in cargo insurance is that many cargo Assureds show little interest in any recovery action against third parties when they expect to recover their losses under the policy of insurance.



For this reason, Institute Cargo Clauses contain a Duty of Assured Clause which, among other things, places a positive duty upon the Assured …

"… to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised."

This clause is often supplemented by additional wording added to the policy that sets out more specifically what the underwriter expects the Assured to do, on discovery of a loss, to preserve the position against third parties who were, or may have been, responsible for the loss.



The form entitled Lodging a Claim Against a Third Party/Invitation to Attend for Joint Survey Guidance Notes, is available for use by Lloyd's Agents. It also provides information to a claimant on what steps to take to preserve rights against carriers and other third parties.

In circumstances where the cargo owner is or will be paid for their loss under the cargo insurance policy, it is mostly for the underwriter's benefit that recovery prospects are preserved and investigated. A competent surveyor will appreciate this at the time of conducting the survey and encourage the Assured to attach proper importance to this duty.

Where the Assured fails to perform this duty, with the result that recovery prospects are lost or impaired, the underwriter is entitled to reduce any claim under the cargo policy by the amount estimated that might have been recovered had the Assured acted properly.

As far as claims against third parties arising from breach of contract are concerned, these will mostly be claims against a shipowner arising under a Bill of Lading or charter party. Such claims will, in many cases, be defended on the shipowner's behalf by the Protection and Indemnity Association (P&I Club) with which the ship is entered. Sometimes claims for recovery will be pursued against other carriers such as road hauliers, railway companies or inland water carriers.

Other contractual parties against whom it might be necessary to take recovery action could include freight forwarders, warehousemen, port authorities, stevedores, container owners and other parties with a contractual duty of care towards the cargo.

There will be occasions when a cargo owner or insurer will seek compensation from a third party who has no direct contractual relationship with the cargo or its owner. Two common examples are the owners of a ship which has collided with the ship on which the cargo is being carried and owners of other cargoes which have caused damage to the subject cargo. Claims against a third party with whom there is no direct contractual relationship are known as claims in tort. There will be circumstances where claims against the parties mentioned in the previous paragraph arise in tort rather than under contract.

8.3. Subrogation

As above, it is usually the Assured in the first instance who is the party entitled to claim against the third party wrongdoer. The situation changes as soon as the insurer pays a claim under the policy in respect of the loss which is the subject of the claim against the third party.

The passing to an insurer of the right to claim compensation from a responsible third party is known as subrogation. The effects of subrogation are that, on payment of a loss:

a. the insurer legally acquires the same rights and remedies against other parties that the Assured has in respect of the cargo for which the loss was paid, but;

b. in respect of a successful recovery, the insurer is entitled to keep only so much as has been paid to the Assured, passing to the Assured any amount recovered in excess thereof.

In respect of point b., where the Assured has borne a policy deductible, or where the underwriter receives a recovery that includes both insured and uninsured losses, it may be that the Assured is entitled to a proportionate share of the amount recovered, even where the total amount recovered is less than the amount paid by the insurer under the policy.

Additionally, where interest is included in the recovery, the Assured is entitled to receive all interest accruing to the period prior to the date the insurer paid the claim. Thereafter, the Assured is entitled to the proportion of the interest received which attaches to any deductible or other uninsured loss. It is doubtful whether these rules are consistently followed in practice.



Any Lloyd's Agent who undertakes a recovery on behalf of an underwriter or other principal should pass to the principal the whole of the net funds received and leave the principal to determine whether there should be any sharing of the recovery with the Assured – it is not a decision for the Lloyd's Agent personally.

On payment of the claim under the policy, it is standard practice for the insurer to obtain a signed Subrogation Receipt from the Assured. There is no standard form of Subrogation Receipt, although all insurers' forms follow a similar pattern. The document generally contains:

- Brief details of the cargo, the vessel, the policy number and other salient information identifying the cargo and the loss being claimed for.

- An acknowledgement by the Assured of having received from the insurer the stated amount as payment of the claim under the cargo policy.

- An acknowledgement by the Assured that the insurer has become entitled to the same rights and remedies in the cargo as the Assured.

- An acknowledgement by the Assured that the insurer is entitled to use the Assured's name in any action against third parties in respect of the cargo and loss referred to in the document.

The signed Subrogation Receipt is the insurer's evidence of having paid the claim and thereby being legally entitled to pursue the recovery. The third parties being claimed against will invariably request sight of this document before entering into any negotiations with the insurer or the insurer's representative.

8.4. What the Assured should do on discovery of loss/damage

As will be seen when looking at contracts of carriage later in this chapter, there are certain measures that a cargo receiver should take immediately on discovering that their cargo has suffered loss or damage. At that time, it is unlikely to be apparent where or how the loss or damage occurred. It is a prudent measure to notify and hold liable not only the carrier but any other third party who might possibly have caused or contributed to the loss. This should normally be done by the cargo receiver.

The form Lodging a Claim Against a Third Party/ Invitation to Attend for Joint Survey Guidance Notes, where used by the Lloyd's Agent instructed to carry out survey on the goods, contains the following advice to the claimant.

"Important: Holding carriers/third parties liable

The Assured/Claimant is usually required to give notice of any loss or damage to the Carriers, or other Bailees, immediately when any loss or damage is apparent, or within three days of delivery if the loss or damage was not apparent at the time of taking delivery."

The Notice of Loss/Damage template (see over), or one in similar form, is suitable for notifying the carrier of the loss and holding the carrier liable. It also invites the carrier to be represented at a joint survey of the goods. The document can be tailored for use against other third parties as appropriate.

Letter of Reserve

NOTICE OF LOSS/DAMAGE

Date: _____

To the Carrier(s) or their representatives at _____

Of the Vessel/Aircraft/Conveyance _____

Goods: _____

Marks and Numbers: _____

We inform you that, of the above goods deliverable to us ex the above Vessel / Aircraft / Conveyance, the following were lost and/or missing and/or damaged:_____

_____

_____

_____

We hereby hold the carrier responsible for this loss and/or damage.
Damaged goods will be surveyed on our behalf by the following Lloyd's Agents: _____

_____

_____

_____

You are invited to attend the survey and should contact either ourselves or the above Lloyd's Agents as soon as possible for details of the date, time and place of survey.

Please acknowledge receipt of this notice.

Signed: _____

Name: _____

Name and Address of Claimant:_____

In some circumstances, there may be more than one Bill of Lading for the same goods, a 'master' Bill of Lading and a 'house' Bill of Lading. There is a category of carrier often referred to as a Non-Vessel Owning Common Carrier (NVOCC). Such a carrier is likely to be a freight forwarder or cargo consolidator who groups or consolidates a number of separate, small shipments into a single container unit for ease of shipment. The main carrier will issue to the NVOCC a master Bill of Lading for one container of consolidated cargo. The NVOCC will issue separate house bills to the numerous owners of the individual cargoes grouped together in the container.



Be alert to the fact that the terms and conditions in a house bill might not be the same as those in the master bill, particularly on important things such as time bars.

There will be some cases where the Assured has a large deductible or other uninsured loss and will therefore retain interest in the progress of the recovery action. Some large corporations with their own legal departments may also choose to remain active in the recovery process. Generally, however, the involvement of an Assured will not extend beyond holding the carrier liable in the above fashion. Thereafter, negotiation with the party being claimed against will be conducted by the insurer or their representative following payment of the claim under the insurance policy.

Even so, the surveyor can considerably improve the insurer's prospects of eventually obtaining a satisfactory recovery by ensuring that the Assured produces and provides all relevant information for submission to the insurer with the survey report while the matter is still fresh. Such documents and information are likely to include:

- A breakdown of the amount being claimed.
- Commercial invoice.
- Packing list.
- Bill of Lading (both master and house, where issued), including conditions on the reverse side.
- Other contract of carriage, if appropriate, eg Air Waybill (master and house, where issued) or CMR (consignment note).
- Charter party (if applicable).
- Outturn receipts at each stage of delivery (including delivery notes and cargo damage receipts, depending on the modes of transport).
- Tally sheets (where appropriate).
- Insurance certificate.
- Notice of claim sent to the carrier or third party.
- Invitation sent to the carrier or other third party to attend a joint survey.
- Any other correspondence exchanged with or received from the carrier or other third party.
- (For bulk and liquid cargoes) draft survey or ullage reports at loading and discharge ports.
- (For containerised cargoes) Equipment Interchange Receipt (EIR) or equivalent from loading and discharge ports plus evidence of security seal at each stage of transit.

In addition, the following documents may assist depending on circumstances:

- Product specifications (in cases of contamination).
- Sale contract.

Wherever possible, the documents should be originals, not photocopies. Many of these documents would be required in any event in support of the claim under the insurance policy. Armed from the start with the above documents and information and the surveyor's report (containing a detailed summary of the surveyor's investigation and findings as to cause and probable time/place of damage), plus a signed subrogation receipt (on payment of the claim under the policy), the job of the insurer or their representative in negotiating with the third party wrongdoer is made much easier.

8.5. Pursuing the recovery

Some insurance companies have their own dedicated recoveries departments. Many will outsource this work to outside agencies such as legal firms or recoveries specialists. Many Lloyd's Agents undertake recovery actions for their clients. Those Lloyd's Agents that do handle recovery actions need to have a sound knowledge not only of law and practice in their local markets but also the main provisions in contracts of carriage used internationally.

Just about every Bill of Lading used anywhere in the world will have detailed terms and conditions on its reverse side. These will invariably refer to the regime under which any claims against the carrier are to be dealt. The most common regimes are the Hague Rules (1924), the Hague-Visby Rules (1968) and the Hamburg Rules (1978). Each of these is a regime drafted at international convention with the aim of creating uniform rules to be used for setting out the carrier's rights and obligations. Governments around the world then decide if they wish to ratify the rules and give them legal effect in their countries.

The Hague Rules were first adopted in 1924 and were designed to prevent shipowners putting highly restrictive clauses into Bills of Lading. Prior to the introduction of these rules, shipowners were generally able to avoid liability for just about every type of loss or damage to cargo, making it virtually impossible for a cargo owner or the insurer to get compensation. These rules set the pattern for subsequent regimes by clearly setting out, on the one hand, shipowners' obligations to the cargo owner and, on the other, those circumstances in which the shipowner would be excused liability for loss or damage to the cargo.

The Hague-Visby Rules were formulated in 1968 and were effectively an update of the previous rules. Many cargo interests around the world still felt that both sets of rules were too heavily weighted in favour of the shipowner. This led to creation of the Hamburg Rules, which were an attempt to correct this perceived imbalance.

The situation today is that some countries have preferred to stay with the Hague Rules, others have ratified the Hague-Visby Rules and some have given effect to the Hamburg Rules. The rules that will normally apply – and be provided for in the Bill of Lading or other ocean carriage contract – are those which have been ratified by the country from which the goods are shipped. A sound understanding of all three sets of rules is essential for the successful handling of recovery actions.

8.6. The Hague Rules 1924 / The Hague-Visby Rules 1968

Introduction

It is convenient here to deal with both sets of rules together. The 1968 revisions dealt mostly with issues of jurisdiction and other areas in need of clarification. There are a set of Articles which deal, among other things, with the following:

- The period of responsibility of the carrier.
- The basis of the carrier's liability.
- The limits of financial liability.
- The carrier's responsibility and their responsibility for subcontractors.
- The documentary requirements.
- The consignor's responsibilities.
- Special provisions concerning the carriage of dangerous goods.
- Time limits for claims and limitation periods.

The key provisions regarding a carrier's responsibilities and rights viz. their relationship with the cargo owner are basically the same in both sets of rules.

When will the conventions apply?

Article X of the Hague-Visby Rules says:

"The provisions of these Rules shall apply to every Bill of Lading relating to the carriage of goods between ports in two different States if:

(a) the Bill of Lading is issued in a Contracting State, or

(b) the carriage is from a port in a Contracting State, or

(c) the contract contained in or evidenced by the Bill of Lading provides that these Rules or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person."

So there must be:

- An international journey, and;
- Issuance of a Bill of Lading or other document of title, and;
- Governing law of contract being state which has ratified HV, or;
- Document issued in a country that has ratified HV, or;
- Voyage starting in a port in a country which has ratified HV.

Let us look at the carrier's responsibilities first.

Carrier's responsibilities

The rules state under Article III (1) that:

"The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to:

(a) make the ship seaworthy;

(b) properly man, equip and supply the ship;
(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation."

and under Article III (2) that:

"Subject to the provisions of Article IV [which is dealt with below], the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

The provisions of Rule 1(a), (b) and (c) and Rule 2 are clear and need no further examination. It is the words that precede them that are important.

Firstly, the obligation upon the carrier is to exercise due diligence (to make the ship seaworthy, etc). In practice, this means that the carrier has to take all the measures that any reasonable carrier would take to ensure that the ship is both seaworthy and cargoworthy for the particular voyage and type of cargo contemplated. It is important to understand that this is not an absolute obligation.

Example

Let us suppose that a vessel suffers a breakdown as a result of a latent defect in the machinery and that that breakdown somehow leads to damage to the cargo. The existence of the latent defect suggests that the vessel was technically unseaworthy and likely to break down. However, if that defect was not discoverable by any reasonable test, then the vessel owner cannot be said to have failed to exercise due diligence.



Thus, to show that the carrier has breached this condition, the cargo claimant needs to show both of the following:

- that the ship was unseaworthy or unfit to carry the cargo, and;
- there was something the shipowner could or should have done to prevent that unseaworthiness or uncargoworthiness but failed to do so.

Proving one but not the other is not enough. It is up to the party who is alleging unseaworthiness (normally the cargo receiver) to prove it.

The above duty to exercise due diligence applies before and at the beginning of the voyage. This means (in English law, at least) from the moment the carrier starts to load the cargo until the ship departs from the berth for the purposes of sailing on the voyage.



A cargo claimant has to show both that:

- The carrier failed to exercise due diligence to provide a seaworthy and cargoworthy ship, and;
- The damage to the cargo which is the subject of the claim was caused by that unseaworthiness or uncargoworthiness.

There are other responsibilities relating to Bills of Lading which are dealt with later in this chapter. It is more appropriate at this stage to look at the rights and immunities that the carrier enjoys.

Rights and immunities

These are dealt with in Article IV of the rules. Rule 1 is a positive statement that the carrier will not be liable for loss or damage arising or resulting from unseaworthiness unless that unseaworthiness has been caused by a want of due diligence to do the things that are set out in (a), (b) and (c) of Article III Rule 1 above.



So if the vessel was unseaworthy and that caused damage but the carrier can show that they exercised due diligence to make the ship seaworthy, they will still be able to rely on the defences in the rules and may therefore not be liable for the damage.

As was stated above, the onus of proving that the vessel was unseaworthy lies with the party alleging it. However, once it is shown that loss or damage did result from unseaworthiness, the burden then shifts to the carrier to prove that due diligence was exercised. Although this order of having to prove things is important, in practice, once a 'prima facie' case has been made against the carrier, there is little option but to start defending it.

Obviously, not all types of loss or damage to the cargo are caused by unseaworthiness. Loss or damage to the cargo might occur at some point during the ocean voyage which has nothing to do with unseaworthiness.

When that happens, prima facie the shipowner will be liable for the damage and will be able to avoid the claim only if it can be shown that one of the following exceptions operated to bring about the loss.

The exceptions (Article IV (2))

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;".

Cargo interests generally find this exception unfair. The master and crew are employees of the carrier and therefore working under the control and direction of the carrier. However, if by their negligent act they cause loss or damage to the cargo while navigating or managing the ship, the carrier does not have to pay compensation to the cargo owner. This exception extends to pilots who might be guiding a ship into or out of port and other servants of the carrier.



It is very important to understand the limitation of the term ‘management of the ship’ and the distinction between managing the ship and caring for the cargo.

Several decisions made in the English courts will help in this respect.

- In one case, the carrier failed to keep the hatches properly covered with tarpaulins while the ship was being repaired with cargo on board. Rain entered the holds and damaged the cargo. The carrier was not entitled to rely on the above exception; covering the hatches was not an act of managing the ship but of caring for the cargo.

- In another case, mismanagement of refrigerating machinery by the crew led to damage to the cargo. As the sole purpose of the refrigeration machinery was to keep the cargo cool, its mismanagement was a failure to care for the cargo, not an act of mismanaging the ship.

On the other hand, a breakdown of the ship’s engines caused by the negligence of the chief engineer or the ship running aground or colliding with another ship as a result of a lapse of concentration on the bridge would both be classed as negligence in the ‘navigation or management of the ship’.

The carrier would then be excused liability for any damage to the cargo that might result (unless the claimant could prove that the carrier had failed to exercise due diligence to make the ship seaworthy at the start of the voyage and that the unseaworthiness was the cause of the engine breakdown, grounding or collision).

The remaining exceptions are largely self-explanatory:

"(b) fire, unless caused by the actual fault or privity of the carrier;

(c) perils, dangers and accidents of the sea or other navigable waters;

(d) act of God; (e) act of war;

(f) act of public enemies;

(g) arrest or restraint of princes, rulers or people, or seizure under legal process;

(h) quarantine restrictions;

(i) act or omission of the shipper or owner of the goods, his agent or representative;

(j) strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;

(k) riots and civil commotions;

(l) saving or attempting to save life at sea;

(m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;

(n) insufficiency of packing;

(o) insufficiency or inadequacy of marks;

(p) latent defects not discoverable by due diligence;

(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.”

The most commonly used defences in practice are negligence in navigation or management of the ship, fire, perils of the seas and inherent vice.



Perils of the seas requires particular comment. A peril of the sea is generally considered to cover fortuitous accidents or casualties peculiar to transportation on the sea such as stranding, sinking, collision of the vessel, striking a submerged object or encountering heavy weather or other unusual forces of nature. But the term should not be interpreted too liberally. If, for example, waves wash across the ship in very heavy seas and enter through the hatch covers, the carrier would not be able to rely on a defence of perils of the seas if the reason the water entered the hatches was that they had defective seals.

Similarly, a shift of cargo in the hold in heavy seas might not be a peril of the sea if the cargo had not been properly stowed or secured in the first place.

A difficulty for any recovery agent is that courts in different countries will interpret the term in their own way and what might be a perils of the seas defence in one country might not be a defence available to the shipowner in another.

The exception in (q) seems, on the face of it, to give the carrier a defence against pretty much anything else that is not included in (a) to (p). However, the burden of proof remains firmly on the carrier to show that the loss or damage was not their fault. Thus, if cargo was presumed to have been sound when loaded to the ship by reason of a clean Bill of Lading having been issued but was found to be damaged at the time of discharge and there are no clues whatsoever as to how the damage occurred, then the defence in (q) would be of no help to the carrier; they would be liable.



Always remember that the burden of proof applies if the carrier wants to rely on the (q) defence.

