UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS AND LAW

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Delay in Marine Insurance Law

by

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ABSTRACT

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Delay in marine adventure is an important and frequent phenomenon of maritime transport and it affects various parties and their interests under several types of marine insurance policies, including but not limited to hull and machinery, cargo, freight and loss of hire. Losses arising from delay are almost always excluded under the standard forms of these policies and under the Marine Insurance Act 1906 (MIA). This thesis traces back the common law origins of the exclusion, identifies the motivations behind the exclusion and submits that the risk of delay and some types of losses arising therefrom were not always excluded under the common law. By introducing distinctions among the types of delay, the work argues that the judgments in favour of the exclusion of delay losses shall be interpreted according to the type of delay and shall not be authority for all types of delay. The findings of the work accordingly clarify and considerably restrict the scope of the exclusion.

The thesis also tackles the MIA provisions pertaining to the impact of delay on voyage policies. It argues that the relevant provisions are not clear and do not entirely reflect their common law background.On the ground that they have not been litigated since the enactment of the MIA, the research assesses whether they are obsolete and proposes that the provisions should be retained subject to reforms.

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I, ……Aysegul Bugra……[please print name]

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INTRODUCTION

1. General introduction of the topic

The occurrence of delay or some loss of time is fairly frequent in maritime transport. This emanates firstly from the fact that many events may result in delay, such as including but not limited to perils of the sea, strike, collision, detention, port congestion or health condition of crew members. Secondly, modern speed of transportation requires either a timely schedule in the prosecution of marine adventure or the prosecution of marine adventure in reasonable time. All these circumstances as well as a mere loss of time upon the voyage insured may result in various types of losses and expenses that may be incurred by several parties such as shipowners, voyage and time charterers, cargo interests, owners of projects whereby the start-up of projects depend upon timely arrival of goods carried by sea.

These losses may be recoverable from the parties who are liable for delay under individual contracts or depending upon the terms of the contracts, may have to be borne by the parties themselves who incur the losses. The relevant interests of the parties which can be affected by these losses or expenses can also be insurable under several types of marine insurance policies such as cargo, hull and machinery, freight, loss of hire and marine delay in start-up insurance. This research mainly attempts to discover the availability of insurance cover for losses and expenses relating to delay and loss of time incurred by maritime parties and to identify the impact of delay at the commencement of or during a marine adventure on an insurance policy. More generally, it seeks to look into the concept of delay in maritime transport from the perspective of marine insurance law and to propose reforms where the research justifies a need for change in the law as it currently stands.

2. Previous research on this area of law

Delay can give rise to complex issues and considerable litigation in respect of goods both under insurance law and the law on carriage of goods by sea. In particular, the determination of the meaning of “delay” and whether the cause of a loss is delay or a peril preceding delay are issues emanating from both of these fields of law. Marine cargo delays have previously

been analysed in the context of carriage of goods by sea,[1] however matters arising from the insurance law aspects of marine cargo delays have not been canvassed to a great extent.[2] Moreover, several textbooks tackled the impact of loss of time under freight policies[3] yet contended with providing an overview of the case law as it stands without expressing an opinion as to the relevant grounds supporting or criticising the current law.

In terms of hull and machinery insurance, previous research has not gone beyond providing the common law background of the reason why delay losses are excluded under hull policies. Less common forms of insurance such as loss of hire insurance and marine delay in start-up insurance have not generally been tackled so far to a considerable extent, hence to the best knowledge of the author there is currently no published work as to the analysis of the issues arising from delay under these types of insurance cover.

As for voyage policies, delay at the commencement of voyage and delay in voyage are concepts having their background mostly in the eighteenth and nineteenth centuries. They have therefore been analysed in light of their common law background in earlier and contemporary textbooks[4] yet no published work so far has substantially assessed whether their provisions under the Marine Insurance Act 1906 are obsolete or suggested reforms with a view of the modern standard form market wordings. Hence, this thesis aims at mostly filling a gap in the research on delay in field of marine insurance which was long overdue and also at continuing the previous line of inquiry that was particularly raised in respect of marine cargo delays.

3. Aims and objectives in a nutshell

[1] Ganado, Max and Kingred, Hugh, *Marine Cargo Delays*, London-New York-Hamburg-Hong Kong LLP, 1990
[2] See the textbooks Gilman, J; Merkin R; Templeman M.J; Blanchard C; Cooke J; Hopkins, P (ed.), *Arnould's Law of Marine Insurance and Average*, Sweet & Maxwell, 18th ed., London 2013 and Dunt, John, *Marine Cargo Insurance*, London: Informa 2009 for a relatively short overview of the marine insurance law on cargo delays. See also Coghill, E.H, Marine Insurance- Damage by Delay, *The Australian Law Journal* Vol 12, 1939, 427-430.
[3]Gilman, J; Merkin R; Templeman M.J; Blanchard C; Cooke J; Hopkins, P (ed.), *Arnould's Law of Marine Insurance and Average*, Sweet & Maxwell, 18th ed., London 2013 and Rose, Francis.D, *Marine Insurance Law and Practice*, London Singapore: LLP, 2007.
[4] For examples see Phillips, Willard, *Treatise on the Law of Insurance*, Vol I, 4th ed, Boston: Little, Brown, and Company, 1854; Maclahlan, David, *Arnould on the Law of Marine Insurance*, 6th ed., Vol. I, London: Stevens and Sons, H. Sweet and Sons, W. Maxwell and Son, 1887; O'May, Donald and Hill, Julian, *Marine Insurance Law and Policy*, London: Sweet & Maxwell, 1993; Gilman, J; Merkin R; Templeman M.J; Blanchard C; Cooke J; Hopkins, P (ed.), *Arnould's Law of Marine Insurance and Average*, Sweet & Maxwell, 18th ed., London 2013

The primary objective of this research is to assess whether the marine insurance law deals with the risk of delay effectively. So as to achieve this objective, it aims at presenting how the law currently deals with the risk of delay under several types of marine insurance policies, at discovering the rationale behind the principles underlying the current law, at indicating the difficulties which surround their application and at proposing reforms in order to achieve a clear, certain and effective approach to delay in marine insurance law.

In light of the foregoing objectives, the research will tackle the general exclusions for delay losses under the MIA 1906 and examine the history and development of these exclusions with a view of determining whether they reflect their common law background. Regard will also be taken to standard form market wordings in order to assess the extent of their similarity to the relevant MIA provisions. The thesis will inquire into the rationale behind not providing cover against losses caused by delay and will embark upon the analysis of whether and when delay can be considered as a speculative risk rather than a pure risk.[5] It will also speculate upon the recoverability of delay losses in the absence of clear exclusions in light of the doctrine of fortuity and assess whether this can be an alternative defence for insurers. The research will attempt to suggest limits to the generic view that losses caused by delay are excluded from the ambit of property policies given that they are economic and therefore consequential losses to the cover provided under these policies.

The thesis will reflect on standard form market wordings on hull and machinery and loss of hire insurance and identify the scope of cover for losses caused by delay or by loss of time. It will be pointed out that the time lost and the consequent losses arising therefrom are usually left to be borne by the assured, which may give rise to the suggestion that a standard form of delay cover can be provided to cover these types of losses not otherwise recoverable under hull and machinery and loss of hire policies. It is noteworthy that the current research merely identifies the reasons behind the need for a standard form delay cover and does neither propose a draft wording nor a template of a possible form of policy; which may be the subject of further research.

In examining whether the current law of marine insurance deals with the risk of delay effectively, focus will also be placed on the impact of the risk of delay on the attachment or

[5] A speculative risk is a risk whereby the assured may either gain or lose upon the occurrence of a peril; whereas a pure risk is where there is only the possibility of loss.

termination of risk under voyage policies. The research sheds light to the history and purpose of the relevant sections of the MIA and studies how the law shall be reformed to reflect the initial purpose for which the provisions were enacted given that they reflect their common law background only partially. Furthermore the work aims at concluding whether they are obsolete by analysing the modern standard market wordings so as to determine to what extent the modern wordings replace the relevant provisions.

One of the benefits of analysing the provisions of the Marine Insurance Act 1906 on delay is that many other common law countries such as Singapore, Hong Kong, Australia, New Zealand and Canada enacted either identical versions of the Act or its versions with minor amendments. Moreover the standard market conditions for hull, freight and cargo are in use not only in England yet in many other jurisdictions. The findings of the thesis would therefore influence the marine insurance law in England as well as in other common law jurisdictions.

So as to clarify the law on delay and to achieve a degree of certainty and consistency for future disputes that may arise in relation to the concept of delay reference will made -where necessary- to judgments delivered in the above mentioned common law jurisdictions. . It is noteworthy that these judgments cannot be direct authority for English courts, they are mentioned in this work only as a guidance that the English courts can make use of in resolving disputes arising from delay.

4. Structure of the research

The thesis is comprised of eight chapters. Chapter I decomposes the concept of delay into its various types and discusses with a speculative approach whether there may be circumstances where some types of delay shall not be considered as “risk”. Commencing with the analogy of delay losses to naturally occurring losses, the chapter goes on discovering the doctrine of fortuity which is an obscure area of law and assesses whether one of the motives behind the exclusion of delay losses can be based on the suggestion that some types of delay losses are not fortuitous. Moreover the chapter endeavours to determine the links between the doctrine of fortuity and provisions on delay losses in marine insurance policies.

Chapter II presents a historical review of the origins of the delay exclusion in s 55(2)(b) of the Marine Insurance Act 1906 in terms of cargo insurance and inquires into the motives

behind the exclusion and to what extent the provision represents the decisions which formed its background. The chapter continues with analysing particularly the rule on proximate causation which, in some of the cases on delay decided prior to the enactment of the MIA, had been interpreted as referring to the last cause-in-time whereby delay as the last cause was excluded. The work elaborates on whether the modern rule of proximate causation could change the approach to delay losses and whether some of the pre-MIA authorities on delay could survive the modern rule. The chapter canvasses furthermore the interaction of delay with perils of the seas and inherent vice along with speculations on possible outcomes of the application of recent authorities to circumstances involving these perils and delay.

Chapter III traces back the law on delay in earning freight and whether such delay results in loss of freight otherwise recoverable in freight policies. It continues with the analysis of the general exclusion of "loss of time" contained in standard form freight policies by setting the common law background against which the general exclusion was introduced into freight insurance. It attempts to determine the clause's scope of application with reference to circumstances involving loss of freight by frustration of adventure by delay and loss of hire by the operation of off-hire clauses under time charters. It further discusses whether the general exclusion is subject to the proximate cause rule or whether it imports a causation rule less strict than the proximate causation rule which would accordingly broaden its scope of application.

Chapter IV tackles primarily the generic view that economic losses and expenses arising from delay are not recoverable under cargo policies on the grounds that they are indirect losses to the insurance contract and that mere delay in delivery on a voyage does not result in loss of the adventure insured according to pre-MIA authorities. The chapter argues whether these suggestions are tenable in light of the law on directness of loss arising from delay in delivery, and of the approach to the concept of loss of adventure under the MIA and standard form cargo clauses. The chapter canvasses also the recoverability of physical and economic losses caused by delay under the conventions on carriage of goods by sea, namely the Hague-Visby Rules[6] as enacted in the Carriage of Goods by sea Act (COGSA) 1971 and the Rotterdam Rules.[7] It purports to assess the risk allocation for these losses between the conventions and

[6] The Hague Rules as Amended by the Brussels Protocol 1968
[7] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008

cargo policies and speculates on possible outcomes of the entry into force of the Rotterdam Rules in the UK on the cover provided for certain delay losses under cargo policies.

Chapter V tackles the scope of a relatively recent type of insurance, namely marine delay in start-up insurance which provides cover against financial losses caused by delay affecting projects requiring timely start-up. It analyses the standard form cover drafted by the Joint Cargo Committee in 2009 which is yet to be in use and the possible impacts of its close connection to marine cargo insurance insofar as the trigger of marine delay in start-up cover and their co-existence under the same policy are concerned. It determines potential insurable interest issues that may arise from the wording, speculates on problems relating to the identification of assured under the policy and identifies ambiguities in relation to the recoverability of sue and labour expenses.

Chapter VI focusses on the impact of delay causing or aggravating physical loss of or damage to the vessel under hull and machinery policies and the recoverability of expenses arising during delay pending repairs. It brings out the common law background of the general exclusion of delay under the MIA insofar as hull and machinery policies are concerned and seeks to determine the limits of the exclusion in light of the authorities decided prior and subsequent to the enactment of the MIA. The chapter continues with the main type of loss excluded under policies on ship, i.e. loss of hire and its connection to loss of time. It scrutinises the standard form of cover currently available in the insurance market –the London ABS Form 1983- with a particular focus on the exclusion of delay losses and discusses the recoverability of loss of hire and expenses arising during general average repairs both in light of the common law authorities and the York-Antwerp Rules. The chapter endeavours to determine the types of losses arising in connection with delay or loss of time that assureds are left to bear.

Chapter VII considers the implied condition as to commencement of risk as provided under s 42 of the MIA. It sets out the general background of the provision with reference to pre-MIA common law authorities and assesses to what extent the provision reflects earlier case law along with whether the section is compatible with standard market terms currently available. It continues with an attempt to identifying the motives behind the need for adopting a different approach to the law on delay at the commencement of risk than its common law origins and queries whether some of the common law authorities can still be implied into s 42.

The chapter considers the Law Commission proposals on voyage policies and on the duty of the assured of fair presentation of risk by discussing their potential impacts on the MIA provision and proposes reforms in respect of the provision.

Chapter VIII tackles the duty provided under s 48 of the MIA (delay in voyage) which requires the assured to act with reasonable despatch in prosecuting the marine adventure insured and which states that insurers are discharged from liability as from the time delay becomes unreasonable. It sets out the common law origins of the section and the analogy of deviation which was primarily the motive behind the provision along with a particular focus on the concept of alteration of risk which used to be the reason behind the analogy between deviation and delay. Furthermore the chapter analyses the concept of "unreasonable delay" as provided under s 48 by seeking to identify the criteria required to decide unreasonableness in light of the common law authorities. It queries the connection between the concept of unreasonable delay in s 48 and excuses for delay and deviation provided under s 49 which excuse assureds for their breach of duty. The chapter also looks into standard form cargo conditions with a view to determine the impact of delay in transit over the modern wordings and refers to authorities from other common law jurisdictions given the lack of litigation in England on that particular issue. Finally it attempts to identify whether the duty to act with reasonable despatch in 48 operates as a warranty in light of the authorities under English law and other common law jurisdictions and the Law Commission papers on warranties. It speculates how the remedy of the duty can be affected should the marine insurance law be reformed in respect of warranties.

CHAPTER I

DELAY AS A "RISK" AND FORTUITY

Introduction

This chapter shall discuss whether one of the reasons of the introduction of the general delay exclusion into marine insurance policies rests upon the fact that delay is a non-fortuitous event. In that respect particular focus will be allocated on types of delays such as delay within the control of the assured or ordinary and expected delays in voyage and whether they can be considered as non-fortuitous events, which may in turn justify the delay exclusion for these particular types of delays.

1.1. Definition of "peril" and delay

The "marine peril" is defined as "the perils consequent on, or incidental to the navigation of the sea".[8] The MIA also provides examples of marine perils such as perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, however does not limit the perils to this group providing that "any other perils, either of the like kind or which may be designated by the policy" may also be covered.[9] Delay is therefore a maritime peril which, although not expressly stated as a maritime peril under s 3, is incidental to the navigation of the sea and consequent upon the enumerated perils.

Rules for Construction scheduled to the MIA reads "perils of the seas" as "fortuitous accidents or casualties of the seas", [10] and the "peril" is qualified as the cause of the loss which must be fortuitous. [11] The term "perils" in traditional property insurance parlance refers to fortuitous, active, physical forces which bring about the loss. [12] Under English law, defining "marine risk" was approached reluctantly[13] however there were attempts to describe the term "risk" in a commercial insurance policy as an accidental cause.[14] "Risk" must be distinguished in this respect from the "risk" in the general sense of the term that insurers

[8] S 3 of the MIA 1906
[9] MIA s.3(2).
[10] r.7.
[11] Per Lord Halsbury *Hamilton v Pandorf* (1887) 12 App. Cas 518 at 524; similarly McLachlin J, *CCR Fishing Inc v Tomenson* [1991] 1 Lloyd's Rep 89, at 91.
[12] Bragg, M. E Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers, 20 *Forum* 1984-1985, 385-399, at 386-387.
[13] Lord Buckmaster in the Privy Council in *Grant, Smith and Co v Seattle Construction and Dry Dock Co* [1920] AC 162, 171-172 stated that "It is not desirable to attempt to define too exactly a "marine risk" or a "peril of the sea"…but it can be said that it is some condition of sea or weather or accident of navigation producing a result which but for these conditions would not have occurred".
[14] Bennett, H, Fortuity in the law of Marine Insurance *Lloyd's Maritime and Commercial Law Quarterly* 3 (Aug) 2007, 315-361, 316. See *Schloss Bros v Stevens* [1906] 2 KB 665

undertake which includes uncertainty about the occurrence of a loss. [15] Both concepts are essential for fortuity as they represent undetermined and uncertain occurrences. [16] This chapter shall discuss whether, according to the current law on fortuity and delay, delay or the peril resulting in delay shall be taken into consideration in assessing whether a loss is caused by a fortuitous event. It shall also analyse whether delay within the control of the assured and ordinary delays in the voyage and losses resulting therefrom can in some circumstances be qualified as non-fortuitous.

1.2. Naturally occurring losses and delay losses

Commonly, insurance contracts do not cover losses that are expected to occur in the ordinary course of events, without the intervention of any external accidental factor. Fortuity is a concept that was discussed by courts especially in the context of losses by inherent vice[17] and wilful conduct of the assured.[18] Fortuity of losses involving the peril of delay was merely canvassed in *The Wondrous*[19] in the context of loss of hire, although only the event and not the loss was considered for assessing fortuity and the discussion had turned on detention resulting in delay rather than delay alone.

Prior to the enactment of the MIA, delay was enumerated in *Thames and Mersey v Hamilton*[20] along with ordinary wear and tear, wilful conduct of the assured to qualify that every accidental circumstance resulting not from the formers, incidental to navigation and happening in the course of the navigation of the ship and causing loss to the subject matter insured would be a peril of the sea. [21] It is submitted that this approach assumes that no accidental circumstance may result from delay, an approach which was also taken in *Taylor v. Dunbar,*[22] one of the main authorities on delay which resulted in the current s 55(2)(b) of the

[15] Vaughan, E.G and Vaughan, M, *Fundamentals of Risk and Insurance*, 10th ed., John Wiley & Sons, 2008, 2. See also Willett, A. *Economic Theory of Risk and Insurance* New York, The Columbia University Press 1901, 29.
[16] *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1991] 1 Lloyd's Rep. 400 extended the interpretation of the term "risk" in the Institute War and Strikes Clauses Hulls-Time by including an element of fortuity in all the risks covered.
[17] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5.
[18] In the context of life insurance, *Beresford v Royal Insurance Co Ltd* [1938] A.C. 586.
[19] *Ikerigi Compania Naviera SA v Palmer (The Wondrous)* [1991] 1 Lloyd's Rep 400. A detailed discussion on this decision can be found below.
[20] *Thames and Mersey Marine Insurance Co v. Hamilton* (1887) L.R. 12 App. Cas. 484
[21] per Lord Bramwell in *Thames and Mersey Marine Insurance Co v. Hamilton* (1887) L.R. 12 App. Cas. 484, 492 although Lord Bramwell recognized "the probability that severe criticism might detect some faults in this".
[22] (1869) LR 4 CP 206.

MIA.[23] It was stated in that decision that "there are so many cargoes which are necessarily affected by the voyage being delayed". [24] Had the voyages been in the ordinary duration expected for that particular voyage, the goods would have arrived in good condition. One may argue that according to Keating J's speech, damage to goods by delay is considered as an event which is expected to occur in the ordinary course of events, nevertheless the delay needs to be an extraordinary delay so that such damage can be considered as inevitably resulting therefrom. Ordinary delays and fortuity will be discussed in more detail below.

The reason why delay is enumerated along with perils resulting in naturally occurring losses can rest upon the fact that delay, so far as perishables are concerned, mostly part of the process of natural deterioration of goods, particularly where it is of extraordinary length. [25] However, it can be argued that the fallacy with relating delay losses to inevitable losses caused by perils such as inherent vice and basing the exclusion of delay upon this argument is twofold. Firstly, the doctrine of fortuity is based on the happening of accidental "perils" and not of accidental "losses". In other words, the peril and not the loss must occur accidentally, or fortuitously. It would follow that in pure inherent vice cases[26] or ordinary wear and tear cases questioning whether these perils (and not losses caused by these perils) were "accidental" may turn out without satisfying result; they merely "exist" as happenings, in consequence of which inevitable losses may occur. Delay is nevertheless distinct from inherent vice and ordinary wear and tear in the sense that the peril of delay may or may not be accidental (e.g. where the delay is an ordinary delay, it may be argued that it is not an accidental delay). [27] It is thus of essence to resolve the issue of whether fortuity test should apply to delay as the peril or to losses arising therefrom which shall be discussed below in this chapter.

1.3. "All risks" policies and recoverability of delay losses in the absence of delay exclusion

[23] The authority of *Taylor v Dunbar* will be analysed in Chapter II.
[24] *per* Keating J, at 210. For Keating J, "it would even be dangerous to establish a precedent to the contrary" of the judgment delivered.
[25] In *CA Blackwell (Contracts) Ltd v Gerling General Insurance Co* [2008] Lloyd's Rep IR 529, HHJ Mackie QC held that as long as the loss was not the result of ordinary wear and tear or necessary deterioration but resulted from some sort of occurrence, the loss was fortuitous.
[26] e.g. *Noten v. Harding* [1990] 2 Lloyd's Rep. 283.
[27] Delay as a peril (not the loss caused by delay) may be "foreseeable" at the time when the insurance contract is made. Although foreseeability is not a criterion for assessing fortuity (*CA Blackwell (Contracts) Ltd v Gerling General Insurance Co* [2008] Lloyd's Rep IR 529) this point may be relevant to show the difference of delay from other events. It is an extraneous force whose occurrence may be evitable.

1.3.1. General considerations on fortuity

English authorities do not seem consistent in deciding whether the loss or the cause of the loss must occur fortuitously. In the leading authority on fortuity *British v Gaunt* it was stated that "Damage...must be due to some fortuitous circumstance or casualty",[28] in other words fortuity was assessed by reference to the peril causing the loss. More recently, the cause of the loss and not the loss itself was considered to be fortuitous in respect of losses arising from detention and delay.[29] Judgments from other common law jurisdictions were also delivered by assessing fortuity with reference to the peril and not to the loss.[30] The lack of clarity in respect of whether the cause of the loss or the loss itself must be looked at could have been due to the fact that "in insurance contract law, fortuity is a concept involving both the likelihood of loss and the cause of loss".[31] Another reason could have been the interpretation of specific wordings as was the case in *The Cendor Mopu*.[32]

In *The Cendor Mopu* the Supreme Court recently interpreted fortuity in the context of perils of the seas, which is defined as "fortuitous accidents or casualties of the seas" and does not include "ordinary action of winds and waves".[33] The Court held that "ordinary" qualified the "action" of the winds and waves and not the winds and waves themselves. It followed accordingly that the result of the peril and not the peril itself was the subject of the assessment of fortuity. It is submitted however that the judgment in this case and generally in decisions on perils of the seas would inevitably turn upon the interpretation of the definition of perils of the seas and cannot be therefore authority for a general suggestion that the result of the perils and not the perils themselves must be fortuitous. Judgments on fortuity delivered posterior to *The Cendor Mopu* made this point clear albeit they were also decided in the

[28] [1921] 2 A.C. 41, 47. Moreover Lord Sumner in *British & Foreign Marine Ins. Co Ltd v Gaunt* [1921] 2 A.C. 41, at 57 stated that "All risks" …includes the risk that when it happens to be raining the men who ought to use the tarpaulins to protect the wool may happen to be neglecting their duty. This concurrence is fortuitous; it is also the cause of loss by wetting". Accordingly the negligence as a cause of loss by wetting was fortuitous. Goddard L.J stated in *London & Provincial Leather Processes Ltd v Hudson* [1939] 2 K.B. 724, 730 that what is meant by "accidental and fortuitous" is that the "assured is deprived *by some unexpected acts* of his property in the goods or his possession in the goods". (emphasis added).

[29] In *Ikergi Compania Naviera SA v Palmer (The Wondrous)* [1991] 1 Lloyd's Rep 400 Hobhouse J discussed whether the detention of the vessel (as the cause of the loss, not the loss itself) was foreseeable to decide the fortuity.

[30] In the US, a fortuitous loss was considered as a loss caused by a fortuitous event, in Avis v Hartford Fire Ins Co 283 N.C. 142, 195 S.E. 2d 545, 548 (1973) as cited in Cozen and Bennett, Fortuity: The Unnamed Exclusion, at 225.

[31] Bennett, *Fortuity* at 315.

[32] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5

[33] r.7 of the Schedule to the Marine Insurance Act 1906.

context of perils of the seas.[34] It would follow from the above that, for the purposes of this chapter, fortuity shall be assessed in reference to the peril of delay and it shall be discussed whether there may be circumstances where delay does not occur fortuitously.

1.3.2. Fortuity, existing policy language and contractual exclusions

One of the main questions to be raised is what implication fortuity has on existing policy language. The doctrine on fortuity in English law is not very clear in this respect. *The Wondrous*[35] adopted an approach based on policy construction whereas Lord Summer in *British v Gaunt*[36] approached fortuity as a more fundamental rule, the approach of which was later on supported in *Blackwell*.[37] In the latter cases it was stated that the requirement for fortuity arises from the nature of the risks insured under an all risks policy rather than the precise words of the policy.

A loss can be caused by a fortuitous event or can itself be fortuitous and still fall within a contractual exclusion. [38] However, it is submitted that the contractual exclusion should give no room for doubt and shall not be ambiguous in order for the exclusion to apply nothwitstanding the fact that the event causing loss is fortuitous. In this case the unambiguous contract language would probably prevail and although losses are fortuitous, exclusions would avail insurers from liability under the policy. It was considered in *Wayne Tank*[39] that "…The effect of an exception is to save the Insurer from liability for a loss which, but for the

[34] See for instance *Versloot Dredging BV v HDI-Gerling Industrie Versicherung AG (The DC Merwestone)* [2013] EWHC 1666 (Comm) citing the decision of the Supreme Court of Canada in *CCR Fishing Ltd v Tomenson Inc (The La Pointe)* [1991] 1 Lloyd's Rep 89, page 91 col 2 was cited: "In general the word 'fortuitous', as interpreted by the cases, carries the connotation that the cause of the loss should not have been intentional or inevitable".

[35] *Ikerigi Compania Naviera SA v Palmer (The Wondrous)* [1991] 1 Lloyd's Rep 400.

[36] *British & Foreign Mar Ins Co v Gaunt* [1920] 1 K.B 903.

[37] *CA Blackwell (Contracts) Ltd v Gerling General Insurance Co* [2008] Lloyd's Rep IR 529. In this case, the wording of the policy was "against all damage...of whatsoever nature". The case involved delay, poor drainage, rain and it was decided that the loss was fortuitous. It was further stated that "Inevitability of loss is not mentioned in s. 55 of the MIA, because it operates at a much more fundamental level than the rule that underwriters are only liable for losses proximately caused by perils insured against. Underwriter can rely upon inevitability of loss, because the whole concept of insurance is about risks, not certainty". This was later stated also in *Mayban General Insurance Bhd v Alstom Power Plants Ltd* [2004] 2 Lloyd's Rep 609 per Moore-Bick J at 686.

[38] This was made clear by Blair J in *Global Process Sytems Inc, Global Process Systems (Asia Pacific) Sdn Bhd v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2009] EWHC 637 (Comm), para 90 where he enunciated that damage may be caused by inherent vice without being inevitable by reference to *TM Noten BV v Harding* [1990] 2 Lloyd's Rep. 283, he also added that not being factually inevitable did not mean that the loss was fortuitous. See also the American case *Goodman v Fireman's Fund Insurance Co*, 600 F.2d 1040 (4th Circ. 1979).

[39] [1974] QB 57.

exception would be covered. The effect of the cover is not to impose on the Insurer liability for something which is within the exception".[40] According to this reasoning, extraordinary delays which can be considered fortuitous[41] and loss resulting therefrom would be covered but for an unambiguous exclusion clause. Therefore, if it can be argued that exclusion provisions such as s 55(2)(b) are not clear as to what types of delays are excluded, the essential type of delay that is purported to be excluded in this type of exclusion provisions can arguably be extraordinary delay and loss arising therefrom. This would be in line both with the pre-MIA authorities of *Schloss Brothers v Stevens*[42] and *Taylor v Dunbar*[43] which decided that losses arising from unreasonable delay are not recoverable under a cargo policy.

In addition to the above, it was suggested that delay cover may be provided by including the wording "deterioration from any cause"[44] against a higher premium or by certain standard form market clauses. [45] In all risks policies or in named perils policies where no specific exclusion clause is found the recovery is subject to the occurring of fortuitous losses. Suggestions were made as to the fact that the term "all risks" is sufficient to exclude any liability for loss or damage due solely to delay and inherent vice.[46] It is submitted however that an "all risks" policy would cover merely fortuitous delay and losses resulting therefrom.

After *The Cendor Mopu*[47] which classified inherent vice not as an exclusion yet rather as a description of circumstances where there was no peril of the sea, one of the questions is whether this reasoning would also apply to delay. This would connote that where there is no

[40] *ibid*, *per* Cairns LJ at 69. This view was previously mentioned in *P. Samuel & Co. Ltd. v. Dumas* [1924] A.C. 431, 467 and 468, per Lord Sumner; and in *Atlantic Maritime Co. Inc. v. Gibbon* [1954] 1 Q.B. 88 which was a case on delay losses, per Sir Raymond Evershed M.R. at pp. 118, 119 and Morris L.J. at p. 138.
[41] Contrary to ordinary delays on a voyage.
[42] [1906] 2 KB 665
[43] (1869) LR 4 CP 206
[44] Dover, V *A Handbook to Marine Insurance*, 8th ed. (London: Witherby 1975), 408. However this wording is not standardised and in other national markets using Institute Clauses where delay is strictly excluded, the assureds may be at a disadvantage in asserting that such cover is a legitimate concern of a marine insurance policy.
According to UNCTAD Legal and Documentary Aspects of the Marine Insurance Contract's document TD/B/C.4/ ISL/27/ Rev.1 (1982), p.35, a majority of the replies from developed market-economy countries to the questionnaire of the secretariat of the UNCTAD on cargo delay cover indicated that coverage for losses caused by delay is possible usually on *ad hoc* basis and usually in the form of coverage for physical loss or damage only. One of the responses from a developing country using British conditions indicated that due to the absence of a standard delay cover wording, the insurance companies stick to the terms and conditions stipulated by the Institute of London Underwriters which specifically exclude delay.
[45] cl. 4 of the Institute Frozen Food Clauses (Excluding Frozen Meat) "Full Conditions" 01/04/68 provides:
"This insurance covers loss of, deterioration of or damage to the interest insured from *any cause* which shall arise during the currency of the insurance". Emphasis added.
[46] Templeman, 151.
[47] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5

perils of the sea, there would be no coverage on the ground that the loss could arguably have been caused by delay. This issue will be deliberated more in detail in the next chapter.

1.3.3. Ordinary delay in voyage and fortuity

Usually ordinary incidents of the voyage such as ordinary wear and tear and ordinary leakage and breakage are excluded from policy cover.[48] The essential reason why losses caused by such occurrences are excluded is given that "so as to consider an incident as a "peril" there must be some casualty, something that "could not be foreseen as one of the necessary incidents of the voyage". [49] The ordinary nature of the occurrences therefore would make the occurrences something else than a "risk". This reasoning gives rise to the question of whether an ordinary delay could be classified as a "risk" ,[50] where delay is in the ordinary course of trade expected by the insurer and assured and can be covered as an insurable peril where the policy contains no specific exclusion on delay. Delay may be expected to occur at the time the insurance contract is made, by way of example during a voyage in winter season between ports where it is a known fact that ice causes port congestion, the resulting delay of a few hours can be classified as ordinary delay. Albeit such delay is highly likely to arise in that situation, whether a loss will result therefrom is not certain. In a scenario where port congestion is provided for as an off-hire event under a charterparty and the off-hire event results in an ordinary delay in the voyage and causes loss of hire, the loss can arguably not be recoverable on the ground that it was caused by a non-fortuitous peril, i.e. ordinary delay. Evidently, other considerations may also arise as to whether loss of hire is caused by ordinary delay or by the event resulting in delay.

Given that most delays, not to say all, arise from perils preceding delay (either insured, uninsured or excluded), assessment of fortuity would result in the questions of whether firstly one of the perils leading to delay is to occur, secondly whether a delay is to result inevitably from such peril and thirdly cause a loss. It would follow that although it is not certain that perils insured under the policy will occur, it can almost be inevitable at least for some perils (e.g. deprivation perils such as detention and seizure) that a certain delay which is expected both by the insurer and the assured would result therefrom, in particular if such delay occurs

[48] s.55(2)(c); ICC A 1982 cl. 4.2. *A contrario* meaning of the exclusion of "ordinary leakage and breakage" may suggest that extraordinary leakage and breakage is not excluded and an analogy may be drawn in this respect with "ordinary delay".
[49] *Thomas Wilson Sons v The Owners of the Cargo per the Xantho (The Xantho)* (1887) L.R. 12 App. Cas. 503, 509 *per* Lord Herschell.
[50] Hodges, 435.

in the usual course of transit or trade and can be classified as "ordinary". The foregoing discussion on whether delay or loss caused by delay must be fortuitous shall accordingly be important in this respect. The fact that delay or loss caused by delay may or may not occur shall be treated differently. By way of example, in a sea transit it is highly likely that an ordinary delay will occur; or in case of port congestion likely that delay will occur however it may not be very likely that physical loss will occur from an ordinary delay where the cargo is not perishable and where the goods are suitably packed to withstand the ordinary course of transit.

The above shall not strictly be read as suggesting that merely delays which are likely to occur in the ordinary course of transit are ordinary,[51] and the reasons are twofold. Firstly, although no decision was made on the point, it was suggested that even a delay of considerable length and of uncertain duration is an incident of maritime adventure which is clearly within the contemplation of the parties and can be an ordinary delay which makes it something other than the cause of frustration. [52] Secondly, while deciding whether delay is ordinary or accidental, attention may be somewhat taken to the circumstances causing delay and to their accidental nature. In *Schloss Brothers v. Stevens*[53] the policy involved an all risks clause covering "all losses by any accidental cause of any kind occurring during transit". [54] The combination of disorganisation of the transport arrangements due to a revolution in the area of the port, the damp climate and storage conditions meant that a delay of two years arising from unusual and accidental causes necessarily involved exposure of goods to damp. The abnormal delay that resulted in damage of the cargo of bales was qualified as an accidental cause on the facts. The term "all risks by land and by water" meant for Walter J all risks whatsoever, i.e "all losses by any accidental cause of any kind occurring during transit". He asked "was the damage from some accidental cause" and answered that "there was an abnormal delay in the transit arising from unusual and accidental causes, which necessarily involved an exposure of the goods to damp". [55] The delay in this case had many preceding events such as revolution, damp climate and storage conditions; it was considered that delay

[51] The length of delay may be of importance in aggravating the loss caused by necessary incidents or ordinary perils of the voyage. In the US case *Cory v Boylston Insurance Co* 107 Mass 140 (1871) the Supreme Judicial Court of Massachusetts held that the underwriters do not assume the risk of the ordinary perils incident to the course of the voyage, nor of ordinary dampness of the holds though aggravated by the lenght of delay.
[52] Argued by Lord Sumner in *Bank Line v Capel* [1919] AC 435 at 458-459. In this case, the dispute turned upon whether a lengthy delay frustrated the object of a charterparty.
[53] [1906] 2 KB 665.
[54] *ibid* at 673.
[55] At 673.

was aggravated by such events. [56] It may therefore be argued that a delay caused by unusual circumstances is not an ordinary delay and is fortuitous, hence within the wording "all risks" and recoverable where the policy contains no express and unambiguous exclusion clause for delay losses.

1.3.4. Ordinary delay and "all risks" policies

According to the authority of *Schloss Brothers v Stevens*, it may be argued that loss caused by abnormal delay falls into a category of its own, and constitutes an all risks loss[57] nevertheless the careful reading of the case would suggest that the case may somewhat be authority that abnormal delay is an accidental cause "if resulted by unusual and accidental circumstances"[58] and not merely because it is an abnormal delay. According to this interpretation of the case a lengthy delay although abnormal may be classified as "ordinary" should it be caused by ordinary circumstances of the voyage. Focus would accordingly not be merely on the length of delay, yet also on whether the circumstance resulting in delay is accidental and unforeseen.

If the above reasoning is tenable, in "all risks" policies not containing an express exclusion clause as to delay, losses arising from ordinary delays and not arising from abnormal delays should be excluded on the ground of fortuity. Likewise, a general exlusion of delay, where the clause does not include the term "*any*" with respect to delay, may be open for construction that it excludes solely the ordinary delay and the resulting loss and not the abnormal, unexpected, extraordinary, unusual, unanticipated delay which may be accepted as a "risk". [59] This approach can be supported on two grounds. The first is an analogy to

[56] At 668. It is noteworthy that the policy in this case was "warranted free from capture, seizure and detention, and consequences thereof" however there was no defence set up under that clause although the delay resulted from the revolution in the area.

[57] Dunt, *Marine Cargo Insurance* 7.25. It was argued that this seems doubtful as delay is by its nature unusual following the reference of *The Chambers Dictionary*, 11th ed., 2008 which had, as cited, defined delay as "the (amount of) time during which something is put off". It is submitted that the search for defining delay with reference to dictionaries may be helpful yet may not be as authoritative as the general aspects of delay found in common law decisions.

Dunt suggested also that *Schloss* case merely anticipated the new proximate cause doctrine established later on by *Leyland Shipping Co v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, which can be supported given that it distinguished *Pink v Fleming* (1890) 25 QBD 396 although that the immediate cause doctrine was applied.

[58] [1906] 2 KB 665, 673 per Walton J "...there was an abnormal delay in the transit arising from unusual and accidental causes, which necessarily involved an exposure of the goods to damp" and the case was distinguished from *Pink v Fleming* (1890) 25 QBD 396 on the basis that in that case the assured needed to prove that the damage resulted directly from collision whereas in this case it needs to prove that the loss is the direct result of "some such accidental cause".

[59] It was considered by Keating J in *Taylor v Dunbar* (1869) LR 4 CP 206 at 210 that there was no case holding a loss caused by "unexpected duration of the voyage" covered, even if the delay is caused by perils insured

ordinarily occurring losses. If the term "all risks" inherently excludes non fortuitous events such as ordinary wear and tear or inherent vice, their express exclusion in the policies must mean something other than "ordinary" wear and tear, for instance an extraordinary wear and tear.[60] The exclusion of delay in all risks policies makes no reference to "ordinary delay", therefore would arguably exclude ordinary delay which would not be considered as fortuitous. Moreover, an ordinary delay, as an event foreseeable by both the insurer and assured at the time of the contract can be considered as part of the definition of perils of the seas if it results therefrom, otherwise it can be part of the preceding peril resulting in delay. It is controversial whether losses arising from these events could be considered as caused by delay; delay can arguably not be a separate cause in this case and so long as the preceding peril is an insured peril, the loss can be taken to have been caused by a fortuity and therefore recoverable. Alternatively, losses arising during an ordinary delay would likely to allude that the proximate cause of the loss is a peril other than delay, in the case of perishables therefore the initial unsuitability of packing, inherent vice or uncargoworthiness of the vessel.

As to abnormal delays caused by accidental circumstances, and which were not in contemplation of the assured, albeit they can be classified as fortuitous they would likely to cause a loss to perishables given their length. Insurers would not likely to be bound by a peril of unknown continuance which would aggravate the risk of loss, yet clear wording would be required and it is controversial whether a general delay exclusion could suffice to strike out a loss caused by a fortuitous delay, i.e. extraordinary delay.

1.4. Delay beyond the control of the assured and s 55(2)(b)

The general delay exclusion under s 55(2)(b) and the Institute Cargo Clauses do not specify whether losses caused by delay beyond the control of the assured are also excluded; however there are views in favour of the suggestion by virtue of the general scope of the clause.[61] Under most of the Institute Clauses delay beyond the control of the Assured does not terminate the cover,[62] yet this shall merely relate to the termination of cover and not to the scope of the exclusion of delay losses. [63] The question with respect to the recoverability of

against. If the suggestion is correct, insurers should draft the exclusion clauses in all risks policies as "losses caused by *any* delay, *whether ordinary or extraordinary*".

[60] Cozen and Bennett, 250

[61] Dunt, *Marine Cargo Insurance* 11.64.

[62] This issue is discussed in detail elsewhere in this work.

[63] *Lam Seng Hang Co Pte Ltd v The Insurance Corporation of Singapore Ltd* [2001] SGHC 31. Some standard forms provided for clearer wording in this respect, e.g. Corn Trade F.P.A Clauses 1961 providing: "Subject to

losses caused by delay beyond the control of the assured on the ground that it is accidental and therefore fortuitous could be of interest particularly where a policy does not contain a general delay exclusion clause as well as where the exclusion clause is considered as ambiguous and interpreted *contra proferentem*.

An analogy may be drawn in this respect between losses caused by delay within the control of the assured and losses caused by wilful conduct of the assured which are excluded for want of fortuity.[64] It was stated in *The Wondrous*[65] that a policy should not be construed as covering the ordinary consequence of voluntary conduct of the assured arising out of ordinary incidents of trading, as this would not be a risk. The test in *The Wondrous* required two stages, namely that the loss must be unexpected from the point of view of the assured and that it must not be within the control of the assured. [66] With respect to the latter, an assured may cause loss of time by not paying the customs fees that can consequently result in damage to goods. [67] In this case a delay within the control of the assured that causes the loss may be accepted as non-fortuitous as the loss occurs by the mere passage of time without any further act involved by the assured. It goes without saying that this case is of importance particularly with respect to deprivation perils such as detention and strikes which naturally contain an element of delay. Accordingly, where a deprivation peril is ensued by a delay within the control of the assured, [68] any loss resulting therefrom would have been caused (proximately or not) by the conduct of the assured and not by a fortuity. This would particularly apply to situations where the loss has an inevitable connection with loss of time, for instance in respect of loss of hire.

1.5. Does delay or the peril causing delay have to be taken into account in assessing fortuity

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the provisions of Clause 3 hereunder this insurance shall remain in force during (i) deviation, delay beyond the control of the Assured, […] but shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay […]."

[64] S 55(2)(a)

[65] *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1991] 1 Lloyd's Rep. 400, 416.

[66] For a more detailed analysis on this aspect, please see Davey, J and Coggon J Life Assurance and Consensual Death: Law Making for the Rationally Suicidal, *Cambridge Law Journal* 65(3) November 2006, 521-548, 530.

[67] As in *Safadi v Western Assurance Co* (1933) 46 Ll. L Rep 140. A cargo of bales of cotton was destroyed by fire during transit whilst they were delayed in the Customs House at Beirut. The goods had not been released by the Customs because nobody had paid for them. The insurers refused payment as they contended the delay was within the control of the assured and the court held in their favour.

[68] Where for example after the initially forced detention comes to an end, the vessel is detained for a longer time because the assured fails to provide necessary documents to satisfy customs authorities for the release of the vessel. In *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1991] 1 Lloyd's Rep. 400 the loss of hire was caused by a detention given that the customs duties had not been paid by the assured.

In *The Wondrous*[69] Hobhouse J. dealt with interpreting "loss of hire" under a freight policy. Owing to the fact that customs duties had not been paid (this was characterised by Hobhouse J as the voluntary conduct of the assured) the vessel was detained by harbour authorities which caused a delay resulting in loss of hire. One of the questions raised was whether delay was fortuitous and Hobhouse J referred to the detention peril and not to delay in deciding whether it was foreseeable at the time when the contract was concluded. He noted that the consequence of a voluntary conduct of the assured (which is delay) would not be described as fortuitous and that in the absence of any statement to the contrary no policy should be construed as "covering the ordinary consequences of voluntary conduct of the assured arising out of the ordinary incidents of trading". [70] This case may therefore stand as authority that the delay resulting from the wilful conduct of the assured could be qualified as a non-fortuitous event.

In *Schloss Brothers v Stevens*[71] the term "all risks by land and by water" meant for Walter J all risks whatsoever, i.e "all losses by any accidental cause of any kind occurring during transit". He asked "was the damage from some accidental cause" and answered that "there was an abnormal delay in the transit arising from unusual and accidental causes, which necessarily involved an exposure of the goods to damp". [72] The delay in this case had many preceding events such as revolution, damp climate and storage conditions; it was considered that delay was aggravated by such events. [73] It may be argued that it shall firstly be assessed whether delay is the proximate or a proximate cause of the loss and secondly, if it is the proximate cause whether it is fortuitous.

1.6. Knowledge of the assured as to the certainty of loss

The concept of uncertainty of loss in insurance law was considered in *Soya v White*[74] with the introduction of the knowledge of the assured [75] as a complementary requirement of

[69] *Ikergi Compania Naviera SA v Palmer (The Wondrous)* [1991] 1 Lloyd's Rep 400.
[70] At 416.
[71] [1906] 2 KB 665.
[72] At 673.
[73] At 668. It is noteworthy that the policy in this case was "warranted free from capture, seizure and detention, and consequences thereof" however there was no defence set up under that clause although the delay resulted from the revolution in the area.
[74] [1982] 1 Lloyd's Rep 136.
[75] Also considered as "conscious awareness of the certainty" by Kenneth, Abraham S in Peril and Fortuity in Property and Liability Insurance *Tort & Insurance Law Journal*, Vol 36, Number 3, Spring 2001, 777-802, at 792.

uncertainty. [76] The knowledge of inevitability of loss at the time of conclusion of the contract must suffice. [77] The knowledge of the assured must be approached cautiously as there is considerable view that it does not have a strict impact on deciding about fortuity. [78]

Although knowledge is not an essential criterion, it is important to set out at which time the knowledge is required to assess fortuity for losses caused by delay. The usual rule is that the knowledge of the assured is required at the conclusion of the contract,[79] moreover knowledge at the commencement of the voyage was also suggested. [80] This distinction is important for the delay that occurs at the commencement of the voyage due to for instance events such as strike or port congestion. In modern shipping, global communication systems allow the master and the shore office of the shipping line to keep shippers and consignees informed as to any possibility of delay at the commencement of the voyage. The later stage of commencement of the voyage compared to the conclusion of contract may therefore have an effect on the knowledge of the assured as to losses that may arise from delay.

Conclusion

Despite the ambiguity as to whether the doctrine of fortuity, as conceived by courts in England, refers to fortuity of perils or losses, it was submitted in this chapter that it refers to perils. This part also attempted to argue that delay has several types some of which may not be considered as a "risk" on the ground that they are not fortuitous, such as ordinary delays or delays within the control of the assured.

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[76] This introduction was made *obiter* by Donaldson LJ, at 149.

[77] Bennett Fortuity 358, this has also been stated in many leading American cases on fortuity such as *Compagnie des Bauxites de Guinée v Insurance Co of North America* 554 F. Supp. 1080 (W.D. Pa) rev'd, 724 F.2d 369 (3d Cir. 1983).

[78] In *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2009] EWCH 637 (Comm) at para 88, Mr. Justice Blair after holding that the loss was not inevitable did not go further to ask whether the claimants knew about the inevitability.Similarly see *Arnould* 17th ed 22-24, this was also submitted by the defendants in *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2009] EWCH 637 (Comm) and accepted by Mr Justice Blair at para.89. This view is also consistent with *Soya GmbH v. White* at page 140 where Waller LJ makes no distinction between known and unknown certainty of loss.

[79] *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1991] 1 Lloyd's Rep. 400, at 415-416. Furthermore it was stated that the knowledge could also have been assessed according to the time of making the charterparty (the decision was with respect to loss of hire under a loss of hire policy). It is submitted that the knowledge at the time of making the insurance contract shall be favoured on the ground that the extent of the knowledge of the assured may change between the date of the charterparty and the date of the insurance contract assuming that the latter is usually concluded after the charterparty is entered into.

