

Lectures on Marine Insurance Law

The Course Outline

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1. INTRODUCTION

- Lecturer and students introducing themselves.
- **Scope of lectures:** see this course outline. Please study and prepare the case study (see the “Appendix”) which will be discussed during the last lecture on marine insurance law.
- **Basic course material:** available at the IMO IMLI library (M. Pavliha: *Lectures on Marine Insurance*, IMO IMLI, Malta, 2000, 334 pages). See also the “Suggested Bibliography” at the end of this course outline.

2. DEFINITION OF INSURANCE AND THE CLASSIC LONDON INSURANCE MARKET DIVISION OF INSURANCE

- **Introduction to risk management:** (1) identification of risks, (2) evaluation of risks, (3) control of risks, (4) finance the risks: *insurance*, bank deposits, captives, other.
- **What is insurance:** the primary function of *insurance* is risk transference and distribution. By effecting insurance, the insured transfers the risk of economic losses to the insurer, who in turn redistributes the risk through investment and reinsurance arrangements. *Contract of insurance* is a contract under which one person (the insurer) is legally bound to pay a sum of money or its equivalent to another person (the insured), upon the happening of a specified event involving some element of uncertainty as to time or likelihood of occurrence, which affects the insured’s interest in the subject-matter of the insurance (F. Marks & A. Balla). The insured is actually buying his “peace of mind”, the “invisible product”.
- **Non-marine insurance:**
 - *insurance of persons:* it deals with the life, physical integrity or health of the insured and is divided into individual insurance and group insurance.
 - *damage insurance:* property insurance and liability insurance.
- **Marine insurance:** the object is to indemnify the insured against losses incident to marine adventure.
- Identical division of insurance in continental markets and *civil codes* (e.g. France, Italy).

- Another possible division of insurance (e.g. under the EU directives): *life insurance* and *non-life insurance* (including marine insurance).
- **World insurance in 2002:** insurance companies wrote USD 2.627 billion in premiums worldwide (USD 1.536 billion life insurance, USD 1.091 billion non-life insurance). On average life premium represents 5,4% of GDP and non-life 3,9% of GDP. See Sigma: *World Insurance in 2002: high premium growth in non-life insurance*, Swiss Re, No. 8/2003.
- **Marine insurance markets in 2002:** a series of disasters. Possible future developments: (1) the return to co-insurance practices, (2) the achievement of market internationalisation, (3) the search for alternative risk financing tools. See a comprehensive report on marine insurance in <http://www.brs-paris.com/annual/insurance/insurance-a/insurance-a.html>.
- **Lloyd's of London:** Lloyd's is the world's leading insurance *market* (it is not a company!) with a capacity to accept insurance premiums of more than £12 billion. It is the world's second largest commercial insurer and seventh largest reinsurer. In 2002, 86 syndicates were underwriting insurance at Lloyd's (there used to be around 400 syndicates!), covering all classes of business (13% marine) from more than 100 countries worldwide. Over 140 firms of Lloyd's brokers were placing risk. Approximately 5% of world reinsurance is placed at Lloyd's. Lloyd's is regulated by the Financial Services Authority. The number of corporate members is increasing (830). Due to the past bad results (significant losses in 1988-1992, the 11th September 2001) there are now radical proposals for reform: the creation of a franchise, a new partnership between the businesses in the market and Lloyd's, which runs the market. See <http://www.lloydsolondon.com>.

3. DEFINITION OF MARINE INSURANCE

- **Definition:** the contract of marine insurance is a special (insurance) *contract of indemnity* which protects against physical and other losses to moveable property and associated interests, as well as against liabilities occurring or arising during the course of a sea voyage (R. Thomas). S. 1 of MIA 1906: A contract of marine insurance is a contract whereby the insurer undertakes to *indemnify* the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.
- **Contract of indemnity:** "The great principle of the law of insurance is that it is a contract for indemnity. The underwriter does not stipulate, under any circumstances, to become the purchaser of the subject-matter insured; it is not supposed to be in his contemplation: he is to indemnify only." – *per* Lord Ellenborough in *Brotherston v. Barber* (1816) 5 M & S 418 at p. 425. Ideally, the insured should be compensated only to the extent of his loss. In practice, however, this is not always easy to attain (S. Hodges). Thus, a policy of insurance is not a perfect contract of indemnity. See *Irving v. Manning* (1847) 1 HLC 287.
- **Common law and civil law definitions of marine insurance:** they are very similar.
- **Terminology of marine insurance in a nutshell:** *the insured* (assured, policyholder), *the insurer* (underwriter, assurer, insurance company), *the subject-matter insured* and many other terms peculiar to marine insurance, which will be explained throughout the course.

- **Lawful marine adventure:** one where any ship, goods or other movables are exposed to maritime perils; the earning or acquisition of any freight etc., any third party liability etc.
- **Maritime perils:** (1) *perils of the seas* = fortuitous accidents or casualties of the sea (heavy weather, sinking, stranding, collision, contact), not including the ordinary actions of the winds and waves; (2) *fire, war perils, pirates, rovers, thieves, barratry* etc. See *The Captain Panagos DP* [1985] 1 Lloyd's Rep. 625. The element of *fortuity* is of crucial importance.
- A contract of marine insurance may cover ***mixed sea and land or sea and inland waters risks*** (e.g. the *Transit Clause* under the Institute Cargo Clauses: “warehouse to warehouse”).
- Difference between *insurance law* and other legal branches, e.g. *maritime law*.

4. ORIGINS

- **9th century B.C.:** *Lex Rhodia de iactu* (the birth of “modern” *general average* = an extraordinary sacrifice or expenditure which 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).
- **7th century B.C.:** *Phoenician maritime law*, e.g. *general average* and *marine insurance* (traces to be found in the Talmuds of Jerusalem and of Babylon at the beginning of our era).
- **384 – 322 B.C.:** *the shipping loan (foenus nauticum)* of Greek and Roman origin (the oldest texts are to be found in certain pleadings of Demosthenes). If the loan was based on the ship (*bottomry*), the borrower had to repay it with high interest only in the case of a successful voyage. Loan could be also based on cargo (*respondentia*).
- **1347:** *the oldest marine insurance policy* (Genova).
- **1370:** *the birth of marine reinsurance*.
- **15th – 16th century:** *fragmentary insurance regulation in medieval cities* (e.g. Barcelona, Venice, Florence).
- **1562:** *Ordo super assecuratoribus* (Dubrovnik) - probably one of the oldest insurance legislation.
- **1563:** *the King Philip II Ordinance on Marine Insurance* (Belgium).
- **End of 16th century:** *Le Guidon de la Mer* (private collection of marine customs).
- **1681:** *The Marine Ordinances of Louis XIV* (also received with great respect in the courts of England and the United States).
- **1688:** first mention of *Edward Lloyd's Coffee House* in Tower Street, London.
- **1779:** Lloyd's standard marine policy – *the SG (Ships and Goods) Policy*.