To end this section it is necessary, because of its importance, to emphasise the relationship between Article III (1) (the duty to exercise due diligence to make the ship seaworthy, etc) and the exceptions in Article VI (2).

The carrier cannot rely on any of the exceptions where the loss or damage is shown to have been caused by a lack of due diligence to make the ship seaworthy before and at the beginning of the voyage.

The following example shows the distinction:

Example

A ship runs aground on rocks that are clearly shown on navigational charts. Cargo suffers loss or damage as a result.

- If the ship had sailed without having the correct charts on board, then there was a lack of due diligence to make the ship seaworthy at the commencement of the voyage. The carrier will be liable for the cargo damage and will not be able to rely on the exception of ‘negligence in navigation’.

- If the ship had sailed properly prepared and fully seaworthy and the grounding was due to a mistake on the bridge then the carrier would be able to rely on the defence of ‘negligence in navigation’.

Package limitation

It has always been considered commercially desirable to allow shipowners to limit their liability for claims (except in extreme circumstances). Were shipowners to face completely open-ended liability, most would find it commercially impossible to trade. The Hague and the Hague-Visby Rules embody this principle in two ways: by providing for a maximum amount the carrier will have to pay for loss or damage, and by providing for a time limit in which claims have to be brought and settled. This section deals with monetary limitation, time limits being dealt with in 8.5.6.

The situation is slightly complicated in that some countries have, by domestic legislation, set different limits of liability than those provided for by the rules themselves. When the Hague Rules were formulated in 1924, British shipowners were the dominant force in

world shipping. This was reflected by setting the maximum amount a carrier would have to pay, when liable, for any single lost or damaged package or unit to £100 Sterling. To complicate matters, those rules provided for this amount to be taken as the gold value and also allowed other countries to use their own monetary systems.



What do you think about containers? When the Hague-Visby Rules came out, containerisation was relatively new and probably not really considered in relation to the wording of the rules. Do you think that the term 'unit or package' used in the Hague or Hague-Visby Rules should relate to the container or the items inside the container?

Modern Bills of Lading often state 'One container STC (Said To Contain) 100 cases' as a means of trying to widen out the package limitation to each case, not the single container.

The Hague-Visby Rules take a different approach and refer to Special Drawing Rights (SDRs). The SDR is a unit of account set by the International Monetary Fund and might be thought of as a fictional currency with a variable exchange rate calculated against a basket of the world's main currencies. The IMF fixes daily the value of one SDR in terms of the US Dollar. This value, or notional exchange rate, can normally be found on the financial pages of the media or on a rate of exchange website such as XE.com, where you will find it under its ISO code of XDR.

The Hague-Visby Rules entitle the carrier to limit liability for loss or damage to cargo to two SDRs per kilo of lost/damaged goods or 666.67 SDRs per package, whichever is the greater. This necessitates two calculations, one on a package basis and one on a weight basis, to ascertain the higher figure to be used for limitation purposes.

As mentioned above, many states that have ratified the Hague or Hague-Visby Rules have enacted their own legislation varying the provisions regarding limitation of liability. Any Lloyd's Agent handling a recovery action where limitation of liability is an issue should be sure to identify the rules that will apply in that particular case.

Breaking limitation

The right for the carrier to limit liability is not unbreakable. The Hague-Visby Rules say:

"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result."

However, it is not easy to prove that the carrier intended to cause damage or was reckless (i.e. could not care less), knowing that damage would probably result, so the right to limit is likely to be broken only in the most extreme circumstances.

Limitation on time

If loss or damage is apparent before or at the time of the cargo owner taking custody of the goods, the owner should immediately notify the carrier or the carrier's agent in writing. (This would not be necessary if the goods have been the subject of a joint inspection at the time of taking custody with the carrier's representative being present.)

If loss or damage is not apparent at the time the consignee takes delivery of the goods, the consignee should, if possible, give notice of the loss or damage to the carrier or their agent within three days of taking delivery and invite the carrier to send a representative to a joint survey of the goods.

It is not fatal to the cargo owner's claim if such notice is not given within three days. However, failure to do so does weaken the claimant's case. Acceptance of the cargo without comment provides the shipowner with a prima facie case that the goods must have been sound at the time of delivery. If some time passes before any notice of claim is made on the shipowner, they are entitled to take the view that, since the claimant remained silent for a time, there is a strong presumption that the damage probably wasn't

there at all at the time of delivery. Late notification of damage simply makes the claimant's case that much harder to prove.



Notify in three days and invite to a joint survey – if not done, then carrier will force cargo owner to prove that the goods were damaged as the assumption will then be that they were sound on arrival.

The other limitation on time is an extremely important one. Under Hague and Hague-Visby Rules:

"… the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered."

This time limit, or time bar as it is more commonly referred to, is strictly enforced. The cargo claimant needs to have achieved a settlement or resolved the claim with the carrier within 12 months of the date the goods were delivered (or should have been delivered, if they were missing).

If not, the carrier is then excused all liability for the loss even if they were at fault.



The conditions in a house Bill of Lading might differ from those in the master Bill of Lading and may provide for an earlier time bar, something the recovery agent should always be alert to. Note also that the time bar in a claim 'in tort', i.e. not under the contract of carriage, will be subject to the laws of the particular jurisdiction. In the UK this would generally be six years.

There are many claims where it is not possible to agree a settlement within this one-year period. What can the claimant do to protect their position? Basically, one of two things:

1 They can ask the carrier to voluntarily postpone the right to time bar the claim and agree to extend the negotiating period beyond one year. Carriers, or their P&I Clubs on their behalf, are nearly always willing to agree at least one extension of time, usually for three or six months.

2 If a voluntary extension of time is not obtained, the usual recourse open to the claimant to prevent their claim from becoming time barred is to commence legal proceedings – (some contracts of carriage or jurisdictions may provide for an arbitration process at this stage).



Do not always assume that an extension is a perfect answer, as there are a number of common legal issues to consider.

Voluntary time extensions are not recognised in all jurisdictions, so are effectively meaningless.

The wording of some agreements to extend time can be complex and carry conditions and may raise potential 'title to sue' issues.

Extensions must be obtained from the correct parties, and if the chain is unclear, obtained from more than one party to ensure the position is protected.

Key points to consider in relation to time extensions are:

■ The general rule is that the party seeking an extension must be a party to the Bill of Lading (or lawful holder of same) or have the right to act for that party. It is at this point that the effectiveness of any subrogation form or assignment of claim is likely to be tested.

■ Identifying the true carrier is not always straightforward where the Bill of Lading issuer is someone other than the shipowner and the vessel is under charter. A voluntary extension of time obtained from the wrong party is worthless. If there are several parties (shipowner, NVOCC, other freight forwarder, charterer, sub-charterer, slot charterer, etc) and it is not clear from the evidence or contract which of these is the true contractual

'carrier', it is often necessary to seek an extension of time from each of them.

■ A time extension and the wording or conditions of same can always be negotiated. The claimant or recovery agent should not be pressured into accepting a time extension (and then later rely on it) if they are unsure of or unhappy with the terms of the extension. Time extensions are 'offered' and do not have to be accepted. The purpose of the voluntary extension is to avoid the need to start expensive legal proceedings, especially in circumstances where both parties feel an amicable settlement is possible but need just a little more time to get there. The extension is therefore beneficial to both sides and should be negotiated accordingly.



If you do not accept a time extension because you are unhappy with the terms/conditions of the extension, then seek legal advice and ensure that proceedings are issued in good time to prevent the claim becoming time barred. Obviously, any action taken must be with the principal's authority.

There is a chart in 8.8 which compares the time limits/notification periods and limits of liability provided for in the three main carriage of goods by sea liability regimes.

It is the responsibility of the person conducting the recovery action to ensure that they are fully aware of which time and liability limits apply, including any variations thereto by reason of local or other applicable law or regulation.

8.7. Some rules relating to Bills of Lading

The following summarises the provisions in the Hague and the Hague-Visby Rules relating to Bills of Lading.

a. Once the carrier or their agent has taken custody of the goods, they must, if the shipper demands it, issue a Bill of Lading for the goods. This has to show:

■ The leading marks as shown on the goods or their packing.

■ Either the number of packages or pieces, or the quantity or weight.

The apparent order and condition of the goods at the time of receipt by the carrier. The above will be based on the information provided in writing by the shipper of the goods, although the carrier is not bound to put anything in the Bill of Lading if its accuracy is doubted and there are no means of verifying it.

b. The Bill of Lading is prima facie evidence that the carrier has received the goods exactly as described. The carrier can, subsequent to issuing the Bill of Lading, challenge its accuracy if they become aware of some inaccuracy that was not apparent at the time of issuing it.



However, the carrier cannot challenge its accuracy after it has been transferred to a third party acting in good faith. This is extremely important as often in the case of a recovery it is a consignee to whom the bill has been transferred that might be making the claim (or in whose name the insurers are).

Sometimes the shipowner or other carrier is reluctant to clause a Bill of Lading as it may lead to objections from a bank that has issued a letter of credit on behalf of the shipper. In such circumstances, the carrier might clause the Mate's Receipts only in exchange for a letter of indemnity from the shipper.

8.8. The Hamburg Rules

Whereas the Hague and the Hague-Visby Rules were conventions formulated by the Comité Maritime International (CMI), the Hamburg Rules were created by the United Nations. This was largely as a result of pressure from cargo interests and smaller trading nations which felt that the existing regimes were weighted in favour of carriers.

The intention of the Hamburg Rules was to:

"... strike a fairer balance between carriers and shippers in the allocation of risks, rights and obligations with regard to liability. They shift the balance of liability slightly from the

shipper to the carrier, but without radically changing the established liability system."

In fact they take a radically different approach by making the carrier automatically liable for any loss or damage unless the carrier can prove not to have been at fault. This is expressed in the rules as follows:

"The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."



There are other provisions relating to delay, fire and live animals which you should familiarise yourself with as they are different to the Hague or the Hague-Visby Rules.

1 Live animals come within the definition of goods under the Hamburg Rules, but do not under the Hague-Visby Rules.

2 Carrier is liable under the Hamburg Rules for delay in delivery, if what caused the delay took place while the goods were in their charge, unless they can prove to have taken all reasonable measures to avoid the occurrence.

3 Carrier is liable under Hamburg for loss/ damage or delay caused by fire if claimant proves that fire arose from fault or neglect on the part of the carrier, their servants or agents.

The Hamburg Rules have not found favour with major exporting and shipowning nations and are thus encountered only infrequently in practice.

8.9. Comparison of limits

The chart below shows the time-bar periods, notification periods and limits of liability for each of the three carriage of goods by sea regimes referred to above. Note that under the Hamburg Rules, the time bar becomes effective after two years, and not one as under the Hague and the Hague-Visby Rules.

Type of claim	Time bar	Notification period	Limit of liability
Hague Rules			
Loss	One (1) year from date of delivery or when goods should have been delivered.	Within three (3) days, but at time of delivery if apparent.	£100 per package or unit. This limit can vary from country to country.
Damage	As above	As above	As above
Additional Information			A higher limit can be set by agreement.
Hague-Visby Rules			
Loss	One (1) year from date of delivery or when goods should have been delivered.	Within three (3) days, but at time of delivery if apparent.	2 SDRs per kg or 666.67 SDRs per package / unit, whichever is the higher.
Damage	As above	As above	As above
Additional Information			A higher limit can be set by agreement.
Hamburg Rules			
Loss	Two (2) years from date of delivery or when goods should have been delivered.	Within 15 days, but the next working day if apparent.	2.5 SDRs per kg or 835 SDRs per package / unit, whichever is the higher.
Damage	As above	As above	As above
Delay	As above	Within 60 days	As above

8.10. Some guidance on handling recovery actions against third parties

A degree of perseverance is often required before liability is admitted by the responsible third party and it would be rare indeed for the claimant to obtain an admission of liability as soon as a claim is lodged. Protracted correspondence and production of evidence will often be required before opposing views are accepted. The best recovery agents are persistent and tenacious as well as being knowledgeable. They tend to have good detective skills and tactical awareness.

The extent of the loss being claimed for will often dictate the time, effort and expense spent on the claim, and it may be that the best that can be hoped for is a 'nuisance' offer by the party being claimed against just to dispense with the matter. The following additional tips will prove useful to anyone pursuing recovery actions.

Who to claim against and why

It is important to identify the correct party against whom to claim. This is particularly the case with containerised goods where primary responsibility for the care of the goods might lie with any of the shipowner, the charterer or slot charterer, or the freight forwarder or consolidator. It is useful to ask the following questions at the start:

1 Who was the contractual carrier?

2 Who was the last carrier?

3 Were claused receipts issued?

4 Who has been held responsible?

5 What does the evidence suggest?



Do not underestimate the value of using diagrams to try and visualise the links between various parties.

Most recoveries will be pursued against the contractual carrier who, under the contract of carriage, may be responsible for the entire voyage and therefore ultimately liable for any damage/loss, even if caused by one of the carrier's sub-contractors.

It is important to check the Bill of Lading (whether it is a master Bill of Lading or a house Bill of Lading issued by a freight forwarder or consolidator) to establish when the contract for carriage and the contractual carrier's liability ends. These can vary greatly.

Sometimes the carrier's responsibility ends as soon as cargo passes the ship's rail. In other cases, the contractual period is from container yard (CY) to container yard and sometimes it is right through to delivery at consignee's door. Where air and/or road carriage is involved, similar checks should be made of the conditions in any applicable Air Waybills, House Waybills and CMR/consignment notes.

It is often best to work backwards in order to determine which of the parties involved in the transport chain is liable. For instance, who was the party responsible for actual/physical delivery? This is normally the haulier delivering the cargo to final destination.

Was there any clausing on the delivery receipt or was it clean? Clausing, or comments as to the condition of the goods, is a very useful guide as to where damage may have happened. Any sensible carrier or bailee taking over custody of goods will make comments in the receipts to protect their own position if there are signs of damage at that time.

A claused receipt indicates that damage was present at that time and the recovery agent will need to go back further in the chain to try to identify a time when the goods were known to be sound or were accepted by a new carrier or bailee without comment.

Examination of other documents, such as outturn reports and tally sheets, may also be necessary to try to identify the place or time where damage seems to have occurred and who had custody of the goods at that time. As above, good recovery agents tend to have good detective skills.

In the absence of clear information, a common tactic is to 'accuse' the biggest target (usually the ocean carrier as they are invariably backed by insurance with a P&I Club) and put them to task to prove their innocence. Their defence may either implicate or eliminate them, the latter often

providing additional clues as to where else the damage might have occurred.

Commencing legal proceedings

In many cases it may be necessary to consider whether or not to bring legal proceedings. Factors that may determine this include the following:

- The size of the claim being pursued.
- The perceived strength of the case.
- Difficulty in obtaining an admission of liability from the party being claimed against.
- The need to prevent the claim from becoming time barred.

If legal action is to be pursued, the question of jurisdiction can be important. Bringing a claim against a third party in a local jurisdiction may expose that party to higher limits of liability than might be the case if the action is pursued elsewhere. An astute choice of jurisdiction may even deprive the third party of the right to limit liability altogether. In a large claim, the securing of a higher limit might be the motivating factor in commencing proceedings. Making a choice on jurisdiction (or forum shopping) is something that requires proper legal advice. There is no value in trying to bring an action in a court that has no jurisdiction over the claim, and the time wasted might lead to the loss of time bar against a more appropriate defendant.



Whatever the circumstances, legal action should never be undertaken lightly as it is invariably expensive (and should never be commenced without the prior approval of the principal). It should also be kept in mind that a court (wherever the jurisdiction) will only give a decision based on the evidence available and the ‘balance of probabilities’ as to where the loss or damage is most likely to have occurred.

Interest

The successful claimant is usually entitled, in addition to being compensated for their loss, to interest thereon from the date the goods were delivered (or should have been delivered) up to the time of settlement. The availability and the rate of interest will usually depend on the jurisdiction in which any dispute is being heard (or would be heard if the matter was not resolved by negotiation).

Recovery claims

Example one

Shipment = 2,000 mt of grain shipped on CIF terms from Immingham to Livorno on the M/V 'SISI ESPEE 3'.

The cargo was collected from the shipper's warehouse and delivered to Immingham in trucks. It was loaded to the vessel by grab crane operated by stevedores acting on behalf of the ship. A clean Bill of Lading was issued, providing prima facie evidence that the cargo was received by the owners of the vessel in good order and condition. The vessel departed and nothing abnormal was noted to have occurred on the voyage, although the vessel did encounter some modestly heavy seas. The vessel arrived at destination and discharged the cargo. The Port Authority issued a clean outturn report. The road haulier collecting the cargo from Livorno issued a clean receipt. The parties involved in the contractual chain were as follows:

1 The road haulier from shipper's warehouse to Immingham port.

2 The stevedores who loaded the cargo to the ship at Immingham.

3 The ocean carrier/shipowner.

4 The stevedores who unloaded the cargo at Livorno.

5 The road haulier from Livorno to consignee's warehouse.

On delivery of the grain to the consignee's warehouse, it was discovered that the cargo had been affected by wetting. The fact that none of the documents recorded any adverse comments as to condition of the cargo suggests that the damage occurred while the cargo was in the custody of the road hauliers who carried it from Livorno port to consignee's warehouse.

The consignees gave notice of claim to all parties and invited them to a joint survey. A silver nitrate test on a sample of damaged cargo was positive, indicating the presence of chlorides, a very strong presumption that the wetting was caused by seawater. By this time, the vessel had already sailed from Livorno and it was not possible for the cargo insurer's surveyor to inspect the ship's hatch covers for signs of lack of watertight integrity.

A claim against the ocean carrier was initially declined on the basis that the claimant could not prove a lack of due diligence to make the ship seaworthy or cargoworthy. The carrier also cited the clean receipt by the Port Authority as evidence that the cargo was sound at the time of discharge. The recovery agent appointed by the cargo insurer undertook a little detective work and established that another cargo of grain on board the same ship, and delivered at a subsequent discharge port, had also suffered damage by water that showed the presence of chlorides.

For good measure, the recovery agent also held the Port Authority and the road haulier liable on the basis that their failure to note any damage on their receipts suggested either:

a. they had received the cargo sound but delivered it damaged, or;

b. they had accepted the cargo damaged but compromised the prospects of a successful claim against the carrier by not noting the damage on the receipts.

This prompted the Port Authority to advise that one of the stevedores had commented to the ship's crew at the time of unloading that some of the cargo appeared to be a bit 'off colour' and the hatch covers looked 'a bit rusty'.

By using a little tactical cunning and intelligence, the recovery agent turned a weak claim into a strong claim and could now show that, on the balance of probabilities, the damage occurred while in the care and

custody of the ocean carrier, probably as a result of ingress of seawater through faulty hatch covers.