[80] *Soya v White* [1980] 1 Lloyd's Rep 491, 504 per Lloyd J.

This finding accordingly gave rise to the question of whether general exclusions for delay losses such as the one under s 55(2)(b) of the MIA are ambiguous and shall be interpreted subject to the doctrine of fortuity. It followed that under all risks policies, the general exclusion of delay could not arguably exclude a loss caused by a fortuitous delay, i.e. an extraordinary delay. This reasoning stems from the suggestion that under all risks policies, cover is subject to the proof of a fortuity by the assured. This chapter tentatively proposes that the insurers, so as to effectively exclude delay losses, must address both fortuitous and non-fortuitous delays by clear wording in their policies.

CHAPTER II

CARGO INSURANCE AND DELAY: PHYSICAL LOSS TO THE SUBJECT-MATTER INSURED

Introduction

The main interest covered by a cargo policy is physical loss of or damage to the cargo. This type of loss has been the subject of the earliest cases on delay through which the current

exclusion of delay losses in s 55(2)(b) of the MIA and the standard market conditions have been developed.

The motives behind excluding these losses were mainly twofold: The first one rested upon an analogy to inherent vice as an excluded event, and the second one related to the approach to proximate causation in the late 19th century which sought to exclude delay as the last cause in time. This chapter will analyse the origins of the delay exclusion from the scope of cargo policies so as to determine whether the exclusion in the MIA reflects earlier case law and assess whether the earlier authorities can survive the changes in law as to the rule of proximate causation. It will also be speculated on how the new rules on causation can be applied to circumstances involving delay as a cause of loss.

Throughout this analysis, reference shall be made to decisions from other common law jurisdictions to illustrate certain aspects of the law relating to physical losses to cargo caused by delay, which in England, have not been litigated after the enactment of the MIA.

2.1. Delay and loss by deterioration

In cargo insurance, delay cover may be provided in the British market on an *ad hoc* basis by express provision in the policy,[81] by including the wording "deterioration from any cause"[82] against a higher premium or by certain standard form market clauses. [83] Moreover even after the conclusion of the insurance contract, the insurer may extend the cover to losses caused by delay by endorsement. [84]

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[81] *Lewis Emanuel & Son Ltd v Hepburn* [1960] 1 Lloyd's Rep 304

[82] Dover, V, *A Handbook to Marine Insurance,* 8th ed., London: Witherby 1975, 408. However this wording is not standardised and in other national markets using Institute Clauses where delay is strictly excluded, the assureds may be at a disadvantage in asserting that such cover is a legitimate concern of a marine insurance policy.
According to UNCTAD Legal and Documentary Aspects of the Marine Insurance Contract's document TD/B/C.4/ ISL/27/ Rev.1 (1982), p.35, a majority of the replies from developed market-economy countries to the questionnaire of the secretariat of the UNCTAD on cargo delay cover indicated that coverage for losses caused by delay is possible usually on *ad hoc* basis and usually in the form of coverage for physical loss or damage only. One of the responses from a developing country using British conditions indicated that due to the absence of a standard delay cover wording, the insurance companies stick to the terms and conditions stipulated by the Institute of London Underwriters which specifically exclude delay.

[83] cl. 4 of the Institute Frozen Food Clauses (Excluding Frozen Meat) "Full Conditions" 01/04/68 provides:
"This insurance covers loss of, deterioration of or damage to the interest insured from *any cause* which shall arise during the currency of the insurance". Emphasis added.

[84] An analogy may be made in this respect to *Kiriacoulis Lines SA v Compagnie d'Assurance Maritime (The Demetra K)* [2002] Lloyd's Rep. I.R. 795 where the insurer by endorsement extended the cover to war risks and malicious acts which were initially excluded.

Some national insurance legal regimes may also provide limited extensions for delay[85] and arguments were put forward for the expansion of the standard marine insurance coverage to include delay caused by risks other than those normally insured under a policy, as well as commercial losses of the assured. [86] Albeit delay cover may be provided as above, losses caused by delay are customarily excluded in standard form cargo policies.[87] The common law background of this generic exclusion shall be scrutinised herebelow in view of the extent thereof in terms of types of delay.

2.1.1. A general review of the pre-MIA authorities

Delay is an event which is capable of causing loss of or damage to perishable goods. Therefore most of the cases constituting the basis of the current law on delay as an excluded peril are on deterioration of perishables. Close examination of these early cases is required so as to determine in which context they assessed delay and whether they are currently still good law.

Perhaps one of the most influential decisions of the law on delay was *Gregson v Gilbert.*[88] The negligence of the captain in finding the destination of the vessel caused delay on the voyage and want of provisions, which consequently resulted in the natural death of the slaves which were at the time considered as cargo. Following this decision, the Statutes 30 Geo. 3, c. 33, s. 8, and 34 G. 3, c. 80, s. 10 had been passed prohibiting the insurance on slaves for losses caused by natural death or ill-treatment. The delay in this decision was not considered as an event that had to be excluded, it was merely stated as an event resulting in the natural death of the slaves if coupled by want of provisions and the negligence of the captain.

[85] e.g. Norwegian Insurance Plan for the Carriage of Goods of 1967, s.68.

[86] Selmer,13. Commercial losses caused by delay shall be analysed under Chapter IV.

[87] e.g. Institute Cargo Clauses A-B-C 1982 cl.4.5.; Institute Frozen Food Clauses A-B-C 1986 cl.4.5.; Institute Commodity Trades Clauses A-B-C 1983, cl.4.5. ; Institute FOSFA Clauses A-B-C 1985 cl.4.5.; Institute Frozen Meat Clauses A 1986, cl.4.5; Institute Frozen Meat Clauses A-24 hours breakdown 1986 cl.4.5.; Institute Natural Rubber Clauses 1984 cl.4.5.; Institute Bulk Oil Clauses 1983 cl.4.4; Institute Timber Trade Federation Clauses 1986 cl.4.5. In all these conditions the wording used for exclusion is "loss of or damage to goods proximately caused by delay".
United Nations Cargo Insurance All Risks Cover 1987 provides in cl.3.8:
"loss, damage, liability or expense caused by delay, even though the delay is caused by a peril insured against, except liability or expense payable under clause 5 (the General Average and Salvage Clause)".

[88] *Gregson v Gilbert* (1783) 3 Douglas 232.

Following the enactment of the statutes on natural death of slaves, a similar issue was raised in *Tatham v. Hodgson*[89]a few years later. Several slaves had perished for want of food owing to the prolongation of the voyage due to bad weather. The dispute arose as to whether the loss was by perils of the seas or by the natural death (mortality) which was statutorily excluded. The Statute 30 Geo. 3, c. 33, s. 8 on which the policy was then based, had enacted, that it was not lawful for any owner of a vessel to insure any cargo of slaves against any loss or damage, except the perils of the sea, piracy, insurrection, or capture by the King's enemies, barratry by the master or crew, and destruction by fire. Moreover the 34 Geo. 3, c. 80, s. 10, which had recited the former Act, provided that no loss or damage was recoverable on account of the mortality of slaves by natural death or ill treatment, or against loss by throwing overboard of slaves on any account whatsoever.

The ordinary course of the voyage was six to eight weeks yet the voyage had lasted for over six months, in other words the delay was unreasonably long for the specific voyage. It was argued that the length of the voyage arising from perils of the seas was the genuine source of the death and that accordingly the loss was not natural, thus excluded.[90] Delay was not discussed as a cause of loss which was not covered by the policy. It was merely touched upon as an event causing death because of want of provisions whereas the essential issue was whether the death was natural given the statutory exclusion.[91] It would follow that delay would not have caused the natural death if not for the want of provisions. It was merely an event induced by perils of the seas, causing the exhaustion of the provisions which resulted in the loss. Accordingly, the natural death would not have been caused but for the delay; nonetheless the relation of delay to the loss was merely incidental in that it would not have caused the loss had there been sufficient provisions. The Court decided that the loss was by mortality and not by perils of the sea by referring to the intention behind passing the Statute, namely to prevent situations where masters would knowingly equip the vessel with less provisions then required and claim against insurers for the loss of slaves.

The length of the voyage in this case was nothing more than a remote cause, an event within the chain of causation which contributed to the loss; yet was not particularly the proximate cause. Although Lawrence J mentioned that delay could be the cause of the loss where the

[89] *Tatham v Hodgson* (1796) 6 T.R. 656.
[90] At 658.
[91] i.e. the statutes 30 G. 3, c. 33, s. 8, and 34 G. 3, c. 80, s. 10.

slaves had died of fevers occasioned by the length of the voyage,[92] that was merely due to the natural death exclusion of the Statute. Perhaps the only *ratio* that can be extracted from the judgment is that unreasonable delay in the voyage was considered distinct from the perils of the seas (whereas an ordinary delay could have been a natural result of the perils of the seas and not a distinct peril) and had occasioned want of provisions and consequently natural death which was excluded from the cover according to the Statute.

Given that the judgment was delivered upon consideration of the provisions of the Statute, it is not clear whether the authority of *Tatham v Hodgson* is good law for the general suggestion that delay losses should be excluded under English law. It is submitted that this argument can be supported by the view expressed by Abbott C.J in *Lawrence v Aberdein* [93] who considered [94] that underwriters would be liable where live animals perish for want of provisions as a result of prolongation of the voyage by perils of the sea, in the absence of an express exclusion of mortality or statutory prohibition. This background used to be the background against which the leading cases on exclusion of delay, i.e. *Taylor v. Dunbar*[95] and *Pink v Fleming* [96]were decided.

In *Taylor v Dunbar*[97] a cargo of meat had become putrid given that the vessel carrying the cargo had delayed due to bad weather. The meat was in no way affected or injured by the sea water however had to be jettisoned because of the damage. It was held by the court that the reason why the goods deteriorated was delay on the grounds that it was not among "other perils, losses and misfortunes" recoverable under the policy and that "delay in the voyage has never been considered as covered". [98] This principle was subsequently embodied in the Marine Insurance Act 1906[99] and has been thenceforth one of the few leading cases on delay.

Two points require clarification in respect of the decision: Firstly, the judgment contained no particular reference to causation and delay as the last cause-in-time.[100] Upon the facts of the

[92] At 659.
[93] *Lawrence v Aberdein* (1821) 5 B. & Ald. 107.
[94] At 111.
[95] *Taylor v. Dunbar* (1869) LR 4 CP 206.
[96] (1890) L.R. 25 Q.B.D. 396.
[97] (1869) LR 4 CP 206.
[98] *per* Montague Smith, J at 211.
[99] s.55(2)(b).
[100] According to *Arnould*, this fact is the reason why *Taylor v Dunbar* may still apply to post-*Leyland* cases on delay as cited by Dunt, J and Welbourne, W *Insuring Cargoes in the New Millenium: The Institute Cargo*

case, there was more than one delay and albeit the first delay had occurred prior to some perils of the seas, the unexpectedly long delay had incidentally occurred last in time. It is submitted that considering the approach taken by courts to proximate causation in the nineteenth century,[101] it would nevertheless not be a fallacy to argue that the unreasonably long delay in the voyage was held not to be covered as it was the last cause in time although this was not expressly held in the decision.[102]

The second point relies on the fact that the interpretation of *Tatham v Hodgson* lacked consideration of the statutory exclusion of mortality which was the main ground upon which the earlier judgments on delay were delivered as well as the speech of Abbott C.J in *Lawrence v Aberdein.*[103] Even where it is assumed that *Taylor v Dunbar* was a correct interpretation of the early cases on delay, it may have nevertheless been overinterpreted when it was enacted in the MIA 1906 as to apply to all types of delay, both to ordinary and extraordinary delays. This is given that there were specific statements in the judgment as to the comparison between the ordinary duration of the voyage and the actual and unreasonable length of the voyage.[104] One of the reasons according to which an unexpected duration of the voyage can be held as a proximate cause or a cause of the loss can be because this type of delay may not be the natural result of a preceding peril (e.g. perils of the seas and ordinary delay resulting from it) and in this sense it may be a delay that could break the chain of causation between the initial peril and the loss.

It is well known that the MIA 1906 is an Act codifying the pre-MIA authorities and that the common law authorities continue to apply, save in so far as they are inconsistent with the express provisions of the Act.[105] The exclusion of delay in s 55(2)(b) is general and ambiguous as to whether it excludes both ordinary and extraordinary delay. It can therefore

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Clauses 2009, Clyde & Co, version reprinted by Lloyd's List Law from Thomas, D.R, *The Modern Law of Marine Insurance Volume 3*, 6.37.

[101] *Thompson v Hopper* (1856) 6 E & B 172 , 937; *Dudgeon v Pembroke* (1877) 2 App Cas 284

[102] *Pink v Fleming* (1890) L.R. 25 Q.B.D. 396 is the leading case on delay applying the last-in-time causation rule. It is not very clear from the reference of *Pink v Fleming* to *Taylor v Dunbar* as to whether the reference was to the application of the last-in-time causation or whether losses caused by delay were never covered under English law. *Taylor v Dunbar* had not expressly applied the last-in-time causation rule and the ratio of the decision rested upon that merely losses caused by unreasonably long delays were not recoverable. The delay in *Pink v Fleming* was arguably not of such kind.

[103] (1821) 5 B. & Ald. 107

[104] It was stated in the decision that the ordinary voyage of the two vessels was normally fifty hours; whereas the delay of one of the vessels was a week and the other vessel had delayed for five days. The reference in the decision to *Tatham v Hodgson* (1796) 6 T.R. 656 where, according to the Court in *Taylor v Dunbar* the loss was "occasioned by extraordinary delay in the voyage from bad weather" can also support this argument.

[105] MIA 1906, s 91(2).

be argued that against the background of earlier decisions, the exclusion of only extraordinary delays can be implied into s 55(2)(b).[106] It is noteworthy that in some of the Scandinavian jurisdictions, the unusual length of delay is an essential element for the cover available for deterioration losses caused by delay.[107]

2.1.2. "Last cause-in-time" rule

According to the approach to proximate cause rule prior to *Leyland*,[108] the cause must not have been too distant to the loss in time or in space. [109] The rule was applied in the leading case on deterioration and delay *Pink v Fleming*[110] where a cargo of fruit was insured under a marine policy against "damage consequent on collision". The vessel carrying the cargo had sustained damage due to a collision in consequence of which she had to be repaired and the fruits be discharged and re-shipped, during which they had perished. The dispute turned on whether the proximate cause of the loss was delay or collision, in which case the assured would have been able to recover. The speeches delivered as to the cause of the loss approached the matter from different angles. It was stated by Lindley L.J. and Bowen L.J that the damage had been partly caused by delay and partly by the handling of the fruit which necessarily took place in the discharging and re-shipment for the purposes of the repairs;[111] whereas Lord Esher MR, delivering the leading speech, found that the handling was the proximate cause of the loss.[112] The Court had observed that delay was not within the wording "consequent on collision" as it had not resulted naturally from the collision. The ground for this argument was that a collision might have occurred without either delay or handling of cargo. The concerns with such an argument are twofold; firstly that it has an inclination of

[106] It can be argued that the word "delay" alone is sufficient to describe a situation where the ordinary duration of the voyage is exceeded. Nevertheless, not every delay (in the sense where the ordinary duration of the voyage is exceeded) would be capable of causing cargo damage whereas every delay in that sense could cause loss of market. Cargoes are usually shipped adequately to overcome ordinary delays in the voyage, and most of the cargo damages usually occur where extraordinary delays are involved save in so far as there was inadequate packaging or inherent vice at the commencement of the voyage.

[107] The Swedish Marine Insurance Plan of 1957 s.157 (c) para.2: "If the voyage, on account of an incident as mentioned in the 1st paragraph (stranding), has taken longer time than normally must be expected, the insurer is liable for damage to the goods caused by the delay, provided that there has been at least three months delay".

[108] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350

[109] *Ionides v The Universal Marine Insurance Co* (1863) 14 CB (NS) 259, 289 per Willes J

[110] (1890) L.R. 25 Q.B.D. 396.

[111] By Lindley L.J. and Bowen L.J at 397-398.

[112] At 397. Lord Esher's reasoning was as follows: Without collision the loss would not occur however the loss had not occurred from the collision alone. The collision had resulted in the vessel being repaired and the cargo had to be discharged. If there was no repairs and discharge of the cargo, *consequent delay* and handling of the fruit the loss would not have happened. Collision was an effective cause of putting into port and repairs. For the repairs it was necessary to remove the fruit and such removal caused damage to the cargo. Accordingly "The agent… which proximately caused the damage to the fruit was the handling", at 397.

adopting but for causation which is no longer applicable following the proximate causation doctrine;[113] and secondly that some delay during the voyage is the natural consequence of collision even if handling is not, especially where repairs are necessary. The crucial point is whether the delay which ensues is unreasonably long compared to the expected duration of the voyage of the goods. Moreover, the reference of the Court to *Taylor v. Dunbar*[114] as an authority supporting their view is controversial. A closer examination of the latter as above would suggest that the reference of *Pink v Fleming* was not accurate.

It is submitted that the authority of *Pink v Fleming* can no longer apply[115] and losses caused by delay in circumstances where delay is the last cause in time can therefore no longer be excluded on this basis.

The principles arising from the above cases -as conceived at the time of the enactment of the MIA 1906 by Sir McKenzie Chalmers - were embodied in s.55(2)(b) nevertheless it is controversial whether the relevant section can still be interpreted according to the "last in time" causation, which shall be discussed in the subsequent part. A finding in this respect would have an impact on most of the common law jurisdictions as their relevant legislations contain equivalent provisions.[116]

2.1.3. Delay as a proximate cause in deterioration cases

i. General overview of proximate causation

The problem of causation involves prioritising some causes over others or rejecting the idea that some are causes.[117] The device developed to achieve finding a proximate cause of loss was codified by the MIA in s.55(1) which is a default rule and operates unless the policy

[113] That is, subsequent to *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.
[114] (1869) LR 4 CP 206.
[115] The earlier approach of "last cause in time" was abandoned with *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350. Post-*Leyland* authorities on delay in the United States observed that the authority of *Pink v Fleming* (1890) L.R. 25 Q.B.D. 396 could not be reconciled with that of *Leyland*. *Lanasa Fruit v. Universal Ins. Co.* 302 U.S.556 *per* Chief Justice Hughes at 567; *Brandyce v. United States Lloyds*, 207 A.D. 665, 203 N.Y.S. 10. For the discussion please see below.
[116] S 55(2)(b) of the MIA 1906 is applicable in Singapore by virtue of the Application of English Law Act 1993, Cap 7A, First Schedule, Part II, item 5. The equivalent provisions in other common law jurisdictions are as follows: Marine Insurance Act 1909 (Australia) s 61(2)(b); Marine Insurance Act 1993, c.22 (Canada) s 53(2)(a); Marine Insurance Ordinance – Chapter 329 (Hong Kong) s 55(2)(b); Marine Insurance Act 1908, Public Act 1908 No 112 (New Zealand) s 55(2)(b).
[117] Lowry, J and Rawlings, P Proximate Causation in Insurance Law, *Modern Law Review* 68(2) 310-319, (2005), at 311.

otherwise provides.[118] The delay exclusion set out in the MIA[119] and in many other standard form policies is subject to the proximate causation rule, hence a close scrutiny of the rule is required so as to have a better understanding of delay exclusions and their ambit.

A strict reading of s.55(1) which expresses that an "insurer is not liable for *any loss not proximately caused* by a peril insured against"[120] raises an important issue as to proximate causation. It may be read as suggesting that the insurers would not be liable where a proximate cause of the loss is not expressly covered. This line of interpretation could invite the conclusion that *The Miss Jay Jay*[121] was not correctly decided[122] where the Court of Appeal had held that the assured could recover where loss was proximately caused by both a peril insured against and an uninsured peril. Against this background, it is possible to reconcile *The Miss Jay Jay* and s.55(1) on the ground that s.55(1) refers solely to single proximate cause situations.[123] This suggestion may be supported with the fact that before *Leyland*, [124] the proximate cause was accepted as the last cause in time, i.e. a single proximate cause was to be looked among other causes. The approach of judges in the pre-MIA decisions showed a determination to find a single cause and the possibility that there could have been two or more proximate causes was rarely acknowledged. [125] It would follow that the ensuing s 55(2)(b) on delay arguably applies to circumstances where delay is the single proximate cause of the loss.

[118] s.55(1) provides "Subject to the provisions of this Act, and unless the policy otherwise provides".
[119] s.55(2)(b).
[120] Emphasis added
[121] *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1987] 1 Lloyd's Rep 32
[122] Lowry, J and Rawlings P., at 314.
[123] Where the other cause is not a proximate cause of the loss.
[124] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.
[125] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, at 353, 371; *Board of Trade v Hain Steamship Co Ltd* [1929] AC 534, 541. Recently courts make attempts to find in favour of one cause rather than to content themselves with finding that there were concurrent causes, as was the approach in certain post-*Leyland* cases. For illustrations of recent cases decided in line of the former *please see Kiriacoulis Lines SA v Compagnie d'Assurance Maritime, Aeriennes et Terrestres (The Demetra K)* [2002] Lloyd's Rep IR 823 and *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5. For illustrations of cases decided with the latter approach, see *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1974] QB 57, 69 per Cairns LJ who suggested that the judges "should not strain to find a dominant cause". Similarly please see *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1987] 1 Lloyd's Rep 32. The Supreme Court in *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5, para 79 criticised this case in relation to its approach to the definition of perils of the seas, however presumed that it was not suggesting that where there were two causes both playing a role in the loss, the court must always treat them as equal proximate causes.

The reluctance to find a single dominant cause and the importance given to concurrent causes gives insurers room to exclude liability where one of the proximate causes is excluded. [126] This approach is of essence for delay exclusions which are ambiguous as to the type of delays and do not distinguish between a delay beyond and within the control of the assured. As a result of this approach policies would not meet the reasonable expectations of the ordinary assureds who are unaware of the rule[127] and who would expect to be covered in case of delay beyond their control and yet may be left without cover.

ii. Proximate causation and delay following *Leyland*

The approach of *Pink v Fleming*[128] to proximate causation and delay has not yet been challenged by a higher court in England. Nonetheless, the nineteenth-century cases on causation in relation to delay inevitably require careful consideration in the light of the abandonment of the last-in-time approach to proximate causation. There is considerable force in both of the arguments that post-*Leyland* rule of causation should apply to delay exclusions[129] and that the modern disputes on delay should be resolved according to the authorities of *Taylor v Dunbar* and *Pink v Fleming* owing to the fact that the MIA was enacted to reflect the positions established thereby. [130] It is noteworthy that even though it can be submitted that *Taylor v Dunbar* where last-cause-in-time rule of causation was not expressly applied can be reconciled with *Leyland* and is still good law, the type of delay there excluded was merely extraordinary delay.

[126] *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1974] QB 57.

[127] Lowry, J and Rawlings, P, 316. It is noteworthy that the interpretation of the policy according to the "reasonable expectation of the assured doctrine" is not yet adopted under English law however is a device that courts refer to where there are ambiguities in the policies. Nevertheless the English Law Commission has proposed in its Consultation Paper no.182 on Misrepresentation, Non-Disclosure and Breach of Warranty that business contracts concluded on insurers' terms (standard market policies) should involve an element of reasonable expectation of the assured which would establish a fair balance between insurers and assureds (at 1.37). The Commission pointed out that the system would be adopted while protecting also the legitimate benefits of the insurers. It is submitted that this proposal may arguably be accepted as an attempt to recognizing the doctrine of reasonable expectation of the assured under English law.

[128] (1890) L.R. 25 Q.B.D. 396.

[129] Bennett, *The Law of Marine Insurance*, 15-35.

[130] Gilman and Merkin, *Arnould's Law of Marine Insurance and Average,* 17th ed., 22-33. The editors of the 17th edition suggested that although *Pink v Fleming* was no longer good law given the abandonment of the last-cause rule, the authority of *Taylor v Dunbar* was not yet challenged in English courts. This was the ground upon which the editors favoured the view that the insurers will likely to exclude liability on facts similar to *Taylor v Dunbar*. The editors submitted that an authoritative resolution was long overdue. See also Coghill, E.H, Marine Insurance- Damage by Delay, *The Australian Law Journal* Vol 12, 1939, 427-430, 429 supporting the view that *Taylor v Dunbar* is still good law.

It is submitted that the former view is a better view for three reasons. Firstly the MIA had been enacted against the background of cases where courts were trying to find a single proximate cause of the loss, this approach was challenged by *Leyland* and was followed by lower courts in the following years.[131] Secondly, an analogy can be drawn from the inherent vice exclusion and the recent speech of Lord Mance in *The Cendor Mopu*, [132] where Lord Mance enunciated "…it might be thought relevant that the 1906 Act, crystallising statutorily the concepts of perils of the seas and inherent vice, was enacted against the background of the Victorian authorities, and before the definitive emergence of the modern conception of proximity".[133] This view can support the argument that the modern approach to proximate causation should be adopted in determining the dominant cause in lieu of the pre-*Leyland* authorities. Thirdly, post-*Leyland* key judgments on delay delivered in the United States,[134] albeit not applying the authority of *Leyland*, held that it is impossible to reconcile the ratio of *Leyland* and the ruling of Lord Esher in *Pink v Fleming*[135] as to the fact that the last cause in time must be looked at. Those key judgments shall be analysed below.

The consequence of suggesting that the last-cause-in-time rule of causation no longer applies to construe the delay exclusion in s 55(2)(b) would also extend to the construction of the same exclusion in the Institute Cargo Clauses.[136]

How to apply Leyland to delay cases

So as to be able to apply the decision of *Leyland* to cases involving delay, careful reading of *Leylan*d is required to distinguish what this case brought about with respect to "efficient cause". It was suggested that to find the efficient cause "the loss of the *kind* covered must be

[131] *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1974] QB 57, 69 per Cairns LJ who suggested that the judges "should not strain to find a dominant cause"*; JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay").* For more information on this point please see "Concurrent Causes and Delay" heading below.
[132] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5.
[133] At para 76.
[134] In *Lanasa Fruit v. Universal Ins. Co.* 302 U.S.556 *per* Chief Justice Hughes at 567; *Brandyce v. United States Lloyds*, 207 A.D. 665, 203 N.Y.S. 10. In the same line see also Dunt, J and Welbourne, W *Insuring Cargoes in the New Millenium: The Institute Cargo Clauses 2009*, Clyde & Co, version reprinted by Lloyd's List Law from *The Modern Law of Marine Insurance Volume 3*, Thomas, D.R.
[135] (1890) L.R. 25 Q.B.D. 396.
[136] The Institute Cargo Clauses dated 1982 contained the identical exclusion wording as s 55(2)(b).

inevitable, but the *extent* of the loss need only be such as would have been within reasonable contemplation or not unlikely to occur." [137]

According to this test, a delay of one day or one month in the carriage of perishable goods with adequate refrigeration would not make them dissimilar as such delay would not inevitably lead to the perishing of goods. Where no refrigeration is in place; whereas a delay of two days may not render delay as the proximate cause of damage to goods, a delay of one month could render it *the* or *a* proximate cause as such delay would inevitably result in loss of or damage to goods. This approach also draws a link to the earlier discussion with respect to unreasonably long delay and whether it is that type of delay that is purported of being excluded on the ground that it is likely to be the proximate cause of a loss. In case of inadequate refrigeration and delay, unseaworthiness (or uncargoworthiness) of the vessel can also be considered as a proximate cause of the loss. By way of example, the lack of refrigeration for frozen goods would inevitably result in loss which would make unseaworthiness the proximate cause of loss and delay could be an event aggravating the loss.

Identifying the proximate cause of loss rests upon identifying whether the loss is the inevitable consequence of a peril or whether the loss follows from that peril in the ordinary course of events. [138] It is therefore crucial to determine the circumstances where delay can be

[137] Clarke, M Insurance: The Proximate Cause in English Law *Cambridge Law Journal* 40(2), November 1981, 284-306, 288. The "loss of the *kind* covered" referred to the loss by seawater and explosion. The "*extent* of the loss" was the sinking given the time of the year and wartime conditions.
Clarke further develops his view at 289 suggesting that the proximate cause is the event, which, "in all the circumstances prevailing at the time of the event, led inevitably to the kind of loss in question." and that "If such loss was the inevitable result of a peril, its full extent will be recoverable, even though such extent was no more than not unlikely to occur at the time of the peril". Arguably, the Supreme Court in *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5 did not approach the perils of the sea on this basis; namely that a usual move of the waves would not inevitably result in loss by seawater (although a higher degree of them could do) although the extent of loss, i.e. breaking of the legs of the rig was not unlikely to occur. If the above interpretation was adopted by the Supreme Court the perils of the seas would not be the proximate cause, or the definition of the perils of the seas would not be as it was decided.
[138] Bennett, *The Law of Marine Insurance*, 9-35. In *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 the vessel was torpedoed by a submarine, following which some water had penetrated through the holes of the hull. Repeated groundings followed after the ship was requested to beach outside the harbour by port authorities. The House of Lords had held that the repeated grounding was not a *novus actus interveniens* and that the torpedoing was the proximate cause of loss.
In *Reischer v Borwick* [1894] 2 QB 548, a vessel insured against collision but not perils of the seas sustained a leak by collision. Temporary repairs were carried out, but while the vessel was being towed to port for permanent repairs, a motion of water (peril of the sea) re-opened the leak, the vessel ran aground. It was held *per* Davey LJ at 553 that the hole was "a continuing source of risk and danger" and that the failure of the temporary repairs did not break the chain of causation.

a *novus actus interveniens*, in other words, where delay can break the chain of causation. This issue will be discussed in the following parts of this work.

iii. The authorities of *Lanasa Fruit* and *Norwich Union*

The pre-MIA authorities on perishable goods and delay have not been tested after the enactment of the MIA in England. It is nevertheless possible to make speculations on the basis of recent and relevant case law from other jurisdictions and the technological developments in shipping and containerising.

Upon an appeal from the Supreme Court of New South Wales (Australia), the Privy Council in *Norwich Union Fire Insurance v Wm.H. Price*[139] went into determining whether perishable goods were lost by delay where they were undamaged by sea water in a collision and had to be sold because of ripening during repairs. The essential dispute between the parties in the appeal was with respect to the interpretation of s 68 of the MIA 1909 on constructive total loss, therefore the issue as to delay was touched upon with no more than a few words both in the judgment of the Supreme Court of New South Wales[140] and of the Privy Council. It was stated in the Privy Council that "the sale was not the result of any sea damage or peril insured against affecting the lemons, but of their inherent vice or of delay: the sale, unless justifiable in consequence of perils insured against, gave no claim against the appellants: it could not on any view constitute a constructive total loss".[141] The judgment did in no way refer to the general delay exclusion in the Marine Insurance Act 1909 of Australia[142] and no analysis of the proximate cause of the loss was carried out by the Privy Council. It is noteworthy that Privy Council decisions are not binding upon British courts, yet are highly persuasive. Despite the fact that the judgment was short of analysis as to causation, it may nevertheless be persuasive for cases involving delay, inherent vice and perils of the seas.

A few years later in the United States, the leading judgment *Lanasa Fruit Steamship v Universal Insurance*[143] was delivered in relation to damage to perishable goods and delay. In that case a cargo of bananas was insured against "perils of the seas" and was totally lost following the stranding of the vessel upon which they were carried. The policy had not

[139] (1934) A.C. 455
[140] *Norwich Union Fire Insurance v Wm.H. Price* (1933) S.R. (N.S.W.) 196, at 202 per Street, C.J "the plaintiff was not liable for any loss caused by delay", as cited by Coghill, at 428.
[141] At 464-465 per Lord Wright.
[142] The exclusions of delay in the MIA 1906 and MIA 1909 are identical for these purposes
[143] *Lanasa Fruit v. Universal Ins. Co.* (1938) 302 U.S.556 (Supreme Court of the United States)

contained any specific exclusion of delay, therefore the main question was whether a general clause in a cargo policy covering the assured against perils of the seas would cover a loss where stranding so delays the voyage that the cargo becomes a total loss. The Court had assumed that the goods were in sound condition when shipped and would have been merchantable at the end of the ordinary length of the voyage.[144] It is submitted that otherwise, inherent vice could have been a potential cause of loss, or that delay in the voyage could have merely been an event aggravating the initial deterioration occurred before shipment. The Court found that delay was caused by stranding and the proximate cause of the deterioration was stranding which was a loss by perils of the seas, thus covered under the policy. The judgment contained several references to the earlier authorities on delay under English law[145] and suggested that the law in the United States was different from that of England in that the MIA 1906 restricted the doctrine of proximate cause by introducing to the s 55(2)(b) the expression "although the delay be caused by a peril insured against".[146] This wording clearly means that the delay exclusion shall apply even where delay is caused by a risk insured against. [147] It is noteworthy that following *Lanasa* and other judgments to the same effect,[148] cargo policies started to contain the wording so as to avoid the effect of the judgment.[149]

[144] *Lanasa Fruit v. Universal Ins. Co*. (1938) 302 U.S.556, 559.

[145] Such as *Tatham v Hodgson* (1796) 6 T.R. 656; *Taylor v Dunbar* (1783) 3 Douglas 232; *Pink v Fleming* (1890) 25 Q.B.D. 396. The Court rejected the approach of *Pink v Fleming* to proximate causation in light of *Leyland.*

[146] At 567. The wording appears also in Time Charter Clauses in freight policies.The phrase is usually part of the exclusions of delay and has several equivalents, such as "even though the delay be caused by a risk insured against" in the Institute Cargo Clauses 1982 and 2009 A-B-C cl.4.5. and in almost all the delay exclusions appearing in the Institute Clauses; "whether caused by a peril insured against or otherwise" in *Turnbull, Martin & Co v Hull Underwriters' Association, Ltd* [1900] Q.B. 402 where it was stated that "otherwise" meant "other perils insured against" and this issue was not disputed. A similar wording was inserted in the policy discussed in *Federation Insurance Company of Canada v. Coret Accessories Inc. & Hirch* [1968] 2 Lloyd's Rep 109.

[147] In some foreign policies, losses caused by delay are excluded only where delay is not caused by an insured risk. *See* Cargo Insurance Policy of Antwerp 20 April 2004 (Goederenverzekeringspolis van Antwerpen 20 April 2004) art. 11.2.4.

[148] See for example *Brandyce v. United States Lloyds* 207 A.D. 665, 203 N.Y.S.10, aff'd, 239 N.Y. 573, 147 N.E.201 (1924). In this case no express clause excluding delay was inserted in the policy. The court decided that if the ship had not been damaged by reason of sea perils the potatoes would have arrived sound. The proximate cause of the loss therefore was the sea peril because it was the efficient dominant cause which, although incidentally involving delay, placed the cargo in such a condition that because of inevitable deterioration or decay, it could not be reshipped and carried to its destination.

[149] *Archer-Daniels-Midland Company v. Phoenix Insurance Company of New York* 975 F.Supp.1137 (United States District Court S.D. Illinois). It was stated at 1147 that "…Delay Clause in the Policy at issue clearly states that losses arising from delay are excluded whether caused by a peril insured against or otherwise…Prior to the addition of this italicized language, cases such as *Brandyce* and *Lanasa Fruit* suggested that losses caused by delay are covered if the delay was caused by an insured peril. With the addition of this language, however, it is irrelevant whether the delay was caused by an insured peril".

However the wording gave rise to discussions under English law, it was argued that it was a surplusage given that delay is always caused by an event, and mostly a peril insured against such as perils of the seas.[150] The House of Lords in *The Playa de las Nieves*[151] enunciated in the context of a freight policy that "whether arising from a peril of the sea or otherwise" was there to make it plain that "the clause is concerned with an intermediate event between the occurrence of a peril insured against and the loss of freight of which the peril was, in insurance law, the proximate cause."[152] The difference between this view expressed in the House of Lords and the expression found in s 55(2)(b) (which applies merely to policies on ships and goods and not to freight policies) is that whereas for triggering a loss of time clause it suffices that the loss of time is merely an intermediate event between the peril and the loss of freight; delay has to be the proximate cause of the loss for the exclusion of delay under s 55(2)(b).

Whether according to the expression delay has to be proximately caused or otherwise caused by an insured peril is unclear.[153] It is submitted however that the exclusion would likely to apply where delay is naturally consequent upon an insured peril without requiring a refined causal link between the peril insured against and delay.

In modern times, perishable goods are shipped on board vessels equipped of refrigerated holds or into refrigerated containers. It is therefore likely that in the future disputes involving delay and perishable goods will turn on the connection between delay and other causes such as the initial unseaworthiness of the ship, the negligence of the carrier[154] or the soundness of

[150] In *Russian Bank for Foreign Trade v Excess Insurance Company Ltd* [1918] 2 K.B. 123 Bailhache J stated *obiter* at 127 with respect to a clause reading "warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise" that the expression was a surplusage on a different ground than the one expressed by the author. He enunciated that every claim upon a policy must arise from a peril insured against and that the expression was therefore obsolete.

[151] *Naviera de Canarias S.A. v Nacional Hispanica Aseguradora S.A (The Playa de las Nieves)* [1978] A.C. 853, 882 per Lord Diplock.

[152] Lord Diplock also rejected the *obiter dictum* of Bailhache J in *Russian Bank for Foreign Trade v Excess Insurance Company Ltd* [1918] 2 K.B. 123 that the expression was a mere surplusage.

[153] *Archer-Daniels-Midland Company v. Phoenix Insurance Company of New York* 975 F.Supp.1137, at 1147

[154] In *Chubb Insurance Co. of Canada v. Cast Line Ltd* 2001 CarswellQue 1616 (Cour superieure du Quebec) the policy was an open ocean cargo policy on all risks of physical loss or damage from any external cause excluding loss due to delay or the deterioration of the merchandise caused by atmospheric conditions or the passage of time. The cargo was carried in containers and one of the containers had delayed in reaching the destination for four weeks. During that delay the container was exposed to sun and heat, in consequence of which the cheese had deteriorated in value. The Court, suggesting that there was no need for expert evidence to determine that the cargo does not deteriorate in value by ageing (at para 23), held that the cause of the loss was not delay but the failure on the part of the carrier to ensure that the temperature inside the container remained at adequate levels so as not to spoil the quality of the cargo.

the cargo when shipped on board.[155] In terms of standard of proof, the assured may have to prove that the damage occurred before the delay came into existence and thus is within the cover. [156]

iv. Perils of the seas and delay

In *Taylor v Dunbar*,[157] the court concluded that a loss caused by delay during sea transit is not a loss caused by perils of the sea. However in this case delay occurred during the voyage was an unexpectedly long delay, which can arguably be accepted as a separate cause on its own, not resulting naturally from perils of the seas. The case is also of essence as it involved a statement as to a policy consideration why delay losses are excluded. Montague Smith J expressed a view on that if they were to allow the recovery of a loss by delay because it is caused by bad weather,[158] they would open a door for claims for losses which were never intended to be covered under an insurance policy. The court has nonetheless never made a distinction among the types of delays and therefore the policy consideration may not be taken to cover all sorts of delays and their relevance to perils of the seas.

"Fortuitous action of the winds and waves" which is read in the definition of perils of the seas was interpreted by the Supreme Court[159] to signify that the result of the winds and waves must be fortuitous, accidental and unexpected and not the winds and waves itself. An ordinary and expected delay resulting from winds and waves can be considered as within the definition of perils of the seas and not as a separate cause of loss.

How courts would approach a loss involving both perils of the seas and delay after the Supreme Court's approach to causation in *The Cendor Mopu* is hard to foresee. In this

[155] In *Univeg Direct Fruit Marketing DFM GMBH v MSC Mediterranean Shipping Company SA* [2013] EWHC 2962 (Comm) a perishable type of cargo was carried in refrigerated containers on board a vessel and her arrival to its port of destination was delayed due to a strike at the port of loading. The cargo had started to deteriorate and was therefore sold for salvage at a considerably lower figure than would have been realised had the cargo not started to deteriorate. The Court found that the ordinary course of the voyage would have taken between 14-18 days and a delay of 5 days was merely part of a gradual deterioration which had started earlier, during the transit to the port of loading. Therefore the claim for the difference in value of the goods failed. The case is noteworthy in relation to its facts; otherwise given that the dispute involved therein was not an insurance dispute, it cannot be authority for a suggestion that delay was not the proximate cause of the loss.

[156] In *Blaine Richards & Co v. Marine Indemnity Insurance Co*. 635 F.2d 1051 (2d Cir.1980) the damage of the perishable goods was caused by fumigation which was proved to have occurred prior to the delay, it was therefore held that that loss was covered by the policy.

[157] (1869) LR 4 CP 206.

[158] The court had taken bad weather as a peril of the sea, this view is no longer viable by virtue of *The Cendor Mopu.*

[159] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5.

decision, inherent vice was not classified as an exception to cover, yet as a description of circumstances where there were no perils of the sea and it is not clear whether the same reasoning would apply in case of perils of the sea and delay. One may argue that insofar as the evidence points out perils of the seas, the loss would not have been caused by delay.[160] This suggestion and analogy with perils of the seas and inherent vice must nevertheless be approached cautiously: In *The Cendor Mopu* the cargo was directly affected by the perils of the sea,[161] which could be supportive of the argument that in such a case the loss would be caused by perils of the seas and not by inherent vice. In circumstances involving both delay and perils of the seas, unless perils of the seas damage the goods directly which is subsequently aggravated by delay, perils of the seas would likely be a remote cause if it merely affects the vessel which require repairs resulting in delay and consequent loss of goods. According to this reasoning, basic cases on delay such as *Taylor v Dunbar* may have to be reconsidered in light of the new approach to perils of the seas.

v. Inherent vice and delay

The reason for excluding delay is often based on an analogy with "inherent vice"; goods susceptible of being perished are likely to perish if they encounter delay and insurers would not wish to underwrite such a risk. [162] It may be very difficult to distinguish in which cases delay could be the proximate cause of the loss rather than inherent vice where both of these perils are causes of the loss, the discussion of which would be rather theoretical as both of these perils are excluded under the MIA 1906[163] and standard market terms.[164] Raising the defence based on both of the exclusions would merely increase the possibility of succeeding in excluding the claim and decisions do not usually discuss them separately.[165]

[160] In *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5, Lord Clarke stated at para 137 that if the question whether loss or damage has been proximately caused at least in part by perils of the seas "…is answered in the affirmative, it follows there was no inherent vice, thereby avoiding the causation issues that arise where there are multiple causes of loss, one of which is an insured risk and one of which is an uninsured or excluded risk".

[161] The leg breaking wave (considered as perils of the seas) hit the oil rig which was carrying the barge and caused the breaking of the barge's legs.

[162] Such analogy was claimed to be ill-founded, see Selmer, 13.

[163] Ss 55(2)(b) and (c)

[164] Institute Cargo Clauses 2009 cl.4.4 and cl.4.5.

[165] *Goldman v Rhode Island* (1951)100 F. Supp.196 United States District Court Pennsylvania. The shoes carried had a delay of 3 months and had deteriorated by molding. The court decided that the assured could not prove that the damage was caused by an insured risk, without discussing whether the loss was caused by both or one of them. For more cases mentioning both but not discussing them separately please see *Cory v Boylston Insurance Company* 107 Mass. 140, 9 Am. Rep 14; *Perry v Cobb* 88 Me. 435, 34 A. 278, 49 L.R.A 389; (US); *Tudor v New England Marine Insurance Company* 12 Cush. Mass. 554.

It was stated in *Soya v White*[166] that inherent vice would be the proximate cause of the loss if the goods were such "that they could not withstand any normal voyage of that duration". [167] According to this statement, one may argue that inherent vice would be the proximate cause if there is no delay: "normal voyage of that duration" is likely to be the equivalent of the expected duration of a voyage for the carriage of a certain type of cargo at a specific time of the year. In case the duration exceeds the length expected for that particular voyage, there would be a delay and inherent vice would not be the only cause. In most of the US decisions involving inherent vice and delay, although courts have not discussed the causation between inherent vice and delay at a great length, they usually considered delay as an event aggravating the loss caused by inherent vice. [168]

It is submitted that the perishable nature of goods shall not connote that the goods have an inherent vice; perishable nature is merely a physical hazard[169] which, coupled by a lengthy delay or lack of refrigeration, can lead to a loss.

Unsuitability of packing could also be an issue in respect of losses caused by inherent vice and delay. The Institute Cargo Clauses refer to the packing to withstand the "ordinary incidents of the voyage".[170] An ordinary delay in the voyage, if considered as "ordinary incident of the voyage", may be treated as part of the unsuitability of packing exclusion and it may raise the question whether the unsuitability of packing would be the cause of the loss rather than delay. Consequently, a delay that would exceed an ordinary time may be accepted as not making part of the definition of the unsuitability of packing and arguably may be excluded by the delay exclusion clause.

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[166] *Soya G.M.b.H. v White* [1980] 1 Lloyd's Rep 491, 505 per Lloyd J.
[167] *ibid*, 505. This decision was later on affirmed by House of Lords.
[168] *Cory v Boylston Insurance Company* 107 Mass. 140 a cargo of champagne was spoiled by mold in the hold, there was also a delay in the voyage. In *Brandyce v. United States Lloyds* 207 A.D. 665, the case involved perils of the sea, inherent vice, delay and the loss of rotten potatoes and delay was an event contributing to the loss.In In a US case *Perry v Cobb* 88 Me. 435, 34 A. 278 a cargo of lime suffered a loss of content from the shrinking of the staves of the barrels, and slacking up of the cooperage. It was claimed that it has resulted from the rolling and pitching of the vessel caused by the storms of an unusually protracted voyage. The Supreme Judicial Court of Maine concluded that the damage came from the inherent qualities of the cargo, "excited by the long-continued transit" at 282. Delay in this case was accepted as an event aggravating the loss which was mainly caused by the nature of the cargo.
[169] Physical hazard is any fact increasing the risk of loss such as age, health, occupation; Lowry and Rawling, *Insurance Law Doctrines and Principles*, 2nd ed., 98. Physical hazard was defined in Greene, at 9 as "a condition stemming from the physical characteristics of an object that increases the probability and severity of loss from given perils".
[170] ICC A 01/01/2009 cl.4.3.

2.2. Delay as a cause of loss

The philosophical aspect of the word "cause" brings about important results; firstly every event may have an infinite number of causes and secondly, each cause can be described in an infinite variety of ways. [171] Nonetheless in English law, "cause" and "causation" were considered by courts as topics the interpretation of which "does not involve any metaphysical or scientific view". [172] This view was echoed in a delay case where it was stated that once there is a clear view of the fact, it would be best to keep away from philosophical mazes.[173] Thus under an insurance policy "cause" would mean "what a business or seafaring man would take to be the cause without too microscopic an analysis but on broad view" [174] and finding the cause of the loss is mostly contemplated as a question of fact. Albeit the approach to ascertaining "cause" under the English law does not rest upon an artificial but upon real sense, rules applicable to ascertaining the cause or concurrent causes of a loss are far from being straightforward.

Whether delay may break the chain of causation between the initial peril resulting in delay and the loss is important to assess whether delay is a factor contributing to the loss or whether it is the proximate cause of the loss.[175] If an event is no more than a contributing factor to the loss, it may well not even be considered as "a causal peril". [176]

It was also held that where the exclusion is the inevitable result of a peril, the exclusion has no independent effect and the peril is the proximate cause. [177] Some delay may be the inevitable result of perils such as perils of the seas or deprivation perils such as detention,

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[171] Bragg, M. E Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers, 20 *Forum* 1984-1985, 385-399, at 385.

[172] *per* Viscount Simon *Yorkshire Dale Steamship Co Ltd v Minister of War Transport (The Coxwold)* [1942] AC 691, 698. Likewise, in *Harrison Ltd v Shipping Controller (The Inkonka)* [1921] 1 KB 122, 130-1, McCardie J considered that causation "is a topic of profound juristic complexity. The Courts cannot act as metaphysical analysts. They can only administer or state the law in practical language upon particular aggregates of circumstances".

[173] *Inman SS. Co v Bischoff* (1882) 7 App. Cas. 670, *per* Lord Blackburn.

[174] *per* Lord Wright in *Yorkshire Dale Steamship Co Ltd v Minister of War Transport (The Coxwold)* [1942] AC 691, 706. Likewise in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, 369 it was stated by Lord Shaw that the causes need to be ascertained "not in an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all".