- **1808:** *Code de Commerce* (France).
- **1859:** *The Antwerp Marine Insurance Policy*.
- **1871:** *The Norwegian Marine Insurance Plan*.
- **1884:** *The Institute of London Underwriters*.
- **1906:** *The Marine Insurance Act 1906* (U.K. – Sir Mackenzie Chalmers).
- **1919:** *The German General Rules of Marine Insurance (ADS)*.
- **Modern era:** the Institute Clauses (1982, 1983, 1995, 2003), the Antwerp Marine Policy, the new policy form MAR (1982, 1991), the American Clauses, the UNCTAD Clauses (1984), the German Clauses (DTV Cargo 2000), the CMI attempts to unify the law, etc.

5. TYPES OF MARINE INSURANCE

- **Hull insurance:** insurance of the vessel with its gear.
- **Cargo insurance:** insurance of goods carried by sea.
- **Insurance against the liability of the carrier:** protection and indemnity; compulsory insurance – e.g. CLC'69, HNS'96; voluntary insurance – e.g. liability for cargo.
- **Other types of marine insurance:** e.g. freight, salvage expenses, general average contributions.

6. SOURCES OF LAW

- **Lack of international law:** no international convention on marine insurance.
- **Recent attempts to unify the law:** The CMI International Working Group has identified non-disclosure, good faith, alternation of risk and warranties as being the most controversial areas of marine insurance. However, there is no prospect for international instrument (e.g. convention, model law).
- **Statutes:** e.g. MIA 1906. Much of the world's marine insurance business is transacted in London and is governed expressly or impliedly by English law.
- **Acquis communautaire:** the three generations of EU directives, unfortunately nothing on insurance contracts.
- **Standard clauses:** e.g. the Institute Clauses (ICC, ITCH, IVCH, etc.) reflecting an international *lex mercatoria* (about 70% of all marine insurance contracts are based on those clauses).
- **Commercial practice:** e.g. the Lloyd's slip placing system.

- **Court decisions (case law):** especially in the common law countries (e.g. England, USA, Canada, Australia).
- **Arbitration decisions.**
- **Doctrine:** articles, books, etc. written by eminent scholars.

7. EXAMPLES OF MARINE INSURANCE LEGISLATION

- **Law on companies** (“status” law) and **contract law**.
- **Belgian marine insurance legislation, August 21st, 1879:** the statute became a part of the *Code of Commerce*, sections 191-250.
- **German Commercial Code 1897 (HGB):** including rules on marine insurance (§§ 778-900).
- **The U.K. Marine Insurance Act 1906 (MIA 1906):** “**the mother of all marine insurance statutes**” (94 sections + First Schedule (Form of Policy: Lloyd’s S.G. policy + Rules for Construction of Policy) + Second Schedule (Enactments Repealed). It came into force on 1st January, 1907.
- The Australian *Marine Insurance Act 1909* (based on MIA 1906).
- The Canadian *Marine Insurance Act 1993* (based on MIA 1906).
- The French *Code des Assurances* (including Law No. 67-522 of July 3, 1967 and Decree No. 68-64 of January 19, 1968 which comprise marine insurance).
- *Civil Code of Quebec 1991*, Articles 2505 – 2628.
- Other legislation.

8. WHO PROVIDES MARINE (RE)INSURANCE?

- **Insurance companies:** stock/shareholding companies, mutual companies.
- **Reinsurance companies:** marine reinsurance and retrocession.
- **Lloyd's of London:** it is a market, not a company. See above.
- **The role of insurance brokers and insurance agents:** the agent – the insurer, the broker – the insured.
- **Protection and Indemnity Clubs (P & I Clubs):** liability insurance.
- **Insurance and reinsurance pools:** for huge risks (e.g. oil rigs, aviation, nuclear plants), based on co-insurance.

9. CONCLUDING AND ENFORCING MARINE INSURANCE CONTRACTS: THE LONDON MARKET

- **Consensus ad idem:** a marine contract is deemed to be concluded when the proposal of the insured is accepted by the insurer.
- **Brokers:** they play a central and dominant role. See Lord Diplock in *American Airlines Inc. v. Hope* [1974] 2 Lloyd's Rep. 301 at 304.
- **The slip placing system:** the slip sets out a brief and abbreviated statement of the subject matter of the risk and the proposed insurance conditions; the slip is first presented to a lead underwriter, then to the subsequent underwriters. Amended slip = counter offer.
- Where a slip is subscribed to by more than one underwriter, there is established a distinct and separate contract with each underwriter (*no joint or joint and several liability*).
- **An oversubscribed slip:** signing down.
- **A discrepancy between the slip and the marine policy:** *prima facie* the primary document is the slip, because it is the basis of the contract of marine insurance.

10. INSURABLE INTEREST

- **The insured must show:** (1) financial loss, (2) the loss was caused by the peril insured against, (3) the subject matter was covered by the peril, (4) insurable interest (see sections 4-15 of MIA 1906).
- **Avoidance of gaming or wagering contracts:** such contracts in marine insurance are void (e.g. a policy in P.P.I. form = Policy Proof of Interest).
- **Definition of insurable interest:** *Lucena v. Crauford* (1806) 2 B & PNR 269 (the restricted view = legal relationship + economic interest); *The Moonacre* [1992] 2 Lloyd's Rep. 501 (towards a broader view: was the relationship between the insured and the subject matter of the insurance sufficiently close to justify his being paid in the event of its loss or damage).
- **When interest must attach:** “at the time of the loss”. Exception: “lost or not lost”. The problem of the FOB contracts!
- **Defeasible or contingent interest:** it is insurable (e.g. buyer – delay).
- **Partial interest:** it is insurable.
- **Reinsurance:** the insurer has an insurable interest in his risk and may reinsure in respect of it.
- **Bottomry and respondentia:** the lender has an insurable interest in respect of the loan.
- **Master's and seamen's wages:** the master or any member of the crew of a ship has an insurable interest in respect of his wages.