Example two

Now let us change the circumstances a little. As above, the cargo was collected from the shipper's warehouse and delivered to Immingham in trucks. It was loaded to the vessel by grab crane operated by stevedores acting on behalf of the ship. A clean Bill of Lading was issued, providing prima facie evidence that the cargo was received by the owners of the vessel in good order and condition. The voyage conditions were the same as above. At destination the Port Authority issued a clean outturn report. The road haulier collected the cargo from Livorno and delivered it in trucks to the consignee's warehouse. On arrival there, it was discovered that some of the grain was wet and the consignee claused the delivery receipt to that effect.

The consignee gave notice of claim to both the ocean carrier and the road haulage company and invited both to attend a joint survey. A silver nitrate test gave a negative result, indicating that the wetting was caused by fresh water, not salt water. By checking weather reports for the day that the trucks carried the grain to the consignee's warehouse, the recovery agent established that there was heavy rain in the area at that time. The consignee was able to produce photographic evidence taken at the time of delivery that indicated there were holes in the tarpaulins that had been used to cover the trucks. Thus, there was strong evidence that rainwater had leaked onto the cargo during the road transit as a result of the poor condition of the tarpaulins. A claim against the road haulier succeeded.



Both these examples demonstrate the importance of obtaining good information at the time the loss is first discovered, and how prospects of recovery are improved by a bit of 'thinking outside the box'.

8.11. Claims against air carriers

Claims against air carriers for passenger or airfreight claims have historically been dealt with under the Warsaw Convention. This convention was drafted in the early part of the twentieth century when the aviation industry was still in its infancy. The aim of the convention was to establish uniformity in the industry with regard to "the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims". It also contained provisions relating to documentation, such as tickets and waybills.

The convention also sought to limit the potential liability of air carriers in the event of accidents. This was considered necessary to allow airlines to raise the capital needed to expand and to provide a definite basis upon which their insurance rates could be calculated. The Warsaw Convention was subsequently modified by the Hague Amendments in 1955 and by the Montreal Protocol No. 4 in 1975. Some of these modifications relate to cargo claims and are thus of importance.

In November 2003, a new convention, the Montreal Convention, came into force in certain countries that had ratified it. This convention, although similar to the Warsaw Convention, was intended to replace it rather than amend it.

As with the various conventions that relate to carriage of goods by sea (dealt with above), the situation is confused because different states applied different versions of the Warsaw Convention (and a few states did not apply it at all). Many states now apply the Montreal Convention.

In the following text, we will refer to Warsaw for the original 1929 Convention, Hague for the 1955 amended Convention, MP4 for the 1975 amended Convention (there were also Montreal Protocols 1, 2 and 3 but these never came into force) and Montreal for the Montreal Convention.

All these conventions dealt substantially with claims concerning passengers and luggage, as well as cargo. The following text deals only with those provisions concerning cargo.

When the conventions apply

The conventions will apply when:

1 The place where the flight begins and the place where the flight ends are both in countries that have adopted the convention.

2 As in 1, even where there is a break in the carriage or a transhipment at an intermediate place.

3 As in 1, where the flight(s) begin and end in the same country but the carriage was via another country.



The circumstances where the conventions will not apply are when either the place of departure or the place of destination are not in a country that applies the convention, or when the flight begins and ends in the same country and does not go via another country (ie there is no 'international' element to the voyage).

Note that this is different to the Hague-Visby Rules for sea carriage, which do not require each end of the journey to be convention countries.

Provided the voyage meets the rules in either 1, 2 or 3, the conventions will apply even where the voyage is performed by several successive carriers. In such circumstances, the voyage will be deemed to be a single carriage within the conventions.

Consignment notes/Air Waybills

Under the original Warsaw Convention, the carrier has the right to require the shipper to provide an air consignment note. This must be in three originals marked respectively For the Carrier and signed by the shipper, For the Consignee and signed by the shipper, plus a copy For the Shipper personally which the carrier must sign and hand back to the shipper after accepting the goods.

The air consignment note must show:

- Places of departure and destination, plus any stopping places en route.
- Details of the shipper, the consignee and the first carrier.
- The description, weight, volume or dimensions, the quantity of the goods and the marks and numbers.
- The apparent condition of the goods or packing.

If the carrier accepts the goods without an air consignment note, or if the air consignment note does not contain all of the required detail as set out above, the carrier cannot rely on any provisions in the contract which would exclude or limit their liability.

Hague requires the issue of an Air Waybill in place of the air consignment note, and the waybill has to contain the following information which is considerably less than required under the Warsaw Convention:

- An indication of the places of departure and destination.
- If the voyage starts and ends in a single state but has one or more stopovers in another state, an indication of at least one stopping place.
- A notice that, if the carriage involves an ultimate destination or stopover in another country, the Warsaw Convention may apply and that, in most cases, the carrier's liability in respect of loss or damage to cargo may be limited.

The carrier must sign this document before loading the cargo on board the aircraft. If the carrier loads the cargo to the aircraft without having made out an Air Waybill, or if the Air Waybill does not contain the above information, the carrier is not entitled to rely on the provisions regarding limitation of liability. If the shipper consents, the Air Waybill may be substituted by 'any other means which would preserve a record of the carriage to be performed'.

MP4 and Montreal both require the issue of an Air Waybill, in three originals, showing:

- An indication of the places of departure and destination.

■ If the voyage starts and ends in a single state but has one or more stopovers in another state, an indication of at least one stopping place.

■ An indication of the weight of the consignment.

Under MP4 and Montreal, failure to comply with the provisions regarding Air Waybills does not deprive the carrier of the right to rely on provisions regarding limitation of liability.

Defences available to the carrier

Under Warsaw, the air carrier is liable for loss or damage to the cargo if the occurrence which caused the damage took place during the carriage by air. The carrier is also liable for damage caused by delay. The term 'carriage by air' is deemed to include the period during which the goods are in the custody of the carrier even when ashore, such as in an airport storage area, and the convention will apply as soon as the goods are taken through the airport entry gates, terminating only when they pass through the exit gates at the destination airport. These provisions have been maintained in Hague, MP4 and Montreal.

Under Warsaw, the carrier will be excused liability if it can be proved both that:

1 The carrier and their agents have taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures.

2 The damage was occasioned by negligent pilotage or negligence in the handling or navigation of the aircraft and that, in all other respects, the carrier and their agents have taken all necessary measures to avoid the damage.

Note that the burden is upon the carrier to prove both the above things in order to avoid liability. This is not an easy thing to do, so a carrier under Warsaw finds it very difficult to avoid liability for loss or damage to cargo. Warsaw does recognise the concept of contributory negligence, and if the claimant's negligence caused the loss or damage, the carrier's liability will be reduced or even removed altogether. While this is perhaps more obvious for personal injuries, it could still apply to cargo related losses.

Under Hague, the defence of negligent pilotage or negligent navigation was removed.

MP4 and Montreal retained the Hague amendments but introduced specific defences for the carrier which would exclude their liability in cases where the loss was solely caused by one of the following:

1 Inherent defect, quality or vice of the cargo

2 Defective packaging of the cargo (except where packed by the carrier directly)

3 Act of war or armed conflict

4 Act of a public authority [eg customs officials] with regard to the entry, transit or exit of the cargo.

Limitation of liability

All versions of the conventions allow the carrier to limit their liability for loss or damage (in most circumstances), although the provisions under each are different. The differences are important.

Under Warsaw, if the loss or damage is caused by the carrier's wilful misconduct, they will not be entitled to limit their liability for that loss or damage, ie the right to limit can be lost, as it can be with the sea conventions.

However, Hague dispensed with this provision and introduced a new test, as follows:

"The limits of liability ... shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

This change is significant as it shifts the burden of proof. The burden is no longer on the carrier to prove their innocence: it is now on the claimant to prove the carrier's guilt if the latter is to be deprived of the right to limit liability. Proving an "… act or omission ... with intent to cause damage ...", etc is extremely difficult and it is only in rare circumstances that the claimant would be able to show this.

This process of improving the carrier's position was continued under MP4 in which the carrier's right to limit became unbreakable, ie they cannot ever lose the right to limit with the simple provision that "the limits of liability may not be exceeded whatever the circumstances which gave rise to that liability". The same provision appears in Montreal.

With regard to the amounts to which the carrier can limit liability, these are as follows:

Warsaw and Hague:

250 French francs per kilogram of weight (unless the shipper made a special declaration of value at the time of shipment and paid a supplementary sum). This was deemed to be the gold value of the franc. Contracting states were free to quote an equivalent amount in currency.

In Hague, an additional provision was introduced making it clear that this limit was to be applied only to the weight of the package or packages affected and not to the weight of the whole consignment unless the affected cargo formed an integral part of a larger consignment under the same waybill and damage to part of it affected the value of the whole. This might be the case where, for example, only a single component of a machine is damaged but that damage renders the whole machine worthless.

Under MP4 and Montreal:

Air carriers may limit their liability to 17 SDRs per kilogram of weight of the damaged item being claimed for. As under Hague, if damage to part of the cargo affects the value of the remainder of the cargo carried under the same waybill (even though that remainder is itself undamaged), then the 17 SDRs per kilogram will be applied to the weight of the entire shipment under that waybill. Montreal contained a provision allowing for a review of the limit each five years to take account of inflation. In 2004, the limit was revised to 19 SDRs per kilogram.

It should be noted here that, from 1 July 2010, the standard IATA Air Waybill conditions were amended to increase the limit of liability to 19 SDRs per kilogram in line with the revised Montreal figure. As most of the world's air carriers are IATA members, it the limit now applies to the vast majority of cases.

Limitations on time

Under all versions of the conventions, acceptance of the goods without complaint is prima facie evidence that the carrier delivered the goods in accordance with the document of carriage.

Under Warsaw, the claimant must make their complaint immediately on discovery of the loss or damage or, in writing, within seven days of receipt of the goods in the case of loss or damage, or fourteen days from when the goods should have been delivered in the case of delay.

Under Hague, MP4 and Montreal, these limits in which to complain were extended to fourteen days (loss or damage) and twenty-one days (delay).

In all cases, the claim will become time barred two years from the date the aircraft arrived at destination, or ought to have arrived at destination or from the date the carriage stopped.

The following chart shows the key sections and relevant provisions of each regime pertaining to liability in a form that enables easy comparison between the different versions of the conventions.

Art	Warsaw	Hague	MP4	Montreal
18	The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.	The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.	The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one of the following: a) inherent defect, quality or vice of that cargo; b) defective packing of that cargo performed by a person other than the carrier or his servants or agents; c) an act of war or an armed conflict; d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.	The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one of the following: a) inherent defect, quality or vice of that cargo; b) defective packing of that cargo performed by a person other than the carrier or his servants or agents; c) an act of war or an armed conflict; d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.
19	The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.	The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.	The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.	The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.
20	The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.	The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.	In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.	In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

22	In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.	In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the passenger's or consignor at delivery. In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same Air Waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.	In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the consignor's actual interest in delivery at destination. In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same Air Waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.	In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the consignor's actual interest in delivery at destination. (Increased to 19 SDRs in 2009.) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same Air Waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.
25	The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct.	The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage, or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.	Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability. [Appears as part of Article 24.]	Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability. [Appears as part of Article 24.]

Position where there is more than one carrier

The following applies in all cases:

■ The shipper has a right of action against the first carrier.

■ The consignee has a right of action against the last carrier.

■ Either may take action against the carrier who performed the carriage during which the loss or damage took place.

Which convention will apply?

This is extremely complex but a structured consideration of various questions will allow the correct answer to be identified.

1 Identify the countries of departure and destination.

2 Which conventions do they use, if any? Warsaw, Hague, MP4, Montreal or nothing?

a. If they both use the same one, and that is either Warsaw, Hague or MP4, then use that one, i.e.:

■ If both apply MP4, then MP4 will be the version that is used for the claim.

■ If both apply Hague, then Hague will be used.

■ If both apply Warsaw, then Warsaw will used.

b. If they use different ones (but neither use Montreal), choose the oldest common one, i.e.

■ If one applies MP4 and the other applies Hague, then Hague will be used.

■ If one applies MP4 and the other applies Warsaw, then Warsaw will be used.

■ If one applies Hague and the other applies Warsaw, then Warsaw will be used.

There is also some logic to this. Hague and MP4 were simply the original Warsaw Convention with subsequent amendments. Where countries apply different versions of the convention, it is the earlier one that will be used to govern the claim. This will apply even where one of the countries has ratified Hague but not previously Warsaw, or ratified MP4 but not previously Hague or Warsaw (because on ratifying Hague or MP4, countries were automatically deemed to be ratifying the preceding versions at the same time).

c. Do both of them use Montreal?

■ If both countries apply Montreal, then

Montreal will be used.

d. Does one use Montreal and the other something else?

■ Look for the last version of the Warsaw Convention (whether it was Warsaw, Hague or MP4) that both countries applied that will be used.

e. Does one use Montreal but never used anything before?

■ In these circumstances, if one of these countries has ratified Montreal but never previously been a party to the Warsaw Convention in any of its forms, then it follows that none of the conventions can apply and the claim will be dealt with under the applicable local law.

In which country should the claim be brought?

All versions of the Warsaw Convention plus the Montreal Convention have the same provision regarding where claims can be brought. The claimant can bring in a claim only in the territory of one of the contracting states to the particular convention. This has to be before the court having jurisdiction:

■ where the carrier is ordinarily resident or has their principal place of business, or;

■ where the carrier has an establishment by which the contract has been made, or;

■ before the court having jurisdiction at the place of destination.

It is likely that the domestic laws of some countries will vary this or interpret the provisions in their own way. In any particular case, this is something that might need to be checked with a local lawyer.

A Lloyd's Agent should never appoint lawyers or seek to instigate legal action without first receiving the express authority and approval of their principal.

Which countries apply which convention?

It is the responsibility of the Lloyd's Agent handling a recovery against an air carrier to establish which of the conventions, or any amendments in respect of the Warsaw Convention, apply in that particular case. The following website will provide an up-to-date list of countries that apply any particular convention:

www.icao.int

8.12. Claims against road carriers

Claims against road carriers are most likely to be dealt with under the laws of the land of the carrier and the particular conditions of carriage that apply. In Europe the situation is different, as any road carriage that crosses an international border will normally be subject to Convention on the Contract for the International Carriage of Goods by Road (CMR). The reason why CMR is prevalent in Europe is that Europe is a relatively small land mass but contains a large number of countries. Cross-border road carriage is thus very common in Europe whereas it would not be so common in, say, North America.

Even so, Lloyd's Agents around the world who undertake recovery actions may still need to have an understanding of CMR. More than ten million teu of containers arrive at the port of Rotterdam alone each year and 40% of these are on-carried by road, often crossing borders en route to countries in the interior of Europe.

The situation will be the same at other busy European container ports such as Antwerp and Hamburg. Thus a container going from, say, Buenos Aires to the interior of Europe via Rotterdam, may be involved in road carriage where CMR applies. A lot of cargo is carried around Europe by lorry and trailer where no sea leg is involved at all.

The text that follows deals only with the key points of the convention. Agents who regularly deal with CMR claims may need to develop a fuller understanding of how they are applied in practice.

What is CMR?

CMR is a contraction of the equivalent title in the French language (Convention relative au contrat de transport international de marchandises par route).

CMR has been adopted by the majority of countries in Europe, plus several North African and Arabian countries and a few of the former Soviet Union countries in Asia.

The convention applies to every contract for reward for the carriage of goods by road in vehicles from one country to another provided that one of the countries involved in the carriage has acceded to the convention.

Thus, if either the country of departure or the country of destination applies CMR, its rules will apply.

The convention applies to goods but it does not apply to any of:

- Funeral consignments.
- Furniture removals.
- Postal carryings.

Where a carriage subject to CMR involves a stage in the journey performed by another means of transport, eg sea or rail, and the goods are not unloaded from the road vehicle, CMR will apply to the whole transit. This would be the case where the lorry crosses, say, the English Channel between the UK and France, or the Mediterranean Sea between Spain and Morocco, on a ro-ro vessel.



However, as we will see, if a problem occurs while the lorry is on a ferry or a train, then as long as the road carrier is not responsible through their act or omission, their liability will be measured using the convention that applies to that other method of transportation – the sea conventions, for example. If no other convention would apply, then the road convention will continue to prevail.

Consignment notes

The contract of carriage shall be confirmed by the making out of a consignment note. The consignment note will be prima facie evidence of the making of the contract, the condition of carriage and the receipt of the goods by the carrier.

If, at the time of receipt of the goods, the carrier does not make any specific reservations on the consignment note, it will be presumed that the goods and their packaging appeared to be in good condition at the time and that the number of packages and their marks and numbers corresponded with what is stated in the document.

If a road carrier gives a clean, unclaused consignment note but later wishes to argue that the goods were not in sound condition at the time they were received, the onus is upon the carrier to prove this.

Carrier's liability and defences

CMR makes the carrier liable …

"...for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery."

Basically, the carrier is going to be liable for loss, damage or delay occurring while the goods are in their custody unless they can prove their innocence.

The carrier shall, however, be relieved of liability if the loss, damage or delay was caused by …

"...the wrongful act or neglect of the claimant

...the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier

...inherent vice of the goods

...circumstances which the carrier could not avoid and the consequences of which he was unable to prevent."

The carrier shall also be relieved of liability where the loss or damage arises from the special risks inherent in the following circumstances:

"(a) use of unsheeted vehicles when their use has been expressly agreed and specified in the consignment note;"

Goods carried on unsheeted vehicles are at greater risk of damage by rain, etc. However, the carrier would not be entitled to rely on this provision if there has been an abnormal shortage, or a loss of any package.

"(b) the lack of or defective condition of the packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;"

An example of such goods would be sheets of glass.

"(c) handling, loading, stowage or unloading of the goods by the sender, the consignee or person acting on behalf of the sender or consignee;

(d) the nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin;"

With regard to (d), note that, if the carriage is performed in a vehicle specially equipped to protect the goods from the effects of heat, cold, variations in temperature or the humidity in the air, the carrier has to prove that all reasonable steps were taken with regard to the choice, maintenance and use of such vehicle and that there was compliance with all given instructions.

"(e) insufficiency or inadequacy of marks or numbers on the packages;

(f) the carriage of livestock."

Note that, with regard to livestock, the carrier must prove that all steps normally incumbent in the circumstances were taken and that any special instructions given were complied with.

The things listed in (a) to (f) are circumstances or types of cargo which bring their own peculiar risks and over which the carrier would have little or no control. However, the burden of proving that one of these things caused the loss or damage still rests firmly on the carrier.

The carrier will not be relieved of liability if the loss or damage arises by reason of either of:

- The defective condition of the vehicle used to perform the carriage.
- The wrongful act or neglect of the person from whom the vehicle may have been hired, or the agents or the servants of that person.