[175] Albeit it has been suggested in Bennett, *The Law of Marine Insurance*, 9.43 that the fact that a peril does not break the chain of causation between the peril meriting the proximate cause and the loss should not necessarily mean that it is excluded from being a proximate cause of the loss.

[176] Lord Mance, Lord Saville and Lord Collins recognized in *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5, that there was only one causal peril which was perils of the seas. Lord Clarke recognized two perils; namely perils of the seas and inherent vice but concluded that only the perils of the sea were a causal peril.

[177] *Mardorf v Accident Insurance Co* [1903] 1 K.B. 584 (an accident insurance case).

capture and seizure and there are authorities in other jurisdictions that where delay results naurally from the deprivations perils, the ensuing loss should be attributed to the initial peril. [178]

In decisions involving the loss of freight by loss of time, loss of time was not considered as a peril. It was stated in *The Playa de las Nieves*[179] that "…The intermediate event, loss of time, is not itself a peril though it may be the result of a peril."[180] Some authors are of the same view in relation to deterioration cases and argue that delay is only a channel in the middle of a chain of causation through which insured or excepted perils may operate and that may have consequences, such as loss or damage. [181] A similar view was taken in a Canadian case[182] for windstorm followed by delay where it was considered that one may not say that these were distinct causes as neither can be separated from the other.

Delay was considered as not naturally resulting from collision in *Pink v Fleming*[183] where the policy covered losses "consequent on collision", on the ground that they were too remote in time. If they had naturally resulted from the peril of collision, collision and not delay and handling would have been the proximate cause of the loss. Given that the case adopted last in time approach of causation, whether delay was the natural result of the collision was assessed according to how far in time delay was from collision and according to the events occurred between collision and whether they happen in every collision. Albeit the former approach can no longer be supported the latter is somewhat viable. In the assumption that collision involves some delay[184] the question would arise whether delay shall be unreasonably long so as to break the chain of causation and whether the relatively short delays are usually accepted as factors contributing to the loss rather than being a proximate cause of the loss.

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[178] In the US case *Magoun v New England Marine Insurance Company, Fed. Cas.* No. 8,961, 1 Story 157 the underwriters contended that the long delay and exposure to hot climate were the immediate causes of the loss and detainment was the remote cause. Justice Story rejected this contention and stated that all the consequences naturally flowing from the peril insured against (in this case delay arising from detainment) shall be attributed to the peril itself.

[179] *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The Playa de las Nieves)* [1978] A.C. 853.

[180] *Per* Lord Diplock at 882. However in carriage cases, delay may be held to have no connection with another peril and may be held to be the responsible cause of the damage to the goods, see *The Renee Hyaffil* T.L.R. vol 32, 660 (CA).

[181] Selmer, K.S "*Delay in Cargo Insurance*" *Cargo Insurance and Modern Transport,* K.Grönförs ed., (Gothenburg , Akademiförlaget 1970), 13.

[182] *Clark's Chick Hatchery Ltd. V. Commonwealth Insurance Company* 1982 CarswellNB 331, at para.11 per Stevenson J

[183] (1890) 25 QBD 396.

[184] Even though a very short delay.

Delay may sometimes be merely an event aggravating the loss[185] already caused by a preceding peril in terms of aggravating the extent of the loss, in which case delay would probably not be *the* or *a* proximate cause of the loss. The assured in such a case would have to prove that part of the loss was occurred before delay and was caused by an insured peril.

Moreover delay can be considered as a contributing factor aggravating the loss where the loss is caused by the lack of ventilation in a ship's hold where the goods remained on board. [186] In these cases it can be held that the loss is proximately caused by the lack of ventilation and that delay was only a contributing factor that worsened the loss on the ground that had the cargo been properly ventilated there would have been no damage no matter how long the cargo remained on ship. Considering that the pre-MIA judgments were delivered at a time where ventilated holds were not available on vessels, it is submitted that in the modern age, it is more likely that the lack of ventilation and not delay is to be the proximate cause of deterioration of perishable goods. Accordingly the general exclusion in s 55(2)(b) in the MIA or the cl. 4.5. in the Institute Cargo Clauses may not be sufficient to strike out a claim. Clauses involving expressions such as ""caused by, resulting from, contributed to or aggravated by"[187] delay" may be drafted so as to ensure that the exclusion covers all degrees of delay, whether as a proximate cause, a contributing factor or as an event aggravating the loss. [188]

Finally, it was suggested in Chapter I that ordinary delay may not be considered as a peril given that it is not accidental. This suggestion gives rise to the question of whether this type of delay can be a proximate cause of loss. A distinction was made in an early US case on delay[189] between the ordinary operation of the elements and their perilous action[190] and was suggested that the latter must be the proximate cause of the loss. The decision was given prior

[185] In *Leyland* Lord Shaw held at 370-371 that there may be "attendant circumstances which may aggravate or possibly precipitate the result, but which are incidents flowing from the injury...The true and efficient cause never loses its hold".
[186] *Continental Insurance Co v Almassa International Inc* (2003) 46 C.C.L.I. 3d 206 (Ontario Superior Court of Justice).
[187] Such a wording was used in the policy which was the subject of the case *Safeco Ins. Co v Guyton*, 692 F.2d 551 (9th Cir. 1982).
[188] *Okanagan Prime Products Inc v Commercial Union Assurance Co of Canada* 1994 CarswellBC 874 (British Columbia Supreme Court) was with respect to a policy including the clause "any increase of loss caused by delays or loss of time due to the presence of strikers …".
[189] *Perry v Cobb* 49 L.R.A. 389, 88 Me. 435, 34 A. 278 (1896) given by Supreme Judicial Court of Maine.
[190] per Haskell J. at 281.

to *Leyland*[191] however the court stated that a protracted voyage is not a peril as it is not an unusual event but one of the natural events of the transit. It is therefore submitted that only extraordinary delay is capable of being the proximate cause of loss, however in most of the circumstances it will be taken to be an element aggravating the loss rather than proximate cause.

2.3. Concurrent causation and Delay

The rules as to concurrent causation are far from being clear, therefore under this heading the relevant case law will be analysed together with speculations on how the authorities can be applied in circumstances involving delay.

In *The Aliza Glacial* Potter LJ stated that "it is only when a Court is driven to the conclusion" [192] of more than one proximate cause, that the concurrent cause rule apply. It was also submitted in *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corp Ltd*[193] by Cairns LJ that unless one cause is clearly more decisive than the other, it should be accepted that there are two causes of the loss and no attempt should be made to give one of them the quality of dominance" and it was held that where one of the causes of the loss is excluded, the loss would not be recoverable.

Wayne Tank approach has not been challenged in English insurance law to a great extent nevertheless applying the reasoning would result in the outcome that where delay is one of the causes of loss, the loss would not be recoverable. It is nevertheless controversial whether the decision should apply to first party policies as well as liability policies. [194] One should refer to the coverage provided and the nature of the risks involved in liability and first-party policies so as to answer this question. There ought to be a motive behind favouring the

[191] *Leyland Shipping Co v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.
[192] *Svenska Handelsbanken AB v Dandridge (The Aliza Glacial)* [2002] EWCA Civ 577, [2002] 2 Lloyd's Rep 421, para 48.
[193] [1974] QB 57, 68-69.
[194] The question whether the same concurrent causation rules shall apply both to first party and liability policies was raised in an American decision given by the Supreme Court of California: *Garvey v State Farm Fire and Casualty Co* 770 P 2d 704, at 710 *per* Chief Justice Lucas. In this case the insured peril was the negligence of the construction company and the excluded risk was the earth movement. The Court mentioned *State Farm Mutual Auto Ins Co v Partridge* 10 Cal. 3d 102 (Supreme Court of California, 1973) which was a third party liability case and which held that where the loss is caused by two concurrent proximate causes, one of which is an insured peril and the other is excluded, that the insured peril should prevail. The Court stated that this case and this approach to concurrent causation may not be applied in property insurance policies.

exclusion clause where it is one of the concurrent proximate causes in liability policies. [195] It was suggested that the approach of favouring the exclusion clause arises because the liability insurer agrees to cover a wider range of risk than the property insurer, [196] and therefore intends to relieve the insurer from more liability.

The *obiter dictum* of *Wayne Tank* was rejected in several US cases. [197] Some American authors commented on the basis of the decisions like *Partridge* that "when there are several distinct or distinguishable factors which contribute to a loss, a persuasive case can be made for the proposition that courts will apply the causation theory that will relate the loss to a covered peril". [198] Accordingly delay as a "cause" in property insurance contract and liability insurance contract may be approached differently[199] where delay is a concurrent cause of a loss.

The Cendor Mopu[200] brought a different approach to concurrent causation as was discussed in *Wayne Tank*, particularly in respect of perils of the seas and inherent vice. Lord Mance, although did not express a concluded view on the point, suggested that there can be a situation of concurrent causes capable of attracting the rule in *Wayne Tank* only where each of the two perils operating independently is of itself able to cause the loss. [201]

[195] Questions of causation cannot be answered in the abstract. An informed response requires an understanding of the purpose and context of the causation test: *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] EWCA Civ 688, [2003] Lloyd's Rep IR 696, para 68.
[196] Lowry and Rawlings, 318.
[197] For an example, see *State Farm Mutual Auto Ins Co v Partridge* 10 Cal. 3d 102 (California, 1973) given by the Supreme Court of California. Both this case and *Wayne Tank* are with respect to liability insurance policies.
[198] Keeton, R.E and Widiss, A. I, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines and Commercial Practice*, (St Paul, West Publishing, 1988). They also refer to the reasonable expectations of the assured doctrine which is not adopted in English law *(Smit Tak Offshore Services Ltd v Youell (The Mare)* [1992] 1 Lloyd's Rep. 154, although it has been stated that a policy should not be construed in a way which would "unwarrantably diminish the indemnity which it was the purpose of the policy to afford", *Morley v United Friendly Insurance plc* [1993] 1 Lloyd's Rep 490, 505, *per* Beldam L.J.). This doctrine is not always applied in American law, the general view is that the court will construe the policy according to the reasonable expectations of the assured where there is ambiguity in the wording of a clause (*Montrose Chemical Corp v Admiral Ins Co* 42 Cal Rptr2d 324 (1995)).
[199] For the suggestion that the "cause" of loss in the context of property and liability insurance contracts are different and that the distinction is critical for the resolution of losses involving multiple causes, see Bragg, M. E Concurrent Causation and the Art of Policy Drafting: New Perils for Property Insurers, 20 *Forum* 1984-1985, 385-399, at 387.
[200] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5.
[201] Merkin, Rob, Perils of the seas, inherent vice and causation, *Insurance Law Monthly* Vol 23 No 3, March 2011, 1-5, at 5.

Effectively, the authority of *Wayne Tank* can apply to situations where two events operating independently cannot cause loss yet do so when they operate together.[202] This situation shall be distinguished from the circumstance where each event capable of causing loss happen together and cause loss,[203] therefore Lord Mance's above mentioned speech shall be approached cautiously in terms of the application of the rule in *Wayne Tank*. A set of judgments were delivered in Australia to the effect that where a loss results from two or more "concurrently operating interdependent proximate causes, the loss is attributable to each of them".[204] The rule applicable to concurrent independent causes may be different from *Wayne Tank* which can arguably apply only to concurrent interdependent causes. Insofar as the independent causes are concerned, there may be cover with respect to the part of the loss attributable to the peril covered.[205] The argument that delay alone cannot cause a loss would limit considerably the application of the rule in *Wayne Tank*.

It would follow that even where the above argument that *Wayne Tank* shall be authority merely for liability policies is not tenable,[206] the next question is whether delay can be an independent cause and cause a loss on its own when it operates. Both of these possibilities shall be respectively analysed below.

2.3.1. Limits to the rule in Wayne Tank: ordinary delay and delay beyond the control of the assured as uninsured peril

[202] The causes of loss in that case were the dangerous nature of the installation and negligence of one of the employees of the assured. This was classified in Clarke, Malcolm A., *The Law of Insurance Contracts*, 4th ed., i-law Service Issue 27, 2013, para 25-6A under the heading "interdependent causes".
[203] This was classified in Clarke, Malcolm A., *The Law of Insurance Contracts*, 4th ed., i-law Service Issue 27, 2013, para 25-6B as "independent causes".
[204] Pynt, G, *Australian Insurance Law: A First Reference*, 2nd ed., LexisNexis, 2011, at 231. The author cites *City Centre Cold Store Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 739 at 745 (Clarke J); *McCarthy v St Paul International Insurance Co Ltd* [2007] FCAFC 28; (2007) 157 FCR 402 at [93] (Allsop J).
[205] Clarke, Malcolm A., *The Law of Insurance Contracts*, 4th ed., i-law Service Issue 27, 2013, para 25-6B as "independent causes" cites *Ford Motor Co of Canada Ltd* v *Prudential Assurance Co Ltd* 14 DLR (2d) 7 (Ont, 1958), affirmed [1959] SCR 539. Clarke also cites *Guaranty National Ins Co* v *North Rivers Ins Co* 09 F 2d 132, 137 (5 Cir, 1990) where the court had decided that the assured could recover in full.
[206] In the context of carriage of goods by sea, Lord Mance focussed on finding "the" proximate cause (a single proximate cause rather than two causes which do not have to be proximate) instead of relying on the relatively flexible approach of *Wayne Tank* in *ENE Kos 1 Ltd v Petroleo Brasileiro SA (The Kos)* [2012] UKSC 17. Lord Sumption in this case concluded that the charterers' order to load was *an* effective cause of the owners' loss (and not the proximate or dominant cause). This approach was supported by Lord Clarke who stated that the order was an effective cause "in the sense that it was not a mere 'but for' cause which did no more than provide the occasion for some other factor unrelated to the charterers' order to operate, it does not matter whether it was the only effective cause", at para 61.

It was discussed in Chapter I that ordinary delay and delay beyond the control of the assured may be excepted from the scope of application of the general delay exclusion on the ground that they can be considered as fortuitous. These types of delay may accordingly be taken to be uninsured perils which would make the rule of *Wayne Tank* inapplicable. They would nevertheless attract the rule of *The Miss Jay Jay*[207] where it was held that where the loss is caused both by an insured and uninsured peril, the assured would recover under the policy.

Notwithstanding the correctness of the above, it was stated obiter in *HIH Casualty & General Insurance Ltd v Waterwall Shipping Inc*[208] that the statutory exception of wear and tear clarified the scope of cover rather than enunciating an exclusion. Moreover in *The Cendor Mopu*[209] Lord Clarke enunciated that s.55(2)(c) excluding losses caused by inherent vice did not mean an exclusion yet merely an amplification of the proximate cause rule, and an example of a loss not proximately caused by a peril insured against. Lord Mance, although did not conclude the point, suggested that the exclusion of inherent vice in the contract (which was subject to ICC (A) 1982) did not make any difference to its reflection as an uninsured peril under s.55(2)(c). Delay may accordingly be considered as an event whereby the loss occurring is not proximately caused by an insured peril.[210]

2.3.2. Whether delay an independent cause of loss

There may be two instances where delay may be regarded as an independent cause of the loss, namely where it is able to cause a loss on its own, and when it occurs independently from any other peril.

An analogy may be drawn with the risk of "unseaworthiness" in determining whether delay can cause a loss independently.Unseaworthiness is usually accompanied by another peril[211]

[207] *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1987] 1 Lloyd's Rep 32. In this case the Court of Appeal granted coverage where the ship was lost as a result of the combination of two events: adverse condition of the sea (an insured peril) and defects in the boat's design of which the assured was unaware (an uninsured peril).

[208] (1998) 146 FLR 76, judgment given by the Court of Appeal of New South Wales.

[209] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)*[2011] UKSC 5 e.g. ICC (A)-(B)-(C) 2009 and 1982 cl.4.5. .

[210] As to the Institute Clauses, delay losses are usually mentioned under headings entitled "Exclusions". e.g. ICC (A)-(B)-(C) 2009 and 1982 cl.4.5. It is controversial whether this wording shall be interpreted as an exclusion rather than an exception clarifying the scope of cover. For the view that it constitutes an exclusion, see Bennett, *The Law of Marine Insurance*, 9.31.

[211] In both *Dudgeon v Pembroke* (1877) 2 App Cas 284 and *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1987] 1 Lloyd's Rep 32 unseaworthiness was followed by perils of the seas and caused a loss.

and was held not to be able to operate independently and depended upon another peril for a casualty to occur.[212] This however did not prevent the courts from deciding that unseaworthiness can be both a proximate cause[213] and a concurrent proximate cause of the loss.[214] Following *The Cendor Mopu*, it is likely that wherever perils of the seas proximately cause the loss, at least in part, there can be no concurrent causation issues between unseaworthiness and perils of the sea.[215] The same can be suggested for delay and perils of the seas.

Another analogy may be drawn with "negligence". Negligence has rarely been held as *the* or *a* proximate cause of the loss[216] yet the decisions did not elaborate to a great extent as to whether negligence can cause a loss on its own.[217] There may be few instances where

[212] *Monarch Steamship co Ltd v Karlshamns Oljefabriker* [1949] A.C. 196 (House of Lords). According to the Court the breach of warranty of unseaworthiness operated directly as a cause and as a dominant cause. A cargo of soya beans was shipped on board a ship and the ship sailed in May 1939, the voyage was expected to last for 60 days however owing to the unseaworthiness of the vessel which slowed the vessel and caused a delay, the ship could not arrive at the port of discharge before the outbreak of war in September. Although this is a carriage case and that causation in carriage cases was stated to be different from causation in insurance cases in *Pink v Fleming* (1890) 25 QBD 396 and in *Thomas Wilson, Sons & Co v Owners of the Cargo per the Xantho (The Xantho)* (1887) 12 App Cas 503, at 510 (opposite view was expressed in *Leyland* by Lord Shaw of Dunfermline at 368), the court referred to *Leyland* when assessing unseaworthiness, delay and restraints. For this reason it is submitted that the case can be mentioned not only for the carriage context yet also for the insurance context.

[213] *Monarch Steamship co Ltd v Karlshamns Oljefabriker* [1949] A.C. 196; *Dudgeon v Pembroke* (1877) L.R. 2 App. Cas. 284. The Court in *Dudgeon v Pembroke* held that there was one proximate cause of loss, namely the perils of the seas and that the condition of the vessel had no part to play in the loss.

[214] *Dudgeon v Pembroke* was upheld by the Court of Appeal in *The Miss Jay Jay*, albeit on different reasoning. According to the Court perils of the seas and unseaworthiness were concurrent proximate causes of the loss.

[215] Per Lord Clarke (at para 137):'The sole question in a case where loss or damage is caused by a combination of the physical condition of the insured goods and conditions of the sea encountered in the course of the insured adventure is whether the loss or damage is proximately caused, at least in part, by perils of the seas (or, more generally, any fortuitous external accident or casualty). If that question is answered in the affirmative, it follows that there was no inherent vice, thereby avoiding the causation issues that arise where there are multiple causes of loss, one of which is an insured risk and one of which is an uninsured or excluded risk.'

[216] For example in *HIH Casualty and General Insurance Limited v Waterwell Shipping Inc & Anor* [1998] NSWSC 436-Supreme Court of South New Wales- the loss of the vessel by sinking was held to be proximately caused by negligence rather than the failure of the wall of the stainer box as a result of the corrosion. However albeit the case refers to post-*Leyland* approach of proximate causation, the reasoning of the judges as to proximate cause is somewhat closer to "but for causation".Lord Sumner in *British & Foreign Marine Ins. Co Ltd v Gaunt* [1921] 2 A.C. 41, at 57 states that "All risks" …includes the risk that when it happens to be raining the men who ought to use the tarpaulins to protect the wool may happen to be neglecting their duty. This concurrence is fortuitous; it is also the cause of loss by wetting".However the House of Lords in *A.-G. V Adelaide Steamship Co (The Warilda)* [1923] A.C. 292 held that negligence was not a distinct operation in itself and the collision occurred because of a warlike operation badly conducted.

[217] Arguably, negligence does not have to operate to cause a loss on its own so as to attract the rule in *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1974] QB 57. See the two judgments recently delivered, namely *Venetico Marine SA v International General Insurance Company Limited and Nineteen Others* [2013] EWHC 3644 (Comm) and *Versloot Dredging BV, SO DC Merwestone BV v HDI Gerling Industrie Versicherung AG, XL* [2013] EWHC 1666 (Comm). In the latter case, it was found by the trial judge that ingress of water which was the cause of loss was fortuitous because it was caused by crew negligence, the proximate cause of the loss was therefore perils of the seas and negligence was merely a factor contributing to

negligence may cause a loss independently from any other cause[218] and most of these instances would refer to negligent acts rather than the type of negligence such as negligent supervision.[219] The analogy of negligence with delay may somewhat be discussed on the basis of the latter as neither delay nor the negligent supervision type of negligence could arguably lead to a loss without being accompanied by a peril.

In other jurisdictions, delay was sometimes accepted as a concurrent cause[220] together with other causes such as windstorm although concurrent causation was not interpreted as requiring both of the causes to be capable of causing loss independently.[221] In *Continental Insurance v Almassa*[222] where lack of ventilation and delay were the possible causes of the loss, the court held that the exclusion could exclude losses caused solely by delay nevertheless it would not extend to exclude also the situations where delay operates concurrently with a number of other factors.

Insurers may develop standard terms to avoid the unforeseeable application and results of causation rules. Whether or not delay can operate independently to be taken for a concurrent cause, a clause to the following effect may be stipulated: [223] Where a loss occurs which would not have happened in the absence of an excluded event, there is no coverage "regardless of: (a) the cause of the excluded event[224]; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss".

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the fortuity of ingress of water. In the former case, negligence of master and crew was held to be a proximate cause of the loss.

[218] E.g. where a cargo is damaged owing to improper loading and stowage without external operation of the seas causing or contributing to the casualty.

[219] Careful consideration may be required to distinguish negligent act causing a loss cases and cases involving for instance negligent supervision. In *Braxton v United States Fire Ins Co*, 651 S.W. 2d 616 (1983) the decision was given by Missouri Appellate Court which concluded that the insured's own negligence in failing to properly supervise the attendant was a legally significant cause of the owner's liability. Accordingly the doctrine of concurrent causation applied and coverage was granted. There may however be disagreement as to the court's finding that the negligent supervision was a separate, independent and concurrent cause of liability.

[220] *Clark's Chick Hatchery Ltd. V Commonwealth Insurance Company* 1982 CarswellNB 331 (Canada). In this case the policy covered "1. Loss of birds resulting directly from c) windstorm" and excluded "(F) Loss of market or loss or damage caused by delay".

[221] The court decided that although "the windstorm was the direct or proximate cause of the loss" (at para 7) "it was also a loss caused by delay and recovery must be denied" (at para 13). The court then proceeded by stating that courts should strain to find a dominant cause as there were two causes both of which can be properly described as effective causes of the loss and applied the reasoning of *Wayne Tank*.

[222] *Continental Insurance v Almassa* (2003) 46 C.C.L.I. 3d 206 (Ontario Superior Court of Justice).

[223] This clause was adopted for homeowners policies of State Farm Fire and Casualty Company in California on January 1, 1983 as a precaution against courts' interpretation of concurrent causation.

[224] In terms of delay exclusion in the MIA and Institute Clauses, this part of the wording is similar to "even though delay be caused by a peril insured against".

2.4. Agreements altering the proximate cause rule and delay

In insurance law proximate cause rule is a term implied into the insurance contract as representing the "real meaning of the parties"[225] and parties are free to agree on wordings altering the proximate causation rule.[226] Nevertheless courts do not readily hold that the policy wording is sufficient to adopt a different test other than proximate cause rule as the test is default and its applicability "does not depend on nice distinctions between the particular varieties of phrase used in particular policies".[227]

The wording "caused by delay" is included in the new Institute Cargo Clauses dated 2009[228] and the clause has not yet been litigated and therefore it is yet to be seen whether it alters the proximate causation rule. In case it is accepted as changing the proximate cause rule, the exclusion can however be triggered if delay is merely *a* cause of the loss and the insurers would not have to prove that delay was the proximate cause of the loss which brings about a lower threshold.[229] A more conservative view as to the fact that the wording does not alter the proximate cause rule can be found as *dicta* in several cases.[230]

The wording "arising from delay" appeared in several cases on delay[231] as well as in some standard market terms.[232] Whether it refers to proximate cause rule is still an unresolved issue

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[225] *Becker, Gray and Co v London Assurance Corpn,* [1918] AC 101, at 112, per Lord Sumner. See also *Reischer v Borwick* (1874) 2 QB 548, 550 per Lindley LJ.

[226] In *Coxe v Employers' Liability Assurance Corp. Ltd* [1916] 2 KB 629 parties agreed that the policy did not insure against death "directly or indirectly caused by …war". The Court decided that this wording could not be reconciled with the proximate cause rule.

[227] *Lloyds TSB General Insurance Holdings v Lloyds Bank Group Insurance Co Ltd* [2001] EWCA Civ 1643, [2002] Lloyd's Rep IR 113, para 40 *per* Potter LJ

[228] The Joint Cargo Committee (JCC memo JC2008/008 dated 3 October 2008 published on the Lloyd's Market Association) had firstly drafted the delay exclusion with the wording "attributable to delay" however later on the expression was changed to "caused by delay". The wording "attributable to" appears also in s.55(1)(a) and it was decided in *Trinder, Anderson & Co v Thames & Mersey Marine Co* [1898] 2 Q.B. 114 that it clearly varies proximate causation rule.

[229] One of the views supporting this approach rests upon the fact that the wording serves to render the English drafting more easily accessible to foreign insureds, Goodacre, K. J *Goodbye to the Memorandum: an in-depth study of standard cargo, war and strikes clauses*, London, Witherby 1988, 21.

[230] In *Coxe v Employers' Liability Assurance Corp. Ltd* [1916] 2 KB 629, 634 Scrutton J stated that "caused by" and "arising from" has always been construed as relating to proximate cause. Moreover in *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The Cendor Mopu)* [2011] UKSC 5 the policy included a clause "caused by inherent vice" and the court stated that treating the wording differently from its equivalent in the MIA would be an oddity, i.e. that the proximate causation would apply.

[231] In *Wilson Brothers Bobbin v Green* [1917] 1 K.B. 860 the policy read "all claims arising from delay", the decision was not given on whether the wording suggests the application of proximate cause rule however the storage charges for preventing a loss of adventure was considered as arising from delay. Likewise the same expression was included in the policies in *Roura v Forgas* [1919] 1 K.B. 189 (which was also a case of loss of adventure) and no reference was made to proximate causation.

[232] Institute War and Strikes Clauses Hulls-Time 1/11/95 cl.4.4 "any claim for expenses arising from delay".

however its general use in a policy may import proximate cause rule[233] unless it is so clear from the policy itself that the wording is inserted to alter such rule. The wording "arising from delay" has been considered in two decisions in United States, namely *Archer*[234] and *Blaine Richards*.[235] In the former case the assured argued on the basis of proximate causation and claimed that detention and not delay was the proximate cause of the loss. The court has not expressed a conclusive view on the wording "arising from", therefore it may not be wrong to assume that the court approached "arising from" on the basis of proximate causation.

2.5. Deprivation perils and delay

In some cases an insured peril may result in partial loss of the cargo and there may also be a risk of ensuing delay which may aggravate the loss and even turn the partial loss into a total loss. In the modern shipping one of the major problems in the transport is piracy which is an insured peril under some standard form marine policies. [236] The act of piracy results often in negotiations to save the ship and the cargo which are of relatively unforeseeable duration[237] and consequently include the risk of delay.

In *The Bunga Melati Dua*[238] a cargo of biodiesel carried on board a ship had to remain on the ship for 11 days before the ship was released, the cargo had not deteriorated during this delay[239] as it was not a perishable cargo. After the vessel and the cargo were released, the cargo was sold at the discharge port at less than half of the original value and the claim of the assured was for the balance.[240] The court decided that the mere capture by pirates did not

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[233] *Handelsbanken Norwegian Branch of Svenska Handelsbanken AB (PUBL) v Dandridge (The Aliza Glacial)* [2002] EWCA Vic 577, [2002] 2 Lloyd's Rep 421, para 60. The policy was on Institute Mortgagees Interest Clauses (Hulls) 1986 and included "loss, damage, liability or expense arising from…".

[234] Both policies included "Warranted free of claim for loss of market or for loss, damage or deterioration *arising from* delay, whether caused by a peril insured against or otherwise". (emphasis added)

[235] *Blaine Richards & Co Inc v. Marine Indemnity Insurance Company of America and William H. McGee & Co.* 635 F.2d 1051, 1981 A.M.C. 1.

[236] E.g. Institute Cargo Clauses A 1982, cl.6.2.

[237] In *Masefield AG v Amlin Corporate Member Ltd &Anor (The Bunga Melati Dua)* [2011] EWCA Civ 24 at para 7, reference was made to the 1st instance judge David Steel J in his finding that based on the communications with the Malaysian Security Council as to the negotiations with the pirates alone, the vessel with its crew and cargoes were likely to be released in short order. David Steel J had also referred to a circular received by the insured's insurance broker which stated that the process of release of a vessel normally lasts between 6 to 8 weeks.

[238] *ibid.*

[239] *ibid* at para 12.

[240] This claim is for the loss of sale, i.e. an economic loss. Whether it can be claimed under a cargo policy and whether its proximate cause is delay has not been elaborated in the case, however it will be discussed in Chapter IV.

make the loss an actual total loss in this case as there was still a hope of release in the near future. The question arises accordingly whether the loss was a partial loss by virtue of s.56(1). In this case part of the goods was not totally lost[241] nor was it delivered in a damaged state, [242] therefore claiming for partial loss would not have been an option for the assured.
Had the cargo been perishable and deteriorated, one of the issues to be discussed would be whether the physical loss of goods by deterioration was proximately caused by delay or by the piracy event. Moreover, in this case the negotiations were conducted merely between the shipowners and pirates, accordingly the cargo owners were in any case not involved in such process. It could follow thence that the delay resulting from the piracy attacks could be qualified as "delay beyond the control of the assured". [243] Had it been a perishable cargo, it would be arguable whether the mere fact that the cargo was captured by pirates would give the assured a right to claim for an actual total loss of the goods on the basis of "irretrievable deprivation". [244] The question whether the cargo would constitute an actual total loss would arise more likely where the cargo would be "so damaged as to cease to be a thing of the kind insured"[245] because of the delay caused by the pirate attack and lengthy ransom negotiations.

Many standard form policies include clauses excluding loss or damage caused by "capture, seizure, arrest, restraint or detainment, and the consequences thereof". [246] Institute Cargo Clauses grant coverage for these perils if they occur in peace time. [247] Many standard form war risks cargo policies also provide cover for the same risks and their consequences. [248] One

[241] As per s.71(1).
[242] As per s.71(3).
[243] "Delay beyond the control of the assured" is a wording that appears in Institute Cargo Clauses 1982 and 2009 cl.8.3 and it is not clear whether it is mainly relevant to whether the insurance is still in force, or also to whether losses caused by delay beyond the control of the assured are within the ambit of the exclusion clauses.
[244] In *Masefield v. Amlin* it was held that the fact that the vessel and cargo were captured by pirates had not *per se* given a right to an actual total loss as during the negotiations there was still a hope that the cargo and vessel would be released, whereby the assured was not "irretrievably deprived" thereof.
[245] MIA s.57(1).
[246] Institute Time Clauses-Hulls (01/10/1983) cl.23; IVC-Freight 01/11/1995 cl.14.2.
[247] cl.6.2 of Institute Cargo Clauses (A)-(B)-(C) 1982 has the heading "war exclusion clause" and provides that the perils enumerated and their consequences shall not be covered. *A contrario* meaning of this clause suggests that these perils are covered if occurred in peace time. The same clause in 2009 forms do not include the same heading nevertheless should the sub-clause be interpreted with the two other sub-clauses mentioning war perils, it shall be accordingly construed to exclude cover merely for these mentioned perils if they occur in war time. The fact that delay is caused by capture may nevertheless be considered separately as capture is only a war peril and cannot occur in peace time. (A definition of capture was given by Channell J. in *Andersen v Marten* [1907] 2 K.B. 248 involving taking by enemy and in time of open war; a similar definition was given by Lord Fitzgerald in *Cory & Son v Burr* (1883) 8 App. Cas. 393).
[248] Institute War Clauses (Cargo) 01/01/2009 and 01/01/1982 cl.1.2; Institute War and Strikes Clauses-Freight-Time and Freight-Voyage 01/11/1995 cl.1.1.2.

may argue whether delay can be considered as "the consequence" of these perils[249] and accordingly be either excluded as a consequence of the named perils or covered when they are insured against. This issue would be of greater importance where the policy does not include any specific delay exclusion[250] although there is nothing barring courts from discussing whether this clause would alone be sufficient to exclude delay even where there is a specific delay exclusion. It was held in the US in *Blaine*[251] that a free from capture and seizure (FC & S) clause alone was considered as barring the recovery for delay due to detention.[252]

Conclusion

The chapter attempted to argue that the authorities from the 19th century which were the background against which the drafters of the MIA had proposed the exclusion of delay in s 55(2)(b) for cargo policies had to be approached cautiously on three grounds: Firstly, the 18th century decisions on delay did not expressly state that delay as a separate peril must be excluded; they merely interpreted a statute then in force which disallowed recovery of losses by mortality where delay was no more than one of the causes of loss. Therefore some of the 19th century leading judgments on delay such as *Taylor v Dunbar* may arguably have overinterpreted the 18th century decisions. Secondly, should this view not be tenable, the authority of *Taylor v Dunbar* shall apply not to all physical losses caused by delay yet only where delay for the specific voyage insured is so long as to make it unreasonable. Thirdly, it is submitted that the main authority supporting the view that delay losses must be excluded on the ground that they are usually the last cause in time shall not survive the modern approach to causation established by *Leyland*.

[249] For the view that the term "consequences" represented a loss and not an independent peril, please *see* Bennett 13.53.
[250] It was decided that where a loss comes within the general wording of the policy but is then specifically excluded by a particular exclusion, the specific exclusion takes priority: *Howard Farrow v Ocean Accident & Guarantee Corpn*. (1940) 67 Ll. L. Rep 27.
[251] *Blaine Richards & Co Inc v. Marine Indemnity Insurance Company of America and William H. McGee & Co.* 635 F.2d 1051, 1981 A.M.C. 1, US Court of Appeals, Second Circuit.
[252] Circuit Judge Lumbard noted at 1056 that "recovery for delay due to detention is barred by both the FC & S and Delay Clauses". The FC & S Clause in this case excluded from coverage all losses due to "capture, seizure, arrest, restraint, detainment, … and the consequences thereof or any attempt thereat…".

Moreover, it is yet to be seen whether given the recent authority in *The Cendor Mopu*, delay will be considered as an exception where there are perils of the sea. A decision to that effect would also require the authority of *Taylor v Dunbar* to be revisited.

The chapter also attempted to examine delay according to two approaches to concurrent causation, namely where both events are capable of causing loss independently and their joint operation causes loss (concurrent independent causes); and where the events operating independently cannot cause loss yet do so when they operate together (concurrent interdependent causes). It was argued that delay can hardly ever be a concurrent independent cause, and even if it can be a concurrent interdependent cause, it may not attract the rule in *Wayne Tank* on the ground that *Wayne Tank* can merely be authority for liability policies and not property policies. The chapter went on discussing that English authorities have not yet challenged *Wayne Tank* to a great extent and speculated that even where this authority is applicable, certain types of delay such as ordinary delay in the voyage and delay beyond the control of the assured can be considered as uninsured perils and escape the rule of *Wayne Tank*.

CHAPTER III

FREIGHT POLICIES
LOSS OF FREIGHT AND HIRE AND LOSS OF TIME CLAUSE

Introduction

Delay in voyage can take several forms which can have an impact on loss of freight: It can delay the earning of freight contracted for whereby the assured may have to contract for substituted freight; it can frustrate the object of the adventure together with a peril from which it ensues; and it can induce loss of hire where it results from an off-hire event under a time charterparty.

The usual exclusion for delay losses in s 55(2)(b) applies to policies on ships and goods however not on freight. The law on delay in relation to freight insurance, both in the sense of freight *stricto sensu* and freight in the sense of charter hire, has been developed according to common law authorities. Against the background of some of these authorities, the Loss of Time Clause was introduced into policies which relieves the insurers from liability for any claim consequent upon loss of time, whether the loss of time is caused by a peril insured or otherwise. The clause was subsequently inserted into standard market terms such as Institute Voyage Clauses-Freight and Institute Time Clauses-Freight.

This chapter shall scrutinise the common law background of the law on delay in regards to freight policies, shed light upon the scope of application of the Loss of Time Clause and assess whether the law, as it currently stands, is tenable.

3.1. Pre-MIA authorities on delay in earning freight

Pre-MIA decisions on mere delay of the voyage[253] which were decided on the basis of policies on freight followed or referred to authorities decided upon policies on cargo.[254] It is

[253] "Mere delay" is used in the sense of a delay which does not reach the point of a delay frustrating the adventure insured.

submitted that those decisions shall be considered separately with respect to the effect of delay on marine adventure and losses arising therefrom. It would arguably not be a fallacy to suggest that delay in earning freight would not amount to a loss of freight by loss of adventure on the ground that freight is a fixed sum, the measure of which would not depend on the timing of the arrival of the goods to their destination. Accordingly, there would be no loss of adventure in a freight policy in so far as the freight is eventually earned, albeit with some delay. The interest of the assured in that case would be the safe arrival of the goods upon which the earning of freight would depend. Nonetheless, the interest sought in a marine adventure in so far as goods are concerned is not merely the safe arrival of goods, yet also their timely arrival.[255] Delay in the marine adventure resulting in the impossibility of selling seasonal goods would not merely delay the earning of the interest contemplated by the assured (as in delay in earning freight) yet could arguably destroy the adventure contemplated. Therefore in this work, authorities on freight and cargo shall be analysed separately.

The common law judgments delivered prior to the enactment of the MIA 1906 consistently held that a mere retardation in a voyage where freight was eventually earned did not give the assured a right to claim for a total loss of freight.[256] In *M'Carthy v Abel*, upon a hostile embargo the assured abandoned the freight to the freight insurers which was accepted by them; the embargo having been subsequently ceased, the ship continued the adventure and in fact earned freight. The assured claimed for a total loss of freight subsequent to the abandonment and the ceasure of embargo, however the Court held, *inter alia*, that there was no total loss of freight as the freight had been actually earned, albeit with some delay.

This decision was followed a few years later in *Everth v Smith*[257] where the assured had insured freight that was planned to be earned from the carriage of a cargo of hemp between two ports and the carriage of another homeward cargo. The vessel could discharge her outward cargo, yet was detained at an intermediate port and was prevented from loading her homeward cargo. The master finally procured some substitute cargo for the homeward

[254] E.g. *Evereth v Smith* (1814) 2 M. & S. 284 (policy on freight) followed *Anderson v Wallis* (1813) 2 Maule and Selwyn 240 (policy on cargo) where it was said "if the retardation of the voyage be a cause of abandonment, the happening of any peril by which a delay is caused in the arrival of the ship would also be a cause of abandonment".
[255] See s 5(2) of the MIA 1906 for the interest in safe and due arrival of the subject-matter insured. The interest in due arrival of goods has been elaborated in Chapter IV.
[256] *M'Carthy, Corner and Henderson v Abel* (1804) 5 East 388; *Everth v Smith* (1814) 2 M. & S. 278.
[257] (1814) 2 M. & S. 278

voyage and the vessel could eventually prosecute the adventure, albeit with some delay due to the detention. The assured incurred some detention expenses which exceeded the freight eventually earned from the substitute homeward cargo and argued that the freight actually earned was not the specific freight contracted for and claimed for total loss of freight. Lord Ellenborough enunciated that it was certainly a loss of the particular trade which the assured had personally in contemplation, but that it was not within the intention of the policy. He found that the insurance was on freight generally,[258] and that it was therefore not material if the freight eventually earned was the one contracted for or a posterior one. The mere retardation of the adventure, and "the consequent inconvenience and expense arising from it", were not a substantive cause of loss where the particular thing insured had not received damage and where freight was eventually fully earned, albeit with some delay.

The decision of Lord Ellenborough is important in two aspects: Firstly, it is authority for the proposition that the substituted freight could not give rise to a total loss of freight if freight, albeit not the freight contracted for, is actually earned with some delay. The inconvenience with this line of reasoning rests upon the fact that insurance on freight which is commensurate with a particular charterparty may not arguably be considered as freight on general terms, but specific freight contracted for.[259] It can therefore be suggested that unless the assured can prove the freight was not on general terms, there may be room to argue that the substituted freight would not be covered under the policy and the assured can claim the difference between the substituted freight and the freight contracted for, a claim for partial loss of freight.

Nevertheless, even in the event that the assured is allowed to claim for a partial loss, such a claim can effectively be considered nowadays as a claim "consequent upon loss of time" on the ground that the freight had to be substituted because of a delay on the voyage and be excluded under the current "loss of time exclusion" in Institute Clauses.[260]

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[258] The policy was expressed to be on "freight valued at £1,200"

[259] Sharpe, Birch H., Substituted Freight, *Law Quarterly Review*, Vol 20, Issue 2, 1904, 160-166, at p 164. See the speech of Gorell Barnes J in *The Main* [1894] P 320, at 324: "It is clear that the Court held that, in a policy in similar terms, the freight which was actually earned on a voyage would be covered, although the assured in taking out his policy contemplated having a specific freight, but when he went to the underwriters he insured the freight in general terms." with reference to *Everth v Smith*.

[260] See Institute Voyage Clauses- Freight 1983, cl.12. According to *Turnbull, Martin & Co v Hull Underwriters' Association, Ltd* [1900] Q.B. 402 the subject matter insured was "freight of frozen meat, chartered or as if chartered". This phrase meant "contracted for, or as if contracted for" and it was held that the loss of time clause applied not only to chartered freights, but to all freights; see the speech of Mathew J at 405.

Secondly, the consequent inconvenience of delay of the adventure by detention would be detention expenses as were incurred by the assured in *Everth v Smith*.[261] The assured in that case had not particularly claimed these expenses, yet had claimed total loss of freight on the ground that the detention expenses had exceeded the freight eventually earned. It is submitted that these expenses can properly be characterised as expenses arising from delay and would give rise to the question of whether they would be excluded by way of the loss of time exclusion in the Institute Clauses on freight. To the best knowledge of the author, this issue has not yet been canvassed by the courts however it was stated in *The Wondrous*[262] that "Freight insurance is concerned with the earnings or potential earnings of the vessel, not with the expenses of earning those sums. It is not concerned as such with the fact that the voyage took longer nor with the fact that the costs of performing it were higher than were expected". [263] There is room to suggest that detention expenses can be excluded by the loss of time clauses.

It may be concluded that where the adventure insured is merely delayed and not ruined by frustrating delay, a mere delay not reaching the point of frustrating delay would solely delay the earning of freight and not terminate the adventure. Consequently, no total loss of freight can be claimed by the assured. Below will be analysed claims for partial and total loss of freight and charter hire along with the issue of to what extent those claims are affected by the existence of "loss of time" exclusion in freight policies.

3.2. Introduction to "Loss of Time Clause"

It was established under common law that the insurer on ship or goods was not liable for losses caused by delay yet the insurer on freight was liable where freight ceased to be payable by virtue of a contractual term or frustration.[264] Whereas the rule on ship and goods was codified in the MIA,[265] the Act is silent as to loss of freight caused by delay. However in practice loss of freight caused by delay is excluded from freight policies on time and voyage

[261] *Everth v Smith* (1814) 2 M. & S. 278
[262] *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1991] 1 Lloyd's Rep. 400
[263] *Ibid*, at 417. An exception to the non-recoverability of these expenses could arguably be where they are incurred in general average. This issue will be discussed in the context of hull and machinery and loss of hire policies Chapter VI.
[264] *Re Jamieson v Newcastle SS Freight Ins Assn* [1895] 2 QB 90.
[265] MIA s.55(2)(b).

basis[266] by the standard loss of time wording "This policy does not cover any claims consequent on loss of time whether arising from a peril of the sea or otherwise".[267]

Loss of time clause has been the subject of several judgments in respect of both claims for loss of freight under voyage charters and loss of charter hire under time charters.[268] Currently, the former is insured under the standard form of Institute Voyage Clauses-Freight and the latter under Institute Time Clauses-Freight. The loss of hire is also separately insured under loss of hire policies and therefore the distinction between that type of policies and time policies on freight must be made for the purposes of losses consequent upon loss of time and their recoverability. The distinction between freight policies on time basis and loss of hire policies was clarified in *The Wondrous*[269] where it was observed that loss of hire policies covered a fixed sum to be paid by reference to a period of time whereas valued time policies on freight insured the part of the adventure represented by the hire to be earned under a particular contract.[270] Moreover the latter requires a loss in respect of the subject matter insured to be proved and is concerned "with the earnings or potential earnings of the vessel and not with the expenses of earning these sums".[271] A calculation of loss suffered under a time charterparty may therefore be relevant in assessing whether the assured has successfully mitigated losses under a freight policy however cannot be taken to answer the question whether there was a loss of freight. Loss of hire policies and their relevance to delay shall be analysed in the Hull Insurance and Loss of Hire Insurance Chapter and the following part is merely concerned with freight policies on time basis.

In the most recent authority on the ambit of the loss of time clause *The Playa de las Nieves,*[272] it was enunciated that the clause postulates a chain of events: The occurrence of a peril insured against, resulting in loss of time, resulting in loss of freight which he would have earned from the use or hire of his vessel.[273] It was held that the clause would exclude any loss where delay was merely an intermediate event between the loss and the peril insured

[266] Institute Time Clauses-Freight 1983 cl.14; Institute Voyage Clauses-Freight 1983 cl.12.
[267] e.g. Institute Time Clauses-Freight 01/11/95 cl.15.
[268] The most recent example of the latter is *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The Playa de las Nieves)* [1978] AC 853
[269] *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1991] 1 Lloyd's Rep. 400
[270] At 417. Unvalued policies on freight are now overtaken by loss of earnings or loss of hire policies, Gilman and Merkin, *Arnould's Law of Marine Insurance*, 18th ed., 12-54.
[271] At 417
[272] *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The Playa de las Nieves)* [1978] AC 853
[273] *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The Playa de las Nieves)* [1978] AC 853, 879-880.

against. Moreover several authorities pointed out that the clause applies both to chartered and not chartered freight,[274] and both to claims for constructive total loss of cargo by frustration[275] and to the withholding of hire under an off-hire clause under a time charterparty.[276] The scope of the clause and its effect on loss of freight and hire shall be discussed under the following headings.

3.3. Loss of freight, frustration and loss of time clause

3.3.1. Frustration of marine adventure and delay

There must be a delay of nature destructive, frustrating so that the marine adventure comes to an end; otherwise the mere lengthening of the voyage shall not terminate or frustrate the adventure and cause loss of freight. It is noteworthy that delay in this context is an event frustrating the object of a contract other than a marine insurance contract, which consequently causes the loss of the subject matter of the latter. For the purposes of this work and in assessing the circumstances where loss of freight would be excluded by virtue of a loss of time clause, it is essential to determine at what point of time delay becomes frustrating.