- **Advanced freight:** the person advancing the freight has an insurable interest (e.g. CIF).
- **Charges of insurance:** the insured has an insurable interest in the charges (e.g. CIF).
- **Quantum of interest:** the mortgagor, the mortgagee.
- **Liability interest.**
- **Assignment of interest:** the rule prevents a mere sale of the insured subject matter from transferring the policy unless there is agreement to that effect between seller and buyer. This principle is different from the non-marine insurance. In other words, e.g. selling the property does not mean automatically transferring the policy.

11. DISCLOSURE AND REPRESENTATIONS – DUTY OF UTMOST GOOD FAITH

- **The principle of utmost good faith (*uberrimae fidei*):** a contract of marine insurance is a contract based upon the utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party (s. 17 of MIA 1906). See *Carter v. Boehm* (1766) 3 Burr. 1905. Prior to the conclusion of contract, also during the contract. See sections 17-21 of MIA 1906.
- **The continuing duty of utmost good faith:** duty of utmost good faith (section 17 of the MIA) continues to apply after the conclusion of the insurance contract. Once the parties are in litigation it is the procedural rules which govern the extent of the disclosure which should be given in the litigation not s. 17 as such though s. 17 might influence the Court in the exercise of its discretion – *Manifest Shipping Co. Ltd. v. Uni-Polaris Insurance Co. Ltd. and La Réunion Européene (The Star Sea)* [2001] 1 Lloyd’s Rep. 389 (HL).
- **The duty of disclosure of insureds and brokers:** every material circumstance must be disclosed; the objective test of materiality - *Pan Atlantic Insurance Co. v. Pine Top Insurance Co. Ltd.* [1995] 1 AC 501 (HL). The “decisive influence test” unfortunately rejected. Lord Mustill: A circumstance is material if it was one which would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk. It is not necessary to show that the disclosure would have had a decisive or conclusive influence. A circumstance may be material even though a full and accurate disclosure of it would not in itself have had a decisive effect on a prudent underwriter’s decision whether to accept the risk and if so at what premium. The insurer must also show that he was in fact induced to enter the contract on the relevant terms (the “actual inducement test”).
- **Better view:** the insurer could only escape liability if the undisclosed matter was something which would have partially induced a hypothetical prudent insurer to refuse the risk or accept it on different terms (S. Derrington).
- **Another possible solution:** the precise questionnaires.
- **Which circumstances need not to be disclosed:** any circumstance which diminishes the risk, which is known or presumed to be known to the insurer, etc.

- **Remedies:** (1) *common law*: If the duty of utmost good faith is breached – avoidance of the contract *ab initio*; (2) *civil law*: also possibility of increasing the premium, damages.
- **The duty of insureds and brokers not to misrepresent:** In practice the law of misrepresentation exists in close alliance with that of non-disclosure. The difference should be abolished.
- **The duty of disclosure of insurers:** e.g. *Banque Financiere de la Cite SA v. Westgate Insurance Co. Ltd.* [1991] 2 AC 249.

12. THE POLICY

- **The contract must be embodied in a policy:** the absence of a marine policy means that the contract can only operate voluntarily without the aid and remedial powers of the courts or arbitrators. See sections 22-31 of MIA 1906.
- **Rules for construction of policy:** see First Schedule of MIA 1906.
- **MAR 91:** all the standard Institute Clauses may be used only with the current Lloyd's Marine Policy (MAR 91) and the Institute of London Underwriters Companies Marine Policy Form (MAR 91), both of which are subject to the "exclusive jurisdiction of the English Courts, except as may be expressly provided herein to the contrary".
- **What a policy must specify:** the name of the insured, the subject-matter, the risks, the voyage or period of time covered by insurance, the sum insured and the name of the insurer.
- **Signature of insurer:** a marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporation the corporate seal may be sufficient. Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the insured.
- **Designation of subject matter:** with reasonable certainty.
- **Types of policies:** time, voyage, valued, unvalued, floating, etc.
- **Time policy:** for a definite period of time; a policy may be a "mixed" time and voyage policy. A specific date for the commencement and termination of the risk must be stated in the policy. It is generally understood that a day starts from 00:00 and ends at 24:00. A policy on ship is nowadays almost invariably insured for a period of time, whereas cargo is usually insured by a voyage policy.
 - **Extension or cancellation clause:** a policy for a period of time does not cease to be a time policy merely because the period of time may be extended or abridged pursuant to one of the policy's contractual provisions. *The Eurysthenes* [1977] 1 QB 49 (CA).
 - **The navigation clause:** see clauses 1.1., 1.2. and 1.3. of ITCH(95). Coverage "at all times", towage and salvage warranty, the use of helicopters, loading and discharging operations at sea, scrapping voyages.
 - **The continuation clause:** the vessel is only held covered if, at the expiry of the policy, the vessel is (1) at sea *and* in distress or missing; or (2) in port *and* in distress. See cl. 2 of ITCH(95).