Amount of compensation

Where the carrier is liable for loss or damage, the amount that must be paid as compensation shall be:

- Calculated by reference to the value of the goods at the place and time at which they were accepted for carriage;.

and fixed according to any of:

- The commodity exchange price.
- If there is no such price, according to the current market price.
- If there is no commodity exchange price or current market price, the normal value of goods of the same kind and quality.

Limitation of liability

As with other conventions relating to the carriage of goods, the road carrier is (usually) able to limit their liability for loss or damage. When CMR was introduced the limits of liability were expressed in gold francs per kilogram. They are now expressed in Special Drawing Rights (SDRs) and the limit of liability as at 2010 is calculated at 8.33 SDRs per kilogram based on the gross weight of the lost or damaged goods.

In addition to the above limit the carrier must refund carriage charges and customs duties:

- In full, in the case of total loss.
- In proportion to the loss sustained, in the case of partial loss.

With regard to any damage that the claimant has proved results from delay, the compensation for that damage shall not exceed the carriage charges.

The shipper may make a special declaration of value at the time of shipment to obtain a higher limit but would usually be charged a higher carriage rate. Such special declarations are rare.

It is possible to break the carrier's right to limit their liability.

"The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability, or which shift the burden of proof, if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court or Tribunal seized of the case, is considered equivalent to wilful misconduct."

The same applies to the servants and agents that the carrier uses for the performance of the carriage.

Limitations on time

Notice of loss or damage must be given to the carrier:

- Immediately, if the loss or damage is apparent at the time of delivery.
- Within seven days (in writing), if the loss or

damage was not apparent at the time of delivery.

Acceptance of the goods at the time of delivery without complaint will be prima facie evidence that the goods were sound at that time (meaning the burden will be upon the claimant to prove otherwise).

In respect of compensation being sought for delay in delivery, the claimant must give

notice of claim within 21 days of taking delivery of the goods.

In the case of partial loss, damage or delay in delivery, the claim will become time barred one year after the date of delivery of the goods.

In the case of total loss, the one-year period will run from the thirtieth day after the expiry of any agreed time limit for delivery agreed in the contract or, in the absence of such an agreement, the sixtieth day from the date on which the carrier took over custody of the goods.

However, where the claim (whether partial or total) arises as a result of the carrier's wilful misconduct, the time-bar period is extended to three years.

There are circumstances in which the time-bar period can be suspended. However, the claimant is always best advised to err on the side of caution and seek any necessary time extension from the one year-anniversary of the date of delivery.



Watch these slightly different time bars relating to delay and non- delivery – it is always advisable to notify the carrier as soon as possible and work on the basis of a one-year time bar from date when goods should have been delivered rather than calculate the 30 days and then add another year.

In which country should the claim be brought?

Legal proceedings can be brought in any of the following places (provided they are a contracting country):

- Any court or tribunal of a country designated by agreement between the parties.
- A court or tribunal in the country where the carrier is ordinarily resident or has their principal place of business.
- A court or tribunal in the country where the carrier has a branch or agency through which the carriage was made.
- A court or tribunal in the country where the carrier took over custody of the goods.
- A court or tribunal in the country to which the goods were destined under the contract of carriage.

The choice of country for bringing an action is likely to have a bearing on the outcome. Some countries are considered more 'carrier friendly' than others. There are also provisions in CMR governing the commencement of an action in one country when an action on the same claim has already been started in another country. Commencement of action and choice of forum for that action are areas that need the considered advice of a competent lawyer.



A Lloyd's Agent should never appoint lawyers or seek to instigate legal action without first receiving their principal's express authority and approval.

When there is more than one carrier

Sometimes there will be more than one carrier involved in a single contract of carriage. In such cases:

- Each of them shall be responsible for the performance of the whole operation.
- The second and subsequent carriers each become a party to the contract by reason of accepting the goods and the consignment note.

Which carrier can the claimant sue?

Legal proceedings concerning a claim for loss, damage or delay based on the same contract of carriage can be brought only against:

- The first carrier.
- The last carrier.
- The carrier who was performing that portion of the carriage during which the event which caused the loss, damage or delay took place.

An action may be brought against several of these carriers at the same time.

In road carriage, there can be a number of carriers, sub-contracted carriers and successive carriers and it can be difficult to establish who is responsible for the loss or damage. Unless there are compelling reasons for going against a different carrier, it is usually best to pursue the first carrier, as this is the party with whom the contract was initially entered into.

Which countries apply CMR?

As at June 2019 CMR was in effect in 45 countries.

Note that, by agreement between the two countries, CMR does not apply on carriage between the United Kingdom and Ireland.

As with all such conventions, further countries may in due course ratify and apply CMR. It is the responsibility of the Lloyd's Agent handling the recovery action on a road transit claim to ascertain whether or not CMR will apply.

This link can be used to find out whether a particular country applies CMR: https://www.unece.org

Chapter 9

General Average and Salvage

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9.1. Introduction

Here is a tale you will not find in the ancient scriptures, but it will have happened and it will have happened many times.

A ship was sailing across the Mediterranean Sea carrying three parcels of cargo for three merchants, Augustus, Septimus and Octobrus. Each parcel of cargo was valued at 100 pieces of silver. A violent storm developed and the ship was blown ashore, becoming stuck fast. The heavy seas continued to pound the ship, threatening to break her up. The master knew that he had to take action to prevent the total loss of the ship and all the cargo, so he decided to lighten the ship by jettisoning (throwing overboard) some of the cargo. But whose cargo should he throw overboard, for the loss of their goods would deal a serious financial blow to their owner? In the end, it was the parcel of cargo belonging to Octobrus that was sacrificed. The ship refloated and was able to weather the storm and eventually arrive safely at destination.

At destination, the parcels of cargo owned by Augustus and Septimus were delivered to them. They each paid to the shipowner the agreed freight of ten pieces of silver, but Octobrus was left with nothing and faced financial ruin. He felt this was unfair. His cargo had been sacrificed in order to save the ship and the other cargo. Why should he not be compensated by them? They were all agreed that their common purpose had been to deliver the cargo to its destination on the same ship on which it had started its journey, and that the ship and its cargo had all been put in danger by the grounding and the storm. The ship and all her cargo could have been lost if the action taken of sacrificing Octobrus' cargo had not been done. So, they convened a meeting and tried to decide the best thing to do. They were all in agreement that they should contribute to Octobrus' loss but the big question was, on what basis and for how much?

Initially, the following was proposed – that the shipowner, Augustus and Septimus should each pay a contribution to Octobrus' loss based on the original full value of their own property that had been saved by the sacrifice of Octobrus' cargo. Here is the first calculation that Octobrus put forward:

	Value of property saved (in pieces of silver)	**Contribution to Octobrus' loss**
Value of ship	1,000	83.34
Value of Augustus' cargo	100	8.33
Value of Septimus' cargo	100	8.33
	1,200	**100.00**

There were immediate objections from the others.

The shipowner questioned whether his contribution should be based on the sound value of his ship (1,000 pieces of silver) when his ship had suffered damage in the storm which would cost 200 pieces of silver to repair. His argument was that at the time the contribution was being asked for, his ship was only in fact worth 800 pieces of silver in reality because of the damage repairs that had to be done, that he would have to pay for.

Augustus and Septimus argued that, as they had each paid a freight of ten pieces of silver on delivery of their goods, the true benefit to them of the sacrifice of Octobrus' cargo was only 90 pieces of silver (ie the value of their cargo, less the freight they had to pay to take delivery of it).

And so a second apportionment was made, as follows:

	Value of property saved (in pieces of silver)	Contribution to Octobrus' loss
Value of ship in sound condition	1,000	
Less: damage	200	
	800	81.64
Value of Augustus' cargo	100	
Less: freight payable on delivery	10	
	90	9.18
Value of Septimus' cargo	100	
Less: freight payable on delivery	10	
	90	9.18
	980	**100.00**

But still there were objections.

Augustus argued that this rewarded Octobrus for the whole of his loss, whereas, if his cargo had been delivered, he would have had to pay his freight of ten pieces of silver. Therefore, he now had an unfair benefit – and in fact could be said to be in a better position because of his cargo being sacrificed.

Septimus argued that, even if this was taken into account, Octobrus was still at an advantage as the remaining parties were having to bear a share of Octobrus' loss whereas Octobrus was not. And so a further apportionment was made, this time as follows:

	Value of property saved (in pieces of silver)	Contribution to Octobrus' loss
Ship, net arrived value as above	800	74.77
Net value of Augustus' cargo, as above	90	8.41
Net value of Septimus' cargo, as above	90	8.41
Add: amount of his loss 'made good' by the contribution of others	90	8.41
	1,070	**100.00**

While Octobrus was happy to accept that making a contribution to his own loss was perfectly fair, he now objected that the shipowner was receiving an unfair advantage. The sacrifice of Octobrus' cargo not only saved the other property, it also enabled the shipowner to earn a freight that would otherwise have been denied him (ie the freight of 20 pieces of silver on Augustus' and Septimus' cargo which would not have been earned if the ship and all her cargo had been lost). Surely this should be recognised too.

The shipowner could not object to this but pointed out that the sacrifice of Octobrus' cargo had led to him losing the ten pieces of silver in freight he would have earned had that cargo not been sacrificed (remember that unless payable in advance on a lost or not lost basis, freight cannot be earned if the cargo is not delivered).

Should this not be recognised also as a sacrifice to save the property? And so it was, by casting the figures yet again, this time as follows:

	Value of property saved (in pieces of silver)	Contribution to Octobrus' loss (100) and sacrificed freight (10)
Ship, net arrived value as above	800	80.00
Net value of Augustus' cargo, as above	90	9.00
Net value of Septimus' cargo, as above	90	9.00
Octobrus' cargo net value including amount 'made good', as above	90	9.00
Add:value of freight sacrificed and being 'made good' by the contribution of others	30	3.00
	1,100	**110.00**

The fairness of this apportionment could be demonstrated by the following summary:

The value of the ship at destination was	800.00
The contributions to the sacrifices payable by the ship was	80.00
The net advantage of these sacrifices to the shipowner was thus	720.00

(pieces of silver)

or 90% of the value of the ship on arrival at destination.

The value of Augustus' cargo at destination (net of freight payable) was	90.00
His contribution to the sacrifices was, as above	9.00
The net advantage of these sacrifices to Augustus was	81.00

(pieces of silver)

or 90% of the value of Augustus' cargo on arrival at destination.

Septimus was in exactly the same position as Augustus.

The position for Octobrus was as follows:

Value of cargo sacrificed (net of freight that he would have had to pay on delivery) and 'made good' to him by the contribution of the others was	90.00
His contribution to the sacrifices was, as above	9.00
He therefore received from the others, on balance	81.00

(pieces of silver)

Meaning he was now in exactly the same net position as the other cargo interests.

With regard to the freight, the position was as follows:

The freight that had been at risk, but which the shipowner had been able to earn by reason of the sacrifice of Octobrus' cargo was	20.00
The freight that had been sacrificed along with Octobrus' cargo was 'made good' to the shipowner	10.00
So the total freight received or 'made good' was	30.00
But the freight had had to pay a contribution to the total sacrifices of	3.00
So the net benefit to the shipowner with regard to his freight was	27.00

(pieces of silver)

or 90% of the value of the freight to be earned at destination.

What the parties had in effect done was to draw up a general average adjustment. They had fairly and equally shared the burden of the sacrifice of some of the property that had been made to save the rest of the adventure. It was out of such circumstances in the very earliest days of seaborne trade on the Mediterranean Sea that the principle of what became known as general average first emerged. It is the equitable sharing of the costs (both in expenditure and the sacrifice of property) of bringing to safety the property involved in a maritime adventure when that property finds itself in a position of peril that threatens to destroy it.

The example above is, of course, contrived but it amply demonstrates the principles that lie at the heart of general average, viz.:

1 That where expenses are incurred or sacrifices of property are made for the sole purpose of rescuing from potential destruction the adventure and the property involved in it, all those who benefit should compensate those who made the expenditure or had their property sacrificed.

2 That the compensation (or 'made good', as it is usually described) for property sacrificed also has to bear its own contribution to the general average so that it is put in exactly the same position as the property that was saved.

3 That the values of property for contribution purposes are to be the actual values (net of any damage) on arrival at destination (known as the time and place the adventure ends), to which must be added any amounts that are 'made good'.

4 That freight, where it is earned only on delivery of the cargo at final destination, must be treated the same as property saved and bear its fair share of the general average losses and expenses.

5 That it makes no difference whose property is sacrificed or which party makes the expenditure; after the general average is adjusted, each party has borne exactly the same proportion thereof.

The details of all the costs incurred and sacrifices made in any case of general average, plus how they are to be shared between the parties to the adventure, are contained in a document known as a Statement of General Average, more commonly referred to as the General Average Adjustment.

This document is nearly always drawn up by a professional average adjuster. Lloyd's Agents studying for this examination are unlikely ever to have to draw up such an adjustment. However, they may find themselves acting as a surveyor 'in the general interest' in a general average case, or may be advising a principal whose property is involved in such a case. A good understanding of the principles and practices of general average is therefore necessary.

9.2. The York-Antwerp Rules

General average has historically been recognised by all maritime nations. However, difficulties arose because different nations dealt with general average in different ways. Some nations were more generous than others in what they would allow the parties in the adventure to recover as general average. In order to bring about uniformity, the York-Antwerp Rules were created towards the end of the 19th century. These rules provide a framework for the treatment of general average and are given effect by clauses in Bills of Lading that provide for their use. A typical clause might read:

General Average to be adjusted in London according to York-Antwerp Rules 1994.

Such a clause would usually stipulate the place at which the general average is to be adjusted. Sometimes, the clause will stipulate the currency in which the adjustment is to be stated, usually the shipowner's normal currency of trading.

The York-Antwerp Rules have been periodically revised over the years and, at any given time, there may be more than one version of the rules in use. The most recent version of the rules is the York-Antwerp Rules 2016. This version has been supported by BIMCO and it is hoped that it will prove to be more popular than the previous 2004 rules which were not as favourable to owners.

The rules most commonly encountered are the York-Antwerp Rules 1994, and it is on

these rules that the text will concentrate with contrasts drawn with 2016 as appropriate.

9.3. The York-Antwerp Rules 1994

The full rules are contained in the appendix. This text will highlight the most important features of those rules.

The rules are divided into two parts. There are seven lettered rules (A to G) which set out the general principles to be followed. There are then twenty- two numbered rules which deal with specific circumstances or subjects. These are always shown in Roman numerals (I to XXII). Three very important points are made at the start of the rules:

- That where the rules apply they will override any law or practice which is inconsistent with the rules.

- That where a situation is covered by one of the numbered rules, it is the numbered rule which is to be followed, ie takes precedence, even if it is inconsistent with anything in the general principles in the lettered rules. The important point to note here is that the numbered rules deal with very specific circumstances, whereas the lettered rules are more general in nature.

- That there can be no allowance in general average for sacrifice or expenditure unless it is reasonably made or incurred. The party making the sacrifice or incurring the expenditure will always be looking to have the other parties involved contribute, but the other parties have rights of challenge based on the overriding concept of reasonableness.

Rule A

This rule contains a definition of general average which closely follows the English law definition:

There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred.

The sacrifice that is made or the expenditure that is incurred must be extraordinary, i.e. it must be something that would not be made or incurred in the normal course of events. This is to be contrasted with a normal, or ordinary charge, that has merely been increased as a result of the general average situation.

Extraordinary example

The cost of extra fuel burnt in order to outrun pirates who threaten to capture the ship and cargo would not be allowable as general average: the burning of fuel to propel the ship is an ordinary use of that fuel, not an extraordinary one.

It has to be intentionally made or incurred, ie the sacrifice of property or the expenditure of money must result from a conscious decision and not be merely accidental or incidental – and it must be reasonable.

Intentional example

Cargo that has already fallen overboard cannot be claimed as a general average sacrifice.

"… for the common safety …"

The above sacrifices or expenditure must be made for the common safety, i.e. for the benefit of all the property at risk in the adventure and not just for one or some interests.

"… for the purpose of preserving from peril the property involved in a common maritime adventure."

The reason for making the sacrifice or incurring the expenditure must be to rescue the adventure (the ship and everything aboard it) from a situation of peril or danger that threatens to bring about their complete destruction. It is important to understand that the adventure need not be fully in the grip of a peril for there to be a general average situation. It is enough that the adventure, because of some mishap or accident, finds itself in a situation where, if something is not done about it, the ship and everything on board it are eventually likely to be lost.

Example one

The ship suffers an engine breakdown and is floating without motive power on a completely calm sea. The ship is not in any immediate danger of sinking but the adventure is in a position of peril because, if a storm blows up or the seas become very rough, the ship would not be able to ride out that storm safely or is at risk of being blown onto rocks or run aground. The cost of rescuing the adventure (e.g. the cost of towage to a place of safety) would be a general average expenditure.

Example two

A fire breaks out in one of the ship's holds. It might be a small and localised fire but if it is not extinguished it might eventually spread and engulf the entire ship and cargo. The cost of fighting the fire would be a general average expenditure. Any damage to the ship or cargo directly caused by fighting the fire (e.g. damage to other cargo by water used to extinguish the fire) would be a general average sacrifice.

Example three

The ship suffers a breakdown in her refrigeration machinery, which is leading to some frozen cargo defrosting but is causing no other problems either to other cargo or the ship itself.

This would not be general average necessarily, as the problem affects only one of the interests.

Some other specific examples of general average sacrifices and expenditure are dealt with in the numbered rules below.

Rule B

This rule relates to vessels that are pushing or towing, or being towed or pushed. An example of this is 'trains' of barges being towed or pushed in convoy along major riverways. If they are involved in commercial activities (as opposed to a salvage operation) the tug and the barges that form that 'train' will be considered a common maritime adventure.

Need for different interests

General average will only apply if there is a common maritime adventure – ie two or more separate interests involved in the journey. Examples would include a ship in ballast if she is time chartered, as the time charterer's bunkers would be a separate interest, or even a ship and cargo owned by the same person as they are also considered as separate interests.

Rule C

This rule stipulates that …

“Only such losses, damages or expenses which are the direct consequence of the General Average act shall be allowed as General Average.”

Indirect losses, or those not reasonably foreseeable as likely to result from the act, will not be allowed as general average. For example, if goods destined for a construction project are sacrificed, the owner of the goods would not be able to claim in general average for any contractual penalties that must be paid as a result of a delay in the construction project. Such losses are not a direct consequence of the sacrifice: they are indirect and too remote.

This is reinforced by the third paragraph of Rule C which specifies demurrage, loss of market and losses by delay as specific types of indirect loss which cannot be allowed as general average.

The middle of Rule C makes it clear that there can be no allowance in general average for loss, damage or expense resulting from damage to the environment or an escape of pollutant substances.

Note, however, that there are some limited circumstances in the numbered rules in which they could be allowed as general average. Remember, the numbered rules take precedence over the lettered rules.