To decide whether the contract is frustrated, the leading test referred to in cases involving frustration and delay used to be[277] the implied term test established by *Taylor v Caldwell.*[278] The test rested upon the idea that there is an implied condition in the contract which operates to release the parties from performing it. This test has more recently been replaced by the "radical change" test according to which there is frustration where without default of either party a contractual obligation becomes incapable of being performed because a fundamental or radical change from the obligation originally undertaken occurs.[279] The test is an objective

[274] *Turnbull, Martin & Co v Hull Underwriters' Association, Ltd* [1900] Q.B. 402, 405.
[275] *Russian Bank for Foreign Trade v Excess Ins Co Ltd* [1918] 2 KB 123; appealed on other grounds [1919] 1 KB 39.
[276] *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The Playa de las Nieves)* [1978] AC 853, 882.
[277] In *Jackson v Union Marine Insurance Co Ltd* (1874) L.R. 10 C.P 125 where Cleasby B referred at 140-141 to the judgment of Blackburn J in *Taylor v Caldwell* (1863) 3 B.S. 826. See also *Re Jamieson v. Newcastle SS Freight Ins Assn* [1895] 2 Q.B 90.
[278] *Taylor v Caldwell* (1863) 3 B. & S 826.
[279] In *Tatem v Gamboa* (1938) 61 Ll.L.Rep 149, 156 the new test was stated by Goddard J as "if the foundation of the contract goes...by reason of such long interruption or delay that the performance is really in effect that of a different contract..." then the performance of the contract is regarded as frustrated. A similar view was expressed in *Davis Contractors Ltd v Fareham U.D.C* [1956] A.C. 696, this was approved by the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675 and in *Pioneer Shipping Ltd v B.T.P Tioxide Ltd (The Nema)* [1982] A.C. 724.

one[280] and does not deal with the actual or presumed intentions of the parties as the implied term test. In this respect a mere change in the expenses or onerousness would not be sufficient to decide frustration but a significant change in the nature of the obligations is required. [281]

Delay may seriously affect the commercial object of the adventure as the ship's expenses and charges may continue during delay,[282] yet it is difficult to lay down strict rules as to when delay causes frustration of a contract. The nature of the underlying contract, the ship, the type of the cargo, and the contemplated duration of the voyage must be taken into consideration while deciding whether a delay is frustrating.[283]

Delay is a frustrating event if it is sufficiently long to frustrate the commercial adventure of the parties,[284] however delay which is within the commercial risk undertaken by the parties may not be sufficient to frustrate the contract. [285] To fall outside what the parties could reasonably have contemplated at the time of the contract, it must be abnormal in its cause, effects or its expected duration.[286] It was suggested that even a delay of considerable length and of uncertain duration can be an incident of maritime adventure, if it is clearly within the contemplation of the parties; delay which is ordinary in character accordingly makes it something other than the cause of frustration.[287]

3.3.2. Does delay have to be the frustrating event for triggering the loss of time clause

This question is of importance particularly with respect to deprivation perils which eventually result in some loss of time. Most of the judgments delivered on loss of freight by frustration of the adventure insured turned upon whether the loss was attributable to the deprivation peril or to loss of time resulting therefrom. Following the authority of *The Playa de las Nieves*[288] which established that the loss of time clause would strike out any claim for loss of freight

[280] *Davis Contractors Ltd v Fareham U.D.C* [1956] A.C. 696, 728 *per* Lord Radcliffe: "…the true action of the court…consists in applying an objective rule of the law of contract".
[281] *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675.
[282] If for instance delay is caused by ice or neaping, the margin of profit is quickly run off despite the benefit of P & I Club policies, as suggested by Lord Sumner in *Bank Line v Capel* [1919] AC 435 at 458-459.
[283] Denny, Maurice E.V, *Freight Insurance: A Commentary (The Insurance of Shipowners' Interest in Freight for the Carriage of Goods)*, London: Witherby 1986, at p 69
[284] *Pioneer Shipping Ltd v B.T.P Tioxide Ltd (The Nema)* [1982] A.C. 724.
[285] *Davis Contractors Ltd v Fareham U.D.C* [1956] A.C. 696.
[286] Beale, Hugh, *Chitty on Contracts*, 30th ed., Vol 1 para 23-035.
[287] Stated by Lord Sumner in *Bank Line v Capel* [1919] AC 435 at 458-459. The contemplation of the parties must be sufficiently clear and if expressly clear, sufficiently wide to cope with the new situation, otherwise it will not prevent frustration, *Fibrosa v Fairbairn* [1943] A.C. 32, 40 *per* Viscount Simon.
[288] *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The Playa de las Nieves)* [1978] AC 853

where the loss of time is merely an intermediate event between the loss and the peril preceding loss of time, it is controversial whether determining the cause of loss of freight is still required to assess the recoverability of loss where some loss of time is involved. However the analysis of the authority would suggest that there are certain exceptions to this rule which shall be mentioned below.

The role of delay in frustration can be categorised under two classes of cases: The first category of cases are the ones where some loss of time is caused by a deprivation peril and secondly cases where the ship becomes a constructive total loss due to damage by perils of the seas. In the former case, it can be argued that the time is only important to estimate correctly the extent of the peril, i.e. "if because of the length of time which is likely to subsist during which the peril lasts, it is justifiable to say 'This finally disposes of the bargain' then the freight is lost then and there immediately upon the happening of the insured peril and is attributable solely to that peril".[289] One of the examples for this category is *Atlantic Maritime v Gibbon*[290] where during a civil war, an adventure had had to be abandoned due to restraint of princes and it was held that the restraint and not delay caused the loss of adventure.[291] The charterparty in this case was terminated due to its own provisions and not owing to a frustration in the strict legal sense. The time element had only been essential in order to estimate correctly the extent of the peril. Similarly in *Roura & Forgas v Townend*[292] it was held that the lapse of time during which a ship is captured cannot be regarded as the cause of loss of profit on charter and would not be excluded by "claims arising from delay" exclusion.

The second category is where the loss of time is caused as a consequence of a mishap[293] such as perils of the seas resulting in constructive total loss of vessel or a breakage of shaft which does not of itself give rise to a claim where delay, "distinct from though consequent upon the accident itself... gives rise to the loss of the bargain".[294]

Determining the length of time required to trigger the clause is of essence and it was held in several cases that the mere fact that some delay occurred following the peril would not be

[289] *Atlantic Maritime v Gibbon* [1954] 1 Q.B. 88, at 126-127. The time element was considered to be relevant "not as a consequence of a mishap, but to ascertain correctly the nature and quality of the accident".
[290] *Atlantic Maritime v Gibbon* [1954] 1 Q.B. 88. *Obiter* support for this suggestion can also be found in *Robertson v Petros Nomikos Ltd* [1939] AC 371, 377.
[291] A similar example can be found in *Russian Bank for Foreign Trade v Excess Ins Co Ltd* [1918] 2 KB 123. The case involved frustration of the voyage by the closure of Dardanelles upon declaration of war.
[292] [1919] 1 K.B. 189, 197 per Roche J
[293] *Atlantic Maritime v Gibbon* [1954] 1 Q.B. 88, 127 *per* Lord Evershed MR
[294] *Bensaude v. The Thames and Mersey Marine Insurance Company Ltd* [1897] AC 609

sufficient to defeat the claim on the ground of the loss of time clause. In *Carra*s,[295] the same peril (stranding) produced the twin consequences of loss of the ship whereby the ship could not make the cancelling date which resulted in loss of freight. It was not questioned that the adventure was frustrated by the casualty which by the following inevitable delay made it impossible to carry out the contract. It was admitted that the loss of time clause would defeat a claim based on loss of the adventure, but the claim for freight was rested on the loss of the ship, on the ground that it was impossible in a commercial sense to repair her. Similarly in *Robertson v Petros Nomikos*[296] the assured's vessel became a constructive total loss, and the charterparty which would have been performed when she was repaired was accordingly never performed. The lost freight was recovered under the total loss clause as the loss occurred immediately when the vessel was totally lost and was not defeated by the loss of time clause. These points were rementioned in *The Playa de las Nieves,*[297] suggesting that under a voyage charter the loss of freight may not be defeated by the loss of time clause where the voyage charter is frustrated because of the destruction of the carrying vessel,[298] because of the destruction of the machinery essential to carry the agreed cargo[299] and where it is frustrated by the outbreak of hostilities.[300] It may accordingly be suggested that the loss of time clause in a freight policy would not strike out any claim where the adventure is frustrated by a peril preceding loss of time and not by loss of time itself, upon the condition that the possibility to prosecute the adventure is defeated by the casualty.

3.3.3. Actual and probable loss of time and loss of time clause

One of the questions that can be raised in relation to loss of time clause is whether it merely applies to claims where loss of time has already occurred or whether it also strikes out claims which rest upon not an actual yet an apprehended loss of time. In determining whether the adventure insured is frustrated, "the probabilities as to the length of the deprivation, and not the certainty arrived at after the event are...material".[301] Therefore in assessing whether delay

[295] *Owners of the Yero Carras v London & Scottish Assurance Corp Ltd (The Yero Carras)* [1936] 1 K.B. 291.
[296] *Robertson v Petros Nomikos Ltd* [1939] AC 371.
[297] *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The Playa de las Nieves)* [1978] AC 853, 883 per Lord Atkin.
[298] *Robertson v Petros Nomikos Ltd* [1939] AC 371.
[299] *Turnbull, Martin & Co v Hull Underwriters' Association Ltd* [1900] Q.B. 402.
[300] *Russian Bank for Foreign Trade v Excess Ins Co Ltd* [1918] 2 KB 123. The case involved frustration of the voyage by the closure of Dardanelles upon declaration of war.
[301] *Bank Line Limited v Arthur Capel & Co* [1919] A.C. 435, 454.

frustrates the object of the adventure insured, the potential duration of the delay at the time of the event is to be looked at rather than the actual duration of the delay.[302]

The loss of time clause defeats claims based on loss of adventure by frustrating delay, which shall connote that although there is no actual yet an apprehended delay, this can be sufficient to strike out claims based on loss of adventure. This suggestion is however controversial given that the wording "consequent upon loss of time" can be interpreted as alluding to a loss occurring after the loss of time begins operating. The common law authorities shall accordingly be scrutinised so as to determine the scope of application of the clause in relation to the foregoing controversy.

It will be seen that there are several authorities on the application of the clause to both actual and apprehended loss of time cases. In *Turnbull*[303] the owners elected not to have the ship repaired as it was obvious that repairs would be of great length and in order to avoid such delay they have arranged another cargo. It was decided that had the ship been repaired promptly there would have been no loss of freight. There was accordingly no actual loss of time due to repairs, however an apprehension of delay on the possibility that the repairs would be carried out. The loss was held to have been within the words "consequent upon loss of time". [304] Later on, it was doubted in *Atlantic Maritime v Gibbon* that the clause applied to estimated loss of time situations where loss of freight was said to occur upon the happening of the deprivation peril resulting in loss of time.[305]

As for the actual loss of time and the operation of the clause in situations where loss of freight was caused by a mishap, in *Petros M Nomikos v Robertson*[306] the ship had had to undergo repairs following a fire; however the repairs caused some loss of time as they could not have been completed on time and the charterparty could not have been performed as expected which resulted in loss of freight. It was stated that every case of constructive total loss of ship based on cost of repairs or deprivation of possession implies some loss of time

[302]Stannard, J.E Frustrating Delay 46 *Modern Law Review* 738-753, at 745.
[303] *Turnbull, Martin & Co v Hull Underwriters' Association Ltd* [1900] Q.B. 402. In this case the insurance was effected on the outward voyage for freight expected to be earned on the homeward voyage. The policy was warranted "free from any claim consequent upon loss of time". While the vessel was discharging the cargo a serious fire broke out which destroyed the refrigerating apparatus. Consequently the carriage of frozen meat upon the return voyage became impossible.
[304] *ibid*, at 406, *per* Mathew J.
[305] *Atlantic Maritime v Gibbon* [1954] 1 Q.B. 88, *per* Evershed M.R. at 127
[306] *Robertson v Petros Nomikos* [1939] A.C. 371, per Lord Wright at 387.

and that arguing that any claim for freight resting upon constructive total loss of the ship should be excluded by the operation of loss of time clause is not acceptable. The distinction of this case from the authority of the House of Lords in *Bensaude* was that in the latter the loss was caused simply by delay in repairing the partial loss arising from perils of the seas, whereas in the former the loss of freight was caused by constructive total loss of the ship which was complete at the date of the fire.[307] The *Nomikos* case shows that even though there is actual loss of time, loss of freight may not be considered as "consequent upon loss of time". There is an obvious controversy between the authority in this case and the decision in *The Playa de las Nieves* where the House of Lords held that both in voyage and time policies on freight, loss of time clause would defeat claims wherever loss of time is an intermediate event between the loss and the peril preceding delay. Nevertheless it is noteworthy that *The Playa de las Nieves* was on a freight policy on time basis and the part relating to freight policies on voyage basis can be considered as *obiter*.

3.3.4. "Loss of time" clause and frustration clauses

Standard freight policies exclude claims based upon loss of or frustration of the voyage or adventure by express clauses. [308] The question arises accordingly whether frustration clauses and loss of time exclusion can be mutually inclusive; i.e. whether a claim for loss of freight where delay frustrates the object of the adventure could be excluded by either of these clauses or in other words whether frustration clauses would also contain the loss of time exclusion for freight losses. [309]

It is submitted that firstly the type of delay ought to be distinguished to determine whether the delay is of the type of a frustrating delay. Frustrating delay is a concept that is used to assess whether a contract of carriage is terminated by a long or potentially long delay for the

[307] See also *Re Jamieson v. Newcastle SS Freight Ins Assn* [1895] 2 QB 90 where the shipowner had chartered his ship to carry a cargo at an agreed freight. While the ship was sailing for the port of loading she was damaged through perils of the sea and was unable to fulfil her engagement. It took her so long to get repaired and the adventure contemplated by the charterparty was according to *Jackson* frustrated. Therefore the shipowner was not bound to proceed with the voyage and charterers were not bound to load. The freight to be earned should the voyage be proceeded with was hence lost by the shipowner. It was held that the loss was occasioned directly by a peril of the sea and not by delay.

[308] Institute War and Strikes Clauses (Freight-Time), (Freight-Voyage) (1/10/83) cl 4.5.; (1/11/95) cl 4.6 "any claim based upon loss of or frustration of any voyage or adventure".

[309] Lord Atkin and Lord Thankerton in *Robertson v. Petros M. Nomikos Ltd.* [1939] A.C. 371, 377, 378, expressed their doubt as to the construction of the loss of time clause and suggested that it received "too wide a construction". This expression can be interpreted as referring to the fact that it shall not be construed to protect underwriters in all frustration cases, even where delay was no part of the frustration; or that it shall not be construed to exclude the claims arising not from frustrating delays.

specific adventure. Its link with the insurance contract is where such delay results in loss of freight which might or might not be recoverable thereunder. Holding that the wording "consequent on loss of time" is sufficient to exclude loss of freight caused by frustrating delay may raise the assumption that "loss of time" would extend to include also frustrating delays. It may accordingly be argued that loss of time and loss of adventure clauses can be mutually inclusive insofar as loss of freight by frustrating delay is concerned.

3.3.5. "Consequent on loss of time" and causation

Whether a loss is consequent on loss of time is a question of fact and the authorities should be treated accordingly.[310] So as to have a better understanding of the wording and its causative meaning, i.e. whether it imports the proximate cause rule into the policy or suggests a different rule, it would be necessary to analyse the relevant market wordings and authorities.

Some standard market terms on freight were drafted with "loss proximately caused by delay" exclusion instead of "consequent on loss of time" clause.[311] These wordings may also co-exist in the same policy, by way of example in *Atlantic Maritime v Gibbon*[312] the policy was warranted free of claims based on a. loss of or frustration of, any voyage or adventure caused by restraint of princes, and b. loss proximately caused by delay. The policy also incorporated Institute Time Clauses-Freight which contained the "consequent on loss of time" exclusion. Albeit the court did not decide on the point, Evershed M.R. admitted that there are distinctions between the two clauses without further elaborating on the matter. [313] It is submitted that an analysis of the two clauses within the same policy would at least raise the issue of incorporation of the standard market term into the policy and on deciding whether the written provision excluding losses proximately caused by delay would prevail over the standard term which reads "consequent on loss of time".

However before asking this question, the fact that there is an ambiguity between the clauses must be established. Therefore the second issue would be with respect to the discussion of whether "loss of time" and "delay" are identical concepts. This question was raised

[310] *Robertson v Petros M Nomikos Ltd* [1939] AC 371, 377.
[311] E.g. Institute War and Strikes Clauses, Freight-Time 1/11/95, cl. 4.5. provided "loss proximately caused by delay or any expenses arising from delay".
[312] [1954] 1 Q.B. 88.
[313] *ibid*, at 122.

previously in two instances[314] and it was stated that there was no difference between the two wordings, nevertheless it can be argued that the concepts must be treated differently on the ground that loss of time refers to a mere lapse of time whereas delay involves a certain period of time that is overrun.

It was rejected in the House of Lords that "consequent on" meant "proximately caused by".[315] Lord Diplock analysed that "consequent on" and "arising from" were similar by enunciating that the exclusion "…contemplates a chain of events expressed to be either consequent on or arising from one another". It was sufficient if the loss of time was within the chain of events between the "event which is in marine insurance law the proximate cause of that loss" and the loss for which the claim is made. The loss of time ought not to have to be the proximate cause of the loss of freight. It would accordingly not be a fallacy to submit that unless a freight policy contains proximate causation wordings, "consequent upon loss of time" *per se* would not import the proximate causation rule.

3.4. Time charters and loss of time exclusion

3.4.1. Origins of the clause

It is not entirely clear whether the loss of time exclusion was inserted into time and voyage clauses on freight following pre-MIA judgments on frustration[316] such as *Jackson v The Union Marine Insurance*[317] or time charter cases such as *The Alps*[318] and *The Bedouin*[319] where the issue was whether loss of hire was occasioned by the off-hire clause in the time charterparties or the peril insured against under the policy. In those latter cases no question of frustration of adventure had arisen and therefore the origins and the essential ground upon which the clause was inserted into policies is of importance for determining the scope of the clause. The rationale behind arguing the latter rests upon the similarity between the wording of the loss of time exclusion later on introduced ("Warranted free from any claims

[314] The owners in *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The Playa de las Nieves)* [1978] A.C. 853, 876 contended that loss of time in the context meant in effect delay. This argument was also mentioned in *Russian Bank for Foreign Trade v. Excess Insurance Co. Ltd* [1918] 2 K.B. 123 at 126-128.
[315] *Naviera de Canarias SA v Nacional Hispanica Aseguradora SA (The Playa de las Nieves)* [1978] A.C. 853, 882 *per* Lord Diplock.
[316] This was enunciated by Donaldson J in *Naviera de Canarias SA v. Nacional Hispanica Aseguradora SA* (*The Playa de las Nieves)* [1975] 1 Lloyd's Rep 259 at 260 and had also been argued by the assured.
[317] (1874) LR 10 CP 125
[318] *Mersey Steamship Company Ltd v Thames and Mersey Marine Insurance Company Ltd (The Alps)* [1893] P 109
[319] *The Bedouin* [1894] P 1

consequent upon loss of time, whether arising from a peril of the sea or otherwise")[320] and the off-hire clauses contained in the charterparties which were the subject of *The Alps* and *The Bedouin* ("in the event of loss of time by… payment of hire to cease…").

The distinction between the foregoing cases is crucial given that where the clause is taken to have originated from cases on frustrating delay, it can be submitted that the clause essentially purports to exclude total loss of freight occasioned by the frustration of the objects of the adventure by delay. On the other other hand, should the clause be taken to have originated from *The Alps* and *The Bedouin*, the clause may be construed to exclude mainly partial loss of hire arising from the happening of an off-hire event and resulting loss of time.

Commencing with *Jackson v. Union Marine Insurance Co Ltd,*[321] the early leading judgment on frustrating delay, the vessel in that case had got aground and delayed due to getting the vessel off the rocks and repairs, during which the charterer had abandoned the vessel and arranged another vessel to carry the cargo. The assured claimed that there had been a total loss of freight[322] on the ground that he was prevented by sea perils from earning freight. The issues were whether the time necessary for repairing the ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of the time, whether there was a total loss of freight to be earned under a charterparty by perils of the sea, and whether such time was so long as to put an end to the commercial speculation entered upon by the shipowner and charterers.[323] The policy also did not contain any loss of time exclusion. Bramwell J held that the proximate cause maxim did not apply,[324] the loss of freight was caused by perils of the seas and that delay was only an event frustrating the charterparty. According to Bramwell J the issue was not whether the perils of the seas or the delay were the proximate cause of the loss of freight, but was whether or not the perils of the sea or the refusal of the charterers to load was the cause. Delay frustrating the charterparty was not even considered as a peril for the purpose of the insurance contract that may or may

[320] This wording is very similar to the current clause in the Institute Clauses Time and Voyage Freight and has the same effect although "warranted free from" is replaced by "This insurance does not cover any claim". This difference was not considered as creating a difference in meaning in *Naviera de Canarias SA v. Nacional Hispanica Aseguradora SA* (*The Playa de las Nieves)* [1978] AC 853.
[321] (1874) LR 10 CP 125.
[322] There is no specific reference in the case whether the shipowners' claim was for constructive or actual total loss. For classification of the case under actual total loss *please see* Hodges, Cases and Materials on Marine Insurance Law, at 620, for the view that the case comes nearest to one of constructive total loss *please see* Arnould's Law of Marine Insurance and Average, 17th edition, 29-62 fn 307.
[323] Cleasby B at 125-126.
[324] (1874) LR 10 CP 125, 148.

not have been the cause. Bramwell J held that there would have been a new adventure after the frustration of the charterparty by perils of the seas and that the perils of the seas did not cause something which caused something else.[325] Cleasby B dissenting in that judgment approached delay as being caused by perils[326] and not by the fault of the charterers[327] or the breach of a stipulation by the owners. It was found that delay frustrated the charterparty; it was the event which gave the charterers the right not to load the ship but not the event which caused the loss of freight. The loss of freight was accordingly held to be caused by perils of the seas.

Should it be submitted that *Jackson* was the ground upon which the loss of time clause was introduced into both time and voyage policies on freight, the main purpose behind this introduction was arguably to exclude total loss of freight by frustrating delay and any delay which was not as lengthy as to be frustrating the commercial speculation of the adventure undertaken by the charterparty would not suffice to trigger the clause.

It could alternatively be argued that the main purpose of the clause was to exclude partial loss of hire by the trigger of an off-hire clause in the charterparty. Several judgments on loss of hire after *Jackson* had referred to *Re Jamieson v. Newcastle SS Freight Ins Assn*[328] for the suggestion that loss of hire by an off-hire event and consequent delay are the types of losses sought to be excluded under time policies on freight. In *Re Jamieson v. Newcastle SS Freight Ins Assn*[329] the risks insured against included perils of the seas and it was provided that "no claim arising from the cancelling of any charter, *nor loss of time under a time charter*" shall be allowed.[330] The claim in this case and the following discussion turned upon the word "cancelling the charter", and the second part of the clause as to the loss of time was *obiter.*[331] It was stated "…What this clause means is that, if under a time charter the ship is laid up and by agreement time is then not to count, the underwriters will not be responsible for loss of freight arising therefrom".[332] It is however required to read this *obiter dictum* along with the

[325] At 148.
[326] Lord Esher M.R also stated in *Re Jamieson v Newcastle SS Freight Ins Assn* [1895] 2 QB 90 at 93-94 "…if the ship is so delayed, whether by a peril of the sea or by any other cause…".
[327] At 132.
[328] [1895] 2 QB 90.
[329] [1895] 2 QB 90.
[330] Emphasis added.
[331] *Per* A.L. Smith LJ at 96.
[332] *ibid.*

previous sentences and the whole context of the decision which may result in a different finding.

Some loss of time is in the nature of loss of hire, nevertheless loss of freight by loss of time requires the delay to be so lengthy for the voyage in question to put an end thereto. The delay that is of nature to frustrate the contract shall therefore be distinguished from the mere passage of time. The insurers may opt for excluding losses resulting from frustrating delays however whether their purpose behind the stipulation of the loss of time clause in a time policy on freight is to exclude loss of hire which can arguably be almost always caused by loss of time is a matter that shall be addressed below.

3.4.2. First interpretation of "loss of time" clause and its context

The loss of time exclusion was tested for the first time in *Bensaude v. The Thames and Mersey Marine Insurance Company Ltd*[333] where the policy was against total loss of freight. It was argued on behalf of the assured that the claim was consequent upon the peril insured against and had happened then and there as the adventure became impossible upon its occurrence, therefore it was submitted that the loss of time was merely an element for measuring the extent of loss.[334] Lord Watson used the "but for" test[335] to assess the cause of the loss of freight and according to him the loss would not have arisen but for the delay occasioned by the breaking of the shaft and that this would be excluded by the loss of time clause. According to Lord Herschell, "any claim consequent upon loss of time" meant that although the freight was lost by a peril insured against (in this case perils of the seas) if the claim depends on loss of time in the prosecution of the voyage and that the voyage cannot be completed within the time contemplated, then the insurer is not liable for the loss. [336] The statement gives rise to the question of whether Lord Hershell construed "whether arising from a peril of the sea or otherwise" as referring to the loss and not to the "loss of time". It was argued by the counsel for the assured that the adventure became impossible after the peril of the sea occurring and breaking the shaft and not with the delay. It was decided that the freight was lost by perils of the seas but the claim depended on loss of time and therefore was struck by the exclusion. It can be argued that this was a decision on delay frustrating a

[333] [1897] AC 609.
[334] *Bensaude v. The Thames and Mersey Marine Insurance Company Ltd* [1897] AC 609, at 610.
[335] At 613.
[336] At 613-614.

voyage charterparty on the ground that it was against total loss only and cannot be authority for cases where delay causes partial loss of charter hire.

3.4.3. Off-hire clauses and loss of time exclusion

i. Early cases on loss of hire and off-hire clauses in charterparties

In early cases on loss of hire where policies did not include the loss of time clause, courts consistently held that loss of hire could be recoverable from insurers where it had resulted from loss of time. In *Inman*[337] the Court of Appeal held that the insurers were not liable on the ground that the perils insured against were not the proximate cause of the loss, however in the House of Lords it was stated that although the proximate cause rule was intelligible and applicable in many cases, in a case such as *Inman* a too literal application of it could have caused injustice. [338] Lord Watson enunciated "If it had been expressly stipulated in the charterparty that freight should cease to be payable so long as the ship was incapable from that cause of efficiently performing her contract, I do not doubt that the insurers would have been liable" given that that would have been a case of loss of freight through perils of the seas.[339]

Following this *obiter dictum*, two important decisions were delivered in respect of loss of hire where time charterparties had contained off-hire clauses, which they now almost invariably do.[340] In two similar cases decided after *Inman* namely *The Alps and The Bedouin*, [341] where in both cases time charterparties contained off-hire clauses and loss of time was caused during repairs of the damaged vessel. In both instances the courts decided that what triggered the off-hire clause in the charterparty was the immediate action of perils of the seas and applied the proximate cause rule. The result was that the inefficiency of the vessel was due to a peril insured against which was the proximate cause of the loss and that the insurers were therefore liable given also the absence of loss of time clause in the policies.

[337] *Inman SS. Co v Bischoff* (1880-1881) L.R. 6 Q.B.D. 670.
[338] *Inman SS. Co v Bischoff* (1881-1882) L.R. 7 App. Cas 670, 675-676 per Lord Selbourne L.C. According to Lord Blackburn, the real question in the case was not whether the proximate cause would apply yet whether there was any loss of freight.
[339] *Inman SS. Co v Bischoff* (1880-1881) L.R. 6 Q.B.D. 670, 690 per Lord Watson.
[340] The current time charterparties in standard forms such as NYPE Time Charter 1946 cl 15 contain the wording "… in the event of loss of time from …" and enumerates off-hire events. The revised version of 1993 preserved the same wording.
[341] *Mersey Steamship Company Ltd v Thames and Mersey Marine Insurance Company Ltd (The Alps)* [1893] P 109 was followed by *The Bedouin* [1894] P 1.

As it is obvious in the foregoing judgments, courts consistently sought to find the proximate cause of the loss in answering whether insurers were liable for loss of hire. This could give rise to the question of whether these authorities could still apply to policies containing a loss of time clause, in other words, whether a loss of time clause could only relieve insurers from liability where loss of time is a proximate cause of the loss or whether it would so relieve them whenever loss of time is merely an event in the chain of causation. This issue shall be discussed under the next headings.

ii. Time charterparties, off-hire clauses and the meaning of "loss of time"

According to the terms of a time charterparty, loss of time can be considered as the result of an off-hire event or the off-hire event itself.[342] In the latter case, what would differentiate delay or loss of time from other off-hire events which could contain an element of loss of time (e.g. detention) would be considered to be a delay of the service immediately required.[343] Therefore a vessel could be said to have been both detained and delayed where the detention causes the vessel to delay the service immediately required. In standard form time charterparties such as NYPE 46 the off-hire clause is taken not to be concerned with the entire maritime adventure or the chartered service as a whole.[344] In that type of charterparties, the loss of time resulting in loss of hire is considered as actual time lost during the inefficiency of the vessel and not an identifiable length of time by which the chartered service could be said to have been delayed.[345] This approach could give rise to the question of whether judgments relating to frustration of voyage charterparties by excessive delay of the entire maritime adventure could be taken as authorities for cases of partial loss of hire by loss of time. This suggestion accordingly doubts whether the authority of the House of Lords in *The Playa de las Nieves*[346] which was decided following *Bensaude*[347] is tenable.

iii. Whether loss of time a cause of loss or merely a measure of loss

[342] In *Nippon Yusen Kaisha Ltd v Scindia Steam Navigation Co (The Jalagouri)* [1998] CLC 1054, the charterparty included an additional clause 53 which put the vessel off-hire where she is "seized or detained or arrested or delayed". In this case the vessel was removed from her berth and was prevented by the port authorities from discharging its cargo.
[343] *Nippon Yusen Kaisha Ltd v Scindia Steam Navigation Co (The Jalagouri)* [1998] CLC 1054, at 1057, Mr Justice Rix as he then was considered that according to time charter interpretation delay was "a word of broad meaning and had to be measured by reference to the service immediately required".
[344] *Minerva Navigation Inc v Oceana Shipping AG; Oceana Shipping AG v Transatlantica Commodities SA* (The M/V Athena) [2013] EWCA Civ 1723
[345] Given the expression "time thereby lost" in cl 15 of NYPE 46.
[346] *Naviera de Canarias SA v. Nacional Hispanica Aseguradora SA* (*The Playa de las Nieves)* [1978] AC 853
[347] *Bensaude v. The Thames and Mersey Marine Insurance Company Ltd* [1897] AC 609

The connection between loss of hire and loss of time would inevitably depend upon the terms of the charterparty. By way of example, where a time charterparty contains an off-hire clause providing that the hire shall cease to be payable where the vessel is prevented from performing for more than twenty-four working hours[348] it would follow that hire would not be considered as having been lost in the first twenty-four hours of inefficiency, albeit time would definitely have been lost by the shipowner. This can accordingly be an example of a circumstance where loss of hire shall not strictly mean that its loss directly depends upon loss of time, yet also upon the terms of the charterparty. Nonetheless, whether the terms of the charterparty shall also determine the cause of the loss of hire is a question that requires further analysis.

It can be submitted that but for the existence of off-hire clauses in charterparties, hire thereunder would not be lost; nevertheless this shall not necessarily denote that the proximate cause of the loss of hire is the terms of the charterparty and not the insured perils. The more fundamental question would perhaps be whether it is still necessary to identify the proximate cause of the loss[349] in order to decide whether the loss would be excluded by the loss of time exclusion. The House of Lords in *The Playa de las Nieves*[350] focused on the distinction between proximate and "consequent upon" causation. According to this authority, for the loss of time exclusion to apply, it would suffice that the loss of hire is merely "consequent upon" loss of time, i.e. the loss of time did not have to be the proximate cause of the loss, it would suffice that loss of time is merely an event in the chain of causation.

The loss of hire by the happening of an off-hire event that triggers an off-hire clause shall be distinguished from loss of hire by frustrating delay. In the former case it may be argued that the hire is lost by virtue of the contract[351] (but for the off-hire clause, the loss of time would not cause the loss of hire)[352] whereas in the latter it happens with the occurrence of a

[348] As in *Mersey Steamship Company Ltd v Thames and Mersey Marine Insurance Company Ltd (The Alps)* [1893] P 109

[349] As was the case in *Mersey Steamship Company Ltd v Thames and Mersey Marine Insurance Company Ltd (The Alps)* [1893] P 109 and *The Bedouin* [1894] P 1

[350] *Naviera de Canarias SA v. Nacional Hispanica Aseguradora SA* (*The Playa de las Nieves)* [1978] AC 853

[351] In the context of voyage charters where the vessel had to incur lengthy repairs the use of the cancelling option in the charterparty was regarded as the cause of the loss of freight. *Mercantile v Tyser* (1880-81) L.R. 7 Q.B.D 73. It can be argued that the happening of an off-hire event triggering the off-hire clause in the charterparty can be considered in the same way, which was argued by the insurers in *Mersey Steamship Company Ltd v Thames and Mersey Marine Insurance Company Ltd (The Alps)* [1893] P 109

[352] Although in certain charterparties such as in BIMCO Supplytime 2005 charterparty, loss of hire may be accepted as an event which occurs independently from the off-hire clause. Cl.14(f) provides that in case

frustrating delay. The loss of time in the former context can arguably be regarded as an event quantifying the amount of loss; [353] the lengthier the loss of time is, the greater the extent of loss shall be.

In this sense, identifying whether the loss of hire is consequent on loss of time and therefore excluded by the loss of time clause in freight policies, or whether is consequent on the off-hire event is important. There is considerable authority now that such loss is excluded by the loss of time exclusion[354] as none of the cases decided on time charters and loss of time other than *The Playa de las Nieves* included a loss of time exclusion.[355] The decision of the House of Lords shall be analysed along with the views expressed in the Court of Appeal as to the fact that the cause of the loss of hire was the off-hire event and not the loss of time. [356]

Under a voyage charterparty, the freight can be lost in several ways such as where the vessel or the cargo becomes a constructive total loss or if delay or the peril preceding delay frustrates the object of the adventure. Therefore one may argue that the loss of time clause in a freight policy has a specific role to strike out all the claims which are consequent on loss of time. Nonetheless the same argument may not be tenable in respect of loss of hire under time charters as that loss merely depends on the existence of an off-hire clause in the charterparty the trigger of which depends on the happening of an off-hire event - off-hire events inevitably contain some element of loss of time. It is crucial to identify the situations where hire will be lost under a freight policy other than the off-hire event situations, as it may not be appropriate to construe the loss of time clause barring all the claims for loss of hire if the most encountered loss is one by the occurrence of an off-hire event. One of the most obvious benefits sought by taking out a freight policy would probably to be covered in case of loss of hire where an off-hire event occurs. [357] Holding that loss of time exclusion strikes out any loss of hire by an off-hire event shall signify that the only loss of hire recoverable under such

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hazardous cargo is carried, the Charterers shall be liable for any loss "directly or indirectly" caused to the shipowners. A delay resulting from the carriage of hazardous cargo and the consequent loss of hire can arguably be an indirect loss.

[353] This point was argued by the assured in *Naviera de Canarias SA v. Nacional Hispanica Aseguradora SA* (*The Playa de las Nieves)* [1978] AC 853.

[354] *Naviera de Canarias SA v. Nacional Hispanica Aseguradora SA* (*The Playa de las Nieves)* [1978] AC 853.

[355] *Inman Steamship Co v Bischoff* 7 App. Cas 670; *Mersey Steamship Company Ltd v Thames and Mersey Marine Insurance Company Ltd (The Alps)* [1893] P 109; *The Bedouin* [1894] P 1.

[356] The decision was given with a majority of Lord Denning M.R and Shaw L.J; Goff L.J dissenting.

[357] *Naviera de Canarias SA v. Nacional Hispanica Aseguradora SA* (*The Playa de las Nieves)* [1976] 3 W.L.R. 45, *per* Lord Denning M.R.

a policy would be loss of hire consequent on total loss of the ship whereby it becomes impossible to perform the service for which she is chartered.

On the other hand, holding the insurers liable for the loss of hire under a freight policy during an excessively long delay could raise the suspicion whether the insurers might have intended to cover such a risk without having requested higher premiums. Subsequent to *The Playa de las Nieves*, standard terms covering loss of charter hire was made available in the market known as London ABS Form 1983.[358] The cover provided under these clauses extends to loss of hire caused by loss of or damage to the vessel preventing it from operating and earning hire, however does not extend to loss of hire where the vessel is not on charter or to loss of hire incurred for the purposes of ensuring the health of a crew member. These types of losses can be considered as consequent upon loss of time and be excluded under both time-freight policies and loss of charter hire policies.

Conclusion

In relation to voyage charters, it is now settled law that the loss of time clause in a freight policy would not strike out any claim where the adventure is frustrated by a peril preceding loss of time and not by loss of time itself, with the condition that the possibility to prosecute the adventure is defeated by the casualty.

In relation to time charters, the loss of time clause has not been litigated since the House of Lords decision in *The Playa de las Nieves*, however it is doubted whether the reliance of the Court on decisions interpreting the clause in the context of delay frustrating voyage charterparties is reasonable. Such interpretation could result in a considerable limitation of the scope of cover under freight policies.

[358] This Form and loss of hire policies shall be elaborated in Chapter VI.

CHAPTER IV

CARGO POLICIES AND ECONOMIC LOSSES & EXPENSES CAUSED BY DELAY

Introduction

A delay during sea transit together with a delay in delivery may result mainly in three types of losses. These are physical damage to or loss of goods;[359] economic loss as a result of the decrease in the market value of cargo between the time of the expected delivery and actual delivery; and pure economic loss where, by way of example, an industrial plant cannot operate given that parts of an essential machine are delivered after the date of delivery[360] or a cargo owner loses his sale contract. Whereas the first category of loss results merely from delay in transit, the second and third categories arise from delay in delivery. The third category of losses can be covered under marine delay in start-up insurance or business interruption policies and due to the nature of the policy and the requirement for a timely delivery of goods, they may contain a delivery time for the cargo.[361] This being said, there is a general view based on pre-MIA case law that the loss of market value caused by delay in delivery is not recoverable under cargo policies on the ground that mere delay in a voyage does not result in loss of the adventure insured and that this type of loss is consequential cargo policies. This chapter shall therefore analyse whether the pre-MIA authorities could survive the enactment of the Act and whether this type of loss can now be recoverable under standard market clauses.

[359] This was dealt with in Chapter II.

[360] See United Nations Commission on International Trade Law, Fortieth session, Vienna, 25 June-12 July 2007, Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), A/CN.9/616, at 42-43.

[361] In relation to a marine delay in start-up policy, see *Assicurazioni Generali S.P.A. v. Black & Veatch Corp*. 2004 A.M.C. 773, 362 F.3d 1108, at 111 for an example of delay of six months after the originally scheduled delivery date.

The above mentioned types of losses are relevant to goods carried by sea and some or all of them are recoverable from carriers under contracts of carriage governed by international Conventions of carriage of goods by sea.[362] For the purposes of this chapter, it is essential to scrutinise whether they are recoverable under cargo policies and other types of policies, and if not affirmative, whether the provisions of the Conventions would allow cargo interests to claim against carriers for those losses. Where these losses are recoverable under cargo policies and the carrier is also liable under the contract of carriage, cargo insurers would be subrogated to the assured's rights subsequent to payment and would claim against the liability insurers of the carriers, i.e. P & I Clubs. In modern practice, many cargo disputes take place between cargo insurers and P&I clubs and the main role of the liability regimes remain in governing recourses between those insurers.[363] Where the loss is not recoverable under a cargo policy and the assured holds no other available cover against such losses under another policy, the only viable option would be to claim against the carrier. It is therefore indispensable to emphasise the liability regimes under the international conventions and standard form cargo policies so as to assess how liability for the risk of delay is allocated.

4.1. Mere Delay not resulting in Loss of Marine Adventure and Common Law Authorities

Prior to the enactment of the MIA 1906, there had been several common law decisions to the effect that so long as non-perishable goods can be forwarded to their destination, there would be no actual loss of goods other than the expense in forwarding them if they are merely delayed on the voyage. It is noteworthy that the authorities are not clear as to whether there can be loss of adventure where forwarding the goods to their destination would take longer than a reasonable time.

4.1.1. Pre-MIA authorities on mere delay not resulting in total loss of marine adventure

In many of the pre-MIA authorities, the disputes turned on whether the initial peril causing either damage to the ship which required repairs (and consequently delay in the arrival of goods for the season) or depriving it from prosecuting the voyage (such as detention) resulted in the impossibility of prosecuting the voyage to the port of destination or whether it was a mere delay upon the voyage.

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[362] E.g United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 ("The Rotterdam Rules"); United Nations Convention on the Carriage of Goods by Sea, 1978 ("The Hamburg Rules"); The Hague Rules as Amended by the Brussels Protocol 1968 ("The Hague-Visby Rules").

[363] Selvig, Erling, The Hamburg Rules, the Hague Rules and Marine Insurance Practice, *Journal of Maritime Law and Commerce*, 12(3), April, 1981, 299-326, at 310.

In *Barker v Blakes*[364] a non-perishable cargo was carried upon a vessel which could not prosecute the voyage due to a prolonged detention in consequence of which the cargo had to be sold. Lord Ellenborough enunciated that "the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may be properly considered as a loss of the voyage and such loss of voyage, upon received principles of insurance law, as a total loss of goods which were to have been transported in the course of such voyage". [365] Delay was involved in this case merely as part of the detention peril and the crucial point was that it was impossible to prosecute the voyage by reason of detention. There was a loss of goods by loss of adventure due to detention and not due to delay arising from the detention.

Several judgments were decided where, upon the facts, delay in the arrival of the goods to their destination or delay in a season was not caused by deprivation perils, yet by damage to ship which necessitated lengthy repairs. In *Anderson v Wallis* [366] the ship carrying imperishable cargo was damaged during the voyage and repairs could not be completed until the new season, another ship could also not be procured to forward the cargo which meant that the cargo could not reach the destination on time. The claim of the assured based on loss of adventure was rejected on the ground that the goods were not perishable and the adventure had not become impossible by reason of the peril damaging the vessel and could have been prosecuted subsequent to the repairs. There was therefore still the possibility of conveying the goods to their destination, albeit with some delay. This was according to the court a temporary suspension of the voyage and not its destruction.[367] In addition, it was enunciated that "if retardation of the voyage be a cause of abandonment; the happening of any marine peril to the ship by which a delay is caused in her arrival at the earliest market, would be also a cause of abandonment".[368]

[364] *Barker v Blakes* (1808) 9 East 283
[365] At 293, 294
[366] *Anderson v Wallis* (1813) 2 Maule and Selwyn 240
[367] The Court thereby distinguished *Manning v Newnham* (1792) 3 Douglas 130
[368] At 247

Similarly, it was stated *obiter* in *Roux v Salvador*[369] that it follows from the concept of irretrievable deprivation that mere retardation of itself cannot constitute an actual total loss of goods. Lord Abinger CB stated the principle as follows:

> "If the goods are of imperishable nature, *if the assured become possessed or can have control of them, if they have still an opportunity of sending them to their destination,* the mere retardation of their arrival at their original port be of no prejudice to them beyond the expense of re-shipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination."[370]

This *obiter dictum*[371] recognises the fact that mere delay in the arrival of the goods cannot result in the total loss of goods where the assured has control over them, however the expenses incurred so as to forward the goods to their destination are recoverable under a cargo policy as partial loss. Whether this position has changed according to the modern policy provisions is an issue that shall also be addressed below[372] and it shall be argued that the modern clauses allow the assured to recover for forwarding charges where the insured adventure is frustrated by delay and not where it is merely delayed.

The *obiter dictum* of Lord Abinger CB continues with:

> "… if, though imperishable, they are in the hands of strangers *not under the control of the assured*; if by any circumstance over which he has no control they can never, or *within no assignable period*, be brought to their destination; … The loss, is in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle".[373]

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[369] *Roux v Salvador* (1836) 3 Bing NC 266.

[370] *ibid* at 278-279 (emphasis added). In the same speech, Lord Abinger enunciated that goods damaged by insured perils which are not capable of being forwarded to their destination can be considered as totally lost. "But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured".

[371] The goods in that case were perishable.

[372] Please see the part entitled "Forwarding and storage charges"

[373] At 279 (emphasis added).

This passage would give rise to several suggestions and questions. Firstly, there may be a total loss of goods where the goods are delayed beyond the control of the assured due to a deprivation peril (such as piracy) whereby the assured has no control or possession of the goods. Secondly, the deprivation of possession or control over the goods may merely be temporary, in situations where for instance imperishable goods go missing and are found much later than the date they should have arrived to their destination.[374] It can be fairly controversial to determine whether the adventure and accordingly the goods are totally lost or whether they are merely delayed, the discussion of which would turn upon the exact point of time the loss must be identified. Lastly, it can be suggested that the expression "within no assignable period" in the *obiter dictum* refers to a situation where the deprivation peril is of unknown length whereby the assured, upon the condition of not having control over the goods during such deprivation, could claim for total loss of goods even where the goods eventually reach their destination, albeit with delay.

"Mere retardation of the voyage", according to earlier authorities is where the goods can still be forwarded to their destination, albeit with some delay. It is submitted however that some delays upon the voyage where non perishables are carried should disengage the assured from the adventure even where the goods are under the control and possession thereof and can be forwarded, in particular where the goods cannot be forwarded to their destination in "reasonable time". An unreasonable delay in the arrival of non perishable goods to their destination could arguably frustrate the object of the adventure contemplated by the assured.[375]

Where goods are perishable and there is a possibility of conveying them however not in a reasonable time so that the cargo can perish, delay during the voyage would be anticipated (and not actual)[376] and whether the anticipation of delay and accordingly of deterioration of goods could give the assured a ground to claim for the loss of the adventure and goods together is controversial. The length of delay and the type of cargo may also be of importance

[374] As in *Federation Insurance Company of Canada v. Coret Accessories* (1968) 2 Lloyd's Law Rep. 109 and *Phoenix Assurance Plc v. Golden Imports Ltd* 1989 CarswellBC 555. These decisions will be elaborated under the heading "Temporary deprivation of cargo and delay".
[375] This issue shall be analysed below.
[376] In *Anderson v Wallis*, the general time of ships sailing for the destination port (Quebec) was April or May, the voyage during this season was expected to last for six weeks but if the vessel sails later the voyage could generally take eight to ten weeks, the winds being so variable. It is submitted that this anticipation of delay meant that the goods would not be delivered within a reasonable time.

to assess whether there is a mere delay not resulting in a loss of voyage and accordingly loss of goods. For instance a cargo of flour may be perishable yet may not perish during a delay of five months, [377] the assured therefore would not succeed if it claims for loss of voyage and goods at the end of the five months unless the delay is likely to continue and the goods cannot be conveyed to their destination in reasonable time.

4.2. Loss of adventure and the Marine Insurance Act 1906

Under a cargo policy, it is mostly argued that the only interest covered is the physical loss of or damage to goods however this suggestion may not be as straightforward in the absence of clear policy wording to that effect. [378] The MIA 1906 provides that where the policy designates the subject matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.[379] Before the MIA 1906 was enacted, the drafter of the Act Sir Mackenzie Chalmers had written:

> "Strictly speaking, it is the risk or adventure of the assured, and not the property exposed to peril, which is the subject of insurance. *Ex hypothesi*, the ship or goods may be lost. What is really insured is the pecuniary interest of the assured in or in respect of the property exposed to peril, in other words, the risk or adventure."[380]

The references in the Act to the expression"adventure" are confined to the sections relating to the definition of marine adventure,[381] to insurable interest,[382] to the warranty of legality[383] and to sections on delay[384] and do not appear in sections on causation or indemnity. This could give rise to the question of whether "loss of adventure" can no longer be a claim for

[377] As in *Hunt v Royal Exch Ass Co* (1816) 5 M. & S.
[378] E.g. where the policy is for "physical loss of or damage to goods" as in *Lewis Emanuel & Son, Ltd v Hepburn* [1960] 1 Lloyd's Rep. 304. Whether all risks policies insure merely physical loss of or damage to goods is discussed elsewhere in this chapter.
[379] S 26(3). The subsection is founded on a speech delivered by Brett J, in *Allison v Bristol Marine Insurance Co* (1876) 1 App. Cas. 209. In this case the policy was on "freight" and upon the facts of the case, Brett J opined that the assured had not intended to insure the whole charterparty freight yet only the part which had not been paid to him when the ship sailed.
[380] Chalmers, *A Digest of the Law relating to Marine Insurance*, 1901, p 5. This was the note to s 3 of the MIA 1906 on marine adventure and the example given was the total loss of goods when the adventure is frustrated although the goods are not physically lost or damaged. For the distinction between "subject insured" and "subject matter of insurance" see Lord Escher *Rayner v. Preston* (1881), 18 Ch. D.1 at p. 9, C. A., as cited in Chalmers, at p 5.
[381] s 3
[382] s 5
[383] s 41
[384] ss 42 and 48

indemnity under the MIA.[385] This argument was however rejected by the House of Lords and it was held that the pre-MIA rule that the assured can recover for constructive total loss of goods as per s 60 where the adventure contemplated is frustrated by the detention of goods for an indefinite time was not altered by the enactment of the MIA 1906.[386] In particular, it was emphasised that

> "… where goods are insured at or from one port to another port the insurance is not confined to an indemnity to be paid in case the goods are injured or destroyed, but extends to an indemnity to be paid in case the goods do not reach their destination. This may be variously described as *an insurance of the venture*, or an insurance of the voyage, or *an insurance of the market, as distinguished from an insurance of the goods simply and solely.* Goods delivered at the port of destination may be of value very different from their value at the port of loading. The underwriter's obligation is to pay money in the event of the goods failing to arrive at their destination uninjured by any of the perils insured against."[387]

In other judgments delivered subsequent to the enactment of the MIA, several speeches were delivered to the effect that the subject matter insured under a cargo policy is the goods as tangible objects as well as the adventure they embarked upon, in the sense that the assured has a benefit in the safe arrival of the goods.[388]

It would follow that unless there is clear and unambiguous wording covering only physical loss of or damage to goods or an exclusion clause for loss of adventure, goods do not have to incur a physical loss or damage for the assured to recover under a cargo policy. Cargo

[385] This was argued in *British and Foreign Marine Insurance Company, Limited v. Samuel Sanday & Co* [1916] AC 650

[386] See in particular *British and Foreign Marine Insurance Company, Limited v. Samuel Sanday & Co* [1916] AC 650, 657-658 per Earl Loreburn. In Lord Atkinson's speech, there were also references to *Barker v Blakes* (1808) 9 East 283 (loss of voyage in consequence of a prolonged detention of the ship and cargo); *Anderson v Wallis* (1813) 2 Maule and Selwyn 240 (mere suspension of the voyage does not result in loss of voyage where the goods are capable of being forwarded with delay); *Rodocanachi v. Elliott* (1873) LR 9 CP 649 (loss of adventure given the goods were indefinitely detained and not merely delayed).