- *Automatic termination*: see clauses 5.1 and 5.2. of ITCH(95). E.g. change of Classification Society; change, suspension, discontinuance, withdrawal or expiry of the ship's class; overdue periodic survey, change of ownership or flag. The "net result" of breach of warranty or termination of insurance is the same: the underwriter is freed from liability as from the date of breach. Compare to *The "Caribbean Sea"* [1980] 1 Lloyd's Rep. 338. A *pro rata* daily return of premium shall be made.
- **Voyage policy on ship**: "from" or "at and from" one place to another.
 - *From*: Where the subject-matter is insured "from" a particular place, the risk does not attach until the ship starts on the voyage insured (rule 2 of the Rules for Construction of Policy, MIA 1906). With respect to "the voyage" see sections 42-49 of MIA 1906.
 - *At and from (ship)*: see rule 3. Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately. With respect to "good safety" see *Parmeter v. Cousins* (1809) 2 Camp 235. The standard of "good (physical) safety" is lower than that of seaworthiness.
 - *Implied condition as to the commencement of risk*: the adventure shall be commenced within a reasonable time, otherwise the insurer may avoid the contract.
 - *Alteration of port of departure*: the risk does not attach.
 - *Sailing for different destinations*: the risk does not attach.
 - *Change of voyage*: the insurer is discharged from liability as from the time of change. Manifest intention to change the voyage is sufficient. See *Tasker v. Cunningham* (1819) 1 Bligh. 87.
 - *Deviation*: the insurer is discharged from liability as from the time of deviation (non-contractual route).
 - *Several ports of discharge*: proceed in the order designated by the policy. If not = deviation.
 - *Delay*: the adventure must be prosecuted with reasonable despatch.
 - *Excuses for deviation or delay*: authorisation ("held covered" provisions), safety of the ship, saving human life, beyond master's control, etc.
- **Voyage policy on goods**:
 - *cl. 8(1) of ICC*: it sets out the general rules relating to attachment and termination of the insurance (the transit clause);
 - *cl. 8(2) of ICC*: it covers the particular circumstance where a change of destination occurs after the completion of the sea voyage;
 - *cl. 8(3) of ICC*: in declaring that the insurance "shall remain in force" confirms that the events listed therein (e.g. delay beyond the control of the insured, deviation, forced discharge) will not terminate the insurance. Its purpose is to dispel any doubts which one might have as regards the continuance of the cover should any one of the enumerated events arise (S. Hodges);
 - *cl. 9 of ICC*: it relates specifically to a termination, not of the contract of insurance, but of the contract of carriage and its effects on the insurance contract;
 - *cl. 10 of ICC*: the "change of voyage" clause states that a change ordered by the insured is covered.
- **Valued policy**: it specifies the agreed value of the subject matter, which is conclusive in the absence of fraud. Valued policies are almost universal in marine insurance. See *Irving v. Manning* (1847) 1 HL Cas 287. However, the value must not go beyond what is "reasonable and fair", and the insured is meant only to have an "indemnity", the very basis of a contract of insurance. What constitutes excessive over-valuation is a question of fact.

- **Unvalued policy:** it leaves the insurable value to be subsequently ascertained (see s. 16 of MIA 1906):
 - *insurance on ship, freight and any other subject matter other than cargo:* the insurable value is the value at the inception of the risk;
 - *insurance of goods or merchandise:* “prime cost” (price paid by the insured, e.g. CIF).
- **Floating policy by ship or ships:** it allows the insured to insure an unascertained cargo on an unspecified vessel (open covers).

13.CONTRACTUAL TERMS

- **Terms defining the risk and exclusions from risk:** general principle, all risks covers.
- **Warranties (see sections 33-41 of MIA 1906):**
 - nature of warranty: it must be strictly and exactly complied with. Upon breach, even if non-causative or immaterial, the insurer may repudiate the contract as from the date of the breach of the contract, i.e. *ex nunc*. See *Pawson v. Watson* (1778) 2 Cowp 785.
 - how an underwriter's liability is *automatically* discharged for breach of warranty: *The Good Luck* [1992] 1 AC 233.
 - when is a breach of warranty excused: The “held covered” provision (e.g. the Breach of Warranty clause under the ITCH(95)). Notice, additional premium.
 - express warranties.
 - implied warranties.
 - warranty of neutrality.
 - no implied warranty of nationality.
 - warranty of good safety.
 - *warranty of seaworthiness of ship* (difference between time and voyage policy). If the shipowner deliberately refrains from examining the ship in order not to gain direct knowledge of what he has reason to believe is her unseaworthy state, he is privy to the ship putting to sea in that unseaworthy state (the “blind eye” knowledge). A finding of negligence to a very high degree does not suffice for a finding of privity. See *The Star Sea* [2001] 1 Lloyd’s Rep. 389 (HL).
 - no implied warranty that goods are seaworthy.
 - warranty of legality.
- **Conditions precedent:** e.g. sections 42-48 of MIA 1906 (the voyage). Avoidance of the contract.
- **Mere conditions:** e.g. the avoidance of delay clause in the Institute Cargo Clauses; the notice of claim provisions in the Institute Time Clauses Hulls. Damages.
- **Interpretation of marine insurance policies:** common intention. See Rules for Construction of Policy, First Schedule, MIA 1906.

14.ASSIGNMENT OF POLICY

- **When and how a policy is assignable:** Marine policies, unlike other policies of indemnity, are assignable unless there are express terms to the contrary. They can be assigned before or after the loss, by endorsement or in some other customary manner. If

the assignor loses insurable interest, the policy lapses and there is nothing to assign. In the converse case, where the insured assigns the policy without assigning the subject-matter, the assignee has no insurable interest and is thus unable to sue on the policy. See sections 50-51 of MIA 1906; *Lloyd v. Fleming* (1872) L.R. 7 Q.B. 299.

- ***The effect of assignment:*** where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name. The defendant (the insurer) is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

15. THE PREMIUM

- ***When is the premium payable:*** unless otherwise agreed, the duty of the insured or his agent to pay the premium, and the duty of the insurer to issue the policy to the insured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium. See sections 52-54 of MIA 1906.
- ***If no arrangement is made:*** a reasonable premium is payable, e.g. by reference to the market rate for the degree of risk in question (see s. 31 of MIA 1906).
- ***Policy effected through a broker:*** the broker is directly responsible to the insurer for the premium. It is a rule unique to marine insurance and to other policies issued by Lloyd's (R. Merkin). See *Power v. Butcher* (1829) 10 B. & C. 329 and *Universo of Milan v. Merchants Marine Insurance* [1897] 2 Q.B. 93.
- ***Effect of receipt on policy:*** the broker's failure to settle obliges the underwriter to look to the broker or its liquidator, and not to the insured.
- ***Return of premium:*** see sections 82-84 of MIA 1906 (enforcement of return, return by agreement, return for failure of consideration).

16. MEASURE OF INDEMNITY

- ***Definition:*** the measure of indemnity is the sum which the insured can recover in respect of a loss on a policy by which he is insured. See sections 67-78 of MIA 1906.
- ***Extent of liability of insurer for loss:***
 - *unvalued policy:* the insured can recover to the full extent of the insurable value.
 - *valued policy:* most policies are valued; the insured can recover to the full extent of the value fixed by the policy.
- ***Total loss:*** (1) valued policy = the measure of indemnity is the insurable value of the subject-matter insured, (2) unvalued policy = the measure of indemnity is the insurable value.
- ***Partial loss of ship:*** the reasonable cost of the repairs less the customary deductions, but not exceeding the sum insured in respect of any casualty; the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage (e.g. cl. 18 of ITCH(95) and cl. 16 of IVCH(95)).