Rule D

This rule does not deal with principles of general average or any type of allowance but refers to the question of fault. There will often be cases where a casualty that gives rise to a general average situation is caused by the fault of one of the parties.

It might be that the shipowner had failed to exercise due diligence to make the ship seaworthy at the start of the voyage (see chapter 8) and the casualty arose directly from that unseaworthiness. In such circumstances, cargo interests who are asked to pay a contribution to the shipowner’s general average losses may have a defence under the contract of carriage against paying it. In other cases, it might be the negligence of a cargo shipper that has caused the casualty, perhaps because their cargo was shipped in unstable condition and began to heat dangerously.

Example

A ship goes aground because of a failure in her steering gear and there is cargo sacrifice to lighten the ship to refloat and the ship suffers further damage to her bottom due to the refloating work. Was the failure in the steering gear completely unexpected and arose from something that could never have been spotted even by the most diligent inspections? Alternatively, was it because there was a lack of routine maintenance?

The fact that the circumstances that gave rise to the general average situation may have arisen as the result of negligence or fault of one of the parties does not mean that there is no general average. A general average adjustment would still be drawn up in the usual way but, depending on the circumstances, cargo interests may have a defence under the contract of carriage against paying their contribution in general average or, if the fault was that of someone other than the shipowner, the contributing interests may have a claim in tort against that party.

Rule E

The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.

This is self-explanatory. In practice, it means that the party claiming must provide the average adjuster with full documentary and other evidence of their claim. General average adjustments, especially in complex cases, can take several years to complete.

In an attempt to speed up the process, a new rule was introduced in 1994 giving the parties 12 months from the termination of the adventure in which to provide the average adjuster with evidence of the claim.

Rule F

This rule deals with something called ‘substituted expenses’. It frequently happens that the cost of carrying out a particular operation would be allowable as general average. However, it might be that an alternative course of action is taken instead, the cost of which would not ordinarily be allowable as general average. This rule provides that the cost of the alternative action will be allowed as general average as a ‘substitute’, but only up to the amount that would have been incurred had the first course of action been adopted.

Example

Ship has arrived in the port of refuge and some repairs will have to be done. The cargo might have to be offloaded and stored while this is done, and then reloaded for the onwards journey. These costs are normally recoverable in general average.

However, the cargo interests might decide to forward cargo to destination themselves and not wait for the repairs to be done – which is a perfectly logical business decision. By doing that, of course, those costs of storing and reloading have been saved.

Therefore, the forwarding costs (which would not normally be allowed in general average as they only benefit the cargo interests) can be substituted into the general average pot up to the value of the storage and reloading costs that would have been allowed in general average anyway and that have been saved.

This is an area where you, as a surveyor, might be asked to advise the average adjuster what the costs of taking various actions might have been, so that the adjuster can consider whether the steps actually taken by, for example, the cargo interests, were eligible as substituted expenses and if so, to what value.

Rule G

This rule affirms that the place at which losses, contributions to general average and values are to be based are those pertaining at the time and place where the adventure ends. That will be the case regardless of where the average adjustment is drawn up.

The latter part of Rule G is a restatement of the words appearing in a standard Non-Separation Agreement (NSA). As mentioned in the commentary under Rule F, cargo is frequently forwarded to destination from a port of refuge on a substitute vessel. It follows that, as soon as the ship and cargo

part company (or are separated from each other), the common adventure is at an end.

General average allowances would cease at that point because any expenses incurred after the separation of the ship and the cargo could not be for the benefit of all. This would deprive the shipowner of claiming in general average certain expenses which would otherwise be allowable under Rules X and XI while the ship is at the port of refuge. To get over this problem, it was customary for cargo interests to be asked to sign a NSA agreeing to treat the general average as still in being and allow the shipowner to claim such allowances, even though the cargo had been separated from the common adventure. This is a perfectly fair arrangement. The shipowner is under no obligation to forward the cargo to destination by other means if the voyage can be continued and the cargo delivered after the ship has been repaired. However, it is often expedient (or sometimes cheaper) to forward the cargo this way rather than keep it at the port of refuge for the duration of the repairs. Sometimes it is cargo interests themselves who desire release of their goods at a port of refuge, and the shipowner is still entitled to demand a NSA. Because this was such a common occurrence, the standard NSA wording was incorporated into Rule G in the 1994 revision of the York-Antwerp Rules.

As mentioned above, some of the numbered rules override the general principles in the lettered rules. Where this is the case, it is the numbered rule which takes precedence as long as the situation falls exactly within the specific circumstances of the numbered rule. If not, then the general principle from the lettered rule will still be applied.

Rule I – Jettison of cargo

"No jettison of cargo shall be made good as general average unless such cargo is carried in accordance with the recognised custom of the trade."

The proper place on board a ship in which to carry cargo is in the holds. However, cargo is sometimes stowed on deck and is therefore the most likely of cargoes to be jettisoned if the vessel needs to be lightened in an emergency, eg to refloat from a position aground.

If there is a jettison from the deck of cargo that should not have been stowed there, this will not be allowed as general average. (In such circumstances, the cargo owner is likely to have a direct claim against the shipowner under the contract of carriage for the loss of their goods.) There is an exception to this in trades where it is customary to carry goods on deck, e.g. in the container trade or on vessels carrying timber.

Rule II – Loss or damage by sacrifices for the common safety

This rule reaffirms the principle that property which is sacrificed in order to rescue the whole of the property (the 'common maritime adventure') from a position of peril shall be made good in general average.

Example

Loss or damage to property caused in the act of making that sacrifice, including by water which goes down a ship's hatch or other opening made for the purpose of making that sacrifice. For example, the hatches might be opened in order to make an emergency jettison of cargo. If seawater (or rainwater) enters the hatches during this operation and damages other cargo in the hold, the damage to that other cargo will be allowed in general average as being a direct consequence of making the sacrifice of the jettisoned cargo.

Rule III – Extinguishing fire on shipboard

Fires on board a ship are not uncommon. Where a fire causes damage to the ship or to the cargo on board, such damage is not allowable as general average. It must be borne by the owner of that damaged property (as a particular average rather than a general average loss). However, the fire will potentially put the ship and cargo in a position of peril.

Therefore, any damage caused in the act of trying to extinguish the fire would be allowed as general average as it is being done for the benefit of all. This would usually be damage by water used to extinguish the fire but might include other measures such as deliberately beaching the ship as a fire- fighting measure.

This rule makes it clear that damage by the heat of the fire or by smoke is not allowable as general average, thereby emphasising a basic principle – that a general loss or sacrifice is one that is intentionally or deliberately made in order to restore safety and not one that happens by mere accident – heat or smoke damage will not be deliberately caused as their movement is uncontrolled. However, the fire-fighters will make deliberate decisions as to where to put the water during fire-fighting operations.

Rule IV – Cutting away wreck

This rule dates from the days when cargo ships had sails and masts. It sometimes happened that sails or masts would be damaged beyond repair by an accident and were then 'cut away' and discarded. Even where the discarding of the damaged sail or mast was necessary to restore the common safety, its loss could not be allowed as general average because it had already been effectively lost or destroyed by the accident and the shipowner suffered no further loss as a result of discarding it. The rule now refers to "... wreck or parts of the ship which have been previously carried away or are effectively lost by accident ...", but the principle remains the same.

Example

Cargo which had been destroyed by, say, fire, and which was subsequently jettisoned in an emergency to lighten the vessel; because it had already been lost by an accident, its subsequent jettison could not be considered a sacrifice allowable as general average.

Rule V – Voluntary stranding

A ship might be intentionally run on shore for the common safety. An example might be where cargo has shifted in a storm to such an extent that the vessel is seriously listing and in danger of capsizing. Another example might be where the vessel has been holed below the water line in a collision and is taking on water that threatens to destabilise her and possibly cause her to sink. Deliberately beaching the ship might be the only way to prevent such a capsize. Such an act is likely to cause damage to the bottom of the ship and may also result in the loss of or damage to some of the cargo.

As this was an intentional act to rescue the adventure from peril, the loss or damage that results would be allowable as general average. This rule makes it clear that such loss or damage intentionally caused to escape from peril would be allowable as general average even if the conditions were such that she might eventually have been driven on shore anyway. This takes away the need to argue about 'what might have happened' if the intentional grounding had not been carried out.

Rule VI – Salvage remuneration

There are two types of salvage operation. The first is pure salvage (or salvage proper) which is an operation by a volunteer from outside the adventure (usually a professional salvor) designed to rescue the ship and its cargo from a position of peril. It might, for example, be the use of the salvor's tugs to refloat the ship when she has run aground, or the use of the salvor's fire-fighting equipment to extinguish a fire on board a ship at sea. If the salvor is successful in saving property by their efforts, they are entitled to a reward.

The second type of salvage is salvage under contract. This is where a contract is negotiated with the salvor (usually by the shipowner) to carry out a specific operation. It might, for example, be a contract on a lump sum or daily rate basis for a salvor's tug to

tow a vessel to a place of safety after she has suffered an engine breakdown.

This rule provides that any payments on account of salvage, whether pure salvage or salvage under contract, where the salvage service was for the purpose of rescuing the property in the adventure from a position of peril, shall be allowed as general average. This will include arbitrators' fees and the fees of the Council of Lloyd's where the salvage is carried out under Lloyd's Open Form. Lloyd's Open Form is not quite the same as true contractual salvage in that the price is not specifically set out in the agreement but is treated as a form of contractual salvage nonetheless.

It also includes any element of the salvor's award (made by a court or at arbitration) which is enhanced because the salvage service also helped to save damage to the environment.

This is one of those instances where the provisions in Rule C regarding damage to the environment or an escape of pollutant substances is overridden by a specific numbered rule. This exception does not extend to any Special Compensation payable to the salvor under Article 14 of the International Convention on Salvage 1989 specifically for preventing damage to the environment. (Lloyd's Open Form and Special Compensation are dealt with further under the section on salvage later in this chapter.)

Some important changes were made to this Rule VI in the York-Antwerp Rules 2004, as will be seen when dealing with those rules further in this chapter.

Rule VII – Damage to machinery and boilers

This rule deals with damage to the propelling machinery and boilers of a ship. As was seen above when dealing with Rule A, loss, damage or expense can only be allowed in general average if it is extraordinary and not something which would happen or be incurred in the ordinary course of events. The purpose of a ship's propelling machinery and boilers is to power the ship. It therefore follows that loss or damage sustained to them cannot be allowed in general average if they are being used for their ordinary purpose.

Rule VII provides an exception to this and allows in general average any loss or damage to the ship's machinery and boilers which is caused as a direct consequence of the ship's engines being intentionally used to try to refloat the ship when she is aground (which is not the usual function of the ship's engines).

There can never be an allowance in general average for damage to the ship's propelling machinery and boilers caused by working them while the ship is afloat.

Rule VIII – Expenses lightening a ship when ashore and consequent damage

If a ship is aground and, as an intentional act to refloat her, cargo or ship's fuel or stores are discharged, the extra costs of lightening, including lighter hire and re-shipping where these are incurred, will be allowed as general average.

Any damage to the ship (including her fuel and stores) and cargo caused as a direct consequence of such lightering and reloading operations is also allowed as general average.

Rule IX – Cargo, ship's materials and stores used for fuel

In extreme circumstances, it might be necessary for cargo or ship's materials or stores to be used as fuel in an emergency in order to rescue the adventure from a position of peril. In such circumstances, those items would be deemed to have been sacrificed for the common safety and may therefore be made good as general average.

Where it is ship's stores or materials that are sacrificed in this way, the estimated cost of fuel that would have been consumed had it been available must be credited against the allowance.

Rule X – Expenses at port of refuge, etc

It is under this rule (and Rule XI) that most expenses that are allowed in general average are incurred. There are many situations in which it is necessary for a ship to put into a

port of refuge, in consequence of an accident, a sacrifice or some other extraordinary circumstance which makes it necessary to put into that place for the common safety. Although it is termed a port of refuge because of the facts surrounding the ship's arrival, that place could actually be the port of loading, a port on the expected route, or a completely different place altogether. It all depends on the circumstances of the casualty and the best option for the ship at the time.

Examples might include:

- The ship having suffered engine problems.
- Shifting of the cargo in a storm.
- A fire having broken out on board.
- The vessel having been holed in a collision or by taking the ground.
- A significant number of the crew having been taken ill.

Where a ship does put into a port or place of refuge for the common safety, the costs of entering that port or place are allowable as general average.

It follows that the cost of being at the port or place and the cost of leaving it afterwards for the purpose of continuing the voyage with all or part of the cargo still on board should also be allowed in general average, as these are a direct and foreseeable consequence of the decision to go there. The underlying concept of general average is the desire by ship and cargo to get to destination together, and costs incurred for the achievement of that common goal are those which are potentially allowable in general average.

Rule X determines the expenses that can (and cannot) be allowed as general average in such circumstances. These may be summarised as follows:

- The cost of entering the port of refuge.
- The corresponding cost of leaving the port of refuge after the problem has been rectified (but only if it is with some or all of the original cargo on board and with the intention of continuing the voyage).
- The cost of handling on board or discharging cargo, fuel or stores when such measures are either:

a. necessary for the common safety, or;

b. to enable repairs to the ship to be carried out which are necessary to allow the remainder of the voyage to be safely prosecuted (which would not include repair of any damage to the ship which is merely discovered while at the port of refuge and which is unconnected to any accident or extraordinary incident having occurred on the voyage). (The cost of handling on board or discharging cargo, fuel or stores is not allowable if incurred solely for the purpose of restowage as a result of shifting during the voyage, unless necessary for the common safety, e.g. where the vessel is still in danger of capsizing even though now in a port.)

- The cost of storing (including insurance, if reasonably incurred) and reloading the cargo, fuel or stores, where the cost of their unloading was allowable in general average for one of the preceding reasons.

There are two other important provisions under Rule X:

1 That if a vessel, having put into a port of refuge, has to be removed to another port or place because repairs cannot be done at the first port of refuge, then the foregoing provisions of Rule X shall apply to the second port of refuge. The cost of removing the vessel to the second port, including any temporary repairs necessary for that purpose and/or towage, shall be allowed as general average.

2 That if a ship is condemned while at the port of refuge or does not proceed on her original voyage, the storage expenses shall be allowable only up to:

- the date of the condemnation or abandonment of the voyage, or;
- the date of completion of the discharge of cargo, if the condemnation or abandonment of the voyage takes place before that date.

This last point is important and centres around the common desire to complete the journey using the same ship. If that ship will

not be completing the journey either because she is declared a CTL by her hull underwriters or the shipowner actively chooses to terminate the contracts of carriage, then the common adventure stops and the ability to share the costs stops as well.

Rule XI – Wages and maintenance of crew and other expenses bearing up for and in a port of refuge, etc.

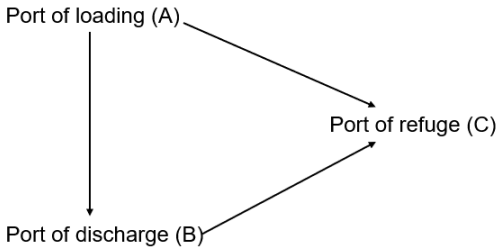
Whereas Rule X deals with the costs of entering and being at a port of refuge, handling and discharge of cargo while there, etc, Rule XI deals with those expenses which a shipowner incurs in running their ship, but which are effectively 'wasted money' while the ship is being detained at such a place. A ship is a freight-earning instrument: the freight earned is designed to cover the shipowner's costs of running their ship and prosecuting the voyage for which the freight is collected, plus a measure of profit. The shipowner must continue to pay some or all of the running costs while a ship is detained at a port of refuge, even though it is 'out of service' during that period. Rule XI recognises that these 'wasted' running costs are being incurred for the common benefit (as opposed to the common safety) and allows the shipowner to recover them as general average, in the circumstances set out in the rule.

Remember the idea that ship and cargo want to get to destination together – anything helping them to do that is for the common benefit – even if the ship is safe in a port of refuge so there is not the idea of common safety any more.

As with Rule X, Rule XI is a long and complex rule and is best dealt with a bit at a time. Its provisions may be summarised as follows:

a. If a ship enters a port of refuge, or returns to a port of loading, in circumstances where the cost of so doing is allowable as general average under Rule X, then the shipowner may recover in general average the wages and maintenance (cost of food, drinking water, etc) of the crew, plus any fuel and stores consumed, during the prolongation of the voyage by reason of having gone there.

Putting into a port of refuge will usually entail a deviation from the intended course of the voyage. When an average adjuster calculates allowances for wages and maintenance and fuel and stores, these must be calculated on a 'net deviation' basis, giving credit for the time and cost that would have been spent on the voyage had the deviation to the port of refuge not occurred.



The shipowner would have incurred the costs of A-B in any event. So, the average adjuster will calculate A-C (taking into account that the journey to B might have been part completed), and then C to B. Once those costs are added up, the costs of A-B will be deducted, and the balance left will be the allowance in general average.

The wages and maintenance must be 'reasonably incurred'. If a ship faces a prolonged stay at a port of refuge, the most reasonable course of action is often to repatriate some of the crew, thereby saving their wages, etc, and leave on board only a small number of essential crew members.

b. The wages and maintenance of the crew while at the port of refuge will be allowable in general average in the following circumstances:

■ when a ship shall have entered or been detained in any port of place in consequence of:

■ accident, sacrifice or other extraordinary circumstance which render that necessary for the common safety (i.e. the adventure is in a position of peril), or;

■ to enable damage to the ship caused by accident or sacrifice to be repaired, where those repairs are necessary for the safe prosecution of the voyage (i.e. even though not in a position of peril, the adventure could

not be safely resumed without the ship being repaired).

A ship might sometimes be detained at a scheduled port of call as a result of an accident or incident, such as a fire breaking out on board. Arguably because she is safe in port she is not in a position of peril as such. However, the adventure could not be safely resumed without repairs being done to any damage caused. It is more preventative action in this case, but to the benefit of all the participants concerned.

In such circumstances, that port of call effectively becomes a port of refuge for the purposes of Rule XI during the extra period that she is detained there. The allowance for wages and maintenance will continue until the ship is, or should have been, ready to proceed on the voyage.

Other charges or allowances which may be admitted to general average while the vessel is at a port of refuge are:

■ Fuel and stores consumed during the extra period of detention, except any fuel and stores consumed in effecting repairs which are not themselves allowable as general average – you, as a surveyor, may be asked to comment on the breakdown in repair costs for example.

■ Port charges during the extra period of detention, except such port charges as are incurred solely by reason of repairs which are not allowable in general average.

Wages and maintenance, fuel and stores and port charges will not be allowable in general average where the reason for being detained at the port is the discovery of damage that is not connected to any accident or other extraordinary circumstance having occurred on the voyage.

Example

A vessel might be detained as part of a port control inspection discovering damage which cannot be explained by an accident or extraordinary circumstance during the voyage.