[387] *British & Foreign Marine Insurance v Samuel Sanday* [1916] 1 A.C. 650, 652-653 per Lord Wrenbury (emphasis added). It is not clear whether "Goods delivered at the port of destination may be of value very different from their value at the port of loading" refers to a delay in delivery of the goods.

[388] In *Rickards v Forestal Land, Timber and Railways Co* [1942] A.C. 50 Lord Wright stated that the primary subject of the insurance on goods is the goods themselves, however an element of safe arrival of goods is also superimposed. See the s 5(2) for interest in safe and due arrival of the goods, which will be discussed below.

policies of that type cover losses suffered by reason of the goods not arriving safely at their destination, though the goods themselves are undamaged. [389]

The scope of loss of adventure is of importance for the purposes of delayed delivery of goods. As seen in the speech mentioned hereabove, loss of adventure was used in several instances as being equivalent to loss of market. However in *Rickards v Forestal*[390] loss of adventure was considered as a more general instance comprising the benefit from the arrival of the goods[391] which can include sale of the goods at a profit at the port of destination (in this context, loss of market) as well as use of the goods as raw material at the port of destination.[392] It may therefore be argued on the ground of the speech in *Rickards v Forestal* that loss of market caused by delay can be considered as an instance by which the assured fails to obtain the benefit sought from the arrival of the goods. This could give rise to the question of whether unless specifically excluded, loss of market caused by delay could be recoverable posterior to the enactment of the MIA on the ground that it is a sub-category of loss of adventure, particularly leading to a commercial frustration of the adventure insured.[393]

Except for the foregoing suggestion, loss of adventure occurs where the transit is terminated or where the object of the adventure is frustrated. Regard must accordingly be taken to two types of delay so as to assess loss of adventure: Firstly to mere delay (or suspension of the voyage) which, according to the pre-MIA authorities does not result in loss of adventure in case of non-perishables yet the transit may be considered as terminated where the goods cannot be forwarded to their destination, or it is submitted where they cannot be forwarded in reasonable time. Secondly, frustrating delay (where delay can be actual as well as anticipated) may or may not give the assured right to claim for the loss of adventure and of both perishable and non-perishable goods. Both of these instances would also require the assured

[389] *Forestal Land, Timber & Railways Vompany, Ltd v. Rickards; Middows Ltd. V Robertson and Others* (1941) 70 Ll.L. Rep. 173 at 184, per Viscount Maugham.
[390] *Rickards v Forestal Land, Timber and Railways Co* [1942] A.C. 50
[391] *Rickards v Forestal Land, Timber and Railways Co* [1942] A.C. 50, 90-91per Lord Wright
[392] *Rickards v Forestal Land, Timber and Railways Co* [1942] A.C. 50, 90 per Lord Wright
[393] Commercial frustration was defined in *Admiral S.S. Co v. Weidner* (1916) 1 K.B. 429, at 436-437 by Bailhache J "The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made." This decision was reversed in *Scottish Navigation Co Ltd v W.A Souter & Co* [1917] 1 K.B. 222 and *Admiral S.S. Co v. Weidner* [1917] 1 K.B. 222 however the definition of Bailhache J was found entirely in line with previous authorities, at 243.

to take precautions against loss of goods or delay in the arrival of the goods by forwarding the goods to their destination in consequence of which forwarding expenses would be incurred. These expenses that can otherwise be names "expenses caused by delay" and their recoverability shall be discussed below in this chapter.

Assuming that the concept of loss of adventure survived the MIA[394] would give rise to another query which is whether "adventure" is a concept inconsistent with the modern market wordings and therefore not recoverable thereunder.

Following the authority in *British and Foreign Marine Insurance v Samuel Sanday*, a clause was inserted into the Institute Cargo Clauses on war risks excluding any claims based on loss of or frustration of the adventure[395] to abrogate the effect of *Sanday*. This clause does not appear in Institute Cargo Clauses All Risks 2009 although the adventure insured can be lost by perils insured under these Clauses or by delay. Whether the exclusion "loss of or damage to the subject-matter insured proximately caused by delay" would exclude also loss of market by delay which can be considered as a type of loss of adventure is a mystery. It is submitted that it would exclude this type of loss where the cover provided under ICC for "loss of or damage to the subject-matter insured" is interpreted as applying to all types of losses as well as physical losses.[396] Alternatively it may also be argued that it excludes loss of market caused by delay where it can be advanced that modern wordings on cargo insure merely against the goods as tangible objects and not the marine adventure. In this work, it shall be argued that the relevant authorities do not establish a clear rule that cargo policies merely insure against loss of or damage to goods as tangible objects.[397] In this case, there may be room for the suggestion that ICC should also contain a clause excluding the loss of or frustration of the adventure.

4.2.1. Definition of marine adventure and "due arrival of insured property"

So as to comprehend loss of marine adventure and whether non-perishable goods could be taken to have totally lost subsequent to a delay in delivery, reference must be made to the definition of marine adventure. According to MIA s.3(2) there is marine adventure where any

[394] *British and Foreign Marine Insurance Company, Limited v. Samuel Sanday & Co* [1916] AC 650
[395] For the most recent version, see Institute War Clauses (Cargo) 2009, cl.3.7
[396] The expression "loss of or damage to the subject-matter insured" appears also in Institute War Clauses (Cargo) 2009, cl.3.7 which also contains a loss of adventure exclusion.
[397] See below the heading "All risks insurance and loss of market by delay".

ship, goods or other movables are exposed to maritime perils. Maritime perils are enumerated by way of example in the same subsection without specific reference to delay. s 90(2) provides that the earlier case law would still apply where the provisions of the Act are not inconsistent with the case law. In light of the definition of marine adventure in s 3 and the definition of insurable interest which refers to marine adventure in s 5, the question arises as to whether the previous case law holding that mere delay would not result in loss of adventure[398] is still tenable.

"due arrival of insurable property"

According to the Marine Insurance Act 1906 s 5(1), every person has an insurable interest who is interested in a marine adventure. The Act goes on illustrating that a person is interested in a marine adventure in which he has a "legal or equitable relation to the adventure or to any insurable property at risk in consequence of which he may benefit by the *safety or due arrival of insurable property*".[399] The meaning of "due arrival of insurable property" was not previously litigated[400] nevertheless it can be interpreted by reference to the following part of the subsection, namely "(…) *or may be prejudiced by its loss, or by damage thereto, or by the detention thereof*". Insurable property includes goods[401] and whereas safety may refer to the goods arriving with no loss or damage; due arrival may in turn refer to goods arriving without detention in the absence of which the goods, albeit not a physical loss, could incur a pecuniary loss if they arrive to a falling market. Detention includes an element of delay which may result in late delivery of the insured goods.[402] In the absence of clear guidance as to the meaning of "due arrival of insurable property"[403] what can accordingly be deduced from this subsection is that insurable interest in property includes a benefit in due arrival of the property to its destination, i.e. an assured insuring goods would benefit both from the goods arriving to their destination without loss or damage, and from their timely

[398] *Anderson v Wallis* (1813) 2 Maule and Selwyn 240; *Rodocanachi v Elliott* (1873) LR 9 CP 649

[399] S 5(2), emphasis added.

[400] An example to the interest in safe arrival of goods is the earning of freight upon the condition that the goods arrive safely at their destination, see Merkin, *Marine Insurance Legislation*, 4th edition, p 9. Chalmers, *A Digest of the Law relating to Marine Insurance*, 1901 does not refer to any specific judgment in this respect.

[401] See s 3(2)(a), for the meaning of goods see MIA 1906, First Schedule, Rule 17.

[402] See Canadian Encyclopedic Digest, Insurance, III.7, § 197 providing in respect of s 5(2) which is equivalent to s 8(2) of the Canadian Marine Insurance Act 1993, c.22, that "Every person with an interest in a marine adventure has an insurable interest if he or she has a legal or equitable relation to the adventure or to any insurable property at risk therein, and may benefit from the safe or *due arrival of the insurable property*, or be prejudiced by its loss or *delay* or incur liability in respect *of such an adventure*." (Emphasis added).

[403] Chalmers and Owen, *A Digest of the Law Relating to Marine Insurance*, 1901, at 9 cites Arnould, ed. 6, p. 101 in support of s 5(2). The relevant part in Arnould mentioned that a party interested in cargo alone has no insurable interest in the ship, given that the goods may arrive safe though the ship be lost.

delivery. This suggestion would also denote that whoever has an interest in the timely delivery of the goods is entitled to insure them (which can be considered as an economic interest), upon the condition that he has a legal or equitable relationship to the goods.[404]

Hence, marine adventure should be more than a mere exposure of the insurable property to the enumerated maritime perils under the cargo policy. One of the reasons why marine adventure should not be confined to the exposure of the subject-matter insured to maritime perils can be explained by the fact that in policies on freight, frustrating delay, although it is not mentioned among the marine perils, causes loss of adventure by frustrating the object of the adventure and consequently a loss of freight.[405] The object of the adventure in this category of cases is usually determined by reference to a contract other than a marine insurance contract, for instance a charterparty under which the relevant adventure is prosecuted. By way of analogy, the object of the adventure for an assured may well be to receive the goods in a certain period for selling in a specific market or under a number of sale contracts, in which case one of the objects of the marine adventure for the assured is the timely delivery of goods. There may accordingly be room for the suggestion that the marine adventure is an instance not limited to the safe delivery of the goods, i.e. with no physical loss or damage, yet a term that would also extend to timely delivery. The question which would accordingly ensue could be whether there can be a loss of adventure where the goods miss their market because of delay, given that the interest of the assured is to sell its goods in a given market in a given period as well as their safe arrival to their destination.

It can be submitted that loss of market by delay in delivery, if not expressly excluded under a cargo policy, can be taken to be recoverable under a cargo policy on the ground that the assured has an insurable interest in due arrival of the goods as per s 5(2).[406] However one of the motives behind the general view that loss of market by delay in delivery is not recoverable under cargo policies rests upon the impression that loss of market by delay is a type of loss of profit, which shall be elaborated in the next section.

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[404] By virtue of s 5(2).

[405] See Chapter III for more details, and in particular see *Jackson v. Union Marine Insurance Co Ltd* (1874) LR 10 CP 125; *Re Jamieson v. Newcastle SS Freight Ins Assn* [1895] 2 QB 90; *Bensaude v. The Thames and Mersey Marine Insurance Company Ltd* [1897] AC 609.

[406] This suggestion can further be supported by the view expressed in *Feasey* v. *Sun Life Assurance Corporation of Canada* [2003] Lloyd's Rep IR 637, per Waller LJ at para 92: "It is not a requirement of property insurance that the assured must have a 'legal or equitable' interest in the property as those terms might normally be understood … It is sufficient under Section 5 of the Marine Insurance Act for a person interested in a marine adventure to stand in a 'legal or equitable relation to the adventure'. That is intended to be a broad concept."

4.2.2. Loss of profit, loss of market and loss of adventure by delay

Loss of profit is usually not recoverable under hull and cargo policies[407] unless specifically covered therein.[408] This is mainly due to the fact that it is considered as an instance of a loss arising by virtue of the physical loss of goods[409] or loss to the ship and therefore consequential to cargo policies[410] and hull policies.

Goods are usually sent to profitable markets,[411] i.e. to markets where the assured will be able to sell its products at a higher figure than the invoice price[412] of the goods at the port of departure. The assured has therefore an economic interest in the safe and timely delivery of goods in the absence of which one of the most basic consequences could be the diminution in value of the goods. Therefore where a rising market is intended, any delay in delivery of the goods would have at least two consequences: The fall in the market value of the goods may result in loss of a sale contract under which the assured sought to gain a fixed profit; and in consequence of delay in the arrival of goods the assured may have to sell his goods at a lower price than the one that could have been realised had the goods arrived on time. Whether the economic benefit behind both of these instances where the goods are undamaged should be treated as part of the "marine adventure insured" or as "profits" which are not recoverable under cargo policies could be a pertinent question.[413] The difference between loss of profit, loss of market and loss of adventure is therefore crucial. This issue shall be dealt with in more detail below in the context of loss of market; however for the purposes of insurable interest

[407] *Lucena* v. *Craufurd* (1806) 2 Bos & PNR 269. See also *Maurice v Goldsbrough Mort & Co Ltd* [1939] 64 Ll.L.Rep 1, at 3 where Lord Wright stated "an insurance described as an insurance on goods does not cover profits".The loss of profit was described as the commission on sale of the goods lost by the assured in consequence of the peril insured against. It is noteworthy that the policy in this case specifically excluded loss of profits of any kind.

[408] *Hibernia Foods plc* v. *McAuslin, The Joint Frost* [1998] 1 Lloyd's Rep 310

[409] Merkin, Robert, *Colinvaux & Merkin's Insurance Contract Law*, looseleaf, 2007 (8th ed.), Sweet & Maxwell, C-0113

[410] Consequential loss policies are available in the market, see *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd* [1996] C.L.C. 676 for an example of such a policy.

[411] This was considered in *Usher v Noble* (1810) 104 E.R. 249, at 253

[412] Insurable value for goods is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole (MIA s 16(3)). Prima facie evidence of the prime cost of the property is the invoice price paid by the assured, Merkin, *Marine Insurance Legislation*, 4th edition, p 16.

[413] With respect to safe arrival of goods and loss of adventure, see *British and Foreign Marine Insurance Company, Limited v. Samuel Sanday & Co* [1916] AC 650 (frustration of the adventure of goods due to the port of destination becoming enemy territory); *Rodocanachi v Elliott* (1873) LR 9 CP 649 (constructive total loss of goods by restraints of princes which might extend to an indefinite time causing a loss of the particular adventure).

considerations and delay in delivery, some leading pre-MIA authorities shall be mentioned in turn.

In *Anderson v Morice,*[414] it was stated that the assured would derive benefit from the policy if the market was a rising market and would sustain loss in a falling market and that the interest in profits arising collaterally from a policy relating to goods cannot be recoverable thereunder.[415] Whether by virtue of the expression "due arrival of insurable property" in s 5(2) of the Marine Insurance Act 1906, the authority of *Anderson v Morice* is now obsolete is yet to be seen. The argument in favour of this suggestion could be supported with the express reference in *Anderson v Morice* to the earlier authorities on insurable interest[416] which is now a broader concept given the development of the doctrine in recent years.[417] Moreover, authorities discussing s 5(2) after the enactment of the MIA 1906 were merely with respect to safe arrival of goods and not to "due arrival" such as the authority of the House of Lords in *British & Foreign v Samuel Sanday,*[418] therefore the meaning of the expression is yet to be tested by the courts in England.

4.3. Constructive total loss and delay

If a cargo is imperishable, or though perishable, not so damaged as to be destroyed by delay or not so damaged as to cease to be a thing of the kind insured[419] (e.g. where perishable goods intended to be sold for human consumption and insured accordingly are so damaged that they can be merely sold as fodder) the assured shall not be entitled to recover as for an actual total loss. However in case the goods are not so damaged, the question that can follow is in which circumstances a loss of perishable cargo can amount to a constructive total loss.

The assured can claim constructive total loss of goods if the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival,[420] therefore such loss can be claimed and the notice of abandonment be tendered as from the moment the

[414] (1874-75) L.R. 10 C.P. 609
[415] At 621, per Blackburn J. This was interpreted by Dunt, *Marine Cargo Insurance*, at para 4.5 that loss of profits relates to whether the market will rise or fall.
[416] (1874-75) L.R. 10 C.P. 609, at 621: "For the subject-matter of this insurance is on "rice" and though that is to be construed liberally as covering any interest in the rice, it cannot be construed as covering an interest in profits that might arise collaterally from a contract relating to the rice. For this it is enough to refer to *Lucena v Crauford*".
[417] See for instance *Feasey* v. *Sun Life Assurance Corporation of Canada* [2003] Lloyd's Rep IR 637
[418] See *British & Foreign Marine Insurance v Samuel Sanday* [1916] 1 A.C. 650
[419] S 57(1) MIA
[420] s.60(2)(iii), ICC A cl.12.

damage becomes more than a slight deterioration (which could amount to a partial loss), until the damage changes the description of goods and renders them unmerchantable (which could amount to an actual total loss). It is submitted that in relation to perishable goods, merely the cost of forwarding the goods can be taken into account and not repairing the damage. The reason is that perishing is a chemical transformation which cannot be repaired contrary to melting which is a physical transformation. Melted goods can be solidified (repaired) however perished goods cannot be returned to their undamaged stage.

The value of the goods would decrease with delay and further deterioration, hence it is more likely that the value of the goods at arrival shall be less than the cost of forwarding the goods the closer the goods are to having unmerchantable quality. In this case, it would be less likely on the part of the insurers to raise the defence that the notice of abandonment was tendered early or belatedly. In addition to the foregoing, perishable goods damaged by an insured peril and having deteriorated accordingly can also lose their value either considerably or entirely due to a delay in delivery to their destination if they were insured and intended for a specific market. The expense of forwarding them would therefore likely to exceed their value at arrival, which can in certain circumstances be close to nil.[421] The same scenario could be valid for imperishables whereby the only loss for the assured would be the forwarding expenses which would likely to exceed the value of the goods at their arrival.

The foregoing is merely an illustration of circumstances which may give rise to constructive total loss claims by the assured. The obvious defence available to insurers for both perishable and imperishable goods would be the exclusion of delay in cargo policies, which is discussed elsewhere in this work.

4.3.1. Delay, deprivation perils and notice of abandonment

i. Reasonable time to make inquiry

In principle, notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, yet where the information is of doubtful character the assured is entitled to a "reasonable time"[422] to make inquiries. [423] For the purposes of delay, it

[421] E.g. in case the goods are intended for a Christmas market and arrive much later than the expected date of arrival.

[422] What is "reasonable time" is a question of fact as per s.88 of the MIA. This principle was held in *Carlton SA Co v. Castle Mail Co* [1898] A.C. 486 at 491, Lord Herschell made the point that "There is no such thing as reasonable time in the abstract".

would be essential to determine when the information can be of doubtful character; what would connote "reliable information of loss" and what could be a "reasonable time". Although reasonable time is a question of fact and not law,[424] it is important to set out general considerations as to when notice of abandonment shall be tendered for the purpose of losses involving delay. The main risk an assured may encounter would be to cause further loss to the subject-matter insured whilst trying to make inquiries into the extent of loss prior to tendering the notice; a notice of abandonment tendered accordingly may incur the risk of being rejected on the ground that the loss was caused by delay within the control of the assured.

The extent of the damage giving rise to a constructive total loss may sometimes be discoverable only by means which may be beyond the control of the assured, for instance through survey reports.[425] Awaiting the issuance of a survey report so as to tender a notice of abandonment with reasonable diligence (for the sake of complying with s 62(3) of the MIA) may give rise to the risk that the damage already caused by a peril is aggravated by delay during the waiting period and that a partial loss becomes a total loss. A notice of abandonment tendered after the receipt of such a survey report may be rejected by the insurers on the ground that the notice was tendered belatedly and that it was within the delay exclusion, however it is submitted that the delay exclusion stipulated both in MIA s.55(2)(b) and standard market terms would not extend to delay as an event aggravating the loss already caused by a peril insured against, yet merely to delay as the proximate cause of the loss.

What shall be considered as "reasonable time" in tendering the notice of abandonment depends upon the nature of the casualty[426] and it is suggested that it shall also depend upon the nature of the thing insured, for instance where there is a prospective delay susceptible of causing damage to perishable goods. The issue could therefore pose a problem in particular where delay is caused by an event such as capture, seizure or detention[427] with unidentifiable

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[423] MIA s.62(3).
[424] S 88 of the MIA 1906
[425] As in *Gernon v. Royal Exchange Assurance* (1815) 6 Taunt 383. A cargo of sugar had been damaged by sea water and was brought to port on 20th December, unshipped and examined on the next day. The survey report was not issued until 7 January. The notice of abandonment tendered on 7 January was decided to be tendered in time.
[426] *Cohen v Standard Mar Ins Co* (1925) 30 Com. Cas.139 at 153.
[427] According to Gilman and Merkin, *Arnould's Law of Marine Insurance and Average*, 17th ed., para. 30-15 these casualties constitute *prima facie* a constructive total loss and although the time they may continue is uncertain, the assured ought to give notice of abandonment immediately upon receipt of intelligence. There are

duration and the subject matter insured is a perishable cargo or is freight.[428] It is usual for cargo owners to sell the goods so as to prevent deterioration or further deterioration by delay,[429] however the subject matter cannot be abandoned if it is sold after the casualty. [430] Therefore it is critical for the assured to be diligent in tendering the notice of abandonment without undue delay.

ii. Apprehension of delay and delay as an operative peril

The peril must act "immediately and not circuitously", [431] "directly and not collaterally"[432] so that the assured can recover under a policy. The apprehension of an insured peril would not give the assured the right to give a notice of abandonment to recover the loss incurred because of having taken an action to avert or minimize it. [433]

For the purpose of timely tender of notice of abandonment and of assessing the proximate cause of the loss, it is important to determine at what point of time delay begins "operating" and finishes being a mere "apprehension". It was stated that if the danger is present and if nothing had been done the peril would have followed in the natural course, this would mean that the peril had begun to operate.[434] Should this reasoning apply to delay and deprivation perils preceding delay such as capture, seizure and detention; it would give rise to the question of whether or when delay is an apprehended peril or becomes operative where it is caused by the foregoing perils.

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some arguments against this suggestion of Arnould at fn.87 contending that there must be a difference between the wartime and peace time perils.

[428] In *Russian Bank for Foreign Trade v Excess Ins Co Ltd* [1918] 2 KB 123 where the issue was whether the adventure was frustrated by the closure of Dardanelles upon declaration of war, the assured claimed for a constructive total loss of cargo due to restraint of princes however the claim was rejected by the insurers on the ground, *inter alia*, that a loss caused by frustration of the adventure was a claim due to delay within the meaning of the words in the policy and that the notice of abandonment was given late by the assured. The assured's offer to the insurers to accept the difference between the value of the cargo as it then was, and the insured value of the cargo, was a negotiation and not a notice of abandonment. What would then constitute an effective notice of abandonment is a crucial question in this situation: the one given in a reasonable time after the day where the vessel was requisitioned, the day where the Dardanelles was closed for the passage of vessels or after the claimants receive legal advice following the information that the insurers will not pay? Bailhache J. considered at 131 that it was "unnecessary to decide whether due notice of abandonment was given" but stated the notice given on July 8 was too late whereas the cablegram of March 5, 1915 (when the vessel was requisitioned) was, in the circumstances, a sufficient notice of abandonment. It is noteworthy that this consideration of Bailhache J. was *obiter* and that the requisition was made in time of war.

[429] This is sometimes referred to as "salvage sales" and shall be considered below.

[430] *Ngo Chew Hong Edible Oil Pte v Knight* [1988] 1 SLR 414.

[431] *Hadkinson v Robinson* (1803) 3 Bos & Pul 388, 392.

[432] *ibid* 393.

[433] For the discussion of the difference between recoverability of sue and labour charges and of expenses incurred to avert or minimize an apprehended peril, see below *Sue and Labour Expenses.*

[434] *Kacianoff v China Traders Insurance Co Ltd* [1914] 3 KB 1121, 1128 per Lord Reading CJ

Some earlier decisions held that a notice of abandonment was tendered on time when it appeared that the deprivation peril was likely to last for an indefinite period.[435] In *Rodocanachi v Elliott*, the likelihood of indefinite duration was considered as an instance different than a mere retardation of the voyage[436] and the adventure was held to have been frustrated. Delay was not taken to be an independent peril from detention, it would not be a fallacy to suggest that it had either become an operative peril where the detention had begun, or where the likelihood that the detention was likely to last for an indefinite period was determined.[437] This distinction between the detention and delay perils would have an impact on the availability of policy exclusions whereby insurers may not raise the defence of delay exclusion if delay is not accepted as an operative peril, thence identifying the moment where delay becomes an operative peril is significant.

iii) Inability to recover in reasonable time and economic loss by delay

There is a constructive total loss of goods where it is unlikely to recover them in reasonable time.[438] Likelihood of recovery in reasonable time is assessed either at the time of tender of the notice of abandonment or later when the assured commences proceedings. In case where some delay is caused by a deprivation peril such as strike or seizure, reasonable time can be relatively short particularly where the assured has commitments to its customers and where the goods are of seasonal nature.[439] It can accordingly be argued that where there is seizure, economic loss by delay can give rise to a constructive total loss within the meaning of s 60(2).[440]

4.3.2. Temporary deprivation of cargo and delay

[435] *Rodocanachi v Elliott* (1873) LR 9 CP 649

[436] The goods were imperishable.

[437] See also *Lozano v Janson* (1859) 121 E.R 61 where a vessel was seized and perishable goods had deteriorated owing to delay, the notice of abandonment was decided to be given in due time. In this case the notice of abandonment was tendered after the seizure, forfeiture of the ship however the assured has given the notice of abandonment as soon as the proceedings were known to him and therefore it was held to be tendered in due time (at 69). As seen in these cases the notice of abandonment is held to be duly tendered if it is given in a reasonable time after the main peril resulting in delay occurs.

[438] MIA s 60(2)

[439] This was recognised in *Clothing Management v Beazley Solutions* [2012] Lloyd's Rep IR. 329, at para 32.

[440] In *Masefield v Amlin* [2010] 1 Lloyd's Rep 345, the assured relied on s 60(1) and asserted that there had been a constructive total loss in that the vessel and cargo had been reasonably abandoned on account of its actual total loss appearing to be unavoidable. The cargo in that case was biodiesel fuel which is seasonal and had missed its market due to delay caused by ransom negotiations. It could have been argued in the first instance that unlikelihood of recovery of the goods in reasonable time (i.e. delay in getting the goods to their market) would result in diminishing their value and could constitute a constructive total loss of goods.

Where there is a delay in the arrival of the goods or where goods that are intended for a specific market are temporarily missing the question arises whether the assured can claim for a constructive total loss as having been deprived of the possession of goods.[441] The assured would have to prove that the goods were unlikely to be recovered. The test for unlikelihood of recovery assumes that there has to be a reasonable time at the expiration of which the subject-matter insured can be considered as having been a constructive total loss.[442] Moreover some standard form hull and freight clauses also specify the length of time spent during the deprivation peril in consequence of which the loss shall be characterised as constructive total loss.[443] Under English law, it was decided that if a thing is missing or has disappeared and a reasonable time has elapsed and the goods have not been found despite diligent research, then the goods are properly be said to be lost.[444] It is submitted that "reasonable time" for goods shall depend upon the type of goods and in any event shall be lesser than the period required for vessels. For the purposes of delay, irretrievable and temporary deprivation of goods could be relevant for two types of delay: delay during transit and delay in delivery.

In relation to the former, some jurisdictions such as Norway have introduced time limits by the expiration of which delay not resulting in physical loss under the cargo policy was deemed total and recoverable.[445] As to the latter, an analogy can be drawn from the context of carriage of goods by sea Conventions whereby the goods are deemed lost if they are

[441] For instance a CIF buyer would have an insurable interest in the goods that are expected to arrive on a certain date.

[442] In *The Bamburi* [1982] 1 Lloyd's Rep 314 this period was 12 months. Cf. also *Wong Wing Fai Co SA v Netherlands Insurance Co* (1945) [1980-81] 1 SLR 242 where nine months was deemed sufficient, as cited in Merkin, Marine Insurance Legislation, 4th. ed, at 85.

[443] The Detainment Clause in Institute War and Strike Clauses Hulls-Time and Hulls Voyage of 1983 and 1995 cl.3 provides that if the vessel have been subject to capture, seizure or detainment and the assured has thereby lost the free use and disposal of the vessel for a continuous period of 12 months, for the purpose of ascertaining whether the vessel is a constructive total loss the assured shall be deemed to have been deprived of the possession of the vessel without any likelihood of recovery. A similar clause can be found in Institute War and Strike Clauses Freight-Time 1983 and 1995 cl.3.

[444] *Holmes v Payne* [1930] 2 K.B. 301 at 310

[445] Under Norwegian Cargo Clauses (All Risks), total loss by delay which does not result in physical loss of or damage to goods may be covered if it is agreed by the assured and the insurer, and the Cargo Clauses suggest a draft clause. "Total loss as a result of delay (not resulting in the physical loss of or damage to the goods)
The Assured is entitled to claim for a total loss pursuant to §§ 35 and 36 of the Cargo Clauses when:
a) a domestic transit has been delayed for at least 30 days, or
b) an international transit has been delayed for at least 30 days as a consequence of theft, piracy, damage to other goods carried by the means of transport, or the means of transport onto which the goods are loaded having suffered a casualty, disappeared or been abandoned, or harbours or transit routes having been destroyed or blocked, but not as a result of protest actions, riots, strikes, or similar occurrences, cf. § 18, no. 3 of the Cargo Clauses.".

delivered after the expiry of a period of time following the time for delivery.[446] The risk with not having a time frame for unlikelihood of recovery is that even if a claim is made for constructive total loss of goods and is paid accordingly by the insurers, the goods may later on be delivered to their destination with some delay. The irretrievable deprivation at that point of time would merely be a temporary deprivation of goods and the insurers may argue that the claim was paid by mistake and that the claim was in any event not recoverable given the exclusion of delay. This matter has been the subject of two decisions which shall be analysed below.

In the Canadian case *Phoenix Assurance Plc v. Golden Imports Ltd*[447] a consignment of fashion wear had disappeared and was subsequently found in a warehouse, six months after the payment of the claim. As the goods had been intended as prototypes they had become worthless to the assured. The policy was on Institute Air Cargo terms and included a delay exclusion[448] which was raised by the insurers to recover back the proceeds paid at the time when the goods had been known as having been totally lost; the insurers further argued that there had been no "loss" in the sense of an irretrievable loss.[449] The Court opined that the word "loss" in the policy was used in two different senses; it was a term of general sense referring to goods not being able to be found, and a term of insurance law art referring to the right of recovery when an assured's interest had been injuriously affected. The word "loss" in the exclusion of delay was used in the latter sense given that goods could not be missing by delay[450] and it was decided that the exclusion merely denied coverage consequent upon the disappearance of the insured goods whether the goods were never recovered or were

[446] Art. 5(3) of the Hamburg Rules provides that the cargo interest may treat the goods as lost if they have not been delivered within 60 consecutive days following *the expiry of the time for delivery* (emphasis added). No equivalent provision exists under the Rotterdam Rules. Nevertheless the distinction needs to be made with respect to the damages that can be claimed in case of delay in delivery and delay in transit. If the loss of goods is because the goods have gone missing during transit (and that the carrier has no means of control over the goods) the assured may want to treat the goods as physically lost at the expiry of a certain time in order not to wait for its delivery any longer and recover in due time. In such a case the damages that can be claimed would be the value of the goods. However if the goods are missing and do not arrive to the discharge port on time, the assured would incur a loss of market. The provision in the Hamburg Rules relates somewhat to this second type of loss, i.e. loss of market.

[447] *Phoenix Assurance Plc v. Golden Imports Ltd* 1989 CarswellBC 555 (British Columbia County Court).

[448] "This insurance is against all risks of loss or damage to the subject matter insured which shall in no case be deemed to extend to cover loss, damage or expense proximately caused by delay or inherent vice, or nature of the subject matter insured".

[449] This was a defence against a claim of actual total loss. According to s 57(1), there is an actual total loss where the assured is irretrievably deprived of the possession of the subject-matter insured.

[450] At para 15

recovered after a lapse of time. Delay did not necessarily exclude recovery where goods went missing but were recovered later.[451]

In an earlier Canadian decision *Federation Insurance Company of Canada v. Coret Accessories,*[452] a similar exclusion clause was held not to respond the claim of the assured where goods were found after the payment of the claim. The Court held that the insurers only insured goods which were permanently lost, not the ones delayed in transit or which were lost temporarily but which were subsequently delivered. It is noteworthy that this reasoning lacks consideration of the fact that in all the circumstances where goods disappear and subsequently found, assureds will have to reimburse insurers given the delay exclusion, despite that at the time of the claim the goods were characterised as "lost".

In the situations similar to the above, it is of crucial importance to identify at which point of time the loss must be identified: at one point of time the loss may be characterised as a total loss by a peril insured against and subsequently as delay in delivery of goods where the goods are subsequently found and delivered with delay. Arguing delay would require the anticipation that they shall be found at a later stage, this would be the case in particular where the whereabouts of the goods are known to the insurer. The delay argument would nevertheless arise at a later stage after they are found.[453] Consequently so as to identify the loss as one of temporary deprivation of goods by delay, they have to be found at a later stage after the claim is made and paid. Unless the delay is within the control of the assured in which case the insurers would be discharged of the policy and no loss arising from delay would be payable as from the discharge,[454] or unless an element of fraud is involved in the loss of goods (e.g. where the assured is aware of the whereabouts of the cargo and anticipates the delay in the arrival of goods) any loss prior to the time when the claim is made should be considered as total loss of goods.

In practice, against the risk of temporarily missing goods and the possible rejection of goods by the cargo owner at the time of the delayed delivery, cargo insurers require their assured to sign a document entitled a "loan receipt" whereby the assured undertakes to take delivery of

[451] At para 16
[452] *Federation Insurance Company of Canada v. Coret Accessories* (1968) 2 Lloyd's Law Rep. 109 (Quebec Supreme Court).
[453] This was the case in *Phoenix Assurance Plc v. Golden Imports Ltd* 1989 CarswellBC 555
[454] Most standard form cargo policies contain a clause providing that the insurance remains in force during delay beyond the control of the assured (see Institute Cargo Clauses 2009 cl.8.3). *A contrario* meaning of this clause would suggest that the insurance would not remain in force where delay is within the control of the assured. Delay within and beyond the control of the assured is discussed in detail elsewhere in this work.

the goods if they are missing and to refund the insurance payment made where the claim was settled should the goods be delivered with delay.[455] The receipt characterises the payment received as a "loan" and not as payment of the claim and allows the assured to keep the difference between the amount paid and the amount of loss or damage if during the temporary deprivation of the goods they were damaged or partially lost.[456] An additional possibility would be to insert clauses in the policy to that effect.[457]

Duties of the assured subsequent to the delayed delivery of goods

Where goods are damaged by a peril insured against and the cost of forwarding the goods to their destination would exceed their value on arrival, [458] assureds can elect to abandon the goods and claim for constructive total loss. Likewise, as seen above, they can also be abandoned if they are missing and their recovery is unlikely. In both of these circumstances, insurers would have two options: They can accept the notice of abandonment, elect to take over the subject-matter,[459] pay the insured value of the cargo to the assured and be subrogated to all the rights and remedies of the assured in respect of the subject-matter as from the time of the casualty causing the loss.[460] This would accordingly entitle them to sell the goods at the port of distress and keep the proceeds of sale as "salvage".[461] However, the assured, as the holder of a bill of lading would still be the person who could claim the goods from the carrier and who can accept delivery of the goods unless the bill of lading is assigned to the insurers upon their election to take over the goods or their payment of the claim. The scenario above where goods disappear and are subsequently delivered to the assured with delay, would give rise to the question of whether the assured is bound to accept the delayed delivery of the goods,[462] sell them and tender the sale proceeds to insurers and if affirmative, whether the nature of such duty would relate to sue and labour.[463]

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[455] Strathy, George R. And Moore, George C, *The Law and Practice of Marine Insurance in Canada*, Butterworths 2003, at 113.
[456] Strathy and Moore at p 461-462, according to the appendix of the loan receipt provided.
[457] Such a clause was found in *Federation Insurance Company of Canada v. Coret Accessories* (1968) 2 Lloyd's Law Rep. 109
[458] Cl 12 of ICC
[459] As per s 63(1). This would give the insurers the right to an equitable lien at that point over the subject-matter which would, upon payment, entitle them to legal ownership as per s79(1), as cited in Merkin, *Marine Insurance Legislation*, 4th. ed., 108.
[460] MIA s 79(1)
[461] Dunt, *Marine Cargo Insurance*, 15.23
[462] Under reservation, in order for the insurers who are subrogated to the rights of the assured to claim against the carrier.
[463] This scenario assumes that the policy does not contain a clause requiring the assured to accept the goods upon their delivery and to reimburse the insurer accordingly for the insured value of the goods that was paid by the insurers upon their acceptance of the notice of abandonment, as in *Federation Insurance Company of*

Most standard form policies contain clauses requiring the assured "to take such measures as may be reasonable for the purpose of averting or minimizing a loss"[464] and it was disputed in *Phoenix Assurance v Golden Imports*[465] where the policy was on Institute Cargo Clauses (Air)[466] terms, whether the assured was bound to sell the goods and tender the sale proceeds to the insurer. The Court concluded that the assured had to make arrangements for the goods in which he retained property and title even though they were late given the mitigation of loss clause. It is however submitted that the decision is not tenable as regards the mitigation of loss on the ground that there is authority under English law that the duty to sue and labour would cease when the insurers admit liability and commence payment.[467] This would denote that the assured would not be bound to accept and sell the goods if they arrive subsequent to the payment of the claim by the insurers.

Lack of clarity abides as to what law would apply to the salvage of goods in the absence of salvage agreement between the insurer and the assured.[468] The law of restitution can arguably provide an answer to this problem.[469]

4.4. Sue and labour, forwarding charges and mere delay in marine adventure

4.4.1. Sue and labour

As per s. 78(3) of the MIA 1906, expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause. This provision presents several issues so far as delay in delivery is concerned.

Firstly, expenses arising during delay (either during necessary repairs of the vessel or during the period of storage of the goods) are not necessarily excluded if they are incurred to prevent a loss otherwise recoverable under the policy. The authority illustrating this point was *The*

Canada v. Coret Accessories (1968) 2 Lloyd's Law Rep. 109. The scenario further excludes the situation where the assured signs a "loan receipt".

[464] See e.g. Institute Cargo Clauses A 2009 cl.16.1.

[465] *Phoenix Assurance PLC v Golden Imports Ltd* 1989 CarswellBC 555

[466] Institute Cargo Clauses (Air) 1982 cl.6 as to mitigation of losses is exactly in the same terms as Institute Cargo Clauses A 2009 cl.16.1.

[467] *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1997] 2 Lloyd's Rep 687, at 696.

[468] Clarke, Malcolm A., *The Law of Insurance Contracts* 4th ed., Service Issue 27, 2013, para 31-1

[469] *Ibid.*

Pomeranian[470] which was decided prior to the enactment of the MIA where a consignment of cattle was insured under an all risk policy (including mortality) on war risks including a sue and labour clause. The vessel was exposed to bad weather and accordingly had to be repaired, whereby extra fodder was needed for the cattles during repairs. The court ruled that the expenses for the purchase of an extra fodder had to be reimbursed by the insurers accepting the possibility of a total loss of the cattles in case of not purchasing the extra fodder. For this reason, the essential question would be a question of "loss by an insured peril" under the policy,[471] which in relation to delay, poses further issues of causation given that many deprivation perils have an element of delay. Disputes on recoverability of sue and labour expenses would therefore likely to turn on whether the loss, the prevention of which results in expenses, is a loss by the deprivation peril or by delay.

The goods which are time-sensitive may be forwarded so as to prevent delay or to minimise it. Delay in this case would be delay in delivery and the loss that is sought to be prevented by incurring sue and labour expenses would be classified as a loss of market by delay. There is no clear authority as to whether sue and labour expenses incurred to prevent delay in delivery can be claimed under a cargo policy however there is a dictum that they would unlikely to be recoverable. In *Weissberg v Lamb*[472] where under an all risks policy the goods were damaged while being loaded on board the ship, the assured paid charges to the removal contractors who then sought to claim that amount back from the insurers under the sue and labour clause. The Court opined that had the assured not paid the charges there could have been delay in delivery of the goods which would be a peril outside the scope of the policy by way of s 55(2)(b) and that therefore the sum could not have been recovered as sue and labour expenses.[473] Under the US law, the same approach was adopted in *Witcher v Saint Paul Fire*[474]with respect to an all risks property insurance policy which excluded business losses due to delay. In this case a gas explosion occurred in a close distance to a construction site and the construction contractor incurred a delay of one month so as to have the structure inspected against possible physical loss due to explosion. His business loss was held to be

[470](1895) P 34
[471] An insured peril must have occurred to recover under the suing and labouring clause as it relates to the prevention or mitigation of loss arising from that insured peril, for illustrations please see *Xenos v Fox* (1868) LR 3 CP 630; *Integrated Container Service Inc v British Traders Insurance Co* [1984] 1 Lloyd's Rep 154
[472] [1950] 84 Ll. L. Rep. 509
[473] At 512.
[474] *Witcher Construction Company v Saint Paul Fire and Marine Insurance Company* 1996 550 N.W. 2d 1 (Court of Appeals of Minnesota)

solely due to temporary construction delay caused by the gas explosion and was held not to be a covered risk. Therefore the expenses incurred for the inspection of the structure were not recoverable, having occurred so as to prevent business losses due to delay which were excluded under the policy.

4.4.2. Forwarding and storage charges

The current Forwarding Charges Clause (cl 12) of the Institute Cargo Clauses 2009[475] provides: "Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a place other than that to which the subject-matter 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 to the destination to which it is insured." This clause would give rise to the question of whether forwarding charges reasonably incurred by reason of delay resulting from a peril insured against could be recoverable by the assured. These expenses can be recoverable where the policy expressly states so;[476] however the position is not very clear in terms of cl 12 of the ICC which also provides that it is subject to the exclusions of the policy, including the exclusion of losses caused by delay.[477]

Two points would require a more detailed analysis in respect of the clause. The first point that would regard delay is the requirement of "termination of the transit by a covered peril". Under an all risks policy, the covered perils that could result in termination of the adventure can be perils such as detentions and requisitions whereby the vessel and consequently the goods are unable to proceed to the destination. The Transit Clause[478] in the Institute Cargo

[475] As well as the Institute Commodity Clauses

[476] See for example http://www.zurich.co.uk/NR/rdonlyres/40E05272-5B99-431C-959F-6218123523B0/0/ZMC1B01CargoPolicy0210Webopt.pdf
where such expenses are recoverable under the title "Consequential Loss" which provides as follows:
"This policy is extended to include reasonable costs necessarily incurred by you as a result of:
a) loss or damage to the subject matter insured recoverable under this policy
b) *as a result of delay to the subject matter insured whilst in transit caused by the carrying vessel or conveyance suffering loss or damage from:*
i) fire or explosion
ii) stranding, grounding, capsizing or sinking
iii) overturning or derailment of land conveyance
iv) collision or contact of vessel, craft or conveyance with any external object other than water
v) general average sacrifice
c) delay in delivery due to closure of any transport route following accident, fire, flood or act of God."
(emphasis added).

[477] ICC cl.4.5

[478] cl.8 of Institute Cargo Clauses 2009.

Clauses refers to delay beyond the control of the assured as an event which does not terminate the transit, *a contrario* meaning of this clause could suggest that a delay within the control of the assured could be an event terminating the transit, nonetheless it would not fulfil the requirement that the transit must be terminated by a "covered peril". Therefore forwarding charges incurred where the transit is terminated by delay within the control of the assured cannot be claimed under this clause.

Secondly it can be argued that despite the clause being subject to the exclusion of delay, loss of adventure may not be a concept that can be directly relevant to delay exclusions, given that loss of adventure arises where the insured voyage is either terminated or frustrated and not merely delayed. [479] Despite the above, the transit can be terminated following a delay frustrating the object of the adventure caused by a peril such as detention which is a covered peril under the Institute Cargo Clauses. The obvious question that would follow would be whether forwarding charges incurred where the adventure is frustrated by delay could be recoverable despite the delay exclusion in the Institute Cargo Clauses. The answer to that question would essentially depend on whether the expense was incurred to prevent delay or the peril resulting in delay; and secondly whether the forwarding charges clause would also apply to a situation where the adventure is lost by frustrating delay.

In relation to the former question, in *Wilson Bros Bobbin Company Ltd v. Green*[480] a claim was made for sue and labour charges to prevent loss of the adventure when the cargo was prevented by warships from completing its voyage. The cargo was subsequently forwarded to its destination. The policy excluded "all claims arising from delay" and it was argued that the claim to recover the storage charges and forwarding expenses was expressly excluded as the claims arose from delay. [481] Bray J. stated that the clause excluding all claims arising from delay had not affected in any way the sue and labour clause[482] and that the assured was entitled to recover the cost of storage for a reasonable time and the proper cost of forwarding the cargo to its port of destination at the expiry of that time. The case is authority for the proposition that the delay exclusion does not apply to claims under the sue and labour clause in such circumstances.

[479] Dunt, *Marine Cargo Insurance*, 13.67
[480] *Wilson Bros Bobbin Company Ltd v. Green* [1917] 1 KB 860.
[481] *ibid* at p.861 by Leck K.C and RA Wright K.C. The goods were discharged on 15 December 1914 and were stored until they were forwarded in September 1915.
[482] *ibid* at 862, 863.

The case is an important authority for several reasons. Forwarding charges and other like expenses incurred in order to prevent a loss of adventure are usually occasioned by a peril depriving the vessel to continue to the port of destination such as restraint of princes or detention and resulting delay. It is therefore crucial to determine whether the expenses are incurred by reason of the deprivation peril and therefore recoverable or by the ensuing delay and irrecoverable if the policy contains an exclusion to that effect. The facts of the case showed that storage and forwarding expenses were incurred by reason of the detention of the ship;[483] delay in this case was an event which determined the amount of expenses and was not the reason why the expenses were incurred.[484]

A similar decision was given in the United States where English law and customs had governed the cargo policy.[485] In this case the vessel carrying the goods had stranded in consequence of which she had to be repaired; given the delay during repairs, the goods were forwarded to their destination on another vessel and additional freight had to be paid accordingly. The insurers had expressly undertaken to pay for forwarding charges under the policy, however the policy also contained a clause "freight warranted free from any claim consequent upon loss of time, whether arising from a peril of the sea or otherwise". It was held that the clause did not prevent the assured from recovering the extra freight paid for forwarding the goods (which were otherwise expressly recoverable under the policy) given that the expenses were the consequence of stranding and not of loss of time. According to the Court, stranding was the proximate and sole cause of the forwarding charges and the expenses were not excluded by the effect of s 55(2)(b) on the ground that the case was not with respect to damage to goods by delay;[486] yet to extra freight paid for forwarding the goods for which the insurers were expressly liable under the policy.

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[483] Shortly after sailing, the ship was stopped by enemy vessels and was put to a port where the cargo was discharged and stored for some time. They were subsequently reshipped and forwarded to their destination.