- ***Partial loss of freight:*** the measure of indemnity is such proportion of the sum fixed by the valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the insured bears to the whole freight at the risk of the insured under the policy.
- ***Partial loss of goods, merchandise, etc.:*** see s. 71 of MIA 1906.
- ***Apportionment of valuation:*** see s. 72 of MIA 1906.
- ***General average contributions and salvage charges:*** see s. 73 of MIA 1906, cl. 2 of ICC(82), cl. 10 of ITCH(95) and cl. 8 of IVCH(95).
- ***Liabilities to third parties:*** the measure of indemnity is the amount paid or payable by the insured to the third party. E.g. cl. 8 of ITCH(95) and cl. 6 of IVCH(95).
- ***Particular average warranties:*** an F.P.A. warranty confines the insured to recovering for total losses only, subject to the ordinary rules concerning the recovery of general average losses and salvage charges.
- ***Successive losses:*** the insurer is liable for such losses even though the total amount of successive losses may exceed the sum insured.
- ***Suing and labouring (sue and labour) clause:*** it covers the charges properly and reasonably incurred in pursuance of the insured's duty to minimize the loss. The sums payable under the clause are additional to the policy indemnity. See cl. 16 of ICC(82), cl. 11 of ITCH(95) and cl. 9 of IVCH(95).
- ***Deductible and franchise:*** participation of the insured in the loss, the purpose of which is more care on the insured's side and lower premium. See cl. 12 of ITCH(95) and cl. 10 of IVCH(95). *Example:* (1) if the deductible is 10 and the loss is 9, the insurer does not pay anything; if the loss is 11, the insurer pays 1, etc.; (2) if the franchise is 10 and the loss is 9, the insurer does not pay anything; if the loss is 11, the insurer pays 11, etc. Thus, the franchise does not really motivate the insured to minimize or prevent the loss.
- ***Under-insurance:*** where the insured is underinsured under an unvalued policy and suffers a partial loss, he may recover only that proportion of his loss which the sum insured bears to the insurable value of the subject-matter. *Example:* if the value of the subject-matter insured is 100, the sum insured is 50 and the actual loss is 30, the insured will recover 15 only. In the case of total loss the insured will recover 50.
- ***Double insurance:***
 - *definition:* it is over-insurance where the sums insured of two or more policies exceed the indemnity allowed, which is against the principle of indemnity. See s. 32 of MIA 1906; e.g. *The Gunford Case* [1911] AC 529 (HL);
 - *consequences:* each insurer is bound to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

17. LOSS AND ABANDONMENT

- **Covered losses:** the insurer is liable for any loss proximately caused by a peril insured against. See sections 55-63 of MIA 1906.
- **Proximate cause:** *causa proxima non remota spectatur*. See *The Leyland Case* (1918) AC 350 (HL).
- **Excluded losses:** e.g. any loss attributable to the wilful misconduct of the insured, delay, ordinary wear and tear.
- **Effect of transshipment:** the liability of the insurer continues.
- **Partial loss:** see above and below.
- **Total loss :**
 - *actual total loss:* definition, a missing ship (after the lapse of a reasonable time).
 - *constructive total loss:* reasonable abandonment (as the total loss appears to be unavoidable); the occurrence of damage which renders the vessel beyond economic repair.
- **Abandonment:** the insured must give notice; otherwise the loss can only be treated as a partial loss. However, in most cases the underwriters would not accept the notice.

18. PARTIAL LOSSES

- **Particular average loss:** it is a partial loss caused by a peril insured against. Particular charges are not included (recoverable under the supplementary contract in the “sue and labour” clause). In other words, with the exception of general average and particular charges, all partial losses (including salvage charges) are particular average losses.
- **Salvage charges:** the fundamental difference between salvage and general average is that in the case of the former, the salvage service is performed by a person who intervenes voluntarily, whereas in the latter, it is performed by a person who is specially hired or employed by the shipowner, on a *quantum meruit* basis, to save the whole adventure from a common danger (S. Hodges). See *Aitchison v. Lohre* (1879) 4 App Cas 755.
- **General average loss:** it is caused by a general average act which is any extraordinary sacrifice or expenditure voluntarily and reasonably made or incurred in time of peril for the purposes of preserving the property imperilled in the common adventure. See *Birkley v. Presgrave* (1801) 1 East 220.
- **Marine insurance v. general average:** “Marine insurance has made general average redundant; in fact, because of the risk involved in general average, all parties now insure against responsibility for general average contribution” ... “General average should therefore be abolished and excluded from contracts ...”(Tetley).

19. RIGHTS OF INSURER ON PAYMENT

- **Subrogation (see s. 79 of MIA 1906):**
 - *total loss*: where the insurer pays for a total loss, he becomes entitled to take over the interest of the insured in whatever may remain of the subject-matter insured, and he is thereby subrogated to all the rights and remedies of the insured.
 - *partial loss*: the insurer acquires no title to the subject-matter insured, but he is thereupon subrogated to all rights and remedies of the insured.
- **Right of contribution and effect of under insurance**: see sections 80-81 of MIA 1906.

20. LIENS FOR MARINE INSURANCE PREMIUMS

- **The key issue**: whether the insurers or the brokers have liens on the insured's ship or cargo or insurance proceeds for unpaid insurance premiums (Tetley).
- The 1926, 1967 and 1993 *Liens and Mortgages Conventions* do not specifically provide such a lien (Tetley).
- **The 1999 Arrest Convention**: "*Maritime claim*" (in respect of which arrest of the ship is permissible) means *inter alia* a claim arising out of "insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer" (art. 1(q)). However, art. 9 provides that "nothing in this Convention shall be construed as creating a maritime lien".
- American maritime law grants such a lien, although no such traditional maritime lien is recognized in the U.K., Canada or France. The U.K. and Canada provide the broker with a possessory lien on the policy, while France permits the cancellation or suspension of the marine policy in the event of non-payment of the premiums (Tetley).