Sometimes a ship that has put into a port of refuge is condemned or does not proceed on the original voyage. When that happens, allowances for wages and maintenance, fuel and stores and port charges will cease, either:

■ on the date the ship is condemned or the voyage is abandoned, or;

■ on completion of the discharge of cargo, if this occurs after the condemnation or abandonment.

Reference is made here to Rule G (above) and the Non-Separation Agreement. If the vessel can be repaired and continue the voyage with cargo to destination, but it is decided for business reasons instead to forward cargo to destination by another means, the wording of Rule G and/or any separate NSA signed by cargo interests would apply. The common adventure would not be considered at an end in those circumstances and the shipowner would still be able to claim in general average for the port of refuge expenses referred to in Rules X and XI.

The last part of Rule XI deals with some specific circumstances where the cost of measures undertaken to minimise damage to the environment can be allowed in general average. These are:

■ As part of an operation performed for the common safety which, had it been undertaken by a party from outside the adventure, would have entitled that party to a salvage award. (This will be better understood after the section on salvage below is studied.)

■ As a condition of entry to or departure from a port or place of refuge (as defined in Rule X). This might include the obligatory placing of booms around

the vessel as a condition of entry in circumstances where the authorities perceive a threat of leakage of pollutant substances.

■ As a condition of remaining at the port or place of refuge. BUT if there is an actual escape of polluting substances, the cost of additional measures required to minimise environmental damage will not be allowed as general average.

■ When incurred necessarily in connection with the unloading, storing or reloading of cargo when the cost of those operations is allowable as general average.



This is another very specific exception to the general provisions in Rule C that no pollution related matters are allowed in general average.

Rule XII – Damage to cargo in discharging, etc

If the costs of handling, discharging, storing, reloading and restowing cargo, fuel or stores are allowable as general average, then (and only then) can be allowed in general average any damage which is caused to the cargo, fuel or stores during those operations.

Anything falling outside these criteria would form a particular average loss on cargo. As a surveyor, you might have to advise the average adjuster as to any division in costs of cargo damage into these categories.

Rule XIII – Deductions from cost of repairs

This rule contains detailed provisions relating to repairs of general average damage to the ship and need not be examined further here.

Rule XIV – Temporary repairs

If it is necessary to effect temporary repairs to the ship for the common safety, or of general average damage to the ship, the cost of those repairs will be allowable as general average damage.

Sometimes it is possible to effect permanent repairs at a port of refuge of accidental (ie non-general average) damage to a ship, but the shipowner decides instead to effect temporary repairs of that damage in order to complete the voyage, deferring permanent repairs to a more convenient time. In such circumstances, carrying out temporary repairs will shorten the length of stay at the port of refuge, thereby reducing the allowances in general average that would have been made under Rules X and XI. This helps everyone who would be contributing to those costs, not just the shipowner.

The cost of temporary repairs can then be dealt with as a substituted expense (see Rule F). This means that the cost of those temporary repairs can be allowed as general average, but only up to the amount of general average expenses saved by shortening the stay at the port of refuge. If the temporary repairs cost more than the amounts saved in port of refuge expenses, then the balance will fall for the shipowner's account only.

Rule XV – Loss of freight

Sometimes, under the contract of carriage, the shipowner will be entitled to receive payment for freight only once the cargo has been delivered at destination. It follows that if the cargo is not delivered at destination, the shipowner does not receive that freight.

If the cargo is lost as a result of a general average sacrifice on the voyage, then the shipowner is entitled to claim as general average any freight that is lost as a result (see the tale at the start of this chapter).

When calculating the amount of freight to be made good in such circumstances, deduction must be made from the gross freight lost of any expenses the shipowner has saved (e.g. the cost of discharging that cargo, had it been delivered, where those costs would have been borne by the shipowner). Our simple story did not factor this element in but the logic is quite clear – if we allowed the shipowner to receive back credit for costs that did not have to be incurred, they would end up better off because of the sacrifice made.

Rule XVI – Amount to be made good for cargo lost or damaged by sacrifice

This must be based on the value the goods would have had if they had been delivered at destination. In practice, this will be based on the CIF invoice value of the goods, from which must be deducted any freight which would have been payable only on delivery of the goods, but which is saved by them having been sacrificed. Where cargo damaged by sacrifice (e.g. wet damaged during fire-fighting) is sold, the amount to be made good will be the sound value, calculated as per the previous sentence, less the net proceeds of sale (i.e. after deduction of sale charges and

any other costs necessarily incurred to effect the sale).

Example one

Totally sacrificed cargo
CIF value $1,000, freight payable $10
Amount to be made good $1,000 - $10 = **$990**

Example two

Cargo suffering sacrifice by wet damage

CIF value $1,000, freight payable $10
Cargo arrives, although damaged so the freight will have to be paid – hence full cargo value can be the starting point.

Gross proceeds of sale $600, with sale costs being $10, hence net proceeds of sale are $590

Amount to be made good is $1,000 - $590 = **$410**

Rule XVII – Contributory values

Contributory values are the values of the property to be used when apportioning the total general average allowances between the parties, i.e. how much each party will contribute towards the total general average sacrifices and expenditures.

Cargo

For cargo, this will be:

	The CIF invoice value of the goods
Less:	Any freight that is at the risk of the shipowner
Less:	Any damage suffered by the goods before or at the time of discharge (which could be particular average or general average in nature)
Plus:	Any of this damage which is made good in general average.

Example

Cargo is involved in an incident which gives rise to general average. There is some fire damage to the cargo in one hold which is estimated at $45,000 and some water damage caused by fire-fighting caused to cargo in another hold which is estimated at $10,000

CIF value	$ 100,000
Less freight	$ 1,000
Subtotal	$ 99,000
Less damage suffered	$ 55,000
Subtotal	$ 44,000
Add back made good	$ 10,000
Total contributory value	$ 54,000

Cargo sold short of destination will contribute based on net proceeds, plus any damage which is made good as general average.

Freight

For freight that is at the risk of the shipowner, this will be:

	The gross amount of the freight which is at risk
Less:	Any charges the shipowner would not have incurred in earning that freight had the ship and cargo been totally lost at the time of the general average act
Plus:	Any freight lost that is made good as general average.

Example

The shipowner is expecting to earn $10,000 in freight for delivery of ten parcels, each of which earns freight of $1,000. The discharge costs liable for payment at the port are $5,000. No cargo has had to be sacrificed during the general average.

Gross freight at risk	$ 10,000
Port costs that would have been saved	$ 5,000
Subtotal	$ 5,000
Not made good as no cargo and hence no freight was sacrificed.	
Contributory value	$ 5,000

Ship

For the ship, this will be:

	The sound value of the ship at destination (usually assessed by a professional valuer)
Less:	The cost of repairing any damage to the ship
Plus:	Any of the cost of repairs that is made good as general average.

(The value of the ship will include the shipowner's bunkers remaining on board at the end of the adventure, except any bunkers loaded subsequently to the general average act, and any bunkers sacrificed as a general average act.)

Example

A ship grounds and is refloated with the help of tugs. The surveyor inspects her bottom and identifies that the costs of repairing the original grounding damage are $1,000,000 and the costs of repairing the refloating damage are $750,000.

Sound value of ship	$ 10,000,000
Less all damage	$ 1,750,000
Subtotal	$ 8,250,000
Add back made good for general average	$ 750,000
Total contributory value	$ 9,000,000

Time charterer's bunkers

For time charterer's bunkers (where involved), this will be:

	The value of any bunkers remaining on board at the end of the adventure
Plus:	The value of any bunkers sacrificed as a general average act.

Other equipment

For radio or navigational equipment owned by a party other than the shipowner, this will be:

	The value of that equipment at the end of the adventure
Plus:	Any damage thereto which is made good as general average.

Items that do not contribute

Mail, passengers' luggage, personal effects and accompanied private motor vehicles do not contribute in general average under the York- Antwerp Rules.

Rule XVIII – Damage to ship

Where the ship has suffered damage that is allowable as general average, this is effectively quantified as follows:

- If the damage is repaired or replaced, the actual reasonable cost of repairs.
- If the damage is not repaired or replaced, the reasonable depreciation in the value of the ship arising from such damage.
- If the ship is an ATL, or a CTL by reason of the cost of repairs exceeding the value of the ship when repaired:

	Estimated sound value, if repaired
Less:	The estimated cost of repairing the damage
Plus:	The estimated amount thereof which relates to repairing general average damage
Less:	The value of the ship in her damaged state, measured by the proceeds of sale, if any.

Example of CTL

Ship is insured for $1,000,000 and suffers particular average damage of $800,000 and general average damage of $300,000. She is actually sold after the CTL declaration for $150,000.

Estimated sound value if repaired	$ 1,000,000
Less all costs of repairing the damage	$ 1,100,000
	- $ 100,000
Plus general average damage that will be made good	$ 300,000
Subtotal	$ 200,000
Less the proceeds of sale	$ 150,000
Allowance in general average	$ 50,000

Rule XIX – Undeclared or wrongfully declared cargo

If goods are loaded without the knowledge of the shipowner, or are wilfully misdescribed at the time of shipment, their loss or damage by general average sacrifice will not be made good in general average.

However, such goods, if saved, will still have to contribute to the general average losses of other parties.

Goods which have been wrongfully declared on a shipment at a lower value than their real value must contribute to the general average at their real value, BUT any allowance in general average for loss or damage to those goods will be based on their (lower) declared value.

Such circumstances as are envisaged by this rule are rarely encountered in practice.

Rule XX – Provision of funds

Where a party to the adventure makes a general average disbursement (an outlay of money), that party is entitled to a commission in general average of 2% of the amount of the disbursement.

This does not apply to the wages and maintenance of the crew, nor to any fuel and stores not replaced during the voyage.

Rule XXI – Interest on losses made good in general average

All allowances in general average attract interest at the rate of 7% per annum, payable to the party who has borne the loss or incurred the expenditure. For damage or sacrifice this is calculated from the date of the end of the adventure, and for expenditure from the date the expenditure was incurred. In both cases, the interest is calculated up to three months after the issue of the general average adjustment. Due allowance would be made for any payments on account made prior to the issue of the adjustment by any of the contributing interests.

Rule XXII – Treatment of cash deposits

This rule relates to the treatment of any cash deposits taken as general average security from cargo interests.



It is difficult for anyone who is not a practising, professional average adjuster to fully understand how all of the above York-Antwerp Rules should be applied in practice. For a Lloyd's Agent studying for this examination, the involvement in general average in practice is likely to be in one of the following roles:

- As a surveyor appointed to survey a cargo which has sustained damage in a general average case.
- As a surveyor appointed to survey a ship which has sustained damage in a general average case.
- As a surveyor appointed to act 'in the general interest' in a general average case.
- As a surveyor appointed to supervise the discharge, storing and reloading of cargo at a port of refuge.
- As an adviser to a principal (usually a cargo interest) whose property is involved in a general average case.

(Acting as a surveyor in one of the above roles is dealt with later in this chapter.)

For the purposes of this examination, candidates are expected to understand the basic principles of general average as applied under the York-Antwerp Rules. Some simple example adjustments and exercises appear at the end of this chapter which will give the candidate a clear idea of the extent to which he or she will be tested in the examination.

9.4. Salvage

The previous section dealt with the York-Antwerp Rules 1994. Later in this chapter, we will deal with certain provisions of the York-Antwerp Rules 2004. In this section, we will first tackle the subject of salvage, as some important changes in the York-Antwerp Rules 2004 relate to the treatment of salvage charges. The candidate will better understand those changes if the subject of salvage is studied first.

General average and salvage – the similarities

Both general average and salvage are designed to achieve the same goal: to rescue the adventure from a position of peril that threatens to destroy all of the property involved in it. When the general average act or the salvage service is successful, the property that has been saved must make a rateable contribution to the sacrifices and expenditure allowed in general average or to the costs of the salvage operation, based on the value of the property saved.

General average and salvage – the differences

General average	Salvage
Intentional act committed by one of the parties involved in the adventure.	Voluntary act done by someone outside the adventure.
Contributions in general average are calculated at the time and place the adventure ends, which will be when all the cargo has been discharged at final destination.	Contributions towards salvage are calculated at the time and place that the salvage services end, which may be far earlier. Salvage services will end when the property is handed back to the owners by the salvors, which might be when a ship is refloated.
General average contributory values are enhanced by made good.	There is no concept of made good in salvage and proportions payable are measured on actual value.
The shipowner has a lien on cargo until satisfactory security has been provided by all interests in relation to their obligations in general average once quantified – even if the shipowner has not suffered any sacrifice or had to incur any expenditure.	The salvor has a lien for reward against all contributory interests in relation to their obligation to pay their share of the award once agreed or assessed.
The shipowner will be exposed to claims from cargo interests who have made sacrifice if security has failed to be obtained from other interests who then refuse to pay their share of any contributions.	Therefore, the salvor will not return the property (ship, cargo, etc) to the owners until receiving suitable security, which may be in the form of an LOF guarantee for example

Salvage in practice

It is recognised in maritime law that, when a salvor commits their equipment and personnel to a salvage operation in order to save maritime property from potential destruction, they should be rewarded for their risk and efforts if they successfully save that property or a part of it. The salvor earns nothing if their efforts are unsuccessful. Thus, salvage proper operates on a 'no cure – no pay' basis. The amount the salvor should be paid is agreed after the event either by negotiation between the parties or, if no agreement is reached, by the courts or by some other arbitration process. The size of the award is normally influenced by factors such as the values of the property saved, the degree of risk the salvor had to take, the skill the salvor exercised in saving the property and the level of success achieved.

Lloyd's Open Form (LOF)

Lloyd's Standard Form of Salvage Agreement, more commonly known as Lloyd's Open Form, has been in existence since the early part of the twentieth century.

Although it is a contract, it preserves the 'no cure – no pay' basis of salvage because while it provides for a mechanism to assess the payment or consideration for the contract, it does not specifically provide what the consideration will be. LOF is by no means used in every salvage case, but it remains the agreement of choice in most significant salvage operations.

When a master agrees with the salvor to enter into a salvage service under LOF, not only does this bind the ship to the agreement but also binds the cargo in the master's capacity as an 'agent of necessity' at the time of an emergency.

LOF is administered by the Salvage Arbitration Branch (SAB) at Lloyd's, which forms part of the Lloyd's Agency Department. When LOF is signed, the SAB will normally collect salvage security from all of the salved property on behalf of the salvor. This will be completely separate from any general average security that is also collected from cargo interests (usually by the average adjuster on the case). In practice, where cargo is insured, it is usually the cargo insurer who provides the security.

The owners of the salved property will then enter into negotiations with the salvors in an endeavour to agree the amount the salvor should be rewarded for their efforts in saving the property. Such discussions are usually conducted by the legal representatives of the respective parties. In many cases, an agreement is reached and the parties settle amicably.

At any stage in the discussions, any of the parties can request that the SAB appoints an arbitrator (invariably a senior barrister from the Admiralty Bar in London) to assess the circumstances and make an award that will be binding on all the parties who have not reached an amicable settlement with the salvors. Once an award is made in this way, the SAB will then collect the due proportions of that award from the salved property interests, releasing the security to the parties after payment. Any of the parties to the award can make an appeal against the original award, in which case an appeal arbitrator is then appointed to reassess the award and either uphold it or amend it upwards or downwards.

Under the most recent Salvage Convention (the terms of which are given effect by law in most maritime nations, including England), it was agreed that, when assessing a salvage award, the courts or arbitrator could take into account the benefits the salvage service has had in preventing or minimising damage to the environment. This was dealt with in two articles in the convention, Articles 13 and 14. Article 13 effectively says that, where the salvor has saved property and the value of the property saved is large enough to bear it, the enhancement or uplift for the salvor's efforts in preventing or minimising pollution shall simply form part of the salvage award that is contributed to by all the salved property. However, where there is no property saved, or where the value of the salved property is not high enough to bear an uplift for helping to protect the environment, the court or arbitrator will make an award for Special Compensation under Article 14 in respect of these environmental considerations. An award for Special Compensation under Article 14 falls on the shipowner alone (and in practice is paid by their P&I Club rather than their hull and machinery underwriters, who will normally pay for Article 13 salvage awards).

It sometimes happens that some of the salved property owners reach agreement with the salvors during the discussion stage but others do not. An arbitrator may then be needed to make an award that will be binding only on those interests who did not reach an amicable agreement. This may be at a lower or higher level than the agreement reached amicably by those parties who settled outside of arbitration. And therein lies one of the anomalies that has been the subject of some irritation for many years and it arises because of the differences between salvage and general average.

When looking at Rule VI of the York-Antwerp Rules above, it was mentioned that the payments made by parties on account of salvage (other than any Special Compensation under Article 14 of the Salvage Convention) will be admitted as an allowance in general average. Once all of the salvage payments have been included in

general average, the total general average is then apportioned over the contributory values at the end of the adventure. It follows that any party that has reached a favourable settlement with the salvor will completely lose the advantage of that favourable settlement once it is reapportioned in general average.

For this reason, when the York-Antwerp Rules were revised in 2004, it was agreed to remove salvage from general average completely and leave the salvage payments 'where they lay' and this now makes it an appropriate point at which to examine the York-Antwerp Rules 2016.

9.5. The York-Antwerp Rules 2016

The basic idea of the revision to the York Antwerp rules completed in 2016 was to rebalance the position between interests which was the perceived issue with 2004. In addition, a set of non-binding guidelines have been created to assist those parties having to deal with General Average matters for the first time.

Rule B

Additional text has been added to this rule to make clear that the separation of vessels in a tug and tow situation for the safety of one or more or those vessels will be a General Average act.

Additionally, it is made clear that when vessels involved in this situation go to a port of refuge, allowances under the Rules can be made in relation to each vessel but the allowances will cease when the common maritime adventure ends – which is a fundamental concept in GA.

Rule E

This amendment makes clear what the obligations of the various parties are to provide information to the adjuster and what the adjuster can do, should such information not be provided.

- All parties should provide information about any contributory interests, and about any loss or expense they wish others to contribute to, as soon as possible.
- If nothing is provided within 12 months of the termination of the common maritime adventure, the adjuster can estimate contributions on the basis of information that is available.
- Parties will be provided with the estimates and have two months to challenge them – but they can only challenge on the grounds that they are manifestly incorrect.
- If any party chasing other parties for recoveries relating to matters within the GA, then the adjuster must be told and given details of any recovery received within two months of any recovery funds being received.

Salvage Rule VI

Salvage rewards may not now form part of the GA pot and will be handled separately according to the rules on Salvage. However salvage rewards can be put back into the GA pot for reallocation according to the rules of GA if the following situations arise.

- Further accident resulting in loss/damage to property which reduces the contributory values and makes a large difference between salved and Contributory values.
- Significant GA sacrifices.
- Salved values are incorrect which has led to incorrect apportionment of salvage expenses.
- Any of the parties to the salvage has actually paid a proportion of salvage due from another party.
- A significant proportion of parties have satisfied the salvage claim on substantially different terms.