[484] In a similar scenario however, in *Russian Bank for Foreign Trade v Excess Ins Co Ltd* [1918] 2 KB 123 where the assured claimed for a constructive total loss of cargo due to restraint of princes, the court held that the adventure was frustrated by the restraint of princes which was a covered peril, however recovery was not available to the assured as the loss was excluded by the wording "all claims due to delay". This case was mentioned in Dunt, *International Cargo Insurance*, 3.107as an authority having a different approach than *Wilson v Green* case. It is submitted, with due respect, that *Russian Bank* case cannot be authority for storage charges and forwarding expenses which involve an element of time (delay) determining the extent of the expenses, it can merely be authority for loss of goods in relation to deprivation perils and delay.

[485] *Firemen's Fund Ins. Co. v Trojan Powder Co* (1918) 253 F.205 (Circuit Court of Appeals, Ninth Circuit, California)

[486] The Court also rejected the contention that *Taylor v Dunbar* (1869) LR 4 CP 206 and *Russian Bank for Foreign Trade v Excess Insurance Company Ltd* [1918] 2 KB 123 shall be relied upon.

4.5. Economic Losses Caused by Delay and Cargo Insurance

4.5.1. Meaning of Delay in Delivery

Under a contract of carriage, delay in delivery may arise where the parties explicitly agree a delivery time in the contract and such agreement is not complied with,[487] where such delivery time is not expressly stated yet is implied or where a reasonable time required for delivery is exceeded.[488] In the absence of an agreed time, some international conventions such as the Hamburg Rules provide a formula resting upon reasonable time required for a diligent carrier to deliver, having regard to the circumstances of the case.[489] As for the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 ("The Rotterdam Rules"), an agreement as to time of delivery can be both express and implied.[490]

Under cargo policies, it may be argued that as the time of delivery of goods would be an element related to the contract of carriage, reference would have to be made to the contract of carriage and to whether it has an express or implied condition in interpreting delay in delivery. Certain cargo policies available in the market contain express references to "delay in delivery" without defining it.[491]Some standard form market terms such as the Institute Cargo Clauses 2009 contain references to the contract of carriage through which certain charges and liabilities or the termination of the policy are determined.[492] The Clauses do not however

[487] For a common law example of delay in delivery under a contract of carriage, see *Horne v Midland Railway Company* (1872-73) L.R. 8 C.P. 131 where the parties had agreed a specific date for delivery of the goods.
[488] For a common law example of not delivering within reasonable time under a contract of carriage see *Wilson v Lancashire and Yorkshire Railway Company* (1861) 9 Common Bench Reports (New Series) 632.
[489] Art 5(2). Under the Carriage of Goods by Sea Regulations 1998 of Australia, if the contract does not specify a time for delivery, the goods are delayed if they are not delivered "within a reasonable time for delivery, at that port, of similar goods carried by a diligent carrier (having regard to any particular circumstances of the case and the intentions of the shipper and the carrier), art 4A(2)(b). No express provision exists in Hague and Hague-Visby Rules as to the meaning of delay in delivery.
[490] Diamond, Anthony, The Rotterdam Rules, *Lloyd's Maritime and Commercial Law Quarterly*, 2009 (4), 445-536, at 479; Berlingieri, Revisiting the Rotterdam Rules, 603.
[491] See for e.g. http://www.zurich.co.uk/NR/rdonlyres/40E05272-5B99-431C-959F6218123523B0/0/ZMC1B01CargoPolicy0210Webopt.pdf Section 2-Optional Extensions, cl.3
"Consequential Loss
This policy is extended to include reasonable costs necessarily incurred by you as a result of:
(…)
c) delay in delivery due to closure of any transport route following accident, fire, flood or act of God"
[492] Institute Cargo Clauses A 2009, cl.2 general average and salvage charges are determined according to the contract of carriage; cl.8.3. the policy remains in force if a liberty granted under the contract of carriage is exercised; cl.9 the policy terminates if the contract of carriage comes to an end unless continuation of cover is requested and additional premium is paid.

refer expressly to contract of carriage in relation to delay in delivery and this could give rise to the question of whether the wording "delay" in the exclusion "losses caused by delay" extends to delay in delivery ascertainable by reference to the contract of carriage, even in the absence of express reference thereto in the clause. An affirmative view can be expressed through an analogy with freight policies whereby loss of freight is determined by reference to delay frustrating the object of the contract of carriage.[493]

Where the contract of carriage does not refer to a specific period for delivery, such period can be deduced by the Courts from ancillary elements such as the type of cargo (where goods are seasonal which require delivery in a particular season) and the intention of the assured to sell the goods in a particular market and the loss of that market. An example to the former can be found in *Federation Insurance v Coret*[494] where the goods which were seasonal handbag parts were temporarily lost and were delivered after the season where the assured had intended the goods to be sold. The Court opined that "There was no obligation to deliver within a specified delay" [495] yet the loss of the assured resting upon the goods missing their market was held to be within the scope of application of the exclusion "loss or damage arising from loss of market, or for loss, damage or deterioration arising from delay". According to this reasoning, delay in delivery may occur where seasonal goods are not delivered in time although the contract of carriage contains no provision as to the time or period of delivery.

In insurance disputes, in the absence of clear indication by the assured made as to the time or interval for resale of the goods in the market to the insurer or carrier under the contract of carriage, Courts may take notice of a particular period where the market prices are high so as to determine the most likely delivery period for the resale of the goods by the assured. In *Lewis Emanuel v Hepburn*[496] where the goods had deteriorated in value given the delay following a strike, the Court emphasised that the goods would have been sold at a time which was not precisely stated yet that it could have been guessed and accepted the evidence submitted by the assured as to an interval of a week where the market prices were high.[497]

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[493] For examples of loss of freight by delay frustrating the charterparty, see *Jackson v. Union Marine Insurance Co Ltd* (1874) LR 10 CP 125; *Re Jamieson v. Newcastle SS Freight Ins Assn* [1895] 2 QB 90. Frustrating delay and loss of freight is discussed elsewhere in this work.
[494] *Federation Ins. Co. of Canada v Coret Accessories Inc* [1968] 2 Lloyd's Rep 109
[495] At 111. It is submitted that "delay" in this context was used in the sense of "time frame".
[496] *Lewis Emanuel & Son, Ltd v Hepburn* [1960] 1 Lloyd's Rep. 304
[497] See *Lewis Emanuel & Son, Ltd v Hepburn* [1960] 1 Lloyd's Rep. 304, 307

In addition to the criteria determining whether there is delay in delivery in an insurance dispute, another complexity lies in the calculation of the loss of the assured, in particular the loss of market value. In the assumption that the meaning of delay in delivery is independent from an express or implied agreement under the contract of carriage, despite that a reasonable time is allowed or an interval is anticipated for delivery, the exact time or day when the goods should have been delivered can mostly not be determined.[498] This would consequently cause hindrance in calculating the measure of damage of the assured, i.e. in determining the difference in the value of the goods between the time the goods should have been delivered and the time of their actual delivery, considering also the speed of commodity market price fluctuations.

Marine Insurance Act 1906 and delay in delivery

The Marine Insurance Act expressly deals only with two modes of delay: delay at the commencement of the voyage,[499] and delay in voyage.[500] The sole express reference to delay in delivery is found in the context of insurable interest with respect to seller's delay in making delivery.[501]

There is *dicta* to the effect that delay in delivery losses are excluded under s 55(2)(b) albeit they are not expressly excluded thereunder. In *Weissberg v Lamb*[502] where under an all risks policy the goods were damaged while being loaded on board the ship, the assured paid charges to the removal contractors who then sought to claim that amount back from the insurers under the sue and labour clause. The Court opined that had the assured not paid the charges there could have been delay in delivery of the goods which would be a peril outside the scope of the policy by way of s 55(2)(b) and that therefore the sum could not have been recovered as sue and labour.[503] No specific time frame was referred to in the judgment as to the time of delivery, this could raise the question whether an element of reasonable time for delivery can be implied from s 55(2)(b).

[498] See *Clark's Chick Hatchery Ltd. v. Commonwealth Insurance Co*. 1982 CarswellNB 331, the expected interval for delivery was given with reference to the time of shipment for a cargo of perishable goods. There was no loss of market in the facts of the case.
[499] S 42
[500] S 48
[501] S 7(2)
[502] [1950] 84 Ll. L. Rep. 509
[503] At 512.

4.5.2. "Loss of Market Caused by Delay"

i. Difference between "market" and "market value"

Under the US law, market was defined as "Geographical or economic extent of commercial demand for any particular product and generally refers to a more or less identifiable group of prospective purchasers seeking a particular type of product offered by a more or less identifiable group of sellers".[504] Market was generally taken to be referring "collectively to matters external to any particular product item, namely those conditions that determine the degree to which supply of that commodity exceeds or falls short of demand".[505] Accordingly the strict meaning of "loss of market caused by delay" could extend to situations where a certain type of product, given the delay in delivery is no longer in demand by identifiable prospective purchasers. However "market value" denotes a "function of qualities (i.e. age, state of repair) inherent to the individual item itself, and refers to the price that that specific article with those qualities would command in a given market".[506] Accordingly, a market is lost when there is delay in distribution or changes in consumer habits, and where a "certain type of product is no longer in demand with its intended purchasers".[507]

"Loss of market" must occur in the originally intended market[508] in that if there is no evidence that the assured lost its customers at the intended market loss of market exclusion does not apply.[509] Therefore if the assured is able to sell its goods elsewhere though to drastically lower prices than they would have received in the originally intended market yet if the originally intended market still exists, this would amount to a "loss of market value" and no to "loss of market".[510] It can be deduced from some American decisions that loss of market by delay assumes that actual delivery of goods is made albeit with some delay and that an exclusion clause for loss of market would not preclude all recovery after the goods are

[504] *Boyd Motors Inc v Employers Ins of Wausau* 880 F.2d 270 (10th Cir. 1989) citing Webster's New International Dictionary at 1504 (2d ed. 1950); Black's Law Dictionary at 874 (5th ed. 1979); Encyclopedia Britannica, Vol 11 at 511 (15th ed. 1982).
[505] *Boyd Motors Inc v Employers Ins of Wausau* 880 F.2d 270 (10th Cir. 1989), 273
[506] At 273
[507] At 273
[508] See *The Parana* (1877) 2 P.D. 118; *American National Fire Insurance Co v Mirasco Inc* 249 F.Supp.2d 303 (S.D.N.Y. 2003).
[509] *American National Fire Insurance Co v Mirasco Inc* 249 F.Supp.2d 303 (S.D.N.Y. 2003), at 322.
[510] *American National Fire Insurance Co v Mirasco Inc* 249 F.Supp.2d 303 (S.D.N.Y. 2003). In this case, there was still market for the sale of goods but the goods could not be sold at the intended market given the denial of importation of the government but there was merely a diminution of value in the goods, the market was not lost and a claim for the diminution in value could not be excluded by a loss of market exclusion.

temporarily lost –where their whereabouts is not known-; whereas where they are never delivered to their intended destination and missing there is a physical loss of goods rather than loss of market.[511]

ii. The possible grounds for the exclusion of delay in delivery losses in insurance policies

The essential motive behind excluding economic losses caused by delay, in particular loss of market, would arguably lie in the distinction between speculative and pure risks. Risk is generally known as the possibility of loss, however when there is also the possibility of gain for the assured, the risk is termed as "speculative risk".[512] Most policies, notably property policies insure against pure risks; which, in contrast to speculative risks, involves only the possibility of loss.[513] Speculative risks, given their nature and the possibility of gain as well as the loss can be considered as a business risk to be borne by the assured.[514] Losses related to delay in delivery, i.e. loss of market can also be classified as a speculative risk given that in consequence of delay in delivery, the goods are no longer suitable for their prospective purchasers in the intended market. This being said, physical damage to goods by delay can be characterised as a pure risk.

In other jurisdictions loss of market is usually excluded from cargo policies by clear wording.[515] It is mostly excluded along with losses caused by delay[516] although it can be

[511] Nationwide Brokers Inc v C & G Trucking Corp. No. 87-C-5770, 1988 WL 116827 (N.D.III. Oct 21, 1988). The Court rejected the argument that loss of market exclusion precluded recovery where outdated magazines have no market on the ground that the exclusion appeared to assume actual delivery of goods.

[512] Athearn, 6. The author gives the example of a person who purchases a share of common stock with the expectation that the stock will rise; the person also runs the risk that the prices may fall.

[513] Athearn, 6

[514] It was stated in Greene, at 11 that an insurer who agrees to cover an assured against price decline, the insurer would "in effect, become a business partner with the insured and would be asked to assume serious risks at a set price but without the corresponding opportunity to share in profits if there should be any". A price fall in the market may also occur where another kind of cargo similar to the one insured arrives to the market where the goods are delivered with delay, this was the situation in *Koufos v C. Czarnikow Ltd (The Heron II)* [1969] 1 A.C. 350.

[515] French marine insurance policy (cargo) (10 August 1968, amended 14 September 1970 and 1 December 1978) art.7.4 provided that the underwriters are free from all liability for claims arising from "delays in the forwarding or arrival of the insured interest; differences of market price" and from their consequences.
"differences of market price" wording was removed in the subsequent versions of the clauses, see French Marine Cargo Insurance Policy All Risks Cover, dated 30 June 1983, as modified 16 February 1990, 22 October 1998 and 1 July 2002) and French Marine Insurance Cargo Policy 2009 (Police Francaise d'Assurance Maritime sur Facultes (Marchandises) Garantie "Tous Risques" 1 July 2009) however those clauses cover only physical loss of or damage to goods.
Two sets of Peruvian conditions and Columbian conditions expressly refer to the exclusion of loss of market in connection with delay (General Conditions issued by Popular y Porvenir, article 7 (d), and the Marine Open Policy issued by El Pacifico of Peru. Article 2(f) of the Columbian general conditions refers to loss of market caused by delay and not specifically to physical damage caused by delay, as cited in UNCTAD document

brought by delay as well as other circumstances such as stranding of the vessel en route. The association of loss of market with delay was considered as a combination with indirect and economic loss and as a standard practice.[517] Exclusion clauses in cargo policies referring merely to losses caused by delay with no reference to loss of market would arguably exclude loss of market caused by delay especially in the case of non-perishable goods.[518] The main intention of excluding delay losses rests upon the approach that cargo owners should be indemnified if the cargo is lost or damaged by an insured peril such as fire or perils of the seas, whereas in case of a delay in the arrival of cargo either in the port or on a vessel trying to access a port the cost should be borne by cargo owners.[519] Another motive for insurers for insertion of the exclusion is to avoid any deliberate delays should the cargo owner no longer want the shipment.[520] This may however not be a valid argument given that standard form market policies used in London contain "avoidance of delay clause" which serves to prevent specifically this type of deliberate delays. [521]

iii. "All risks" insurance and loss of market by delay

TD/B/C.4/ISL/31 dated 3 November 1980 and entitled "Legal and Documentary aspects of the Latin American marine insurance legal regimes, Report by the UNCTAD Secretariat", p 21.

American Institute of Marine Underwriters (AIMU) Cargo Clauses 2004 All Risks cl. 4 is entitled "Paramount Warranties" and includes "Delay Warranty" at point C which provides "Warranted free of claim for loss of market or for loss, damage, expense or deterioration arising from delay, whether caused by a peril insured against or otherwise".

[516] American Institute of Marine Underwriters (AIMU) Cargo Clauses 2004 All Risks cl. 4 excludes loss of market under the title "delay warranty"; *Blaine Richards & Co Inc v. Marine Indemnity Insurance Company of America and William H. McGee & Co.* 635 F.2d 1051, 1981 A.M.C. 1 (delay clause in the all risks policy excluding "loss of market and loss, damage or deterioration arising from delay and the clause in the war risks policy excluding "delay, deterioration and/or loss of market); *Federation Insurance Company of Canada v. Coret Accessories* (1968) 2 Lloyd's Law Rep. 109 (loss or damage arising from loss of market, or for loss, damage or deterioration arising from delay); *Clark's Chick Hatchery Ltd. v Commonwealth Insurance Company* 1982 CarswellNB 331 (loss of market or loss or damage caused by delay); *A. Tomlinson (Hauliers) Ltd. v. Hepburn* [1964] 1 Lloyd's Rep. 416 (excluding deterioration through delay and loss or [sic] market); *Boyd Motors Inc v Employers Ins of Wausau* 880 F.2d 270 (10th Cir. 1989) (loss or damage resulting from delay, loss of market); *Ontario Inc v Commonwealth Insurance Co* 2005 CarswellOnt 2605 75 O.R. (3d) 653, 26 C.C.L.I. (4th) 225 (delay, loss of market or loss of use or occupancy and consequent loss of any kind).

[517] *Boyd Motors Inc v Employers Ins of Wausau* 880 F.2d 270 (10th Cir. 1989) citing inter alia *Blaine Richards & Co Inc v. Marine Indemnity Insurance Company of America and William H. McGee & Co.* 635 F.2d 1051, 1981 A.M.C. 1

[518] Frozen Food Extension Clauses 1/1/86 which can be used with Institute Frozen Food Clauses A 1/1/86 contains "4.5. claims arising from loss of market" as exclusion. The earlier version of this clause excluded claims caused by delay. So far as the Institute Clauses are concerned, this gives rise to the question of whether "loss caused by delay" exclusion excludes merely loss of market caused by delay and not the physical loss or damage caused by delay.

[519] The statement of a London underwriter published in Guy, Jon, Africa's Cargo Insurance Dilemma, *Fairplay* 2013, 378(6738), 20

[520] Guy, Africa's Cargo Insurance Dilemma, 20

[521] See Chapter VIII for more information on avoidance of delay clauses.

All risks cargo policies essentially cover loss of or damage to goods, yet also loss of adventure if that type of loss is not specifically excluded. Whether the wording "loss of or damage to goods" in a cargo policy implies only physical losses in the absence of the expression "physical" is a curiosity.[522]

In *Lewis Emanuel & Son, Ltd v Hepburn*[523] the policy covered "physical loss or damage or deterioration caused by or arising out of riots, strikes and civil commotions and delay consequent thereon". Loss of market by delay was not therefore expressly excluded and the issue was whether claims for loss of market caused by delay due to strikes were recoverable. But for the strike and delay consequent thereon the goods (perishable) would have been sold at a higher figure. Insurers argued that "physical" was meant to apply to damage and deterioration and not to loss of market value, and the premium could not have been assessed in relation to market prices which could vary in short term. The Court went into discussing "physical loss or damage or deterioration" and decided that it merely referred to physical loss, physical damage and physical deterioration; loss of market, although a "loss" was not a "physical loss" within the meaning of the policy and therefore not recoverable. The decision was given upon the construction of the policy wording and is by no means authority for the suggestion that loss of market is not recoverable under cargo policies. The ratio of the decision raises the query as to whether the word "loss", in the absence of the adjective "physical", could be sufficient to include loss of market value. It was argued on behalf of the insurers that the insurers could not have intended to cover loss of market caused by delay given that no insurer could assess a premium in relation to variation of market prices.[524]

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[522] In *Quorum v. Schramm* [2002] 1 Lloyd's Rep 249 the value of the goods had depreciated because of a suspicion that the goods were physically damaged. It was held that that type of loss could not have been recoverable in the absence of physical damage, this decision therefore suggests that where there is only a loss in value without any direct physical change there is no damage to goods.
In *Technology Holdings Ltd v IAG New Zealand Ltd* (2009) 15 ANZ Insurance Cases 61-786 where goods were insured against "loss or damage" the Court held that if goods had to be stored in specific conditions which were not met by reason of an insured peril, that of itself could constitute "damage" even though there was no physical alteration to goods yet merely because the goods were no longer fit for use. This case was interpreted as giving way to economic deterioration to be considered as "damage" in Colinvaux & Merkin, C-0113. The decision relied on *Ranicar v Frigmobile Pty Ltd; Royal Insurance Pty Ltd* BC8371124 (Unreported Judgment by Green CJ, Supreme Court of Tasmania) where it was enunciated that under some circumstances goods could be said to have been damaged although no physical change had been caused to the goods. The example given was food handled in a way which violated the religious dietary laws of the country to which it was exported. On the facts of the case, the storage of the perishable goods above a certain temperature had affected their exportability whereby their value was reduced. The loss had arisen from the inability of the assured to export the goods and this was considered as "damage" within the meaning of the policy.
[523] [1960] 1 Lloyd's Rep. 304
[524] At 305.

The important part of this case rests upon the fact that the goods were also damaged by delay caused by strike. Delay had therefore caused two separate types of losses: Physical loss whereby the value of the goods had diminished so the goods were sold for less than they otherwise would have sold for; and loss of market value because the goods could not be sold at the time where the market was more favourable to the assured than the one following delay. Damage in this case was considered as a physical happening, most likely given the wording "physical", yet loss of market was stated as a financial happening.[525] The former type of loss was a physical loss by delay caused by the strike which resulted in a financial disadvantage, the same delay also caused another financial disadvantage which was the missing of a good market price. This case is therefore a good example to the fact that delay can cause physical loss having a financial consequence (in which case it can be recoverable if the policy does not contain a clear exclusion clause as to delay losses) and financial loss (i.e. loss of market value). This decision can accordingly not be relied upon to support the view that loss of market is excluded from the ambit of a cargo policy on the ground that it is not a physical loss, given that the policy in that particular case particularly insured against "physical loss".

As far as the Institute Cargo Clauses are concerned, nowhere in the clauses appears a specific expression of "physical loss". In *Coven SPA v. Hong Kong Chinese Insurance Co*[526] it was suggested that "all risks cover applies only to physical loss or damage"[527] however this judgment can arguably not be authority for the proposition that financial losses are not recoverable under cargo policies, as on the facts of the case, the goods did not exist in the first place and there was merely a "paper loss" and not a "financial loss". "All risks including shortage in weight" was construed as meaning that only shortage in weight was resulted from physical loss or damage to cargo could be recoverable under the policy. The Court in that case relied upon *Fuerst Day Lawson v Orion Insurance*[528] in support of the proposition that all risks policy merely applied to physical loss of or damage to the goods.[529] With due respect, this reliance is controversial given that the relevant part of the decision turned upon arguments of the parties as to the insurable interest of a CIF buyer in the goods until the time of shipment. It was submitted by the insurers that the buyers would have had insurable interest had they insured against loss of profits or the seller's default in shipment, yet that

[525] At 309
[526] *Coven SPA v. Hong Kong Chinese Insurance Co* [1999] Lloyd's Rep. IR 565.
[527] at p.568 per Clarke L.J.
[528] *Fuerst Day Lawson Ltd v Orion Insurance Co Ltd* [1980] 1 Lloyd's Rep 656
[529] [1999] Lloyd's Rep. IR 565, at 568

they would have no insurable interest in the goods until the time of shipment under an all risks policy.[530] The Court did not express an opinion upon these arguments on the ground that they did not arise for decision, therefore it is doubted that *Fuerst Day Lawson v Orion Insurance* can stand as authority for suggesting that all risks policies merely cover physical loss of or damage to goods.[531]

Given the above observations, it can be argued that so far no authority under English law strictly held that all risks policies covered merely physical loss of or damage to goods.

iv. Scope of "loss of market by delay"

Goods arriving late and undamaged

There are several types of cargo which are susceptible of losing their market in case of delay in delivery; fashion wears, oil, goods requiring timely delivery such as magazines and generally seasonal goods. They can both lose their market completely if they cannot be sold to their prospective purchasers, or their market value where they still have a commercial value subsequent to delay, although they cannot be sold at the initially aimed price. These types of loss are most likely to be the main types of loss that are sought to be excluded by "loss caused by delay" or other expressions having similar causation wordings. In other jurisdictions, exclusions of "loss or damage arising from loss of market, or for loss damage or deterioration arising from delay"[532] and "loss, damage or expense proximately caused by delay"[533] were held to have excluded the depreciation in value of the goods following delay in respect of seasonal goods. Albeit it can be suggested that loss of market is an instance different than loss of market value and that a clause expressly excluding the former shall not necessarily exclude the latter, the latter can arguably be excluded by the wording "loss caused by delay".

The exclusion of loss of market value may seriously prejudice the assured under a cargo policy particularly where seasonal goods suffer delay in transit due to piracy peril. In

[530] *Fuerst Day Lawson Ltd v Orion Insurance Co Ltd* [1980] 1 Lloyd's Rep 656, 664

[531] These two judgments were mentioned in favour of the suggestion that cargo policies cover merely physical losses in Gilman and Merkin, *Arnould's Law of Marine Insurance and Average*, 18th ed., para 23-72, fn 490.

[532] *Federation Insurance Company of Canada v. Coret Accessories Inc. & Hirch* [1968] 2 Lloyd's Rep 109

[533] *Phoenix Assurance Plc et al. V. Golden Imports Ltd* 1989 CarswellBC 555. The policy in this case was on Institute Air Cargo terms and the facts of the case can be found elsewhere in this work under the section "Temporary deprivation of cargo and delay".

Masefield v. Amlin, [534] a cargo of biodiesel oil had lost its market value following a pirate attack to the vessel carrying the cargo. Accordingly the assured had to sell it to a substantially lesser price than the insured value. The policy was an all risks policy which excluded "capture, seizure, arrest, restraint or detainment (piracy excepted)" and the insurer observed *inter alia* that the claim was for loss of market and not for physical loss of goods and therefore excluded by s 55(2)(b).[535] In that particular case, the issue turned on the alternative ground of defence of the insurers, therefore it was untested whether an assured could claim financial loss following a piratical detention and ensuing delay. Assureds whose cargo runs the risks of being captured by pirates where the carrying vessel enters piracy prone areas may protect themselves against this type of loss by requesting the extension of cover and paying extra premiums. This option would seem viable particularly on the ground that negotiations which can be lengthy for release of the vessel and cargo are usually carried out between the pirates and the ship and the cargo interests may incur serious losses for events totally beyond their control. Contractual extensions for that particular type of cases must be made available for assureds.[536]

In the case of a valued policy, an element of loss of profit from sale of goods can be included in the valuation of the cargo[537] and if the insurer agrees to the valuation, the assured recovers that sum in the event of loss. Therefore in the absence of clear wording excluding loss of market value by delay, this type of loss can be recoverable by the assured if it is included in the valuation by the assured.[538] This suggestion is evidently subject to the rules of the MIA 1906 as to disclosure of material facts which would influence the judgment of the insurer in fixing the premium or in determining whether he would take the risk.[539] Accordingly the policy could be avoided where the overvaluation is material.

Damaged goods and loss of market value by delay

Consequential losses under insurance policies are those losses which are not proximately caused by an insured peril but by the loss of the subject matter insured, i.e. by the physical

[534] *Masefield v Amlin* [2010] EWCH 280 (Comm)
[535] At para 12.
[536] Lewins, Kate; Merkin, Robert, "Masefield AG v Amlin Corporate Member Ltd, The Bunga Melati Dua: Piracy, Ransom and Marine Insurance" (2011) 35(2) *Melbourne University Law Review* 717-734, at 733
[537] See *M'Swiney v Royal Exchange Assurance Co* (1849) 14 Q.B. 634, 641
[538] For the relevant discussion Legh-Jones, Nicholas (gen.ed.), Birds, John and Owen, David, *Macgillivray on Insurance Law*, 10th ed., London: Sweet and Maxwell, 2003, para 1-57.
[539] See s 18

loss of or damage to the subject matter.[540] Hence, any loss of market value which comes into existence by damage to goods which causes delay in delivery can be taken to be out of the scope of a cargo policy on the ground that it is not a direct yet a consequential loss.

Where cargo is damaged by an insured peril such as perils of the seas, the measure of indemnity would be the diminution in value of the goods and any cost of repairs where the goods are repairable.[541] The diminution in value which is attributable to damage to property can be contemplated as being covered by the wording "loss of or damage to" [542] and not excluded by the exclusion of "loss or damage resulting from … loss of market". Some standard form cargo conditions in other jurisdictions reflect this distinction by clear wording.[543]

In circumstances where goods are held up due to deprivation perils such as detention or seizure and are both damaged and delayed, elaborate issues may arise as to the types of losses incurred by the assured and their recoverability under a cargo policy containing delay exclusion. This is given that where goods are both damaged and delayed, loss of market

[540] See Sutton, K.C.T, *Insurance Law in Australia*, 4th edition, 2012. See also Webster's Third New International Dictionary 483 (1993) as cited in Johnson, Scott G., Ten Years After 9/11: Property Insurance Lessons Learned, *Tort Trial and Insurance Practice Law Journal* Vol .46, Issues 3&4, 685-734, at 725.

[541] Note that property could suffer damage without necessarily diminution in value, *Jan de Nul v Axa Royal Belge SA (Formally NV Royale Belge)* [2001] EWCA Civ 209, para 92.

[542] *Boyd Motors Inc v Employers Ins of Wausau* 880 F.2d 270 (10th Cir. 1989) (marine insurance policy), the policy was an all risks inland marine policy which insured "direct physical loss or damage to the insured automobiles, except […] loss or damage resulting from delay, loss of market…". The first question in this case was whether the expression "direct loss and damage" covered diminution in value of the subject-matter insured after repairs when the subject-matter was damaged and whether such diminution was recoverable given the "loss of market" exclusion. Diminution in value was considered as a direct physical loss as it resulted from repairs for the damaged vehicle. Therefore the diminution in value of hail-damaged cars was a direct loss to the insured subject-matter and not an excluded consequential loss.The insurers by the policy in this case had promised to repair or replace the damaged property and the Court was of the view that the coverage extended therefore not only to the cost of repairs but also to the diminution in value of the repaired property. See also *Quorum v. Schramm* [2002] 1 Lloyd's Rep 249 where the value of a painting had diminished following damage by fire and the diminution in value was calculated with reference to the market value of the painting right after the fire.

[543] Norwegian Cargo Clauses 2004 § 6 provides "Unless otherwise specially agreed, the Insurer shall not be liable for

1.General capital loss, including loss of time, loss due to economic fluctuations, loss of market, operating loss or similar losses"

In the Commentary to Norwegian Cargo Clauses: Conditions relating to Insurance for the Carriage of Goods of 1995, Version 2004, CEFOR Form No 261A, issued by The Central Union of Marine Underwriters (CEFOR), Oslo, Norway October 2004, available at

http://www.cefor.no/Clauses/Cargo-Clauses/ , general capital loss was defined as losses which can be incurred by the assured as a result of loss of or damage to goods and includes damages that have to be paid due to the loss of delivery contracts and costs for replacing the damaged goods with more expensive ones.

According to the Commentary, the other exclusions refer to charges and losses generated in connection with a delay. More specifically, "loss due to economic fluctuations" refers to depreciation in the value of the goods and can be partly recovered under the rules governing the calculation of the insurable value which includes the anticipated profit.

value incurred by the assured can either have been caused by delay or by damage to goods which results in depreciation in their value.[544] All these types of losses and their recoverability were discussed in *Blaine Richards v. Marine Indemnity Insurance Company of America*[545] where a cargo of beans were improperly fumigated and were detained by US authorities. The assured incurred expenses to recondition the cargo and also lost the original sale contracts, accordingly the beans had to be sold at lower prices. The goods were insured under an all risks policy against "all risks of physical loss or damage from any external cause" which contained an FC & S Clause[546] and also a Delay Clause excluding coverage "for loss of market or for loss, damage or deterioration arising from delay, whether caused by a peril insured against or otherwise". They were also insured under a war risks policy excluding losses caused by "delay, deterioration and/or loss of market". It was decided that unless it could be shown that the original purchasers rejected the cargo due to their physical condition no damages could have been recovered on the ground that the loss of original sale contracts would have been attributable solely to delay caused by detention which was excluded.[547] Likewise, the Court ordered that whether the sale of goods at lower price was caused by delay or contamination of goods (i.e. "damage" under the all risks policy) had to be found.

It is also controversial whether the assured can recover under an all risks policy which contains a clause excluding loss arising out of delay and loss of market where due to damage to cargo the assured is deprived of selling his cargo for some time and then because the reputation of the cargo is bad. In the American case *Interpetrol Bermuda Ltd. v. Lloyd's Underwriters*[548] the issue was whether a temporary contamination of the cargo that deprives the cargo owner of free access to the market is ground for recovery under an "all-risk"

[544] There is *dicta* to the effect that "loss of market" with no specific reference to delay would also extend to loss of market by delay: In *Russian Bank for Foreign Trade v Excess Insurance Company Ltd* [1918] 2 K.B. 123 the policy contained "excluding deterioration or loss of market" as well as "all claims due to delay" exclusions. Bailhache J stated at 128, in respect of the "all claims due to delay" exclusion "They may cover the same ground, but they are certainly of wider import." It is also possible to argue that loss of market which is mentioned along with deterioration merely refers to loss of market value arising from deterioration of goods. Nevertheless "all claims due to delay" exclusion could exclude both loss of market caused by delay, loss of use of cargo due to delay and physical damage to cargo by delay.

[545] *Blaine Richards & Co Inc v. Marine Indemnity Insurance Company of America and William H. McGee & Co.* 635 F.2d 1051, 1981 A.M.C. 1

[546] The clauses excluded all losses due to "capture, seizure, arrest, restraint, detainment, confiscation, pre-emption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise"

[547] At 1056

[548] *Interpetrol Bermuda Ltd. v. Lloyd's Underwriters* 1984 588 F. Supp 1199 (United States District Court, S.D New York)

insurance policy. The cargo which could have been sold en route was not marketable for some weeks (which was described as "the delay period") due to contamination and afterwards for a few weeks because the cargo's reputation was bad. Between the contamination and the sale of cargo the market fell and the cargo had to be sold at a much lower figure than its invoice price. The assured claimed damages not only for the loss of market but also for the cost of financing the cargo from the beginning of the delay period until the time of sale. The policy was "against all risks whatsoever" excluding "loss arising out of delay, deterioration, or loss of market, unless otherwise provided elsewhere in this policy." The assured argued that "unless otherwise provided under the policy" left the exclusion ineffective and that the loss of market caused was recoverable under "all risks whatsoever" wording. It was held that to prevail upon a trial, the assured must nonetheless overcome the requirement that the loss be proximately caused by an insured peril. It can be argued that the cost of financing the cargo during the period of delay can be exactly the type of loss or expenditure that is sought to be excluded under cargo policies.

A pertinent aspect of the decision in *Interpetrol* was that under an all risks policy, economic damage such as loss of market proximately caused by an insured peril was stated to be within the cover.[549] It was argued elsewhere in this work[550] that English law decisions were not authoritative for the suggestion that all risks cargo policies would merely cover against physical loss of or damage to goods and would not extend to cover economic losses arising from physical loss of the subject matter by an insured peril. Hence, it could be argued that if the reasoning in the American decisions applies, the issue would turn upon whether loss of market suffered by the assured occurred due to physical loss of the subject matter insured or by delay.

Under many business interruption policy forms, coverage is subject to the interruption being caused by physical loss of or damage to the subject-matter insured. One can expect that so long as the physical loss of the subject matter is caused by a peril insured against under the relevant property policy, the resulting business interruption claim (i.e. loss of market) arising from delay could be recoverable under business interruption policies. Nevertheless most business interruption policies contain specific clauses excluding delay and loss of market on

[549] By reference to *Stanley v Onetta Boat Works*, Inc, 303 F.Supp. 99, at 106. It was decided in that case that under an all risk builder's policy, economic loss (lost profits and loss of use) proximately caused by an insured peril would be deemed "not consequential"

[550] See above "All risks insurance and loss of market by delay".

the ground that they do not directly flow from a covered loss. In the absence of unambiguous wording as to the exclusion of that types of losses, it can be argued that business interruption policies are the type of policies which can specifically grant cover for loss of market by delay, upon the condition that the assured proves the direct connection between the loss of the subject-matter and the loss of market by delay.[551] It is submitted that this can be possible where delay in delivery and the consequent economic loss is caused by the fumigation of a contaminated cargo.

4.5.3. To What Extent Loss of Market Value is Indirect?

i. Loss of market value and directness under general contract law and carriage of goods by sea

In contract law, foreseeable losses were held to be those which are reasonably supposed to be in contemplation of both parties at the time they made the contract. They are two kinds; those which are fairly or reasonably considered to arise naturally, and those which arise from any special circumstances communicated at the time of the contract.[552] Under an insurance contract, a consequential loss is not recoverable either given that it is not proximately caused by an insured peril but by the loss of the subject-matter insured against[553] and because it is in nature distinct from physical damage.

In *The Parana*[554] where there was a long delay in the arrival of the vessel to the port of destination, the price of the goods had fallen between the time when the goods should have arrived and when they actually arrived after the long delay. The contract contained no clause excluding loss of market by delay however the Court decided that the consignee was not entitled to recover damages arising from the loss of market. The Court however emphasised that the loss of market could be recoverable if goods are sent by a carrier to be sold at a

[551] In the US, it was held in Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 279 F. Supp. 2d 235, 240, aff'd as modified, 411 F.3d 384 (2d Cir. 2005) that the term "loss of market" did not "bar recovery for loss of ordinary business caused by a physical destruction or other covered peril.", as cited in Bell, Bernard P., Time Element (Business Interruption) Insurance Chapter 46 in *New Appleman on Insurance Law Library Edition* accessed at http://www.lexisnexis.com/legalnewsroom/insurance/b/applemaninsurance/archive/2011/08/23/time-element-business-interruption-insurance-new-appleman-on-insurance-law-library-edition-chapter-46-insurance-coverage.aspx

[552] *Hadley v Baxendale* (1854) 9 Ex. 341

[553] Merkin, Robert, *Colinvaux & Merkin's Insurance Contract Law*, looseleaf, 2007 (8th ed.), Sweet & Maxwell, C-0115. See also *Shelbourne & Co v Law Investment and Insurance Corporation Ltd* [1898] 2 Q.B. 626, 627 where the insurers had accepted payment for damage to barges consequent upon collision yet had rejected payment for loss in consequence of detention during repairs on the ground that that loss was not proximately caused by the perils insured against (i.e. was not proximately caused by collision) and was remote.

[554] (1877) 2 P.D. 118

particular market and where they do not arrive to their destination by reason of the breach of contract (delay) on the part of the carrier.[555] Moreover it could be recoverable where it was known to both parties that the goods would sell at a better price if they arrive at one time than if they arrive at a later time.[556] The vital part of the judgment was "In order that damages may be recovered, we must come to two conclusions- first, that it was reasonably certain that the goods would not be sold until they did arrive; and, secondly, that it was reasonably certain that that was known to the carrier at the time when the bills of lading were signed."[557]

The suggestion that the damages could be recoverable where it was known to both parties that the goods would sell at a better price if they arrive at one time than if they arrive at a later time can be considered as the second limb of *Hadley v Baxindale*[558] which would apply where goods are delivered to a carrier with notice that delivery of the goods within a certain period is an essential part of the contract. *The Parana* was later on applied in *The Notting Hill*[559] where the cargo owners having their cargo on board a ship which had collided with another ship sued the owners of the latter for the loss of market. The fact that this was a case of tort and not contract did not prevent the application of *The Parana*[560] where Mellish L.J enunciated that loss of market is on an ordinary voyage so uncertain that it cannot be the natural and reasonable consequence in every case and not the natural and reasonable result in a collision case. These two cases were not followed in *Koufos v C. Czarnikow Ltd (The Heron II)*[561] where the question was whether damages for breach of contract of a loss of a kind which the other party, when he made the contract, ought to have realised were not unlikely to result from a breach of contract causing delay in delivery.[562] It was enunciated that "Where there's a market it must be assumed to be in contemplation of the parties as a

[555] (1877) 2 P.D. 118, 121
[556] (1877) 2 P.D. 118, 121
[557] At 123. A similar view was taken in the American case *Aktieselskabet Stavangeren v Hubard-Zemurray S.S. Co*, 250 F. 67, 162 C.C.A 239 (5th Cir.1918) where under a time charterparty the owners who carried the goods had no obligation to deliver the goods within any stated time, the shipper/charterer's loss was the difference between what the value of the goods had they been sold at the intended market and what the shipper/charterer would have received had the advance orders which had been given not been cancelled because of the delay in delivery.
[558] In this case one of the questions was whether the carriers knew that delay could cause loss of profit to the cargo owners.
[559] (1884) 9 P.D. 105
[560] This reasoning was based on *Hadley v Baxindale* (1854) 9 Ex. 341. In *Koufos v C. Czarnikow Ltd (The Heron II)* [1969] 1 A.C. 350, 386 Lord Reid distinguished between contract and tort law in terms of remoteness of damage yet stated that this shall not mean that *Hadley v Baxendale* would be decided differently.
[561] [1969] 1 A.C. 350
[562] It was stated at p 385 "The parties are not supposed to contemplate as grounds for the recovery of damage any type of loss or damage which on the knowledge available to the defendant would appear to him as only likely to occur in a small minority of cases".

grave danger that the goods may be sold on arrival so that if there's a delay one of the consequences may be loss of market".[563]

In terms of measure of damages for loss by non-delivery, the calculation rests upon the difference between the market value of the goods at the time when they ought to have been delivered (the market being the intended market) and the freight payable under the contract.[564] Where the delivery of goods is delayed, the difference between the market value of the goods at the intended destination on the date of their intended delivery and their market value at the actual delivery date is the measure of damage.[565] This rule had also been applied in the context of carriage of goods by sea.[566]

ii. Loss of market value and directness under insurance law

Under the common law, it was not unusual to recover on a policy of goods the depreciation in their value where they were not physically damaged.[567] The earlier authorities shall however be treated with caution in a possible attempt to draw an analogy to depreciation in value caused by delay, on the ground that the losses there at issue were arguably the direct consequences of the insured peril (disallowance of discharge of cargo by government authorities) whereas the main argument behind the exclusion of loss of market value by delay rests upon the suggestion that that loss is not proximately caused by an insured peril, yet by an excluded peril that is delay and that most -if not all- losses arising from delay are considered as consequential to cargo policies given their economic nature.

It can be submitted that in shipping circles, goods are usually traded for sale with profits and are therefore sent to markets where goods can be sold accordingly during particular seasons. It may therefore be known to the parties of a carriage contract that any delay in delivery of the goods may result in the loss of market value of the goods, hence losses resulting from delay can arguably be recoverable thereunder. However, recoverability of such losses under

[563] At 426
[564] *Rodocanachi v Milburn* (1886) 18 QBD 67, 76.
[565] *Wilson v Lancs & Yorks Ry* (1861) 9 C.B. (N.S.) 632; *Collard v S.E. Ry* (1861) 7 H. & N. 79; *Schulze v G.E. Ry* (1887) 19 QBD 30; *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033, 1046 as cited in Beale, Hugh, *Chitty on Contracts*, 30th ed., Vol I, Sweet & Maxwell, 2008, at 26-089.
[566] *Koufos v C. Czarnikow Ltd (The Heron II)* [1969] 1 A.C. 350
[567] *Puller v Glover* (1810) 12 East 124. In this case insurers had agreed to pay total loss if the goods were not allowed to have been discharged by authorities. It was held that although there was no physical damage to goods, the loss which ensued from the disallowance of discharge (i.e. depreciation in value of the goods) was recoverable. See also *Puller v Staniforth* (1809) 11 East 232.

insurance policies, in the assumption that the policy contains no unambiguous exclusion clause or no express exclusion whatsoever, would entail an inquiry into whether a possible loss in the market value of goods by delay ought to have been contemplated by insurers when the policy is made, in particular where seasonal goods are insured. Another related question could be whether the rules of the MIA as to disclosure by the assured and the information which is ought to be known by insurers in the ordinary course of their business could be referred to in determining whether loss of market value by delay was in the contemplation of the insurers.[568] This suggestion would however denote that insurers, except for their knowledge of the insurance market would also be expected to have adequate knowledge of the commodity market.

Should it be argued that loss of market value by delay is a type of loss that could be in the contemplation of insurers, that shall be specifically excluded from the scope of the policy, otherwise an exclusion of consequential losses caused by delay would arguably leave out merely expenditures incurred during delay (i.e. expenses in financing the cargo during delay) and not loss of market value.[569]

iii. Recoverability of loss of market value by delay in general average and directness of loss

So as to be recoverable under the MIA and the York-Antwerp Rules in general average, the loss ought to be a loss that is the direct consequence of the general average act[570] and under the Rules losses such as loss of market, considered as indirect losses, are not recoverable as a general average loss.[571] The exclusion of loss of market through delay as an indirect loss to the general average act was introduced for the first time with the York-Antwerp Rules 1924.[572] The case law prior to 1924 is therefore crucial to interpret the exclusion and the ground upon which the necessity for its introduction was based. One of the reasons why loss of market through delay was excluded under the York-Antwerp Rules 1924 was suggested in

[568] As per s 18(3)(b), the assured need not disclose any circumstance which is known or presumed to be known to the insurer. "The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know".
[569] An exclusion entitled "Consequential Loss/Delay Exclusion Clause" which provides "This Policy does not cover loss of market and / or loss or damage arising from delay or consequential loss of any description." could be an example of a clear clause for excluding all types of delay loss. The wording was used in the policy which was at issue in *Clothing Management v Beazley Solutions* [2012] Lloyd's Rep IR. 329.
[570] MIA s 66(1)
[571] York-Antwerp Rules 1924, 1974, 1994, 2004 Rule C.
[572] The York-Antwerp Rules 1890 did not contain any general rules similar to the current Rule C in terms of losses through delay.

Australian Coastal Shipping Commission v Green[573] to be *The Parana.*[574] It is noteworthy that albeit in *The Parana*, loss of market by delay was held not to be recoverable; this rule was made subject to two exceptions: If goods are sent to be sold in a particular season for being sold to higher price compared to other seasons and if it is known to both parties of the contract that the goods will sell at a better price if delivered on time.[575] Assuming therefore that the exclusion of loss of market by delay in the York-Antwerp Rules 1924 rested upon the authority of *The Parana*, it did not extend to the two exceptions mentioned hereabove. In addition to the foregoing, the authority of *The Parana* as to directness of loss of market was not followed in *Koufos*[576] and it was enunciated that loss of market by delay was directly caused by the breach of the contract.[577]

It was stated that the word "direct" in the context of York-Antwerp Rules 1950, which was essentially found in all the subsequent versions of the Rules, has a narrower meaning compared to directness as was considered to be the test in relation to remoteness of damage,[578] although under English law loss of market was regarded as a direct loss. [579] Under the current version of the Rules loss of market is excluded in its own right and is followed by the exclusion of loss incurred by reason of delay. Accordingly where goods intended for a specific market arrive at the port of destination safely however with some delay, and the loss of market arises from market fluctuations during the period of delay, claims for such a loss would according to the Rules not be recoverable in general average.

The earlier decisions assessed directness with reference to mainly two tests, one based on foreseeability of the general average loss by the master at the time of the general average sacrifice,[580] and the other based on the existence of subsequent accidents to the general

[573] [1971] 1 Q.B. 456, at 481
[574] (1877) 2 P.D. 118
[575] (1877) 2 P.D. 118, 121
[576] *Koufos v C. Czarnikow Ltd (The Heron II)* [1969] 1 A.C. 350, 385 per Lord Reid
[577] The crucial question according to Lord Reid was rather whether "on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation", at 385.
[578] *Australian Coastal Shipping v Green* [1971] 1 Q.B. 456 at 487, per Carins L.J
[579] *Australian Coastal Shipping v Green* [1971] 1 Q.B. 456 at 481, *per* Lord Denning M.R.
[580] This test was established by Lowndes in *The Law of General Average: English and Foreign*, 4th ed., London: Stevens and Sons, 1888, at p 36 in the following passage: "We have to determine quod pro omnibus datum est, and since giving must always imply an intention to give, what we have here to ascertain must be what loss at once has in fact occurred, and likewise must be regarded as the natural and reasonable result of the act of sacrifice? Or in other words, what the shipmaster would naturally or might reasonably have intended to give for all when he resolved upon the act? If then upon the act of sacrifice any loss ensues, which the master did not in

average act breaking the chain of causation between the act and the loss.[581] It is submitted that these tests are not readily reconcilable although earlier cases cited both with approval.[582] It is not very clear whether the two tests should be applied together, and it is submitted that their application to circumstances involving delay may have fairly different and irreconcilable results.

The test for direct consequence based on "subsequent accidents" was rejected by the Court of Appeal in *Australian Coastal Shipping Commission v Green*[583] where it was enunciated that an event does not break the chain of causation when the claimant, when he does the general average act, does actually foresee the consequence, ought reasonably to have foreseen that a subsequent accident of the kind might occur or even that there was a distinct possibility of its happening. [584] It would follow that whereas delay could be considered as an event breaking the chain of causation between the general average act and loss of market according to "subsequent accident" test, the same argument may not be readily advanced on the basis of the foreseeability test.