21. CONFLICT OF LAWS

- **National conflicts of laws (federal law v. state or provincial law)**: e.g. USA, Canada.
- **International conflicts of laws**: according to Prof. Tetley, "the law of the marine insurance contract should be determined by studying and weighing all the contacts, especially express choice of the parties, as well as considerations of public order, mandatory rules, evasion of the law, etc., as evaluated in a *uniform methodology*".
- **The contacts used to determine the properly applicable law (Tetley)**: express choice, the country of contracting or the place of performance, the country in which the insurer carries on its business, the insurance market with reference to which the contract was made, the place where the whole process of formation of the contract occurs, policy-holders residence, location of the risk, etc.
- **European Union**:
 - *Second Council Directive on direct insurance other than life insurance of June 22, 1988*: "large risks"; freedom of choice of applicable law subject to mandatory rules; where no choice of law – the law of the country with which the contract is most closely connected (the most significant relationship), being either the law of the place

where risk is situated or the law of the habitual residence or the central administration of the policy-holder.

- *Third Council Directive on direct insurance other than life insurance of June 18, 1992*: it amends the Second Directive so as to widen the freedom of parties to an insurance contract to choose the law.
- *The Rome Convention 1980*: it does not apply to marine insurance risks in the EU, but does apply to risks outside the EU and to all reinsurance; the three-stage process (express choice, implied choice and the most significant relationship).

22. INSTITUTE CARGO CLAUSES (1982)

- *Institute of London Underwriters (ILU)*: it is an organisation established in 1884, representing the interests of member insurance companies, maintaining a close liaison with Lloyd's marine market. Drafting of clauses (hull, cargo, etc.) is carried out through the ILU's Technical and Clauses Committee.
- *Freedom of contract*: the clauses are purely illustrative and different policy conditions may be agreed.
- *English law, practice and courts*: all the standard Institute Clauses are subject to English law and practice, and may be used only with the Lloyd's Marine Policy (MAR 91) and the Institute of London Underwriters Companies Marine Policy Form (MAR 91).
- *The reform of the pre-1982 Institute Cargo Clauses*: the ICC 1963 were offered on the basis of the old Lloyd's SG policy. The reform was driven by UNCTAD.
- *The 1982 (general) clauses*: risks covered, exclusions, duration (the "Transit Clause"), claims, benefit of insurance, minimising losses, avoidance of delay, law and practice.
 - *Institute Cargo Clauses (A): all risk cover* – see *Brothers v. Stevens* [1906] 2 KB 665 and *The Gaunt Case* [1921] AC 41 (HL). The insured discharges his onus by proving that the loss was caused by some event (casualty) covered by the general expression. The clauses include the "Both to Blame Collision" Clause and exclusions (e.g. wilful misconduct of the insured, ordinary leakage, unseaworthiness, war, strikes).
 - *Institute Cargo Clauses (B): restricted (named) perils cover*. Risks covered: e.g. fire or explosion, collision, earthquake, entry of sea, lake or river water into vessel). See the "Both to Blame Collision" Clause and exclusions (e.g. wilful misconduct of the insured, ordinary leakage, unseaworthiness, war, strikes).
 - *Institute Cargo Clauses (C): restricted (named) perils cover*. Risks covered: (there are no clauses 1.1.6., 1.2.2. (except jettison), 1.2.3. and 1.3. which can be found under the "B" cover). See also the "Both to Blame Collision" Clause and exclusions (e.g. wilful misconduct of the insured, ordinary leakage, unseaworthiness, war, strikes).
 - *Institute War Clauses (Cargo)*.
 - *Institute Strikes Clauses (Cargo)*.
- *Other clauses*: e.g. The Computer Millennium Clause, The Cargo ISM Endorsement Clause.
- *Special Institute Trade Clauses*:
 - *Commodity Trades Clauses*: e.g. coffee, cotton, fats, metals, oil seeds, sugar;
 - *Other Trades Clauses*: e.g. coal, jute, rubber, timber.

23. INSTITUTE TIME AND VOYAGE CLAUSES HULLS (1983, 1995, 2003)

- **Main amendments of the 1983 Institute Time Clauses Hulls (ITCH) and Institute Voyage Clauses Hulls (IVCH):** they were put into effect from 1 November 1995, introducing the Classification Clause, the extension of the due diligence proviso of the Inchmaree Clause and a 12-month time limit for the notification of claims.
- **The 1995 clauses:** navigation, continuation, breach of warranty, classification, termination, perils, pollution hazard, three fourths collision liability, sistership, general average and salvage, new for old, bottom treatment, wages and maintenance, agency commission, unrepaired damage, constructive total loss, freight waiver, assignment, disbursements warranty, returns for lay-up and cancellation, war exclusion, strikes exclusion, malicious acts exclusion, radioactive contamination exclusion clause.
- **The market has not accepted the 1995 clauses:** the shipowners still want to insure under the 1983 clauses, mostly because of the strict warranty regarding the classification, which is provided by the 1995 clauses (cl. 4.2 of ITCH(95) and 3.2. of IVCH(95)).
- **Description of certain 1995 clauses: (A. Mandaraka-Sheppard)**
 - **English law and practice (preamble):** an express choice of English law and practice to the insurance contract has been declared; the exclusive jurisdiction of the English courts is separately provided for in the new MAR policy form.
 - **Navigation (clause 1 in both ITCH and IVCH):** it prescribes and defines the scope of the liabilities accepted by the insurer with respect to the hull policy, within which the insured risks operate; assistance to ships in distress; “ship to ship transfer”; “scrapping voyages”.
 - **Continuation clause (clause 2 ITCH):** this is a straightforward “held covered” provision provided certain conditions exist; the insured may have the cover extended, provided prior notice is given, only if the ship is at sea and in distress or missing.
 - **Breach of warranty (clauses 3 ITCH and 2 IVCH):** the “held covered” provision (a conditional waiver of the insurer's automatic discharge from liability for breach of a warranty or change of voyage, being subject to prior notice).
 - **Classification (clauses 4 ITCH and 3 IVCH):** the insured has to ensure throughout the period of insurance that the vessel is classed with a Classification Society agreed by the insurers and that her class is maintained, etc.
 - **Termination (clause 5 ITCH):** the clause is designed to protect underwriters from drastic changes in the risk undertaken (e.g. a change of the vessel's classification society, ownership, flag, etc.); the importance of periodic surveys!
 - **Assignment (clauses 21 ITCH and 19 IVCH):** a notice must be endorsed on the policy and produced prior to the payment of a claim or return of premium; *nemo dat quod non habet*.
 - **Perils (clauses 6 ITCH and 4 IVCH):**
 - **perils not subject to due diligence proviso:** perils of the seas, rivers or other navigational waters; fire or explosion; violent theft by persons from outside the vessel; jettison; piracy; breakdown of or accident to nuclear installations or reactors; contact with aircraft or similar objects, or objects falling there from, and conveyance, dock or harbour equipment or installation; earthquake, volcanic eruption or lightning; accidents in loading, discharging or shifting cargo and fuel.
 - **perils subject to the due diligence proviso (the Inchmaree Clause):** bursting of boilers/breakages of shafts or latent defects in machinery or hull; negligence of

master, officers, crew or pilots; negligence of repairers or charterers; barratry. See *The Inchmaree* (1877) 12 AC 484 (HL).