This decision will be made by the adjuster taking all the circumstances into account.

Rule XI – Wages and Maintenance and other expenses in a port of refuge

There are two areas of clarification in the new text to this rule.

- Allowances for port charges can include all customary or additional expenses incurred for the common safety or to enter/remain at a port of refuge.

■ Costs relating to movement of cargo, fuel or stores includes handling on board.

Rule XVI – Sacrificial damage to cargo

This rule now makes clear that the commercial invoice can be taken by the adjuster to be the value at time of discharge for cargo notwithstanding where the final delivery point is under the contract of carriage.

Rule XVII – Contributory values

This rule reinforces the point about the usage of the invoice in rule XVI but also allows the adjuster to exclude certain cargo from contributing to GA should the adjuster consider that the cost of including it within the adjustment is disproportional to the amount it will contribute.

This is an important practical consideration in that for containerised cargo, often at least 10% of a shipload is uninsured and is of relatively low value so the time and effort involved in obtaining security and tracking down the appropriate parties involved is unduly costly.

In reality, many hull insurance policies have within them a GA absorption clause which means that the hull insurers will pay up to an agreed value in GA rather than have the owner go through the process of collecting contributions.

The final change to Rule XVII is in relation to the separation out of salvage awards.

If the salvage is being dealt with outside GA, then any deductions to the various contributory values for GA can only be made to the value of the amount paid to salvors including interest and costs.

Finally it is made clear that the types of cargo that do not contribute to GA include accompanied personal effects (where in the 1994 rules it just said personal effects).

Rule XX – Provision of funds

The previous allowance of 2% on GA disbursements has been removed.

Rule XXI – Interest

Now set at an amount linked to 4% above LIBOR (London Interbank offering rate) for a stated period.

Rule XXII – Cash deposits

Sums shall be sent to the adjuster who will deposit them in a special account, ideally earning interest, in the name of the adjuster.

The account will be separate from any other and ideally be a trust account or whatever similar concept exists in the jurisdiction in question.

■ Rules always subject to what is permitted in any particular jurisdiction,

■ The rules on time do not apply to claims by parties on their insurers,

Rule XXIII – Time Bar

This rule was introduced in 2004, and kept in the 2016 update:

■ a basic one-year time bar from the date of adjustment being issued to claim contributions,

■ a final six year time bar from the end of the common maritime adventure,

■ parties can agree to extend if they require,

■ the rules are always subject to what is permitted in any particular jurisdiction,

■ the rules on time do not apply to claims by parties on their insurers.

9.6. Miscellaneous points on general average and salvage

This section deals with other points of importance which do not fall under the previous headings

Declaration of general average

The term is often used that general average has been ‘declared’. In many minds, this fixes a notion that the shipowner needs to make some official declaration or notification according to prescribed rules. While there may be some peculiar procedures to be followed in a few countries around the world, in practice there is generally no legal requirement for the shipowner to make any

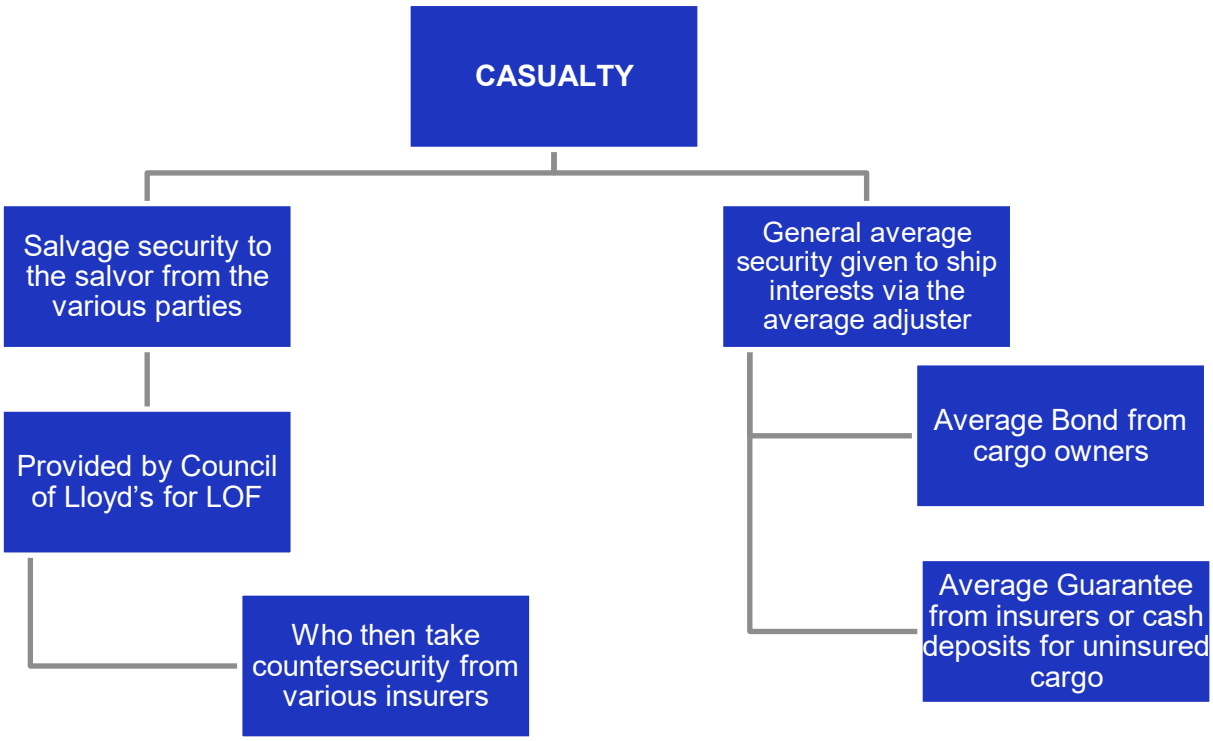
kind of official ‘declaration’ or announcement before a situation of general average can legally exist.

General average is recognised by all major maritime nations, and a situation of general average exists as a matter of fact as soon as the requirements for general average are met (ie that an intentional sacrifice or expenditure is made or incurred for the common safety, etc). The owners of property will know of the existence of the general average as soon as they are asked to provide security in order to obtain delivery of their property at destination (or most likely earlier than that in the modern world of virtually instant communication).

Salvage and general average security

Salvage security has to be given for a specified amount. This means that the salvor has to estimate what they believe they should be awarded for their efforts and set the amount of security requested at an appropriate level. The salvor will demand their security as soon as the salvage service has terminated.

General average security is given to the shipowner as it is the duty of the shipowner to ensure that a general average adjustment is drawn up, even where the only parties with a claim in general average are cargo interests. The shipowner invariably appoints a professional average adjuster and, in practice, it will be that average adjuster who collects the security on behalf of the shipowner. This is normally in the form of an Average Bond, given by the owner of the cargo, and an Average Guarantee, given by the insurer of the cargo (or a cash deposit where the cargo is not insured). Both the bond and the guarantee are promises to pay any general average contribution properly due once the general average has been adjusted. Unlike salvage security, general average security is not given for a specific amount. In practice, the security is limited to the full arrived value of the cargo. Security for general average becomes due on delivery of the property at destination (or other termination of the adventure).



The surveyor’s role in general average

A cargo surveyor may be appointed by a cargo insurer to inspect damage that has been sustained by one or more cargoes that

are insured by that insurer. In some general average cases, a cargo surveyor is appointed (usually by the average adjuster on behalf of the shipowner) to act 'in the general interest' and may be surveying all the cargo or so much of it as may have been damaged in the casualty. In either case, the surveyor will not only comment on the cause, nature and extent of the damage sustained but should also enable their principal to identify how much of that damage, if any (and consequent extra charges), were directly caused by a general average act.

The following types of loss or damage are those likely to be sustained by cargo as a result of a general average act:

- Jettison in order to refloat the vessel.
- Damage during lightering and subsequent reloading in order to refloat a vessel.
- Damage during handling on board in connection with either of the above.
- Damage by water or other measures taken to extinguish a fire on board the ship.
- Damage during the act of unloading, storing or reloading of cargo at a port of refuge, where the cost of those measures is allowable in general average under Rule X of the York-Antwerp Rules.

It is very important that the surveyor distinguishes in their report any damage that has been sustained purely by accidental means unconnected with the general average act and damage that has resulted directly from the general average act.

Where a surveyor is appointed in the general interest to oversee the discharge, storing and reloading of cargo at a port of refuge, they should clearly identify any damage that is caused to the cargo during those acts as well as noting any other damage in existence which cannot be attributed to those acts. The surveyor may also be asked to examine the invoices covering the costs of unloading, storage and reloading and to approve them as being fair and reasonable.

General average and marine insurance

The contribution to general average payable by the property involved in the adventure is (except in very limited circumstances) covered under a standard marine insurance policy, whether on ship, cargo or freight.

Where the damage to the property is of a general average nature (i.e. a general average sacrifice such as jettison of cargo or damage done to the ship by refloating operations), the Assured may claim that from their own insurer in full under the policy and does not have to wait until a general average adjustment is produced before being reimbursed. Where the insurer has paid such a claim, the general average adjuster will give them due credit in the adjustment – effectively like the insurer making a recovery from the other parties.

Where the property covered by the policy is under- insured, the amount recoverable under the policy in respect of the contribution payable to general average (absent any agreement in the policy to the contrary) is reduced in proportion to the under-insurance. It is always important to remember that the parties' legal obligations in relation to general average contributions in particular are completely separate from any insurance they have, and they will not have much success in trying to avoid payment of their obligations just because they do not have adequate insurance in place.

Any amount in relation to a general average contribution that has to be made can also be claimed from most insurance policies, but only to the extent of that contribution. Hence claims cannot really be made on insurers until the extent of that contribution in financial terms is known, although early warning to the insurers will always be prudent, especially if you want their help with guarantees.

9.7. General average example

General average adjustments are nearly always prepared by professional average adjusters and are often very lengthy and complicated documents. It takes years of training and experience to become a competent general average adjuster, and it is unlikely that a Lloyd's Agent would be required to produce a general average adjustment, except where the case is a

relatively simple one involving only local interests. The following example is not designed to convert candidates studying this examination into instant professional average adjusters. The purpose is to reinforce the basic principles of general average dealt with above and to familiarise candidates with a typical (though simplified) presentation of a statement of general average.

Example

(In this example the York-Antwerp Rules 1994 apply but see notes at the end about what the impact would be should the 2016 rules apply.)

A ship carrying 5,000 tons of bulk cargo runs aground on rocks in a storm. Salvage tugs are engaged on a daily-hire basis to assist the vessel to refloat.

As part of the refloating operation, part cargo is jettisoned and the ship's engines are used at full reverse power – consider whether this might be a sacrifice on the part of the ship – does it satisfy the requirements?

The vessel is eventually refloated and proceeds to a port of refuge under her own power.

At the port of refuge, the cargo is discharged and stored in a warehouse while the ship goes into drydock for repairs to the hull and then reloaded after the repairs have been completed. Consider whether this activity has benefited everyone and whether therefore it falls for consideration in general average.

There is no loss or damage to cargo as a result of unloading, storing or reloading. After repairs, the vessel proceeded safely to destination – also known as the time and place that the adventure ends.

The following loss/damage and expenses were incurred:

Cost of salvage tugs	$ 50,000
Cost of repairs to the ship's bottom (Of this, $100,000 was caused when running aground and $200,000 was directly attributable to efforts to refloat – this is important to distinguish as only part of this will be general average, i.e. the element attributable to trying to refloat her).	$ 300,000
Cost of repairs to ship's engine – (damage caused during refloating operations)	$ 25,000
Discharge, storing and reloading at the port of refuge	$ 25,000
Wages and maintenance, fuel and stores and port of refuge expenses allowable under Rules X and XI	$ 50,000
Quantity of cargo jettisoned	200 tons

The value of the ship in sound condition is $5,000,000.

The CIF value of the cargo is $500,000, with the freight payable on loading and non-returnable in any event.

For this exercise, the adjustment of the general average is shown as a guideline on how to set out the figures in a logical fashion. Interest and commission has been ignored and figures are rounded to the nearest whole number.

Disburse-ments, etc.		General average	Remainder
$	**Shipowner's Disbursements and Allowances**	**$**	**$**
50,000	**Cost of salvage tugs** Allow to general average: IN FULL – tugs engaged to assist the vessel to refloat [Rule VI]	50,000	
100,000	**Cost of repairs to grounding damage** Allow to general average: NIL – accidental damage caused when the vessel ran aground		100,000
200,000	**Cost of repairs to refloating damage** Allow to general average: IN FULL – damage caused during efforts to refloat the vessel [Rule II]	200,000	
25,000	**Cost of repairs to engine damage** Allow to general average: IN FULL – damage caused when engines were used to assist refloating operations [Rule VII]	25,000	
375,000		275,000	100,000
50,000	**Port of refuge expenses**	50,000	
25,000	**Discharging, storing and reloading cargo at port of refuge** (Allowances made in accordance with Rules X and XI)	25,000	
450,000		350,000	100,000

Contributory value of ship	
Value in sound condition	$5,000,000
Deduct: loss / damage (grounding damage, refloating damage, engine repairs and cost of salvage)	$375,000
	$4,625,000
Add: made good (everything as above apart from the grounding damage)	$275,000
	$4,900,000

Loss/damage to cargo	Loss/damage **$**	Made good **$**
5,000 tons cargo – CIF Value - $500,000		
200 tons jettisoned – CIF Value in proportion	20,000	
Allow to general average: IN FULL – Cargo jettisoned for the common safety during efforts to refloat [Rule II]		20,000
	20,000	20,000
Contributory value of cargo		
CIF Value		$500,000
Deduct: loss/damage		$20,000
		$480,000
Add: made good		$20,000
Contributory value		$500,000

Apportionment of general average			
Ship:	Allowances in general average		$350,000
Cargo:	Allowances in general average		$20,000
	(i.e. total general average pot to be apportioned)		$370,000
Apportioned:			
Ship:	Contributory value	$4,900,000	pays $335,741
Cargo:	Contributory value	$500,000	$34,259
		$5,400,000	pays $370,000
Balance in general average			
Shipowners:	Receive their disbursements and allowances in GA		$350,000
	Pay proportion of general average attaching to ship		$335,741
	Receive on balance		$14,259
Cargo interests:	Pay proportion of general average attaching to cargo	$34,259	
	Receive their allowances in general average	$20,000	
	Pay on balance	$14,259	

Notes

1 The damage caused to the ship when running aground is not general average – it is accidental damage that was not intentionally incurred for the common safety. The damage caused during efforts to refloat is general average damage – the refloating operation was an intentional act aimed at rescuing the property from peril. In practice, the hull surveyor has the often-difficult task of having to differentiate between damage that happened when the vessel ran aground, and any new and separate damage solely attributable to the refloating efforts.

2 The damage to the ship's engines was caused when the engines were used in efforts to refloat the ship. A ship's engines are not intended to be used in this way; this is therefore an extraordinary and intentional use of the engines to try to rescue the adventure from peril and the cost of repairing this damage can be allowed as general average. This is the only circumstance in which damage to ship's engines sustained while they are being worked can be allowed as general average.

3 A general average adjustment always finishes with a balance showing who pays and who receives. Where there are multiple cargo interests 'Cargo' will usually be shown as a single item in the balance and a separate schedule will follow showing how much each individual cargo interest will pay or receive.

4. If this adjustment was being worked out under the 2016 rules, then the USD 50,000 for salvage tugs would not form part of the GA pot to be allocated as none of the criteria set out in Rule VI (b) appear to apply according to the facts set out – unless the adjuster in their discretion considers the sacrifice made by the ship of the refloating damage to be significant enough to trigger the discretion to bring salvage back into the overall GA pot.

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Institute Cargo Clauses (A) (1/1/09)

RISKS COVERED

Risks

1. This insurance covers all risks of loss of or damage to the subject-matter insured except as excluded by the provisions of Clauses 4, 5, 6 and 7 below.

General Average

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of carriage and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 below.

"Both to Blame Collision Clause"

3. This insurance indemnifies the Assured, in respect of any risk insured herein, against liability incurred under any Both to Blame Collision Clause in the contract of carriage. In the event of any claim by carriers under the said Clause, the Assured agree to notify the Insurers who shall have the right, at their own cost and expense, to defend the Assured against such claim.

EXCLUSIONS

4. In no case shall this insurance cover

4.1 loss damage or expense attributable to wilful misconduct of the Assured

4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where such packing or preparation is carried out by the Assured or their employees or prior to the attachment of this insurance (for the purpose of these Clauses "packing" shall be deemed to include stowage in a container and "employees" shall not include independent contractors)

4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured

4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)

4.6 loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage
This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract

4.7 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.

5.

5.1 In no case shall this insurance cover loss damage or expense arising from

5.1.1 unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein

5.1.2 unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out prior to attachment of this insurance or by the Assured or their employees and they are privy to such unfitness at the time of loading.

5.2 Exclusion 5.1.1 above shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.

5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination.

6. In no case shall this insurance cover loss damage or expense caused by

6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

6.2 capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat

6.3 derelict mines torpedoes bombs or other derelict weapons of war.

7. In no case shall this insurance cover loss damage or expense

7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions

7.3 caused by any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted

7.4 caused by any person acting from a political, ideological or religious motive.

DURATION

Transit Clause

8.

8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit, continues during the ordinary course of transit and terminates either

8.1.1 on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance,

8.1.2 on completion of unloading from the carrying vehicle or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance, which the Assured or their employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution, or

8.1.3 when the Assured or their employees elect to use any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit or

8.1.4 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, whichever shall first occur.

8.2 If, after discharge overside from the oversea 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 that 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.

8.3 This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, 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.

Termination of Contract of Carriage

9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before unloading of the subject- matter insured as provided for in Clause 8 above, then this insurance shall also terminate unless prompt notice is given to the Insurers and continuation of cover is requested when this insurance shall remain in force, subject to an additional premium if required by the Insurers, either

9.1 until the subject-matter insured is sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the subject-matter insured at such port or place, whichever shall first occur,

or

9.2 if the subject-matter insured is forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named in the contract of insurance or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

Change of Voyage

10.

10.1 Where, after attachment of this insurance, the destination is changed by the Assured, this must be notified promptly to Insurers for rates and terms to be agreed. Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable market terms.

10.2 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.

CLAIMS

Insurable Interest

11.

11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.

11.2 Subject to Clause 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Insurers were not.

Forwarding Charges

12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured.

This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their employees.

Constructive Total Loss

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival.

Increased Value

14.