If the assured incurs loss of market in consequence of a general average act leading to a delay, such as where the vessel proceeds to a port of refuge to avoid damage to cargo by perils of the seas; this loss is expressly considered and excluded as an indirect loss to the general average act and therefore not recoverable under the York-Antwerp Rules.[585]

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fact bring before his mind at the time of making the sacrifice, it would have to be considered whether it were such a loss as he naturally might or reasonably ought to have taken account of."

[581] It was cited in *Anglo-Argentine Live Stock Agency v Temperley S.S. Co.* [1899] 2 Q.B. 403 at 410, "Ulrich, in his Grosse-Haverei, p.5, says: "General average comprises not only the damage purposely done to ship and cargo, but also (1.) all damage or expense which was to be foreseen as the natural (immediate) consequence of the first sacrifice, since this unmistakably forms part of that which was given for the common safety; (2.) all damage or expense which, though not to be foreseen, stands to the sacrifice in the relation of effect to cause, or in other words was its necessary consequence. Not so, however, those losses or expenses which, though they would not have occurred but for the sacrifice, yet likewise would not have occurred but for some subsequent accident."

[582] *Anglo-Argentine Live Stock Agency v Temperley S.S. Co.* [1899] 2 Q.B. 403, at 410, that the master knew or ought reasonably to have known that the general average sacrifice could result in the losses incurred (Lowndes test); and that the damage was the necessary consequence of the general average act (Ulrich test). Likewise in *Austin Friars Steamship Co Ltd v Spillers & Bakers Ltd* [1914] 1 K.B. 833 where the master had decided to put into a port of refuge yet the vessel had struck the pier, Bailhache J applied first the foreseeability test and decided that what in fact occurred (damage to pier and liability to third parties arising by damaging the pier) was in contemplation of the master. In relation to the subsequent accident test, he enunciated that the collision with the pier was a foreseen result and not the result of a subsequent accident.

[583] *Australian Coastal Shipping Commission v Green* [1971] 1 Q.B. 456.

[584] *ibid*, at 482 per Lord Denning M.R. This reasoning follows the test established by Lowndes.

[585] Both in the 1974 and 2004 versions, by virtue of Rule C. Rule C provides: "Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss

It was recognised in *Anglo v Temperley*[586] that loss of market by delay could desirably have been recoverable yet that the common law was clear as to their non-recoverability.[587] Following the rejection of subsequent accident test in favour of the reasonable foreseeability test, it is now debatable whether loss of market by delay could still be considered as an indirect loss. According to this test, it can be suggested that delay is usually foreseeable where a general average act occurs, for delay, as has already been discussed in this work, is almost always preceded by other events. In this respect delay may not break the chain of causation between the general average act and the loss and that losses resulting from delay may therefore be considered usually as direct consequences of the general average act.[588] However, albeit delay may generate losses which can be considered as "direct consequence of general average act" under the common law, Rule C § 3 of the York-Antwerp Rules excludes any loss incurred by reason of delay.

Loss of market which does not arise through delay (where goods cannot arrive to their initial destination and have to be sold elsewhere) is recoverable in general average under English law.[589] Under the common law, it was held that expenses for keeping the cargo in good condition during delay were held to be not recoverable.[590]

It was submitted that an extraordinary delay at a port of refuge in consequence of which delivery of goods does not occur on time may give rise to frustration of the commercial speculation entered into by the carriage contract.[591] It may therefore be drawn an analogy between the carriage contract and the insurance contract and be argued that where the insurer is given information as to the fact that the cargo insured is for a specific market, any delay in delivery may be considered as a commercial frustration of the adventure contemplated by the

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whatsoever, such as loss of market, shall not be admitted as general average". The wording in York-Antwerp Rules 1924 was to the same effect, having been slightly differently drafted.

[586] *Anglo-Argentine Live Stock Agency v Temperley S.S. Co.* [1899] 2 Q.B. 403

[587] At 412

[588] It is submitted that 1924 version of York-Antwerp Rules by providing "damage or loss sustained by the ship or cargo through delay on the voyage, and indirect loss from the same cause" recognised that delay could be an intervening cause (as per "indirect loss from the same cause") and also an event not breaking the chain of causation ("damage or loss sustained by the ship or cargo through delay"). Accordingly direct and indirect losses incurred by delay are excluded according to this wording. The current Rules are not different in this respect, they are only clearer.

[589] *Anglo-Argentine Live Stock Agency v Temperley S.S. Co.* [1899] 2 Q.B. 403

[590] *Anglo-Argentine Live Stock Agency v Temperley S.S. Co.* [1899] 2 Q.B. 403, 413.

[591] Wilson, D.J and Cooke J.H.S, *Lowndes and Rudolf The Law of General Average and The York-Antwerp Rules*, 13th ed., para 00.43

parties[592] and it would depend on the wording of the policy whether the losses arising would be recoverable.

iv. Loss of use of cargo and resulting loss of sale contracts

As a result of delay in delivery of goods, the assured can be deprived of honouring sale contracts entered into prior to the occurrence of delay in delivery. This type of loss can be considered as a loss of use of cargo and may equally occur where the cargo is held up due to perils such as detention or congestion. Under property or cargo policies the exclusion of loss of use of cargo can appear along with the exclusion of loss of market.[593] It shall be noted that the intention of the assured in the sale of goods at a profit and resulting loss of a sale contract is a different instance from loss of market value. The latter may be categorised as a sub-category of loss of adventure which is insured under a cargo policy as well as the loss of or damage to goods[594] whereas the former as a loss of profit and therefore a consequential loss not recoverable under a cargo policy.

Under the common law, anticipated profits from the sale of cargo were insurable so long as they were certain[595] and not where they were merely speculative, i.e. where no binding agreement had yet been reached by the assured for reselling the goods.[596] Examples can be found of cargo policies where only loss of profit to be made upon resale of cargo was insured.[597] Loss of profit can equally be incurred following delay in delivery of the goods at

[592] Commercial frustration was defined in *Admiral S.S. Co v. Weidner* (1916) 1 K.B. 429, at 436-437 by Bailhache J "The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party to a contract, of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made." This decision was reversed in *Scottish Navigation Co Ltd v W.A Souter & Co* [1917] 1 K.B. 222 and *Admiral S.S. Co v. Weidner* [1917] 1 K.B. 222 however the definition of Bailhache J was found entirely in line with previous authorities, at 243.

[593] *Ontario Inc v Commonwealth Insurance Co* 2005 CarswellOnt 2605 75 O.R. (3d) 653, 26 C.C.L.I. (4th) 225 (delay, loss of market or loss of use or occupancy and consequent loss of any kind); *Triple Five Corp v Simcoe & Erie Group* 1994 CarswellAlta 451 Alberta Court of Queen's Bench ("loss caused by delay, loss of market or loss of use, except as may be provided under Business Interruption covers of the Policy").

[594] In the absence of an express clause having effect of excluding loss of adventure, see for e.g. Institute War Clauses (Cargo) cl 3.7; Institute Strikes Clauses (Cargo) cl.3.8 "any claim based upon loss or frustration of *the* voyage or adventure" (emphasis added).

[595] *Grant v Parkinson* (1781) 3 Doug. 16, 18 as cited in Legh-Jones, Nicholas (gen.ed.), Birds, John and Owen, David, *Macgillivray on Insurance Law*, at para 1-57.

[596] *Lucena v Craufurd* (1806) 2 Bos. & Pul. (N.R.) 269, 321 as cited in Legh-Jones, Nicholas (gen.ed.), Birds, John and Owen, David, *Macgillivray on Insurance Law*, at para 1-57.

[597] *The Corporation of the Royal Exchange Assurance v M'Swiney* (1849) 14 Queen's Bench Reports 646. In this case, profit on resale of a cargo of rice was insured under a cargo policy. While part of the cargo was loaded on

their destination.[598] If the ship with goods laden on board is damaged by perils of the seas and the goods are sent on another ship to their destination and arrive on time, there would be no loss of profits. If the goods are not however loaded on the ship which is damaged by perils of the seas and the goods cannot be forwarded to their destination which results in delay in delivery of the goods; it can be argued that profits are lost by delay in delivery and not by perils of the seas.[599] Insuring loss of profits could give rise to the question of whether a delay of one day in the arrival of goods to their destination could amount to total loss, the answer seems to be affirmative where cover against delay in delivery is expressly granted under the policy,[600] in the absence of which insuring loss of profit under a cargo policy would not extend to "events collateral to those on which ordinary profit on goods depends",[601] such as retardation of the voyage.[602]

The recoverability of that loss under a policy covering profits can be challenged on the ground that that would otherwise be considered as a policy on the arrival of the ship in a given time and the ability of the assured to perform his sale contracts.[603] It is however possible for the assured to insure the loss of profit to be earned by the arrival of goods by a certain date upon the condition that the date by which the goods should arrive is disclosed to the insurer. This would be on the ground that information as to the arrival of goods by a certain date could be considered as an event which would influence the decision of the insurer in fixing the premium and in determining whether he would take the risk as per s 18

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board, the ship was disabled by perils of the seas and loaded rice was spoiled. Accordingly the loaded cargo had to be discharged and no cargo was eventually delivered to their destination. This resulted in the upsetting of all of the assured's sale contracts. It was held that loss of profits was insurable and insured in respect of the cargo loaded; however the loss of profit as regards the unloaded cargo was not occasioned by perils of the seas but was consequential upon the loss of cargo loaded as the profit to be made upon the whole cargo depended on the safe arrival of the whole cargo on board a particular vessel and in a certain time.

[598] See *The Corporation of the Royal Exchange Assurance v M'Swiney* (1849) 14 Queen's Bench Reports 646, 663

[599] *The Corporation of the Royal Exchange Assurance v M'Swiney* (1849) 14 Queen's Bench Reports 646

[600] *The Corporation of the Royal Exchange Assurance v M'Swiney* (1849) 14 Queen's Bench Reports 646, 660. It is submitted that after the enactment of the MIA, the expression "due arrival of insurable property" in s 5(2) could be interpreted such that the assured could incur loss of adventure by delay in delivery of the goods even where the goods are late for one day, where the date on which the goods should have arrived is disclosed to the insurer.

[601] *Ibid*, at 663

[602] Loss of profits by perils of the seas can occur where goods are damaged thereby and cannot be sold in consequence of which the sale contracts entered into by the assured cannot be honoured.

[603] Argued in *The Corporation of the Royal Exchange Assurance v M'Swiney* (1849) 14 Queen's Bench Reports 646, 658

of the MIA. Cover would most likely be granted by insurers against the payment of additional premium.[604]

4.5.4. Delay Losses and Risk Allocation between Liability Regimes and Marine Insurance

There may be certain types of delay losses for which neither the carrier and accordingly the P&I clubs, nor the cargo insurers are liable. It is evidently open to insurers to offer additional coverage against payment of extra premium for delay losses not otherwise recoverable under standard form policies. However the existence of a liability regime whereby carriers are liable for some or all types of delay losses would affect the compensation of shippers or consignees (who can be insured under a cargo policy for their respective interests) and could provide an alternative for these parties where they are not insured against delay losses under their cargo policy.

Liability regimes applicable to carriers give cargo interests the opportunity to claim directly against carriers for their losses arising from carrier's liability; nevertheless in practice, they would rather determine the recourses between cargo and liability insurers. Albeit recourse to carriers seems to be available to cargo interests (or to their insurers following subrogation), it is controversial whether such recourse stands as the most viable option, given that it can be fairly limited under certain circumstances: Firstly, carriers' liability is based on fault or neglect, hence even where a carrier is liable for delay losses under a liability regime, liability can be avoided where it is proved that delay occurred with no fault or neglect attributable to the carrier. Moreover, carriage conventions usually contain provisions limiting the liability of carriers, it may even be that separate[605] and lower liability limits compared to general liability limits can be set out for delay losses. Last but not least, under certain conventions carriers are liable only where the contract of carriage contains an agreement as to the time of delivery of goods,[606] failing which it is controversial whether the carrier is liable for delay in delivery losses. As to the other and more practical side of the coin, cargo interests may expect to reach quicker settlements with their cargo insurer or business interruption insurer (for pure

[604] It was suggested that it would be "strange" if the insurers insure the arrival of goods by a certain day at the ordinary premium in *The Corporation of the Royal Exchange Assurance v M'Swiney* (1849) 14 Queen's Bench Reports 646, 655 per Parke B

[605] See e.g. The Rotterdam Rules (United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008) art 60.

[606] It is controversial whether under the Rotterdam Rules carriers are liable only where the time of delivery is agreed under the contract of carriage. This issue shall be dealt with in more detail below.

economic losses caused by delay) instead of going into lengthy negotiations and/or proceedings with the carrier or the P&I clubs.[607]

Adoption of new carriage conventions such as the Rotterdam Rules[608] setting an express liability regime for delay losses is of high importance for cargo insurers. Where and if the Rules enter into force in the UK, cargo interests will have a right to recourse against carriers for such losses. However as delay may result in different types of losses, i.e. physical loss of or damage to goods, loss of market value and pure economic loss caused by delay in delivery; it would be required in this work to primarily determine the types of delay losses recoverable under the liability conventions prior to proceeding with elaborating on the risk allocation between cargo insurance and liability conventions. It may be suggested that a regime establishing liability of carriers for certain types of delay losses can be an incentive for cargo insurers to provide cover for these losses which are otherwise sought to be excluded by the general delay exclusion.[609] Where cargo insurers insure the same types of delay losses otherwise recoverable under liability regimes,[610] they would be entitled to be subrogated to the rights of the assured (cargo interest) following payment and would also have a right to recourse against carriers or their P&I clubs. It is often the concern of cargo interests that the premium to be paid for purchasing cover for delay losses under cargo policies can be high, however this may not always be the case, particularly where these losses are also covered under the carriage conventions.

This suggestion rests upon the ground that cargo insurance premiums are based on the probability of loss, less the probability of recovery from the carrier's insurer (P&I club).[611] So long as there is a possibility for cargo insurers to recourse to P&I clubs for some of the delay losses, the premiums for receiving delay cover under a cargo insurance policy would not be as high as suspected. This section will therefore analyse the provisions of the Hague

[607] By virtue of the Third Parties (Rights against Insurers) Act 1930; cargo interests, as a third party, can directly claim against P&I clubs for their losses incurred due to a breach of the carrier which is covered under the P&I club cover unless the cover contains a "pay to be paid" rule. According to the "pay to be paid" rule, the assured under a P&I club cover is required to discharge his liability by making payment to the third party so as to be entitled to claim against the club. The effect of this rule was clarified in *The Fanti* and *The Padre Island (No.2)* [1990] 2 Lloyd's Law Reports 191.

[608] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008

[609] By s 55(2)(b) or by provisions contained in standard form cargo policies.

[610] This scenario assumes that the usual delay exclusions in cargo policies are either delimited by cargo insurers or are deleted completely.

[611] Peck, David S., Economic Analysis of the Allocation of Liability for Cargo Damage: The Case for the Carrier, or Is It?, *Transportation Law Journal*, Vol 26, Issue 1, 1998, 73-106, at 104.

Visby Rules[612] as enacted into the Carriage of Goods by Sea Act 1971 in terms of risk allocation for delay losses between the Rules and cargo insurance and will speculate on the possible effects of the Rotterdam Rules in that respect if they enter into force in the United Kingdom.[613]

Despite the foregoing, it is noteworthy that a drawback of analysing risk allocation for delay losses between carriage conventions and marine insurance may lie in that parties can negotiate both under the marine insurance policies and carriage contracts to reach the risk allocation which suits best their respective interests regardless of what the law initially imposes.[614] Nonetheless, it is believed in this work that changes in rules governing carriage of goods by sea and any ambiguities arising from the new liability regimes could create a less obvious risk allocation as between the carrier and cargo interest, hence cargo interests may risk of not being fully aware of the risks they bear which may in turn be insured under cargo or business interruption policies. Moreover, cargo insurance and liability insurance for carriers provided by P&I clubs are obtained in independent markets[615] and cargo liability rules of the carriers determine the share of business as regards insurance against cargo losses and any changes in the rules of liability may affect this market sharing.[616] This section will therefore shed light upon the possible outcome of the enactment of the Rotterdam Rules upon the market sharing between P&I and cargo insurance.

i. Risk allocation between marine insurance and the Hague-Visby Rules

[612] The Hague Rules as amended by the Brussels Protocol 1968
[613] The Rotterdam Rules has not yet been signed by the United Kingdom and is not yet in force given the small number of states having ratified it. The Convention requires 20 ratifications for entry into force.
[614] The Coase Theorem in Coase, R.H., The Problem of Social Cost, *Journal of Law and Economics*, Vol 3, 1960, 1-44, at 7-8 explains that legal rules are only justified by reference to a cost-benefit analysis where they allocate risks to the most efficient right bearer taking into consideration the costs of bargaining and information gathering. This was interpreted in Sturley, Michael F. Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby and Hamburg in a Vacuum of Empirical Evidence, *Journal of Maritime Law and Commerce*, Vol 24, No 1, January 1993, 119-149, at 123, "The parties blessed with perfect information and freed from transaction costs, will negotiate to reach the most efficient risk allocation regardless of what the law initially imposes. For essentially the same reasons, changing the liability rules also has no impact on determining which party will be ultimately responsible for any cargo damage".
At a more general level, in terms of delay losses and economic theory of law, it could be asked whether it would be cheaper to leave the cargo insurer pay the loss without subrogating the rights of the assured against the carrier, or to give subrogation rights whereby the carrier would have to pay higher P&I calls to cover the extra risk. This was submitted in Sturley, Michael F. Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby and Hamburg in a Vacuum of Empirical Evidence, at 144 in the context of Hamburg Rules and did not involve a particular reference to delay losses.
[615] Selvig, Erling, The Hamburg Rules, the Hague Rules and Marine Insurance Practice, *Journal of Maritime Law and Commerce*, 12(3), April, 1981, 299-326, at 311
[616] Ibid.

Unlike the Hamburg Rules[617] and the Rotterdam Rules, the Hague-Visby Rules do not contain an express rule providing that the carrier is liable for losses arising from delay in delivery of cargo. It was suggested however that such liability could be inferred from certain provisions of the Rules,[618] namely from article III rule 2 whereby the carrier has to "properly and carefully" carry and discharge the goods,[619] and in article III rule 6 whereby the carrier is discharged from liability within one year of the date when the goods "should have been delivered".[620] In addition to the foregoing, the limits set out in Article IV rule 5(a)[621] provided for losses to a cargo owner "in connection with the goods" raised arguments as to whether it would also extend to financial losses caused by delay[622] where delay is caused by a breach of the carrier's liability (e.g. unseaworthiness). Moreover the provision that limitation of liability is calculated "per kilo of gross weight of the goods lost or damaged" could give rise to the query as to how the limits for pure economic losses caused by delay where goods are not damaged or lost can be calculated under the Rules. This could connote that the draftsmen of the Visby Amendments either intended not to make limitation available for pure economic delay losses in that cargo interests could recover in full or to confine limitation merely to physical losses[623] (caused by delay). Alternatively it may be argued that imposing liability on the carrier for economic losses caused by delay was never intended by the draftsmen in the first place, hence the absence of express provision on delay.

[617] Under the Hamburg Rule, the carrier is not only liable for loss of or damage to the goods, yet also for delay in delivery (Art 5(1), delay in delivery is defined in art 5(2)) however the liability is limited to the amount of freight paid under the contract of carriage (Art 6(1)(b)).

[618] Aikens, Lord Justice; Lord, Richard QC and Bools, Michael, *Bills of Lading*, 1st ed., Informa 2006, para 10-173 suggests that claims for financial loss or loss arising from delay where the goods are not lost or damaged are covered under Art III rule 6 based on the decision in *The Casco* [2005] 1 Lloyd's Rep. 565.

[619] Art III.r 2 states "Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

[620] "Subject to paragraph 6bis 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."

[621] "Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher."

[622] Aikens *et al*., *Bills of Lading*, para 10-310. See also Treitel, Sir Guenter H. and Reynolds, F.M.B, *Carver on Bills of Lading*, 2nd ed., London: Sweet and Maxwell, 2005, at para 9-249 for the view that the words cover loss of or damage to the goods arising from breach of the carrier's duties and extend also to the situation where delay in delivery results from breach of the carrier's duties. The paragraph continues with the illustration of delay caused by unseaworthiness or lack of care for the cargo. In the context of the Hague Rules, "loss or damage to or in connexion with goods" was held not to have been limited to physical loss or damage in *G. H. Renton & Co. Ltd. Appellants; v Palmyra Trading Corporation of Panama Respondents* [1957] A.C. 149.

[623] Both of these options were found to be equally unlikely in Ganado, Max and Kingred, Hugh, *Marine Cargo Delays*, London-New York-Hamburg-Hong Kong LLP 1990, at 151.

In *The Limnos*,[624] it was held that the limits under art IV rule 5(a) applied not only to physically lost or damaged goods yet also to economic losses caused by the carrier's breach of duties under the Rules. It was not disputed between the parties that a claim in respect of losses due to delay could be recoverable under the Rules, however whether such a claim would be subject to gross weight limitation figure provided for under the article was not common ground. Burton J decided that economic losses were also subject to the gross weight limitation under art IV rule 5(a). This decision could however produce anomalies in respect of pure economic losses caused by delay where the cargo is not physically damaged, on the ground that limitation based on gross weight can accordingly not be calculated.[625] This suggestion can perhaps be subject to the situation where delay in delivery is caused by physical damage to goods resulting from the breach of one of the carrier's duties under the Rules, in which case limitation could arguably be calculated on the basis of goods damaged.

Although the Hague-Visby Rules do not expressly contain any provision making the carrier liable for delay in delivery, under the common law, the carrier has the duty to deliver the goods to the consignee within reasonable time.[626] It was argued that the common law duty of reasonable despatch should still be applicable despite the absence of express provision as to delay under the Hague-Visby Rules.[627] However it is noteworthy that the type[628] and extent of economic losses caused by delay recoverable under the Hague-Visby Rules where delay results from a breach of the Rules is an area where case law is yet to give answers to;[629] as well as how the general limits shall apply to economic losses caused by delay in delivery. Although this uncertainty is not in favour of cargo interests, carriers would nevertheless likely to purchase liability insurance for covering economic losses caused by delay otherwise recoverable under the Hague-Visby Rules. If cargo insurers expressly insure cargo interests against physical loss of or damage to goods and loss of market value caused by delay, pay against the assured and be subrogated to its rights as against the carrier; the main dispute

[624] *Serena Navigation Ltd & Another v Dera Commercial Establishment & Another (The Limnos)* [2008] EWHC 1036 (Comm)
[625] Baughen, Simon, Economic Loss Claims and The Hague-Visby Gross Weight Limitation Figure, *Lloyd's Maritime and Commercial Law Quarterly*, 2008 (4), 439-444, at 443
[626] *Wilson v Lancashire and Yorkshire Railway Company* (1861) 9 Common Bench Reports (New Series) 632 as cited in Treitel, Sir Guenter and Reynolds, F.M.B, *Carver on Bills of Lading*, 3rd ed., London: Sweet and Maxwell, 2011, at 9-033.
[627] Treitel and Reynols, *Carver on Bills of Lading*, 3rd ed., 9-149
[628] Loss of market value or consequential losses such as loss of sale contracts
[629] Tsimplis, M, *Limits of Liability*, p 189 in Baatz, Yvonne; Debattista, Charles; Lorenzon, Filippo; Serdy, Andrew; Staniland, Hilton; Tsimplis, Michael, *The Rotterdam Rules: A Practical Annotation*, London: Informa, 2009

between the liability and cargo insurers would turn upon the types of delay losses recoverable under the liability policy and whether limitation of liability under the Rules would apply to such losses.

Despite the fact that losses caused by delay can be recoverable under the common law although not expressly recoverable under the Rules, their recoverability would firstly be subject to the assessment of remoteness (i.e. the damage must have occurred due to the failure to deliver with reasonable despatch) and to the limitation of liability under the Rules – in case it applies to delay losses. The uncertainty of recoverability of losses caused by delay under the Rules would not give cargo insurers an incentive to cover some of these delay losses on the ground that they may not recourse to carriers or to their insurers following payment and subrogation of cargo insured's rights.

ii. Risk allocation between marine insurance and the Rotterdam Rules

The Rotterdam Rules are not free of ambiguity as to whether the carrier is liable for physical loss of or damage to goods by delay. Provisions relating to the basis of liability categorises the types of losses for which the carrier is liable under three headings: losses, damages and delay.[630] It may therefore be argued that references to delay in the Rules merely include certain delay in delivery losses and do not extend to physical loss or damage arising from delay in transit.[631] This suggestion can be supported on the ground that "delay" in the Rules is defined with reference to delay in delivery only[632] and the carrier is liable for "loss of or damage to the goods, as well as for delay in delivery" which distinguish physical loss of or damage to goods and losses arising from their delay in delivery.[633] Despite the foregoing, the wording of Art 60 which provides for compensation limits mentions "loss of or damage to goods due to delay"[634] and raises suspicions as to whether the wording refers to physical loss or damage caused by delay. However it was made clear in the working groups of the Rules

[630] See art 17
[631] For a supporting view see Von Ziegler, Alexander, Delay and the Rotterdam Rules, *Uniform Law Review*, NS - Vol. XIV, 2009-4, 997-1010, 999. For the contrary view see Sturley, Michael F., Fujita, Tomotaka, van der Ziel, Gertjan, *The Rotterdam Rules: The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Sweet & Maxwell Thomson Reuters, 2010, p 121 citing the 17th Session Report (Report of Working Group III (Transport Law) on the work of its seventeeth session (New York, 3-13 April 2006), U.N. doc no. A/CN. 9/594) para 203; 19th Session Report (Report of Working Group III (Transport Law) on the work of its nineteeth session (Vienna) 15-25 October 2007, U.N. doc. No. A/CN 9/642 (2007)) para 179.
[632] Art 21
[633] Art 17(1)
[634] Art 60.

that the article merely applied to economic losses caused by delay and not to physical losses.[635] It was enunciated in the same working groups that physical loss of or damage by delay was covered by the provisions on the calculation of compensation in art 22. The physical losses caused by delay are also subject to the limitation under art 59 of the Rules which is calculated on weight basis.

The Rules do not expressly provide a provision on pure economic losses caused by delay and their recoverability. Pure economic losses arguably refer to losses such as the loss of a sale contract or losses incurred where an industrial plant cannot operate given that parts of an essential machine are delivered after the date of delivery.[636] Those types of losses are not recoverable under cargo policies however tailor made covers are available in the insurance market in the form of consequential loss or business interruption policies. Under art 60 of the Rules, economic losses caused by delay are limited to an "amount equivalent to two and one-half times the freight payable on the goods delayed". Whether the expression "economic losses" is sufficiently wide to cover pure economic losses as well as loss of market value shall be answered considering the working documents of the Rules. In the working documents, it was stated that only pure economic loss[637] fell within the scope of "economic loss" under art 60 and was subject to the limits based on payable freight.[638] Therefore, albeit liability of the carrier for pure economic losses caused by delay exists under the Rules, the limits for such liability are fairly low in that losses incurred by cargo interests could readily exceed those limits. It may therefore be sound for cargo interests to purchase business interruption insurance to be covered against pure economic losses caused by delay.

[635] United Nations Commission on International Trade Law, Fortieth session, Vienna, 25 June-12 July 2007, Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), A/CN.9/616, at 43

[636] United Nations Commission on International Trade Law, Fortieth session, Vienna, 25 June-12 July 2007, Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), A/CN.9/616, at para 183.

[637] The example given was of an industrial plant which could not operate given components of an essential machine were delivered late, United Nations Commission on International Trade Law, Fortieth session, Vienna, 25 June-12 July 2007, Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), A/CN.9/616, at para 183.

[638] A/CN.9/616. This was preferred over a limitation level based on value of the goods given that such losses would be unrelated to the value of the goods, at para 187. See however Berlingieri, *Revisiting the Rotterdam* Rules, 604 who argues that the expression "economic loss" in art 60 is not limited to loss of market yet includes any type of financial loss.

As for the limitation of liability for loss of market value caused by delay, the Rules are not clear as to whether it is subject to the limitation under art 60[639] or art 59,[640] i.e. whether it shall be calculated on the basis of the freight or the weight of the goods. Despite this controversy, all three types of losses caused by delay i.e. physical loss of or damage to goods, loss of market value and pure economic loss by delay are recoverable from the carrier under the Rotterdam Rules and this would provide more clarity as to the type and extent of delay losses recoverable compared to the Hague-Visby Rules. The adoption of the Rotterdam Rules in the UK may therefore give an incentive to cargo insurers to revise their wording and extend their cover to physical losses and loss of market value caused by delay against the payment of additional premium which can arguably be lower compared to premiums charged at the time of the Hague-Visby Rules. The primary motive behind this reasoning is that cargo insurers would have the right to recourse against P&I clubs following their payment of the claim. Albeit the liability under the Rotterdam Rules for delay losses is limited, the limitations are not far from being generous particularly given that it is often difficult to decide the real cause of delay.[641]

One drawback of the Rotterdam Rules in terms of recoverability of delay losses could perhaps be the definition of delay in delivery[642] and the fact that it is not clear whether the carrier is only liable for delay in delivery losses if the contract of carriage contains an agreement as to the time of delivery - in which case the scope of application of the Rules can be considerably narrow.[643] Nevertheless, it is of common view that the carrier shall be liable even where a time for delivery is not expressly agreed in the contract and that such agreement can be implied. [644]

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[639] Berlingieri, *Revisiting the Rotterdam* Rules, at 604 argues that it is subject to art 60.

[640] United Nations Commission on International Trade Law, Fortieth session, Vienna, 25 June-12 July 2007, Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), A/CN.9/616, at para 184 provides that the Working Group concurred with the analysis that loss of market value was a type of loss that should be covered by draft article 23 (as it then was), which is currently art 22 whereby compensation thereunder is subject to the limitation under art 59.

[641] Girvin, Stephen, The Right of the Carrier to Exclude or Limit Liability, Chapter V, 111-137 in Thomas, D.R, *A New Convention on the Carriage of Goods by Sea-The Rotterdam Rules*, Lawtext Publishing, 2009, at 136, it was said that two and half freight payable as a limitation for delay losses under art 60 would be too favourable to cargo interests.

[642] Under the Rules delay in delivery occurs where "the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed", art 21. As to liability for delay, see art 17. The question of what time is agreed is left to national law, Treitel and Reynols, *Carver on Bills of Lading*, 10-027.

[643] Art 21. As to liability for delay, see art 17. The question of what time is agreed is left to national law, Treitel and Reynols, *Carver on Bills of Lading*, 10-027.

[644] For a view supporting that the carrier would be liable even in the absence of such agreement between the parties, see Diamond, Anthony, The Rotterdam Rules, *Lloyd's Maritime and Commercial Law Quarterly*, 2009

In analysing risk allocation between liability conventions and marine cargo insurance, one of the arguments raised is the problem of "double insurance" and expenses relating thereto[645] due to the availability of cover for cargo interests for the same losses under both instruments. Where cargo insurers agree to cover cargo interests for physical losses and loss of market value caused by delay, albeit the double cover may result in the enumerated expenses, it can be submitted that there would be no "double insurance" in the strict legal sense of the word given that the assured under the cargo policy cannot be indemnified twice: The assured would only be paid by the cargo insurer who would be subrogated to the rights of the assured and claim against the carrier or the P&I club. Given this right of recourse, the premium set out by cargo insurers shall likely to be less compared to what they would have set under the Hague-Visby Rules where their recourse could be controversial. Accordingly, it would not be a fallacy to suggest that the entry into force of the Rotterdam Rules in the UK would also result in the increase of P&I premiums due to the carrier's liability for several types of delay losses.

Conclusion

This chapter traced back the generic suggestion that loss of market value and loss of market caused by delay in delivery were excluded under cargo policies and assessed whether and to what extent these losses were indirect losses not recoverable thereunder. In this regard, loss of adventure which was mainly a pre-MIA concept was analysed in view of the relevant sections of the MIA so as to determine whether the concept survived the Act and is relevant to standard market conditions.

One of the findings was that loss of use of cargo or loss of a sale contract can be considered as loss of market which is consequential to a cargo policy if the definition of "market" is referred to. Similarly expenses during delay such as the ones incurred for keeping the cargo in good condition during delay are usually not recoverable on the ground that they are losses consequent upon physical loss of or damage to cargo. Nevertheless loss of market value is an instance distinct from loss of market. Albeit it depends on whether a specific market will rise or fall and accordingly can be described as a speculative risk, there is room to argue that it

(4), 445-536, at 479; see also Berlingieri, Revisiting the Rotterdam Rules, 603 and Von Ziegler, Delay and the Rotterdam Rules, at 1000.

[645] See Sturley, 143 fn.97 for the types of expenses; in summary they are administrative, survey and legal costs.

can be recoverable under a cargo policy *inter alia* upon two grounds: Where the assured, at the time of entering the contract of insurance, informs the insurer that the goods are seasonal and have to be delivered on a certain date or season; where it can be proved that the insurer ought reasonably to have known that a cargo should have been delivered on a certain date or season, i.e. where this fact is in the insurer's contemplation; and where the cargo policy does not contain an unambiguous clause excluding this type of loss. Doubt was cast in this chapter on the fact that relevant decisions under English law may not be authority for the suggestion that cargo policies insure merely against physical loss of or damage to goods, the same doubt was cast likewise in relation to standard form cargo clauses. It was accordingly suggested that loss of market value caused by delay in delivery could be claimed as loss of adventure on the ground that delay in delivery of seasonal goods may result in commercial frustration of the adventure insured. This suggestion was raised for cargo policies which do not contain an unambiguous exclusion for loss of adventure.

In addition to the foregoing, the chapter sought to analyse the recoverability of economic and physical losses caused by delay from the angle of both cargo and business interruption insurance and conventions on carriage of goods by sea. It was argued that the uncertainty of recoverability of these losses under the Hague-Visby Rules could have been one of the motives behind the persistent approach to exclusion of delay losses in cargo policies given that it restricted the cargo insurers'recourse to carriers or P&I clubs following payment of the claim. It is anticipated that the wide scope of the liability regime of the Rotterdam Rules for delay losses could change this approach and be an incentive for the provision of cover for certain types of delay losses under cargo policies.

CHAPTER V

MARINE DELAY IN START-UP INSURANCE

Introduction

Many infrastructure and construction projects worldwide require the shipping of specialised material for use on the construction site, the delay of which can cause various types of financial losses to contractors. Delay in start-up (DSU) insurance (also known as "advance loss of profits insurance"[646]) is therefore offered in the market for the purpose of insuring against the risk of delay to the timely prosecution and completion of a project. This is usually taken out separately from business interruption cover. Equipment and material carried by sea as marine cargo for the purpose of use on the project site would have to be insured under a marine cargo policy against physical loss or damage to the cargo[647] however the subject-matter insured under a marine delay in start-up policy is delay to the project insured and not the project cargo. In practice, banks which are the financiers of large projects take out marine DSU on behalf of project owners or operators. Under a marine DSU policy, the indemnity period would usually commence on the date from which revenue would have started to be earned but for the physical loss of or damage to equipment and material.[648]

Albeit this type of insurance covers the assured against financial losses caused by delay to the project, it usually requires physical loss or damage to the equipment and material carried by sea or to the conveyance[649] to trigger claims under the marine DSU cover. For this reason, so as to have a better control over the physical loss or damage which can in turn cause delay to

[646] Robert, Harry, *Riley on Business Interruption Insurance*, Sweet & Maxwell, London, 2011, 10.22

[647] See for instance the draft Project Cargo Insurance and Project Cargo Delay in Start Up Wording (published on 12 May 2009, JC 2009/012) prepared by the Joint Cargo Committee where marine cargo policy and marine delay in start-up policy are joined in the same document. This document has yet to be accepted for use in the insurance market. For such examples in other jurisdictions, see the policies in *Assicurazioni Generali S.P.A. v. Black & Veatch Corp*. 362 F.3d 1108, 2004 A.M.C. 773 (the policies were interpreted according to Missouri law).

[648] Borthwick, David, *Insurance Principles in Project Finance*, in "The Principles of Project Finance", Rod Morrison (ed.), Chapter 10, 123-136, 127. Where the duration of the indemnity period is for 12 months and the damage occurs in June in the absence of which the revenue would have commenced to be earned in September, the 12 months period would commence in September.

[649] Under The draft Project Cargo Insurance and Project Cargo Delay in Start Up Wording (published on 12 May 2009, JC 2009/012), marine DSU cover is triggered merely by loss of or damage to conveyance, and not to cargo.

the project, insurers in practice insure both the physical damage risk and the delay risk[650] under the same policy.[651] This would denote that the goods would be covered during the transit[652] until they are delivered to the project site. Any loss occurring during the transit causing delay to the project would trigger the marine DSU policy.

Marine DSU cover is not common in practice and until recently no standard market clauses had been proposed in this respect. The Joint Cargo Committee however published in 2009 a set of standard clauses which are yet to be in use in the insurance market.[653] This chapter shall analyse the wording of the draft clauses and attempt to raise issues which can turn contentious in the future along with a particular focus on the relevant MIA sections.

5.1. Issues relating to insurable interest

In marine DSU policies, site owners (or principals) are usually insured as assured along with contractors and banks as lenders.[654] It is however of great importance to clearly provide for the names of the assureds and whether they are covered under the cargo section or the marine DSU section of the policy; as well as to define the scope of the "project". Certain policies may describe "project" including the transportation of project cargo, in addition to the construction project on site for which the goods are carried.[655] Any change in the definition of "project" could accordingly have an impact on insurable interest. The following paragraphs will attempt to analyse the possible interests of the parties to a project and whether and under what circumstances they can have insurable interest under both cargo and marine DSU sections or under merely one section.

5.1.1. Principals

[650] Borthwick, *Insurance Principles in Project Finance*, 128.
[651] See *Assicurazioni Generali S.P.A. v. Black & Veatch Corp*. 362 F.3d 1108, 2004 A.M.C. 773 where the marine cargo policy offered two types of coverage, i.e. against physical losses in the first section and against delay in start-up losses and expenditures incurred to avoid or diminish such losses in the second section.
[652] The meaning of "transit" may undoubtedly change depending on the wording of the policy. See for example cl.8 of ICC A 2009 where the transit commences where goods are first moved in the warehouse.
[653] The draft Project Cargo Insurance and Project Cargo Delay in Start Up Wording (published on 12 May 2009, JC 2009/012)
[654] *European Group Ltd and Others v Chartis Insurance UK Ltd* [2012] EWHC 1245 (Comm); *Assicurazioni Generali S.P.A. v. Black & Veatch Corp*. 362 F.3d 1108, 2004 A.M.C. 773
[655] Draft Project Cargo Insurance and Project Cargo Delay in Start Up Wording (published on 12 May 2009, JC 2009/012), Project Overview section 2.

Principals or project owners have interest firstly in the safe arrival of the project cargo[656] in the sense that if the goods arrive in a damaged state, there would be a need to replace the goods or repair the damage and the principal's project would be affected by such casualty by incurring associated costs. Principals would also have insurable interest in the marine DSU section of the policy given that they would be interested in the due arrival of the goods[657] which is the very purpose for which marine DSU policy is taken out. In the event where the project cargo is delayed and the project fails to commence on the scheduled date, the principal would prejudice consequential losses such as loss of revenue. Due arrival of goods to the project site may however be considered as an interest in the goods and accordingly an interest covered under the marine cargo section rather than under the marine DSU section. It is noteworthy that so as to trigger DSU claims, late arrival of goods must have been caused by loss of or damage to goods under the cargo section of the policy.[658] Should it be suggested that the cargo section of the policy covers merely physical loss of or damage to cargo, late arrival of the goods due to loss or damage would cause nothing more than financial loss not otherwise recoverable under the cargo section. Therefore an interest in "due arrival of goods" would arguably refer to an interest under the marine DSU policy only.

5.1.2. Lenders (banks)

Lenders undoubtedly have insurable interest in due arrival of goods like principals, given that any delay in start-up would generate a loss in the revenue to the principal which in turn could risk the service (reimbursement) of the loan. In that regard, it can be submitted that they have an equitable relationship to the project cargo albeit arguably not a "legal" one.[659]

5.1.3. Contractors

It is common in practice to insure contractors of the project under the marine cargo section of the policy.[660] However whether contractors have insurable interest in a marine DSU section is

[656] MIA 1906 s 5(2) provides that a person has insurable interest in a property if he benefits from the safe arrival of goods or where he is prejudiced by its loss.
[657] MIA 1906 s 5(2)
[658] Which relates to safe arrival of goods
[659] In the sense of MIA s 5(2)
[660] See *Alstom Ltd v Liberty Mutual Insurance Co* (No 2) [2013] FCA 116 where Alstom (supplier of the goods to the project site) was a named insured under the policy alongwith "all contractors and subcontractors in any tier engaged on the project, manufacturers and/or suppliers … engaged in the project …" which included inter alia the manufacturer and supplier of the goods to Alstom; engineering and procurement contractors were insured as assureds under a "Primary Marine Project Cargo/Delay in Start-Up Insurance Policy" however the decision did not make reference to whether they were insured under both the marine cargo and marine DSU sections. See also Draft Project Cargo Insurance and Project Cargo Delay in Start Up Wording (published on 12

a matter which needs further attention. The late arrival of goods to a project site would cause the contractor a delay in commencing the construction which may accordingly expose them to penalties (which are considered as liquidated damages) under their construction contracts with principals. These losses cannot be recovered under marine DSU policies, yet in constructors' all risks policies. The interest in the timely commencement of the commercial operation on the project site would therefore be the interest of the principal (site owner) and not of the contractor's. For this reason, contractors would arguably not have insurable interest in a marine DSU section.

As seen above, insurable interests of parties to a project differ in each section of the policy and it is therefore crucial for insurers that parties having insurable interest in each section of the policy are clearly provided for. In the absence of this, there may be a risk of having to indemnify a builder having an insurable interest under a marine cargo policy for mitigation expenses incurred so as to avoid delay in start-up losses that could have otherwise been incurred by a site owner (having an insurable interest in delay in start-up policy).[661]

5.2. Scope of cover and duration of risk

The Joint Cargo Committee drafted a Project Cargo Delay in Start Up Wording to be used along with marine cargo policies, having reviewed the existing wordings used in this field. According to the draft Wording, the policy covers where the following events cause a delay to the scheduled commercial operation date of the project:

- Loss of or damage or mechanical breakdown of the hull or machinery and/or equipment of the vessel on which any the project cargo is carried which would be covered under the Institute Voyage Clauses- Hulls 1/10/83 and/or Institute War and Strikes Clauses Hulls- Voyage 1/10/83[662]
- Loss of or mechanical breakdown of any motor or rail vehicle or attachment thereto upon which any of the project cargo is carried or is intended to be carried,[663]
- The vessel on which any of the project cargo is carried or is intended to be carried, being involved in a general average, salvage or a life-saving operation,[664]

May 2009, JC 2009/012), Project Overview section 1 where contractors and sub-contractors are included as insureds.

[661] See *Assicurazioni Generali S.P.A. v. Black & Veatch Corp*. 362 F.3d 1108, 2004 A.M.C. 773 for such an example.

[662] Joint Cargo Committee Project Cargo Insurance/Project Cargo Delay in Start Up Wording, published on 12 May 2009, JC 2009/012, section 2.1.2

[663] Section 2.1.3

- Delay in delivery of the project cargo resulting from insured events under the marine cargo policy.[665]

For the first three circumstances, the duration of risk under the marine delay in start-up policy is from the time that such vessels, craft and conveyances come alongside the berth at which the project cargo is to be loaded thereon,[666] for the fourth circumstance the policy attaches when the marine cargo policy attaches (yet no earlier than commencement of loading of the project cargo at the suppliers' premises) and terminates when the cargo policy terminates or on completion of unloading at project laydown area, whichever is sooner.[667]

It is submitted that the fourth trigger requires further consideration. The exact expression provided in the DSU Wording is as follows: "If at any time during the period of the policy an indemnifiable event occurs which causes a delay to the Scheduled Commercial Operation Date consequent upon

1.1. Delay in delivery of the Project Cargo which results from an event giving rise to an indemnifiable claim under Section 1 of this policy…".

This expression is open to interpretation. Delay in delivery of the project goods may be caused by insured events under a cargo policy such as capture of cargo or seizure or piracy. In these cases the goods do not need to be physically lost or damaged; it may be that these events only cause delay in delivery of goods. Another class of insured events however can cause physical loss or damage to goods (e.g. perils of the seas, or fire on board) which would require some degree of improvement of goods or their replacement which could accordingly cause delay in delivery. Under the DSU Wording, delay as a consequence of alteration, additions or improvements of the project cargo carried out after the occurrence of damage is excluded.[668] This would connote that where there is physical loss of or damage to cargo, delay in delivery would likely to result from either the improvement or the replacement or repairs of the cargo which would be excluded under the said clause. This line of interpretation would doubt that physical loss of damage to cargo and consequent delay in delivery could trigger DSU claims if the most encountered reason why there is delay is because the goods

[664] Section 2.1.4
[665] Section 2.1.1
[666] Section 2.4.2
[667] Section 2.4.1
[668] Section 2.6.7

need to be replaced or repaired which is an excluded event under the DSU part of the policy.[669]

The above interpretation does however not ignore the fact that the DSU cover may still be triggered by "events giving rise to an indemnifiable claim" (as per section 2.1.1) under the cargo policy. The delay in delivery of goods by events such as capture or seizure may result in the need of storage or forwarding of goods on a different vessel; in addition thereto, the assured may have to incur expenses in order to prevent loss of or damage to goods. All these expenses and forwarding charges may be considered as "indemnifiable claim" under the cargo policy and any event insured against under the cargo policy which results in delay in delivery of the goods could trigger the DSU cover although the goods are physically undamaged.

For the above reasons, it is doubtful whether the DSU cover is triggered by physical loss of or damage of the project cargo causing delay in delivery.

5.3. Measure of indemnity

Under the Joint Cargo Committee's Draft Wording, the measure of indemnity is subject to the choice of the assured and is either the loss of gross profit (the sum obtained by applying the rate of gross profit to the difference between the turnover which would have been achieved during the indemnity period and the actual turnover[670]) or the fixed costs and debt servicing costs (expenses incurred by the project which are not affected by any change in the output of the insured project[671]). Whichever is opted for by the assured, increased costs of working expenses (the additional expenditure necessarily and reasonably incurred by the assured for the sole purpose of avoiding or diminishing the reduction in turnover[672]) are recoverable in addition thereto.

5.4. Exclusions

The exclusions under a delay in start-up policy vary in practice according to the insuring company policy wording. There are nonetheless certain provisions which have been observed

[669] Section 2.1.1. provides "if at any time during the period of the policy an indemnifiable event occurs which causes a delay to the operation date". "Indemnifiable event" in this context refers to an indemnifiable event under the marine DSU part of the policy. Should there therefore be an excluded event under the marine DSU cover such as addition or replacement of goods resulting from delay in delivery caused by physical loss of or damage to goods, such event would not be capable of triggering the DSU cover.
[670] Section 3.1.a
[671] Section 3.1.b
[672] Section 3.1.c

by the Joint Cargo Committee as appearing commonly in most marine DSU policies and have been included in the Draft Wording. Those are the loss of or damage to project cargo,[673] delay as a consequence of fines, penalties and damages for breach of contract,[674] delay as a consequence of alteration, additions or improvements of the project cargo carried out after the occurrence of damage,[675] delay as a consequence of lapse or cancellation of a lease, import licence or regulation unless resulting from the insured events under the delay start-up section of the policy,[676] delay as a consequence of physical loss or damage to contractors' or subcontractors' materials other than project cargo procured thereby.[677] It is submitted that loss of market caused by delay in delivery of the goods to their destination cannot be indemnified under marine delay in start-up policies given that although loss of market can be considered as a consequential loss not recoverable under a cargo policy, the goods carried to the construction site are carried for the purpose of use on the site, and not for the purpose of sale in the market.