- *Importance of statutory exclusions*: the ITCH and the IVCH do not have a general exclusion clause, so s. 55(2) of MIA 1906 will apply (e.g. wilful misconduct of the insured, delay, ordinary wear and tear). All the exceptions can be contracted out but the one regarding the wilful misconduct (no man can take advantage of his own wrong – *per* Salmon J, *Slattery v. Mance* [1962] 1 All ER 525).
- *Pollution hazard (clauses 7 ITCH and 5 IVCH)*: it covers the risk of loss or damage to the insured vessel arising from the activities of governmental or state authorities aimed at the prevention or mitigation of pollution hazards.
- *Collision liability (clauses 8 ITCH and 6 IVCH)*: the insurer pays three quarters of any sums paid by the insured to third parties in consequence of legal liability arising from a collision.
- *Sistership (clauses 9 ITCH and 7 IVCH)*: it provides cover against collision and salvage services rendered to or by a ship within the same management as the insured vessel.
- *Notice of claim and tenders (clauses 13 ITCH and 11 IVCH)*: the notice must be given to underwriters promptly after the date on which the insured, owners or managers, become or should have become aware of the loss or damage and prior to survey; a 12-month time limit.

- *Other time clauses (hulls)*: restricted perils, total loss, general average and three fourths collision liability; total loss only; disbursements and increased value; excess liabilities; war and strikes; war and strikes – limited conditions.

- *Other voyage clauses (hulls)*: total loss, general average and three fourths collision liability; war and strikes.

- *The Institute Mortgagees Interest Clauses Hulls (1986)*: to protect his interest fully, a mortgagee would be well-advised to take out these clauses.

- *The new International Hull Clauses 1/11/2003*: published on 5th November 2003. The new clauses are designed to update both the 1/10/83 and the 1/11/95 Institute Time clauses – Hull and the earlier version of these new clauses, the 1/11/2002 version. These clauses are designed to compete with clauses found in other marine insurance markets. The IUA has all but removed reference to the English ‘warranty’ from the hull clauses. The navigational limits clause is no longer referred to as a warranty, and the consequences of its breach are now spelled out - in a way similar to the change of class/management clauses. The effect of a breach of navigational limits clauses is now *suspension* of cover for the duration of the breach (even in relation to loss or damage not caused by the breach of warranty) but cover is restored on remedy of the breach. See <http://www.geocities.com/Heartland/Hollow/5666/form2.html>.

24. UNCTAD MODEL CLAUSES ON MARINE HULL AND CARGO INSURANCE (1984)

- *UNCTAD*: the United Nations Conference on Trade and Development was established on December 30, 1965, by a UN General Assembly resolution as a permanent organ of the General Assembly, with the purpose to promote international trade especially amongst emerging nations.

- ***New standard insurance clauses:*** they were drafted in order to decrease “the monopoly” of the London market and its Institute Clauses. Unfortunately, they have remained a “dead letter” as they are not used in practice.
- ***Marine Hull Insurance (All Risks Cover):*** coverage, general exclusions, additional coverage, period of coverage, duties of the assured, measure of indemnity, claims settlement, annex of additional coverage which may be available under all risks cover (extended cover clause).
- ***Marine Hull Insurance (Named Perils Cover).***
- ***Cargo Insurance (All Risks Cover):*** coverage, general exclusions, additional coverage, period of coverage, measure of indemnity, insurable interest.
- ***Cargo Insurance (Intermediate Cover).***
- ***Cargo Insurance (Restricted Cover).***

25. OTHER EXAMPLES OF STANDARD MARINE INSURANCE TERMS AND CONDITIONS

- ***Marine Insurance Policy of Antwerp put into Force on 1st July 1859 (+ Clauses 1900, modified in 1931):*** nowadays the policy is only used for cargo.
- ***The Norwegian Marine Insurance Plan 1996, Version 1999 (NSPL):*** an agreed document established by the Norwegian marine insurance market to regulate insurance of ships and offshore structures (P&I insurance no longer included). Separate conditions were adopted for cargo: *Conditions Relating to Insurance for the Carriage of Goods, 1995.*
- ***DTV Cargo Insurance Conditions 2000 (DTV Cargo 2000):*** “the most modern conditions for cargo insurance in the world today”. All risk; Limited Cover; Open Policy; War Clauses; Strikes, Riots and Civil Commotions Clause; Confiscation Clause; Contingency and DIC Insurance Clauses; Classification and Age Clause.

26. PROTECTION AND INDEMNITY INSURANCE (P & I)

- ***Mutual insurance:*** one where two or more persons mutually agree to insure each other against marine losses. See s. 85 of MIA 1906.
- ***Origins:*** P & I insurance came into common use after the 1835 case of *De Vaux v. Salvador* 111 Eng.Rep. 845 (K.B.1836): collision liability was not a “peril of the sea” and thus not covered under the basic Lloyd's S.G. policy.
- ***Running Down Clause:*** it covers only three fourths of the collision liability.
- ***P & I clubs (mutual insurance societies):*** they were founded to cover the remaining one fourth of the collision liability; now they also cover other third-party risks and risks not covered by hull policies; approximately 25 P & I clubs in the world, a large majority

located in the U.K. (the largest club is U.K. P& I Club with approx. 5000 vessels insured). 13 Clubs are members of the International Group of P& I Clubs (a special pool).

- **Problems regarding competition law:** the European Commission adopted two formal decisions clearing the co-operative arrangements between the International Group of P&I Clubs (1985, 1999).
- **Examples of risks covered:** personal injury to or illness or loss of life of crew members, passengers and others, loss of personal effects, life salvage, collision liabilities, pollution, towage contract liabilities, wreck liabilities, cargo liabilities.
- **“Pay to be paid”:** the P & I clubs only indemnify the insured if he has paid the third party claimant, is up-to-date in his “calls” and has complied with the other exigencies of club membership; no *direct action* in the U.K. and the U.S.