14.1 If any Increased Value insurance is effected by the Assured on the subject-matter insured under this insurance the agreed value of the subject-matter insured shall be deemed to be increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

14.2 Where this insurance is on Increased Value the following clause shall apply:
The agreed value of the subject-matter insured shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the subject-matter insured by the Assured, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

BENEFIT OF INSURANCE

15. This insurance

15.1 covers the Assured which includes the person claiming indemnity either as the person by or on whose behalf the contract of insurance was effected or as an assignee,

15.2 shall not extend to or otherwise benefit the carrier or other bailee.

MINIMISING LOSSES

Duty of Assured

16. It is the duty of the Assured and their employees and agents in respect of loss recoverable hereunder

16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and

16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

Waiver

17. Measures taken by the Assured or the Insurers with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

AVOIDANCE OF DELAY

18. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

LAW AND PRACTICE

19. This insurance is subject to English law and practice.

Note

Where a continuation of cover is requested under Clause 9, or a change of destination is notified under Clause 10,

there is an obligation to give prompt notice to the Insurers and the right to such cover is dependent upon compliance with this obligation.

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CL382
01/01/2009

Institute Cargo Clauses (B) (1/1/09)

RISKS COVERED

Risks

1. This insurance covers, except as excluded by the provisions of Clauses 4, 5, 6 and 7 below,

1.1 loss of or damage to the subject-matter insured reasonably attributable to

1.1.1 fire or explosion

1.1.2 vessel or craft being stranded grounded sunk or capsized

1.1.3 overturning or derailment of land conveyance

1.1.4 collision or contact of vessel craft or conveyance with any external object other than water

1.1.5 discharge of cargo at a port of distress

1.1.6 earthquake volcanic eruption or lightning,

1.2 loss of or damage to the subject-matter insured caused by

1.2.1 general average sacrifice

1.2.2 jettison or washing overboard

1.2.3 entry of sea lake or river water into vessel craft hold conveyance container or place of storage,

1.3 total loss of any package lost overboard or dropped whilst loading on to, or unloading from, vessel or craft.

General Average

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of carriage and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 below.

"Both to Blame Collision Clause"

3. This insurance indemnifies the Assured, in respect of any risk insured herein, against liability incurred under any Both to Blame Collision Clause in the contract of carriage. In the event of any claim by carriers under the said Clause, the Assured agree to notify the Insurers who shall have the right, at their own cost and expense, to defend the Assured against such claim.

EXCLUSIONS

4. In no case shall this insurance cover

4.1 loss damage or expense attributable to wilful misconduct of the Assured

4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where

such packing or preparation is carried out by the Assured or their employees or prior to the attachment of this insurance (for the purpose of these Clauses “packing” shall be deemed to include stowage in a container and “employees” shall not include independent contractors)

4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured

4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)

4.6 loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage

This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract

4.7 deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons

4.8 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.

5.

5.1 In no case shall this insurance cover loss damage or expense arising from

5.1.1 unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein

5.1.2 unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out prior to attachment of this insurance or by the Assured or their employees and they are privy to such unfitness at the time of loading.

5.2 Exclusion 5.1.1 above shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.

5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination.

6. In no case shall this insurance cover loss damage or expense caused by

6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

6.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat

6.3 derelict mines torpedoes bombs or other derelict weapons of war.

7. In no case shall this insurance cover loss damage or expense

7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions

7.3 caused by any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted

7.4 caused by any person acting from a political, ideological or religious motive.

DURATION

Transit Clause

8.

8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit, continues during the ordinary course of transit and terminates either

8.1.1 on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance,

8.1.2 on completion of unloading from the carrying vehicle or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance, which the Assured or their employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution, or

8.1.3 when the Assured or their employees elect to use any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit or

8.1.4 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, whichever shall first occur.

8.2 If, after discharge overside from the oversea 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 that 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.

8.3 This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, 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.

Termination of Contract of Carriage

9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before unloading of the subject- matter insured as provided for in Clause 8 above, then

this insurance shall also terminate unless prompt notice is given to the Insurers and continuation of cover is requested when this insurance shall remain in force, subject to an additional premium if required by the Insurers, either

9.1 until the subject-matter insured is sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the subject-matter insured at such port or place, whichever shall first occur,

or

9.2 if the subject-matter insured is forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named in the contract of insurance or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

Change of Voyage

10.

10.1 Where, after attachment of this insurance, the destination is changed by the Assured, this must be notified promptly to Insurers for rates and terms to be agreed. Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable market terms.

10.2 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.

CLAIMS

Insurable Interest

11.

11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.

11.2 Subject to Clause 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Insurers were not.

Forwarding Charges

12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured.

This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their employees.

Constructive Total Loss

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be

unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival.

Increased Value

14.

14.1 If any Increased Value insurance is effected by the Assured on the subject-matter insured under this insurance the agreed value of the subject-matter insured shall be deemed to be increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured. In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

14.2 Where this insurance is on Increased Value the following clause shall apply:

The agreed value of the subject-matter insured shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the subject-matter insured by the Assured, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

BENEFIT OF INSURANCE

15. This insurance

15.1 covers the Assured which includes the person claiming indemnity either as the person by or on whose behalf the contract of insurance was effected or as an assignee,

15.2 shall not extend to or otherwise benefit the carrier or other bailee.

MINIMISING LOSSES

Duty of Assured

16. It is the duty of the Assured and their employees and agents in respect of loss recoverable hereunder

16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and

16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

Waiver

17. Measures taken by the Assured or the Insurers with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

AVOIDANCE OF DELAY

18. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

LAW AND PRACTICE

19. This insurance is subject to English law and practice.

Note

Where a continuation of cover is requested under Clause 9, or a change of destination is notified under Clause 10, there is an obligation to give prompt notice to the Insurers and the right to such cover is dependent upon compliance with this obligation.

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CL383
01/01/2009

Institute Cargo Clauses (C) (1/1/09)

RISKS COVERED

Risks

1. This insurance covers, except as excluded by the provisions of Clauses 4, 5, 6 and 7 below,

1.1 loss of or damage to the subject-matter insured reasonably attributable to

1.1.1 fire or explosion

1.1.2 vessel or craft being stranded grounded sunk or capsized

1.1.3 overturning or derailment of land conveyance

1.1.4 collision or contact of vessel craft or conveyance with any external object other than water

1.1.5 discharge of cargo at a port of distress,

1.2 loss of or damage to the subject-matter insured caused by

1.2.1 general average sacrifice

1.2.2 jettison.

General Average

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of carriage and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 below.

"Both to Blame Collision Clause"

3. This insurance indemnifies the Assured, in respect of any risk insured herein, against liability incurred under any Both to Blame Collision Clause in the contract of carriage. In the event of any claim by carriers under the said Clause, the Assured agree to notify the Insurers who shall have the right, at their own cost and expense, to defend the Assured against such claim.

EXCLUSIONS

4. In no case shall this insurance cover

4.1 loss damage or expense attributable to wilful misconduct of the Assured

4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where such packing or preparation is carried out by the Assured or their employees or prior to the attachment of this insurance (for the purpose of these Clauses "packing" shall be deemed to include stowage in a container and "employees" shall not include independent contractors)

4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured

4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)

4.6 loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage

This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract

4.7 deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons

4.8 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.

5.

5.1 In no case shall this insurance cover loss damage or expense arising from

5.1.1 unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein

5.1.2 unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out prior to attachment of this insurance or by the Assured or their employees and they are privy to such unfitness at the time of loading.

5.2 Exclusion 5.1.1 above shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.

5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination.

6. In no case shall this insurance cover loss damage or expense caused by

6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

6.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat

6.3 derelict mines torpedoes bombs or other derelict weapons of war.

7. In no case shall this insurance cover loss damage or expense

7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions

7.3 caused by any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the

overthrowing or influencing, by force or violence, of any government whether or not legally constituted

7.4 caused by any person acting from a political, ideological or religious motive.

DURATION

Transit Clause

8.

8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit, continues during the ordinary course of transit and terminates either

8.1.1 on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance,

8.1.2 on completion of unloading from the carrying vehicle or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance, which the Assured or their employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution, or

8.1.3 when the Assured or their employees elect to use any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit or

8.1.4 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, whichever shall first occur.

8.2 If, after discharge overside from the oversea 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 that 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.

8.3 This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, 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.

Termination of Contract of Carriage

9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before unloading of the subject- matter insured as provided for in Clause 8 above, then this insurance shall also terminate unless prompt notice is given to the Insurers and continuation of cover is requested when this insurance shall remain in force, subject to an additional premium if required by the Insurers, either

9.1 until the subject-matter insured is sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the subject-matter insured at such port or place, whichever shall first occur,

or

9.2 if the subject-matter insured is forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named in the contract of insurance or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

Change of Voyage

10.

10.1 Where, after attachment of this insurance, the destination is changed by the Assured, this must be notified promptly to Insurers for rates and terms to be agreed. Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable market terms.

10.2 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.

CLAIMS

Insurable Interest

11.

11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.

11.2 Subject to Clause 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Insurers were not.

Forwarding Charges

12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured.

This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their employees.

Constructive Total Loss

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival.

Increased Value

14.

14.1 If any Increased Value insurance is effected by the Assured on the subject-matter insured under this insurance the agreed value of the subject-matter insured shall be deemed to be

increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

14.2 Where this insurance is on Increased Value the following clause shall apply:

The agreed value of the subject-matter insured shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the subject-matter insured by the Assured, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

BENEFIT OF INSURANCE

15. This insurance

15.1 covers the Assured which includes the person claiming indemnity either as the person by or on whose behalf the contract of insurance was effected or as an assignee,

15.2 shall not extend to or otherwise benefit the carrier or other bailee.

MINIMISING LOSSES

Duty of Assured

16. It is the duty of the Assured and their employees and agents in respect of loss recoverable hereunder

16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and

16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

Waiver

17. Measures taken by the Assured or the Insurers with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

AVOIDANCE OF DELAY

18. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

LAW AND PRACTICE

19. This insurance is subject to English law and practice.

Note

Where a continuation of cover is requested under Clause 9, or a change of destination is notified under Clause 10, there is an obligation to give prompt notice to the Insurers and the right to such cover is dependent upon compliance with this obligation.

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RULE OF INTERPRETATION

In the adjustment of general average the following Rules shall apply to the exclusion of any Law and Practice inconsistent therewith.

Except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.

RULE PARAMOUNT

In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.

Rule A

There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided.

Rule B

There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation.

When measures are taken to preserve the vessels and their cargoes, if any, from a common peril, these Rules shall apply.

A vessel is not in common peril with another vessel or vessels if by simply disconnecting from the other vessel or vessels she is in safety; but if the disconnection is itself a general average act the common maritime adventure continues.

Rule C

Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.

In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure.

Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be admitted as general average.

Rule D

Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.

Rule E

The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.

All parties claiming in general average shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution within 12 months of the date of the termination of the common maritime adventure.

Failing such notification, or if within 12 months of a request for the same any of the parties shall fail to supply evidence in support of a notified claim, or particulars of value in respect of a contributory interest, the average adjuster shall be at liberty to estimate the extent of the allowance or the contributory value on the basis of the information available to him, which estimate may be challenged only on the ground that it is manifestly incorrect.

Rule F

Any additional expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.

Rule G

General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.

This rule shall not affect the determination of the place at which the average statement is to be made up.

When a ship is at any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the adventure had continued in the original ship for so long as justifiable under the contract of affreightment and the applicable law.

The proportion attaching to cargo of the allowances made in general average by reason of applying the third paragraph of this Rule shall not exceed the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense.

Rule I. Jettison of Cargo

No jettison of cargo shall be made good as general average, unless such cargo is carried in accordance with the recognised custom of the trade.

Rule II. Loss or damage by Sacrifices for the Common Safety

Loss of or damage to the property involved in the common maritime adventure by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III. Extinguishing Fire on Shipboard

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage by smoke however caused or by heat of the fire.

Rule IV. Cutting Away Wreck

Loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be made good as general average.

Rule V. Voluntary Stranding

When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage to the property involved in the common maritime adventure shall be allowed in general average.

Rule VI. Salvage Remuneration

(a) Expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.

Expenditure allowed in general average shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.

(b) Special compensation payable to a salvor by the shipowner under Article 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance shall not be allowed in general average.

Rule VII. Damage to Machinery and Boilers

Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the propelling machinery and boilers shall in any circumstances be made good as general average.

Rule VIII. Expenses Lightening a Ship when Ashore, and Consequent Damage

When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred), and any loss or damage to the property involved in the common maritime adventure in consequence thereof, shall be admitted as general average.

Rule IX. Cargo, Ship's Materials and Stores Used for Fuel

Cargo, ship's materials and stores, or any of them, necessarily used for fuel for the common safety at a time of peril shall be admitted as general average, but when such an allowance is made for the cost of ship's materials and stores the general average shall be credited with the estimated cost of the fuel which would otherwise have been consumed in prosecuting the intended voyage.

Rule X. Expenses at Port of Refuge, etc.

(a) When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be admitted as general average.

When a ship is at any port or place of refuge and is necessarily removed to another port or place because repairs cannot be carried out in the first port or place, the provisions of this Rule shall be applied to the second port or place as if it were a port or place of refuge and the cost of such removal including temporary repairs and towage shall be admitted as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.

(b) The cost of handling on board or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge, shall be admitted as general average, when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage.

The cost of handling on board or discharging cargo, fuel or stores shall not be admissible as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.

(c) Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be admitted as general average. The provisions of Rule XI shall be applied to the extra period of detention occasioned by such reloading or restowing.

But when the ship is condemned or does not proceed on her original voyage, storage expenses shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

Rule XI. Wages and Maintenance of Crew and Other Expenses Bearing up for and in a Port of Refuge, etc.

(a) Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).

(b) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted in general average.

Fuel and stores consumed during the extra period of detention shall be admitted as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.

Port charges incurred during the extra period of detention shall likewise be admitted as general average except such charges as are incurred solely by reason of repairs not allowable in general average.

Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew and fuel and stores consumed and port charges incurred during the extra detention for repairs to damages so

discovered shall not be admissible as general average, even if the repairs are necessary for the safe prosecution of the voyage.

When the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers and crew and fuel and stores consumed and port charges shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

(c) For the purpose of this and the other Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms of articles of employment.

(d) The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:

(i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;

(ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);

(iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule XI(b), provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;

(iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is admissible as general average.

Rule XII. Damage to Cargo in Discharging, etc.

Damage to or loss of cargo, fuel or stores sustained in consequence of their handling, discharging, storing, reloading and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

Rule XIII. Deduction from Cost of Repairs

Repairs to be allowed in general average shall not be subject to deductions in respect of "new or old" where old material or parts are replaced by new unless the ship is over fifteen years old in which case there shall be a deduction of one third. The deductions shall be regulated by the age of the ship from the 31st December of the year of completion of construction to the date of the general average act, except for insulation, life and similar boats, communications and navigational apparatus and equipment, machinery and boilers for which the deductions shall be regulated by the age of the particular parts to which they apply.

The deductions shall be made only from the cost of the new material or parts when finished and ready to be installed in the ship. No deductions shall be made in respect of provisions, stores, anchors and chain cables.

Drydock and slipway dues and costs of shifting the ship shall be allowed in full.

The costs of cleaning, painting or coating of bottom shall not be allowed in general average unless the bottom has been painted or coated within the twelve months preceding the date of the general average act in which case one half of such costs shall be allowed.

Rule XIV. Temporary Repairs

Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average.

Where temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be admitted as general average without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in general average if such repairs had not been effected there.

No deductions “new for old” shall be made from the cost of temporary repairs allowable as general average.

Rule XV. Loss of Freight

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Deduction shall be made from the amount of gross freight lost, of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

Rule XVI. Amount to be made Good for Cargo Lost or Damaged by Sacrifice

The amount to be made good as general average for damage to or loss of cargo sacrificed shall be the loss which has been sustained thereby based on the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value. The value at the time of discharge shall include the cost of insurance and freight except insofar as such fright is at the risk of interests other than the cargo.

When cargo so damaged is sold and the amount of the damage has not been otherwise agreed, the loss to be made good in general average shall be the difference between the net proceeds of sale and the net sound value as computed in the first paragraph of this Rule.

Rule XVII. Contributory Values

The contribution to a general average shall be made upon the actual net values of the property at the termination of the adventure except that the value of cargo shall be the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value. The value of the cargo shall include the cost of insurance and freight unless and insofar as such freight is at the risk of interests other than the cargo, deducting therefrom any loss or damage suffered by the cargo prior to or at the time of discharge. The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charterparty to which the ship may be committed.

To these values shall be added the amount made good as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew’s wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average or fall upon the ship

by virtue of an award for special compensation under Article 14 of the International Convention on Salvage, 1989 or under any other provision similar in substance.

In the circumstances envisaged in the third paragraph of Rule G, the cargo and other property shall contribute on the basis of its value upon delivery at original destination unless sold or

otherwise disposed of short of that destination, and the ship shall contribute upon its actual net value at the time of completion of discharge of cargo.

Where cargo is sold short of destination, however, it shall contribute upon the actual net proceeds of sale, with the addition of any amount made good as general average.

Mails, passenger's luggage, personal effects and accompanied private motor vehicles shall not contribute in general average.

Rule XVIII. Damage to Ship

The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear caused by a general average act shall be as follows:

(a) When repaired or replaced,

The actual reasonable cost of repairing or replacing such damage or loss, subject to deductions in accordance with Rule XIII;

(b) When not repaired or replaced,

The reasonable depreciation arising from such damage or loss, but not exceeding the estimated cost of repairs. But where the ship is an actual total loss or when the cost of repairs of the damage would exceed the value of the ship when repaired, the amount to be allowed as general average shall be the difference between the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the value of the ship in her damaged state which may be measured by the net proceeds of sale, if any.

Rule XIX. Undeclared or Wrongfully Declared Cargo

Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods wilfully misdescribed at time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.

Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value.

Rule XX. Provision of Funds

A commission of 2 per cent. on general average disbursements, other than the wages and maintenance of master, officers and crew and fuel and stores not replaced during the voyage, shall be allowed in general average.

The capital loss sustained by the owners of goods sold for the purpose of raising funds to defray general average disbursements shall be allowed in general average.

The cost of insuring general average disbursements shall also be admitted in general average.

Rule XXI. Interest on Losses made Good in General Average

Interest shall be allowed on expenditure, sacrifices and allowances in general average at the rate of 7 per cent. per annum, until three months after the date of issue of the general average adjustment, due allowance being made for any payment on account by the contributory interests or from the general average deposit fund.

Rule XXII. Treatment of Cash Deposits

Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges, such deposits shall be paid without any delay into a special account in the joint names of a representative nominated on behalf of the shipowner and a representative nominated on behalf of the depositors in a bank to be approved by both. The sum so deposited, together with accrued interest, if any, shall be held as security for payment to the parties entitled thereto of the general average, salvage or special charges payable by cargo in respect to which the deposits have been collected. Payments on account or refunds of deposits may be made if certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.

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