27. MARINE REINSURANCE

- **Definition:** the insuring of a risk or part of a risk by the principal insurer (the insurance company, the ceding company, the cedant, the reinsured) with another insurer (the reinsurer, the reinsurance company). The insurer under a contract of marine insurance has an insurable interest in his risk and may reinsure in respect of it (s. 9(1) of MIA 1906). In simple words, reinsurance is “insurance of insurance”.
- **Difference between reinsurance and co-insurance:** the latter is effected by a number of insurers and it is based on the principle of joint and several liability.
- **The role of reinsurance:** (1) providing capacity, (2) creating stability and (3) strengthening finances.
- **Marine reinsurance contract:** it is based on the principles laid down in law for the conduct of direct marine insurance (insurable interest, utmost good faith, proximate cause, indemnity, subrogation).
- **No legal relationship between the insured and the reinsurer:** unless the policy otherwise provides, the original insured has no right or interest in respect of reinsurance (s. 9(2) of MIA 1906).
- **The “Cut-Through” clause.**
- **Forms of reinsurance:**
 - *facultative:* each risk is considered separately by the reinsurer. *Drawbacks:* e.g. the large amount of clerical work, the time taken to place a risk, lower commission. *Purposes:* e.g. to reinsure special risk or excess of the existing treaty limits;
 - *treaty:* the reinsurer no longer examines each risk individually and he has no power to decline or rate a risk as long as it falls within the scope of the treaty. There are also facultative obligatory treaties and open covers.
- **Categories (types) of reinsurance:**
 - *proportional:* quota share, surplus;
 - *non-proportional:* excess of loss, stop loss, aggregate excess of loss.

- **Retrocession:** “reinsurance of reinsurance”.
- **Fronting reinsurance:** one reinsurer “fronts” for another reinsurer.
- **Tonnage policies:** this is a contract between two underwriters whereby one reinsures with the other the likelihood of total losses in certain classes of vessel over an agreed period.

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Freightforwarding

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APPENDIX

Case Study

In January 2002, Best Trading Co Pty Ltd contracts with Double Happiness Pte Ltd of Hong Kong for the sale of 15MT of stilton cheese, 15 MT of gorgonzola cheese and 30 MT of cheese spread in jars, all on terms CIF Hong Kong. Best trading engages Sendit & Hope Forwarders Pty Ltd to arrange for door to door carriage from its Melbourne cool store to Double Happiness's Hong Kong cool store.

The consignment of cheese is stuffed into 4 reefer containers by Sendit & Hope at Best Trading's Melbourne cool store. The stilton is in one container, the gorgonzola in another and the cheese spread in two others. All of the cheese is to be carried chilled but the stilton and the gorgonzola are to be carried at much lower temperature than the cheese spread.

Best Trading fills out an insurance certificate in the standard Institute Frozen Food Clauses A form, issued by Inherently Equitable Insurance Co., which is in identical terms to the Cargo A Risks form except for Clause 1 which provides:

1. *This insurance covers, except as provided in Clauses 4, 5, 6 and 7 below,*
 - 1.1 *all risks of loss of or damage to the subject-matter insured, other than loss or damage resulting from any variation in temperature howsoever caused.*
 - 1.2 *Loss of or damage to the subject-matter insured resulting from any variation in temperature attributable to*
 - 1.2.1 *breakdown of refrigerating machinery resulting in its stoppage for a period of not less than 24 consecutive hours*
 - 1.2.2 *fire or explosion*
 - 1.2.3 *vessel or craft being stranded grounded sunk or capsized*
 - 1.2.4 *overturning or derailment of land conveyance*
 - 1.2.5 *collision or contact of vessel craft or conveyance with any external object other than water*
 - 1.2.6 *discharge of cargo at a port of distress*

The certificate refers to 30MT cheese spread and 30MT "cheese various". Best Trading sends a copy of the completed certificate to Inherently Equitable.

Sendit & Hope arranges road carriage of the four containers to Melbourne container terminal where they remain for five days awaiting arrival of the "Platter", the ship on which they are to be carried to Hong Kong. During their stay at the container terminal, the settings and Partlow charts on the containers are monitored by Amnesiac Monitors Pty Ltd. The weather is very hot and unseasonably humid.

On arrival of the "Platter" at Melbourne, the containers are shipped on board and Three Monkey's Inc, the operator of the "Platter", issues a bill of lading naming Sendit & Hope as the shipper. The ship's departure is delayed for three days because of engine problems. The weather continues to be hot and humid. Finally, the "Platter" departs Melbourne.

After departure from Melbourne, the "Platter" experiences further engine trouble necessitating a salvage tow to Sydney, the next port of call. The vessel is detained there for a week, while

spares are air-freighted from Singapore and repairs are undertaken. Sydney is now experiencing hot and humid weather. Finally, the “Platter” departs Sydney.

By the time the vessel arrives in Brisbane, nearly three weeks after leaving Melbourne, the crew members have noticed an overpowering and unpleasant smell of decay from two of the four containers. Three Monkeys contacts Sendit & Hope, saying that the ship’s crew is revolting (as, by their smell, are the contents of the containers), and that the containers should be discharged from the ship in Brisbane. Sendit & Hope contacts Best Trading. Further investigation reveals three things:

1. that the powerful smell is coming from the two containers containing the stilton and the gorgonzola;
2. that the temperature setting on those two containers is at the level intended to chill the cheese spread;
3. that the temperature setting on the two containers containing the cheese spread is at a level colder than that intended for the stilton and the gorgonzola.

Best Trading agrees that the two foul smelling containers should be discharged from the ship at Brisbane, saying that it wishes to protect its commercial relationship with Double Happiness. It also requests the discharge of the two containers of cheese spread as it suspects it may have been damaged by over chilling. Three Monkey’s discharges the goods in return for the original bill of lading which had not yet been sent to Hong Kong.

When the containers are opened in Brisbane, it is found that the stilton and the gorgonzola are in an advanced state of decay. Much, but not all of the cheese spread has frozen solid. When thawed, the frozen cheese spread separates into a thick curd sludge and an unpleasant astringent whey.

Discuss the insurance implications.

[This problem is an adaptation of one set by Professor Martin Davies as an insurance hypothetical at the MLAANZ Conference 1996. The adaptation was made by Dr. Sarah Derrington of The University of Queensland, T.C. Beirne School of Law, Brisbane]