One of the exclusions that requires specific emphasis is loss due to any delay in delivery of the goods to the project site resulting from any restriction imposed by a public authority (commandeering, requisition or destruction or damage) other than where the carrying vessel is covered by the Institute War & Strikes Clauses Hulls-Voyage 01/10/83.[678] The wording is ambiguous as to whether the acts of the public authority should be directed to the vessel, to the goods carried thereon or to both. The expression "other than where the carrying vessel is covered by the Institute War & Strikes Clauses Hulls-Voyage" is likely to support the argument that the acts should be directed to the vessel carrying the goods, in which case the exclusion would operate where requisition of the vessel other than in times of war or strikes results in delay of delivery of the project cargo.[679] However the exclusion gives rise to even more ambiguity as it is subject to specific cover under the marine cargo policy.[680] This may arguably mean that where goods are specifically covered under the marine cargo policy against commandeering, requisition or destruction or damage by order of any government,

[673] See section 2.6.1, this is given that such losses are recoverable by marine cargo policies
[674] Section 2.6.2
[675] Section 2.6.3
[676] Section 2.6.4
[677] Section 2.6.7
[678] Section 2.6.5
[679] Under section 2.1.2, loss by delay in delivery of the project cargo arising from loss of or damage or mechanical breakdown of the carrying vessel covered under The Institute Voyage Clauses-Hulls 1/10/83 and/or Institute War and Strikes Clauses Hulls- Voyage 1/10/83 is covered.
[680] Section 2.6.5

delay resulting therefrom and consequent losses are recoverable under the marine DSU policy and the exclusion does not apply. Cargo may be requisitioned or destroyed by a public authority independently from the vessel where for instance the cargo does not have an import licence and is delayed not due to the fact that the vessel was requisitioned but simply because the cargo was requisitioned. For these reasons, this exclusion may have to be revised in order to avoid ambiguities.

5.5. Mitigation of losses and recoverability of mitigation expenses

The complex co-existence of marine cargo and marine DSU cover in the same contract raises intricate issues with respect to sue and labour. The main grounds which have so far appeared in judicial decisions were whether the provider of a project cargo (and contractor on the project site) can be indemnified under a duty of the assured clause of a delay in start-up section of a marine policy for mitigating consequential losses which would otherwise have been incurred not by themselves but by the site owner due to delay to the operation date of the project, and whether the cost of repairing or replacing the goods can be claimed by a contractor as sue and labour expense in order to avoid a much greater delay in start-up loss under a marine project cargo/delay in start-up policy.

With respect to the second query, in *Assicurazioni v Black & Veatch,*[681] the builder had taken out a marine cargo insurance policy from a syndicate of underwriters at Lloyd's through its broker. The first section of the policy covered physical loss to the project cargo and the second section provided coverage for delay in start-up losses and expenditures incurred to avoid or diminish such losses through a duty of the assured clause. The consequential losses arising from delay in start-up were recoverable solely by the site owner and not by the builder.

The project cargo, whilst on its voyage from Japan to the United States was damaged by a severe typhoon and was replaced which accordingly caused a delay of six months after the originally scheduled delivery date. The builder in anticipation of this delay incurred several expenses to avoid delay in the start-up of the plant and managed to meet the deadline for completing the plant, otherwise the site owner would have incurred consequential delay in start-up losses (lost revenue). The builder argued that under the duty of the assured clause[682]

[681] *Assicurazioni Generali S.P.A. v. Black & Veatch Corp*. 362 F.3d 1108, 2004 A.M.C. 773

[682] The clause began with: "It is the duty of the Assured and their servants and agents *in respect of loss recoverable hereunder*…" (emphasis added).

they were entitled to be indemnified for mitigation expenses incurred so as to prevent a loss recoverable under the delay in start-up section of the policy even though the site owner (assured under the policy) and not themselves would have incurred the losses.[683] The Court accepted this argument and observing that "loss recoverable hereunder" was not specifically limited either to the builder's or the site owner's loss, ruled in favour of the builder.

A similar issue was raised in *European Group Ltd v Chartis Insurance UK Ltd*[684] where a marine cargo/DSU insurer had agreed that contractors could recover costs of repair and replacement of damaged goods as sue and labour expenses if those expenses were incurred in avoiding the greater loss of delay in start-up which would have arisen under the DSU section of the policy. [685] The marine insurers could have argued that the loss under the DSU policy would be a type of loss that could be incurred by the principals and not by the contractors and that they could accordingly not be entitled to claim sue and labour expenses for a loss which would otherwise be incurred not by themselves but by the principals. The grounds for the possibility of advancing such an argument can be deduced with reference to the law on sue and labour.

Under the common law, whether there is a duty to sue and labour or whether sue and labour is merely a matter of causation is an issue yet to be resolved by courts.[686] Courts nonetheless recently applied the causation test[687] which seeks to establish whether the loss is proximately caused by the assured's act of not mitigating the loss or caused by an insured peril. The rationale behind the test is that the assured ought not to have caused his own loss by failing to

[683] The definition of "assured" under the general framework of the policy included both the site owner and builder. The parties to the dispute had agreed that there was a general framework to the insurance contract and the risk for a particular project was added to the framework policy by way of endorsement. The general framework provided that both the builder and site owner were assureds thereunder, in other words the word "assured" which is a critical wording for the "duty of the assured" clause did not particularly appear neither in the marine cargo nor in the delay in start-up section of the policy.

[684] *European Group Ltd v Chartis Insurance UK Ltd* [2012] EWHC 1245 (Comm)

[685] At para 38

[686] According to *Yorkshire Water* v. *Sun Alliance & London Insurance* [1997] 2 Lloyd's Rep 21 the common law does not impose a duty to sue and labour. According to Chalmers, s 78(4) of the MIA 1906 which established that it is the duty of the assured to mitigate losses recoverable under the policy was based upon three cases: *Kidston* v. *Empire Marine Insurance Co* (1866) LR 1 CP 535, *Currie* v. *Bombay Native Insurance Co* (1869) LR 3 CP 72, *Benson* v. *Chapman* (1849) 2 HLC 496 and *Notara* v. *Henderson* (1872) LR 7 QB 225 although arguably only Currie case was directly relevant and decided that the loss was proximately caused by the master's conduct and not by an insured peril (as cited in Merkin, *Marine Insurance Legislation*, 4th edition, 106)

[687] For examples, please see *Integrated Container Service Inc* v. *British Traders Insurance Co Ltd* [1984] l Lloyd's Rep 154; *State of Netherlands* v. *Youell* [1998] 1 Lloyd's Rep 236; *Strive Shipping Corporation* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd, The Grecia Express* [2002] Lloyd's Rep IR 669.

mitigate it. It is therefore debatable whether a builder who has an interest in the marine cargo policy yet is not interested in the marine DSU policy can be held to have failed his duty to sue and labour if he fails to mitigate the site owner's loss (and not his own loss) recoverable under the DSU policy. His own loss recoverable under a Marine Project Cargo/Delay in Start-Up Policy could be loss of or damage to goods arising from an insured peril which is recoverable under the cargo policy section. Otherwise his loss resulting from delay in delivery of the goods to the project site would for instance be penalties that shall be paid to the site owner for delaying the commencement date of the construction which would not otherwise be recoverable in neither cargo nor DSU sections.

The question therefore arises whether it would be a fortuitous event for the DSU policy where a contractor (builder) who has no insurable interest in the DSU part of the policy fails to mitigate losses recoverable not by himself but by the person who has insurable interest in the DSU part. Where it can be argued that the proximate cause of the loss of the site owner is the builder's failure to mitigate the site owner's loss, this can be considered as a fortuity for DSU policy. Moreover, whether the loss incurred by the site owner occasioned by delay in delivery of the goods caused by the contractor's failure to mitigate delay is recoverable is another critical issue that can be raised. The Joint Cargo Committee wording provides that the loss of the site owner caused by delay in delivery of the project cargo resulting from insured events under the marine cargo policy is recoverable.[688] Whether failure to mitigate delay losses otherwise recoverable under the marine DSU section is an insured peril under a marine cargo policy (on "all risks" terms) is the question that would ensue. It is submitted that this could not be characterised as an insured peril under a marine cargo policy and therefore the losses of the site owner arising therefrom cannot be recoverable under the marine DSU section.

Conclusion

It is anticipated that if the Marine Cargo/Delay in Start-Up Wording drafted by the Joint Cargo Committee is welcome by the insurance market, intricate issues will arise with respect to the recoverability of sue and labour expenses, determination of the assured and the duties

[688] Section 2.1.1

under the duty of the assured clause given the co-existence of marine cargo and marine DSU sections in the same policy.

It shall also be noted that a considerable part of delays to projects are occasioned by loss of or damage to project cargo, which is a doubtful trigger of the marine DSU cover under the Joint Cargo Committee Draft Clauses. It is therefore submitted that the relation between loss of or damage to cargo and the exclusions of the DSU cover must be clarified, in the absence of which it may be difficult for assureds to argue that physical loss or damage resulting in delay in delivery of the project cargo is sufficient to trigger the DSU cover.

CHAPTER VI

DELAY CONSIDERATIONS UNDER HULL & MACHINERY INSURANCE AND LOSS OF HIRE INSURANCE

Introduction

The MIA 1906 provides that an insurer of a ship is not liable for any loss proximately caused by delay, although the delay is caused by a peril insured against. [689] The common law origin of the provision goes back to *Shelbourne v Law*[690] where it was held that loss of earnings due to detention and delay of a vessel during repairs necessitated by a collision are not recoverable under a hull and machinery policy.[691]

Hull and machinery policies moreover provide liability cover for owners against the detention and demurrage claims of third parties where the owners' vessels collide with other vessels. Shipowners' claims as to demurrage, detention and loss of use of the vessel are however outside the scope of this cover.[692] Those claims all have a relevance to loss of time given that in order to calculate the exact measure of loss, the number of weeks, days and hours during which the vessel is deprived of earning must be taken into consideration. In other words, loss of earnings can be considered as a consequence of loss of time occasioned by damage to hull. Part of the type of expenses arising from delay otherwise excluded from the scope of hull and machinery policies can be insured in the market under loss of hire (loss of earnings) policies, however the scope of the standard cover provided under the London ABS Form is fairly controversial and not litigated to a great extent.

In light of the above, the first section of this chapter shall analyse whether delay can cause a physical loss to the hull along with the law on recoverability of expenses incurred during delay and whether the law on hull and machinery insurance shall be reformed in relation to losses and expenses caused by delay. The second section on loss of hire insurance shall

[689] MIA s.55(2)(b).
[690] *Shelbourne & Co v Law Investment and Insurance Corporation Ltd* [1898] 2 Q.B. 626. This judgment was given as an illustration of the subsection in Chalmers and Owen, *A Digest of the Law Relating to Marine Insurance*, 1901, p 64. It was also found in later editions, see Ivamy, E.R. Hardy, Chalmers' Marine Insurance Act 1906, 9th ed., London: Butterworths:1983, p 80; and in Ivamy, E.R. Hardy, *Marine Insurance*, 3rd ed., London: Butterworths, 1979, p 257.
[691] Chalmers and Owen, *A Digest of the Law Relating to Marine Insurance*, 1901, p 64. The same judgment was given as example also in later editions, see Ivamy, E.R. Hardy, Chalmers' Marine Insurance Act 1906, 9th ed., London: Butterworths:1983, p 80; and in Ivamy, E.R. Hardy, *Marine Insurance*, 3rd ed., London: Butterworths, 1979, p 257.
[692] *Phoenix Shipping Co v Apex Shipping Corp* [1982] 2 Lloyd's Rep 407, 414 per Mustill J, "It is clear beyond doubt that an insurance on a subject matter, whether described as "hull and machinery" or "ship" or "vessel" does not indemnify the assured against loss of earnings, or wasted expenditure during periods of delay."

scrutinise the ambiguities of the clauses of the London ABS Form in relation to the scope of cover with a particular focus on the exclusion of expenses arising from delay.

HULL AND MACHINERY INSURANCE AND DELAY

6.1. Damage by delay: introduction

Damage to the hull of the vessel by delay may occur generally in two cases; namely first where the vessel deteriorates pending repairs to average damage. In this case the damage is usually caused by a preceding event such as collision or perils of the seas which require repairs, and delay intervenes at the process where the repairs are awaited. [693] The deterioration of the hull of the vessel by delay in these situations are rare, mainly because the deterioration is essentially caused by the peril preceding delay and delay is an event aggravating the deterioration already caused. It is therefore controversial whether delay in these cases can be regarded as a proximate cause of the loss. The second situation is where the event causing delay does not damage the hull of the vessel yet results in a too lengthy delay[694] that may produce deterioration to the hull of the vessel. This loss may be accepted as having been proximately caused by delay, even though delay is caused by a preceding peril. In the current standard market terms no specific provision as to such delay losses are stipulated nevertheless a different clause may be invoked by hull insurers; namely the exclusion of ordinary wear and tear.

The absence of a delay exclusion clause in hull policies[695] is suspicious where standard market terms provide clear delay exclusions for containers, [696] given that delay may cause both to the hull of the vessel and to the container similar damages.

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[693] This issue will be covered below.

[694] This seldom happened during The World War 2 detentions.

[695] Institute War and Strikes Clauses, Hulls-Time 1/11/95 includes a delay exclusion clause however it refers merely to "expenses" arising from delay, and not to "loss" or "damage" arising from delay.
The American Institute Hull War Risks and Strikes Clauses 1977 also includes an exclusion clause as to delay:
"This insurance does not cover any loss, damage or expense caused by, resulting from, or incurred as a consequence of:
(c) Delay or demurrage; ..."
The exclusion arguably relates merely to consequential losses: Haehl, Harry L. The Hull Policy: Coverages and Exclusions Frequently Employed: F.C. & S., War Risk, S.R. & C.C., Automatic Termination, Cancellation *Tulane Law Review* 41, 1966-1967 277-314, at 282-283, fn. 31. Although the author of the article has referred to the previous American Hull Clauses, the clause with respect to delay has not changed in the 1977 form.

[696] Institute Container Clauses Time- Total Loss, General Average, Salvage, Salvage Charges, Sue and Labour 01/01/87 cl.4.5, the clause reads "loss, damage or expense proximately caused by delay". This exclusion is separate from the ordinary wear and tear, ordinary corrosion and rust and gradual deterioration exclusion at cl.4.2.

6.2. Deterioration of the hull by lengthy delays and ordinary wear and tear

Ships do not usually navigate for any length of time without a certain degree of deterioration and diminution in value, which is usually referred to as wear and tear. Ordinary wear and tear may result from excessive delays following a detention, capture or seizure.

In the United States, *Magoun v New England Marine Insurance Company*[697] illustrated this point. In that case, excessive delay due to an earlier detention combined by hot weather and exposure of the vessel to an open roadstead had caused damage to the hull of the vessel requiring great repairs that cost more than the vessel was worth. The Court rejected the argument that the long delay and exposure to the climate was the proximate cause of the loss and the detention was the remote cause and that the insurers were not liable for wear and tear and delays in the voyage. It was held that "all the consequences naturally flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself".[698]

In some other cases, delay may occur following damage to the hull of the vessel and may aggravate the loss already caused. In *St. Margaret's Trust Ltd v Navigators and General Ins Co Ltd*[699] the vessel put on mud berth had subsequently shifted across river to another mud berth, where she slipped over a low tide, and filled with water on the flood tide owing to the neglected state of her topside caulking. The vessel was left at that position for nearly a month, and then was towed to a place where she was left until another mud berth became available. The vessel gradually deteriorated and had no more than a break-up value. Later orders were given by the harbour authority about the removal of wreck. The issue in this case was whether the vessel was a total loss. It was held that there was no evidence that the vessel was a total loss as the only evidence was to the effect that the vessel when raised could have been made approximately into the condition in which she was when first submerged, and her eventual deterioration resulted from delay and that accordingly the claimants were only entitled to recover, as a partial loss the amount paid by them in connection with the refloating of the vessel and the estimated damage to the fittings caused by the submersion.

[697] *Magoun v New England Marine Insurance Company,* 1 Story 157, 16 F.Cas. 483, C.C.Mass. (1840)
[698] As cited in *Lanasa Fruit v. Universal Ins. Co.* (1938) 302 U.S.556 (Supreme Court of the United States)
[699] *St. Margaret's Trust Ltd v Navigators and General Ins Co Ltd* (1949) 82 Ll. L. Rep 752.

Whether the deterioration resulting from delay could be qualified as ordinary wear and tear was not discussed in the above case, nor was the impact of the length of delay. The MIA provides that insurers are not liable for ordinary wear and tear. [700] It shall be considered whether the exclusion of delay or ordinary wear and tear or both can be invoked where ordinary wear and tear results from a lengthy delay.

6.3. Delay in carrying out repairs and increased cost of repairs

The delay in effecting repairs may be caused by circumstances within or beyond the control of the assured. In the former case, there is a risk that the increased cost of repairs arising from delay in effecting repairs may not be recoverable on the ground of failure to sue and labour. [701] Prior to the MIA it was stated that charging the insurers more for the increased cost of repairs delayed by the assured would not be fair on insurers. [702] However this statement was merely an *obiter dictum* as in *Marine Insurance Co v China Trans-Pacific SS Co* no extra cost had arisen for delaying repairs. Where repairs can be carried out promptly, the assured may also be unable to recover increased costs due to delay in repairing on the ground that the indemnity falls to be measured at the termination of the risk.[703]

In the latter case, the delay sufficiently lengthy to cause increased cost of repairs may be caused by events beyond the control of the assured. In *Irvin v. Hine*[704] the ship was damaged in 1942 and never repaired yet it was proved that, owing to the wartime licensing system then in force, she could not in any event have been repaired before 1946 or 1947. The depreciation arising from the unrepaired damage exceeded the estimated cost of repair in 1946. It was contended by the underwriter that this figure should be reduced to what the repairs would have cost in 1942 which was rejected on the ground that the measure of indemnity should be the cost of repairs at the time when they could have been effected. [705]

6.4. Expenses incurred during repairs

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[700] s.55(2)(c).
[701] MIA s.78(4); the Duty of the Assured (Sue and Labour) Clause in International Hull Clauses 2003 cl.9.1. The event resulting in need for repairs that are delayed must be an insured peril.
[702] *Marine Insurance Co v China Trans-Pacific SS Co* (1886) 11 App. Cas. 573, 591-592 *per* Lord Blackburn. In this case the repairs were carried out a year after the damage had occurred.
[703] *Helmville Ltd v Yorkshire Insurance Co Ltd* (*The Medina Princess)* [1965] 1 Lloyd's Rep 361.
[704] *Irvin v. Hine* [1950] 1 K.B. 555.
[705] *Per* Devlin J, *ibid* at 572 "In estimating the cost of repair for the purpose of a partial loss, I think that the court has to arrive as near as possible at the actual figure which would have been expended had she been repaired."

6.4.1. Are they all losses caused by delay?

Expenses arising during repairs may or may not be regarded as losses proximately caused by delay within the meaning of s.55(2)(b). In *The Jascon 5*[706] the dispute turned upon a standard form of builder's risk policy which contained no express exclusion clause for loss, damage or expense caused by delay,[707] however the insurers invoked s.55(2)(b) to argue that the expenses claimed was not within the scope of cover. In this case, damage to the vessel caused delay in completion of the contract between the owner of the vessel and the shipyard given that repairs needed to be carried out and expenses arising during repairs[708] which delayed the completion of work were claimed as repair costs. It was stated in the decision that the policy was a marine hull policy covering all risks whilst the work was being done to the vessel and the fact that expenses arising during repairs are calculated on a time basis would not necessarily mean that these should be considered as costs of delay or amount to a loss proximately caused by delay. [709] It was further enunciated that whether or not costs incurred are costs of repair or costs proximately caused by delay –and hence excluded- was a question of fact and would depend on the evidence submitted by the parties. [710]

6.4.2. Wages and maintenance expenses arising during repairs at a port of refuge

i. Under the common law

Under the common law, wages and maintenance expenses of crew during the stay of the vessel at the port of refuge[711] were not recoverable as a general average loss by the shipowner on two grounds. The first ground was that the general average act was taken to have terminated where the vessel reached the port of refuge and that accordingly all the expenses incurred following the termination of the general average operation were considered to be resulting not from the general average act yet from delay in port for repairs, which fell under the shipowner's duty under his contract.[712] The second ground was that those expenses were merely the augmentation of an ordinary expenditure whereas a loss recoverable in general

[706] *Talbot Underwriting Ltd v Nausch Hohan & Murray Inc (The Jacson 5)* [2005] EWHC 2359 (Comm) affirmed by the Court of Appeal, *Talbot Underwriting Ltd v Nausch Hohan & Murray Inc (The Jacson 5)* [2006] EWCA Civ 889.

[707] Institute Clauses Builders' Risks

[708] The expenses referred to were costs of labours, materials in effecting the work itself and additional expenses such as planning and supervision of the repairs and provision of the yard services.

[709] At para 136, *per* Cooke J.

[710] At para 137.

[711] Some works refer to these expenses as "detention expenses", Wilson, D.J and Cooke J.H.S, *Lowndes and Rudolf The Law of General Average and The York-Antwerp Rules*, 13th ed., para 11.01

[712] Lowndes, R, *The Law of General Average: English and Foreign*, 4th ed., London: Stevens and Sons, 1888, at p 240. This view was also found in Wilson, D.J and Cooke J.H.S, 13th ed., para 11.02.

average had to be an expenditure of extraordinary nature.[713] The services of the crew during the entire voyage were deemed as due to the cargo on board and that the shipowner had to bear the risk of a longer voyage.[714]

That being said, the earlier common law decisions forming the authority on the question of recoverability of wages and maintenance expenses at the port of refuge as general average expenses were decided with respect to the cover provided under hull and machinery policies.[715]This type of expense was considered as a distinct subject matter than the one insured under hull and machinery policies and therefore not recoverable thereunder.[716] The rule as to wages and maintenance expenses at the port of refuge, however, does not apply where the damage necessitating repairs was itself the subject of general average.[717] Doubt was cast in *Atwood v Sellar*[718] as to whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by the courts, as constituting a claim for general average, in a case where the ship puts into the port to repair damage itself belonging to general average. It was also stated that wages and maintenance provisions at a port of refuge were recoverable under the laws of all the other countries except for England and the reason for this could have been that either the Courts had made a mistake to limit the application of the rule or that the disallowance rested upon public policy grounds.[719]

As to the first ground mentioned above for the disallowance of the expenses during repairs, i.e. that the general average act terminates when the ship arrives to the port of refuge, the main counter-argument would rest upon the concept of "common danger" to the ship and

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[713] *ibid*
[714] *ibid*
[715] *Robertson v Ewer* (1786) 1 Term Rep 127 where it was enunciated by Buller J that the wages and provisions were no part of the thing insured.
[716] *De Vaux v Salvador* (1836) 4 Adolphus and Ellis 420 where Lord Denman stated that the sea peril in this case cannot be held as the proximate cause of the loss but that the damage results from delay incident to the damage. In this case the claim was for expenses of wages and provisions of crew that arose during the detention of the ship in repairing (necessary repairs) damage resulting from a collision. The claim therefore was for consequential losses caused by delay.
[717] Lowndes, R, *The Law of General Average: English and Foreign*, 4th ed., London: Stevens and Sons, 1888, at § 57
[718]*Atwood v Sellar* (1880) 5 Q.B.D. 286, at 291. In this case, in consequence of damage to the ship by perils of the seas, the ship had to be put into a port of refuge for repairs. The cargo had to be accordingly unloaded and warehoused for the repairs to be carried out and the question was whether the expenses of warehousing and reloading goods unloaded for the purpose of repairing the injury, and expenses incurred for pilotage were the subject of general average. The going into port, the unloading, warehousing, and reloading of the cargo and the coming out of port, were treated in this case as parts of one act or operation carried through for the common safety and were regarded as continuous.
[719] *Atwood v Sellar* (1880) 5 Q.B.D. 286, 291

cargo whereby the general average sacrifice is made. This concept can either refer to danger of actual injury to the ship and cargo, or alternatively danger of the ship with her cargo being prevented from prosecuting the voyage. Albeit in the former case, putting into a port of refuge can arguably terminate the general average situation, in the latter case the general average sacrifice would arguably span to the expenses incurred until the ship leaves the port of refuge. Wages and maintenance expenses would therefore occur during the general average act. A second question could be whether the wages and maintenance expenses are a common sacrifice or a sacrifice merely made by the shipowner during the repairs necessary for the prosecution of the common adventure. Some of the earlier authorities referred to in *Atwood v Sellar* distinguished the situations of an injury to the vessel which is of itself the subject of general average, i.e. of voluntary sacrifice for the general advantage (e.g. injury arising from a collision) and an injury caused by ordinary perils of the seas in consequence of which proceeding to port of refuge is necessary.[720] The cases mentioned therein are in no way direct authority for the suggestion that wages and maintenance expenses could be recoverable, yet can constitute a fair ground to argue the allowance of such costs as general average expenses where they are incurred as the result of a voluntary sacrifice. Accordingly the mere fact that these expenses were incurred at the port of refuge during delay pending repairs shall not necessarily mean that they are excluded from the scope of general average merely because they arise during delay.

ii. Under the York-Antwerp Rules

According to the York-Antwerp Rules, wages and maintenance expenses during the prolongation of the voyage occasioned by a ship entering a port of refuge or returning to her port of loading shall be admitted as general average if those expenses are incurred for common safety or where the ship is necessarily removed to another port for carrying out repairs.[721] Recovery of those expenses is available only if they are incurred while proceeding to and from the port of refuge; and from the first port of refuge to the second port where repairs are taking place. The Rules use the term "prolongation of the voyage" for the part of

[720] In *Hallett v Wigram* (1850) 9 C. B. 580 , at p. 603 Wilde, C.J quoted with approval, the following passage from Abbott, 8th ed. p. 497: "It seems to result from these decisions that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages, and provisions during the stay, are to be considered as general average; but if the damage was incurred by the mere violence of the wind or weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner 'to keep his vessel tight, staunch, and strong' during the voyage for which she is hired."

[721] York-Antwerp Rules 2004, Rule XI(a), this rule existed also in the previous versions of the Rules.

the voyage which involves a deviation from the original route to proceed to the port of refuge and which also inevitably involves some loss of time during the original voyage. Therefore the prolongation of the voyage begins where the vessel deviates and ends where the vessel resumes the originally intended course.[722] Whereas "prolongation" as a term could have either a geographical or a temporal meaning in other contexts,[723] in the context of Rule X, it is submitted that even if it is used in its geographical meaning, its temporal meaning shall also be implied where because of the deviation, the voyage cannot be terminated within the expected period of time.

There is no international uniformity as to calculating the extent of prolongation of voyage however many of the calculation methods combine distance with time involved.[724] When this rule is considered together with Rule C,[725] some ambiguity may arise as to the difference between "prolongation of the voyage" and "delay on the voyage" and expenses resulting therefrom. However given the express and specific rule described in Rule X as to the recoverability of wages and maintenance expenses, they are allowed as general average expenses even though they are expenses arising during the period of delay.

6.5. Loss of possession and use of the vessel, delay and constructive total loss

The MIA provides that there is constructive total loss where the assured is deprived of the possession of his ship by a peril insured against[726] and deprivation of use is usually caused by perils such as capture and seizure which inevitably contain an element of loss of time. For the

[722] Lowndes and Rudolf, 11.08.

[723] In *Union Castle Mail Steamship Co Ltd v United Kingdom Mutual War Risks Association* [1958] 1 All ER 431 the assured was covered under a 1956-1957 Standard Form of War Risks Time Policy on Hull and Machinery for expenses incurred by the assured by reason of prolongation of the voyage arising from compliance with directions of certain authorities. Diplock J in an *obiter* passage stated that "prolongation" in that context was merely temporal given the word "period of" preceding prolongation. Moreover he observed that there can be deviation without prolongation of the voyage if the voyage is terminated within the expected period of time and he assessed the prolongation of the voyage by reference to the dates the vessels were due to their port of loading from their round voyage. It is submitted that the *obiter dictum* of Diplock J would not apply in the case where the deviation from the agreed route for proceeding to port of refuge and the following loss of time are incurred because of a general average act. The type of expenses recoverable under the York-Antwerp Rules, i.e. wages and maintenance of the crew, do not arise after the expiry of the expected duration of the voyage (as was interpreted as "prolongation" in this decision) yet during the deviation, the stay at the port of refuge and on the voyage back to the point where the vessel deviated.

[724] Except for the "Time only" method, which would create more ambiguities as to the difference of prolongation of the voyage from delay.

[725] Under York-Antwerp Rules 1974, Rule C provides: "Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average. Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average".

[726] s.60(2)(i).

purposes of this section attention will be drawn to circumstances whereby delay can be considered as an event causing deprivation of use by reason of injury to hull.

In *Field Steamship Co v. Burr*[727] the ship was insured under a time policy on hull against perils of the seas and all other perils. The vessel was injured by a collision and a hole was knocked in her bottom. Her cargo, through the action of the water and mud which came through the hole, became rotten. After the collision the vessel was towed to discharge the rest of the cargo however discharge was not allowed because of the condition of the cargo which accordingly had to be discharged elsewhere. Owners claimed for the cost of dealing with the cargo during the delay occurred between the date of the collision and the discharge of the cargo. According to the assured the damage to the ship could not have been repaired unless the cargo was discharged and the cost of discharging the cargo was really part of the cost of repairing sea damage to the ship. [728] L.Smith LJ held that "delay occasioned by discharging cargo is not a deprivation of the use of the hull and machinery to the owner by reason of an injury to the subject-matter insured". [729] The injury in that case was to the cargo and not to the hull.

Even if the above is correct, the position might be different where the cargo damages the hull of the vessel. An example was given in the above case[730] for a cargo of cement which encounters perils of the seas, solidifies and is affixed to hull and machinery. Removing the cargo in such a case would inevitably result in delay and consequently deprivation of use of the vessel. The question is whether the cost of removing the cargo from the hull and the cost arising from such deprivation would be recoverable under a hull policy which can be answered if it is assessed whether the expense sustained has been incurred as "owner of the structure of the ship" or as "carrier". [731] Expenses arising out of deprivation of use of the vessel are incurred as "carrier" and for this reason they are excluded from the ambit of the hull policy. The most obvious example of loss occasioned by such deprivation is loss of hire which is not recoverable under hull policies on the ground that it is not a loss or damage to the ship itself. This type of loss can arguably be covered under loss of hire policies which will be elaborated in the following section of this chapter.

[727] *Field Steamship Co v. Burr* [1899] 1 Q.B. 579.
[728] At 581-582.
[729] At 585. Holding this, for L. Smith LJ the mere extra expense of taking the cargo out of the vessel is *a fortiori* not part of this liability.
[730] At 587.
[731] This difference was raised by reference to the defendants' arguments by Chitty LJ at 588. For a more detailed view on this point, insurable interest of an owner under a hull policy and loss of hire policy shall be analysed.

On the ground that there is constructive total loss where the assured is deprived of the use of the vessel by an insured peril, another issue that shall be tackled is how it can be determined whether the cause of the deprivation of the use of the vessel is perils of the seas or delay. It can be relatively easy to argue that the cause of deprivation of use is delay where the perils of the seas causes injury to cargo, therefore deprivation is an indirect consequence of perils of the seas. Likewise in the above case the deprivation of use was held to be due to delay. [732] It was held in *Field Steamship Co v. Burr* that the real sea damage was to the cargo and the incidental consequence was that the ship could not be used again until the damaged cargo was removed, and therefore it was suggested that the deprivation of use of the vessel was due to the delay and not perils of the seas.

Deprivation of the use of the vessel can arguably be by an injury to the hull of the vessel where for instance a cargo that is susceptible of becoming sticky in time is affixed to the hull of the vessel because of a lengthy delay and cause damage to the hull. The removal of the cargo may give rise to the question of whether the deprivation of use of the vessel during such delay is by an injury to the hull of the vessel. It is also arguable whether the cost of removing the cargo from the hull can be claimed as it would be part of repairing the hull damage. A second question is whether removal expenses can be recovered as sue and labour expenses, as not removing them may cause further damage to hull.

The relation of delay and loss of use may have different effects in first party and liability claims. The 3/4th collision liability clause provides that the insurers will indemnify the assured for delay to or loss of use of any other vessel in consequence of the collision. [733] Although the new version of the clause has not yet been interpreted to a comprehensive extent, it may be argued that it covers the claim for loss of use that needs to be paid by the vessel that the assured under the hull policy collides with. [734] This loss can be considered as a

[732] The reference was made to *De Vaux v Salvador* (1836) 4 Adolphus and Ellis 420 where Lord Denman stated that the sea peril in this case cannot be held as the proximate cause of the loss but that the damage results from delay incident to the damage. In this case the claim was for expenses of wages and provisions of crew that arose during the detention of the ship in repairing (necessary repairs) damage resulting from a collision. The claim therefore was for consequential losses caused by delay.

[733] International Hull Clauses 2003 cl.6.1.2; Institute Voyage Clauses Hulls 1983 cl.8.1.2.; Institute Time Clauses Hulls cl.6.1.2.

[734] In the earlier version of the Insitute Time Clauses Hulls dated 22/07/1959 the policy was worded to cover the assured "in respect of damage done in collision to another ship or vessel *including its demurrage*" (emphasis added). It is however important to distinguish the "demurrage" that is used in the strict legal sense and the term

loss incurred by way of delay resulting from collision and for which the assured of the insured vessel shall be liable by way of damages.

In conclusion, deprivation of possession of the vessel by delay during repairs would result in loss of hire which is arguably not recoverable under hull policies. Deprivation of possession of the vessel during the period of capture and seizure may give the right to tender a notice of abandonment on the ground that the real cause of the loss of use is the preceding peril and not delay. And finally discharging the goods which are affixed to the hull because of delay in the voyage and resulting cost of repair is not a loss occurred by the deprivation of possession by delay however may arguably be recovered under a hull policy, although caused during delay.

LOSS OF CHARTER HIRE INSURANCE AND LOSS OF TIME

It was mentioned above that according to the MIA s 55(2)(b) of the MIA 1906, a policy on ship does not cover losses proximately caused by delay. One of the most obvious types of loss that is sought to be excluded by this wording is loss of hire (loss of earnings) arising from the loss of use of the vessel which can otherwise be recoverable under loss of hire policies. According to the drafters of the Act, [735] the exclusion rests upon the authority of *Shelbourne v Law*[736] where loss of earnings due to the detention of an insured vessel during repairs necessitated by a collision was not allowed on the ground that it was remote to the hull policy. This judgment therefore needs a closer scrutiny.

In this case a "river insurance policy" that was a time policy covered the assured against "loss or damage by reason of the collision" of the barges insured and excluded "loss or damage …

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that is used in the general sense. If the term is used in the strict legal sense, it would mean "the agreed amount of damage which is to be paid for the delay of the ship caused by a default of the charterers at either the commencement or end of the voyage", per Brett MR at 251in *Harris v Jacobs* (1885) 15 QBD 247. Accordingly the events where demurrage would arise would be confined to cases where collision occurs while the vessel is loading or discharging (the fact that demurrage goes on running when the loading or discharging is interrupted by collision was mentioned by Atkinson J at 216 in *Petrinovic & Co Ltd* v. *Mission Française des Transports Maritimes* (1941) 71 Ll L Rep 208) or when it occurs when the vessel leaves the loading or discharging port temporarily (*please see* Atkin LJ at 211 in *Cantiere Navale Triestina* v. *Handelsvertretung der Russe Soviet Republik Naphtha Export* (1925) 21 Ll L Rep 204 (CA) for the proposition that demurrage would continue to run if the vessel's absence from the port is only temporary).

[735] Chalmers and Owen, *A Digest of the Law Relating to Marine Insurance*, 1901, p 64. The same judgment was given as example also in later editions, see Ivamy, E.R. Hardy, Chalmers' Marine Insurance Act 1906, 9th ed., London: Butterworths:1983, p 80; and in Ivamy, E.R. Hardy, *Marine Insurance*, 3rd ed., London: Butterworths, 1979, p 257.

[736] *Shelbourne & Co v Law Investment and Insurance Corporation Ltd* [1898] 2 Q.B. 626

in respect of the cargo or engagements" of the barges. There was also a clause whereby the insurer had the option to make good the loss or damage instead of paying for it. Two barges collided with a vessel and the assured suffered loss of the earnings during delay arising from detention, as well as physical damage to the barges. The Court accepted the insurer's argument that the loss was not proximate to the injury by collision but was a fact which existed in consequence of the injury and that it was rather proximate to the repairs. The Court further opined that the clause granting the insurers the option to make good the loss could merely refer to the damage to barges and not to loss occasioned by the loss of time. Accordingly the "claim for damage for loss of time while the barges were detained for repairs", wages and maintenance of the crew were held not to be recoverable under the policy. Kennedy J opined: "There can be no question that on an ordinary marine policy there would be no right to claim for loss of time, or for the wages and maintenance of the crew". This judgment emphasises the fact that such losses are caused by delay and are remote to the damage to barges by collision, therefore not recoverable under policies covering merely the vessel and not the consequent losses arising from the deprivation of its use.[737]

However there is now market for covering loss of earnings under standard form policies such as the London ABS Form 1983.[738] Below is an attempt to analyse relevant clauses of the Form and controversial issues which may give rise to disputes in relation to the recoverability of loss of hire and other losses and expenses incurred during delay.

6.6. Events triggering cover and the requirement of damage to vessel

Loss of hire may be occasioned by loss of or damage to hull by the perils insured under the hull policies, by delay in delivery of a new-building vessel[739] or by events which do not occasion damage to the hull yet merely loss of use of the vessel, such as port congestions. Under the standard forms available in the English insurance market loss of hire is covered solely where it is occasioned by damage to the vessel.[740] By way of example, under the

[737] However cf. *Owners of the Steamship Gracie v Owners of the Steamship Argentino (The Argentino)* (1889) 14 App Cas 519 where loss of earnings incurred while a vessel was undergoing necessary repairs were held to be the direct consequence of the collision.
[738] See Appendix II.
[739] See for e.g. the policy in *Hong Kong Borneo Services Co Ltd v Anthony David Pilcher* [1992] 2 Lloyd's Law Reports 293
[740] See e.g. London ABS Form No.1.23-2 Loss of Charter Hire Insurance- Including War (ABS 1/10/83 Wording). This wording is still widely used in the market, Silver, Paul "Stuck in the Doldrums? A Consideration of whether the ABS Loss of Charter Hire Insurance Wording is still Fit for Purpose" Chairman's Address of the Association of Average Adjusters, 10 May 2012, available at

London ABS Form,[741] the cover is provided where the vessel is prevented from earning hire due to "a loss, damage or occurrence covered by" *inter alia* Institute Time Clauses-Hulls (1/10/83) and Institute War and Strikes Clauses Hulls-Time 1/10/1983.[742] Albeit there is room to argue that the word "occurrence" may allude to wider circumstances than loss or damage to the hull,[743] the exact meaning of the wording has not yet been tested in court.

It is noteworthy that the word "occurrence" is used in several other parts of the ABS form as well as in the Institute Time Clauses-Hulls 1983. "Occurrence" in the context of the ABS Form other than in the context of cl. 1(b) was mainly used along with "accident"[744] and "accident" was deemed to include heavy weather damage occurring during a single sea passage between two successive ports as defined in cl.12.2 of the Institute Time Clauses-Hulls 1983.[745] Therefore it is submitted that the expression should be interpreted with reference to the Institute Time Clauses-Hulls[746] and should arguably refer either to general average act[747] or to collision which is an event resulting in loss of hire however is not

http://www.average-adjusters.com/AAA%20Loss%20of%20Hire%20Address%2010.05.12.pdf, at p.2. For a recent example of a policy written on the ABS conditions, see *Sealion Shipping v Valiant Insurance Co (The Toisa Pisces)* [2013] 1 Lloyd's Rep. 108 where the dispute arose out of misrepresentation and excess applicable to a period of delay which shall be discussed in detail below.

[741] Hereinafter referred to as ABS Form

[742] Cl 1(a)

[743] This was argued in two unpublished papers cited in Silver, namely by G.D Kemp in a paper entitled "Loss of Hire" written in 1963 for the Chartered Insurance Institute and by Geoffrey Hudson in a paper entitled "Claims on Loss of Earnings Insurances" written in 1978. The former paper discussed the wording then in use "if in consequence of loss, damage or occurrence covered by I.T.C etc. or Breakdown of Machinery occurring during period of this insurance, the vessel is prevented from earning hire in excess of X days any one accident, this policy will pay …". Kemp argued that "occurrence" was inserted to cover situations such as a general average deviation to a port of refuge. As cited in Silver, at p.6, based on the 1971 wording which was very similar to 1983 ABS Form wording Hudson had given the example of a vessel running aground and being put off-hire for which loss of hire insurers would be liable given the wording "occurrence" although no damage to the hull was in place. It is doubtful whether this argument would succeed given that stranding is usually caused by perils of the seas and can be considered as a loss caused by perils of the seas within the meaning of cl 6.1.1 of the Institute Time Clauses-Hulls 1983. Where the ship suffers a loss by perils of the seas because of stranding, this would be covered under the "loss, damage" wording of the ABS Form. Otherwise if the ship merely runs aground without being damaged or lost, this would arguably not be an event recoverable within the meaning of "loss, damage or occurrence covered by Institute Time Clauses-Hulls (1/10/1983)" in the first place because it would not be covered under the Clauses.

[744] Cl 1(b)-cl.8 (deductible clause) - "any one accident or occurrence".

[745] Cl.6.

[746] Cl.12 provides "all such claims arising out of each separate accident or *occurrence* (including claims under Clauses 8, 11 and 13)" (emphasis added). These clauses should provide an answer as to what is considered as "occurrence" in the Hull Clauses.

[747] Cl.11 of the Institute Time Clauses-Hulls 1983

recoverable under the hull clauses.[748] The equivalents of the ABS Form available in other jurisdictions refer to hull clauses covering merely loss or damage to the vessel.[749]

In addition to the foregoing, whether the loss of hire should strictly be resulting from a loss of or damage to the hull was discussed in *The Wondrous*[750] in respect of a policy which stated that the policy was only to pay if in consequences of risks enumerated in the Institute War and Strikes Clauses Hulls-Time 1983 the vessel was prevented from earning hire. Accordingly two possible interpretations could be made: Either the policy would pay where the risks enumerated under the hull policy would result in loss of hire; or where those risks would cause a loss of or damage to vessel in consequence of which loss of hire would be incurred. In that case the vessel was detained for a year by reason of the failure of the assured to pay the port dues, therefore the vessel was not lost or damaged. The first instance rejected the argument that the reference in a loss of hire policy to "risks enumerated" in the hull policy did not mean that these risks had to cause "loss of or damage to the vessel".[751] This decision was reversed by the Court of Appeal[752] however it is noteworthy that both of the decisions were delivered upon the construction of the policies there at issue[753] and the Court of Appeal decision can by no means be authority for a generic suggestion that loss of or damage to vessel is not required for triggering claims under loss of hire policies.

In this respect, the wording under the ABS Form is clearer in terms of the requirement of a loss of or damage to the vessel for triggering the loss of hire cover compared to the wording discussed in *The Wondrous.*[754] The approach adopted by the Court of Appeal that loss of or damage to vessel was germane to a loss of hire policy was based on the argument that the policy incorporated Hull Clauses instead of Freight Clauses[755] which was the expression of

[748] As per cl.8 of the Clauses, the insurers cover 3/4th of the owner's collision liability, however the loss of hire arising from the collision is not expressly or otherwise covered by the Clauses.
[749] The ABS Form in cl 1(a) provides "loss, damage or occurrence covered by Institute Time Clauses- Hulls (1/10/1983) or Norwegian Hull Form or American Institute Hull Clauses (2nd June 1977)". Other standard forms of loss of hire policies such as Norwegian General Conditions Form (1972) and American Institute Form 1961 all required physical loss or damage to the vessel.
[750] *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1991] 1 Lloyd's Rep. 400
[751] See *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1991] 1 Lloyd's Rep. 400, 416 per Hobhouse J
[752] *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1992] 2 Lloyd's Rep 566, at 573, 577
[753] The loss of hire policy was subject to the Jardine Glanville Ltd War Loss of Hire Wording No 1 which provided that the policy shall only pay if in consequence of the risks enumerated in the Institute War and Strikes Clauses Hulls-Time 1.10.1983 including London Blocking and Trapping Addendum LPO444 the vessel is prevented from earning hire.
[754] If in consequence of "loss, damage or occurrence covered by Institute Time Clauses-Hulls 1983" the vessel is prevented from earning hire.
[755] *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1992] 2 Lloyd's Rep 566, 573

their intention to limit the loss of hire cover to the circumstances of loss of or damage to the vessel. Albeit the risks enumerated under both Clauses are fairly similar – if not identical-, incorporation of the Freight Clauses would run the risk of the loss of hire claims being excluded by the loss of time provision under the Freight Clauses[756] if it could be said that the incorporation encompassed not only risks enumerated but also to the exclusions.[757] In *The Wondrous*, it was submitted that the risks enumerated referred merely to the perils "in consequence of which" the vessel was prevented from earning hire, and loss of time being merely the consequence of those perils could not be included in the "risks enumerated". On the facts of this case, the author would submit that the incorporation of Freight Clauses would not substantially change the outcome in terms of the loss of time exclusion. It would merely provide the assured a wider scope of cover given that the loss of hire would have to be caused by perils enumerated without the requirement of a loss of or damage to the vessel.

A large number of circumstances may give rise to loss of time without any damage to vessel, such as time lost during surveys following a stranding where the vessel is not damaged, loss of time due to a congestion or strike in port, loss of time as a consequence of removing a damaged cargo, as a consequence of an event that is allowed in general average[758] and time lost in consequence of death or illness on board. Therefore restricting the cover for loss of hire merely to incidents resulting in loss of or damage to hull would leave out a considerable number of loss of hire claims unrecoverable. Removal of damaged cargo shall be elaborated in the next section given its relevance to hull insurance and common law origin.

6.7. Loss of time in removing cargo and consequent loss of hire

The ABS Form provides that loss of hire is covered if it is incurred following loss, damage or occurrence covered by Institute Time Clauses-Hulls 1983 which excludes the sum that the assured has to pay in result of removal of cargo. This would first of all exclude the situation where the peril causes no damage to the hull of the vessel yet merely damages cargo carried on the vessel insured in result of which loss of hire would occur due to the time lost while its

[756] Institute Time Clauses Freight 1/10/1983, cl.14. This clause was discussed in Chapter III.
[757] It was decided that the "risks enumerated" included both the covered perils and exclusions in the incorporated text, *Ikerigi Compania Naviera SA v Palmer* (*The Wondrous)* [1991] 1 Lloyd's Rep. 400, 416 per Hobhouse J.
[758] Loss of hire arising from loss of time consequent on these risks are recoverable under The Nordic Marine Insurance Plan of 2013, Chapter 16, Loss of hire insurance, clause 16-1.

discharge.[759] However loss of hire whilst removing the cargo where damage is caused to the hull by the combination of perils insured under the Institute Time Clauses-Hulls 1983 and by cargo can arguably be recoverable.[760] The most obvious example would be where a cargo of cement which encounters perils of the seas, solidifies and is affixed to hull and machinery.[761]

6.8. "Expenses arising from delay"and losses arising from delay

The ABS Form provides that expenses arising from delay except such expenses as would be recoverable in principle in English law and practice under the York-Antwerp Rules 1974 are excluded from the scope of cover.[762] This part shall accordingly discuss firstly the type of expenses which are susceptible of being excluded by this wording and secondly the circumstances giving rise to general average expenses which are recoverable under the ABS Form.

6.8.1. Common law background of loss of hire arising during general average repairs

In the average adjusting practice, where the vessel is on time charter at the time of the average loss, the time charter hire does not contribute to general average.[763] The legal equivalent of this rule emanates from a set of common law authorities and has also been expressly regulated under the York-Antwerp Rules. Albeit the common law authorities seem to have established the law quite clearly, the application of these authorities to loss of hire policies is controversial given that they were decided with respect to claims arising from hull and machinery policies whereby loss of hire as a consequential loss to the loss of or damage to the vessel is already excluded from the scope of cover. It was not accordingly surprising that loss of hire arising during general average repairs was held not recoverable in general average. A further analysis of the authorities and the York-Antwerp Rules 1974 shall shed light to the application of these authorities in the context of loss of hire policies in the ABS Form.

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[759] See *Field Steamship Co v. Burr* [1899] 1 Q.B. 579 for an example where the casualty damaged the cargo and not the hull of the vessel. The vessel was injured by a collision and a hole was knocked in her bottom. Her cargo, cotton seed, through the action of the water and mud which came through the hole, became rotten. The policy in this case was a hull and machinery policy.

[760] This type of loss is expressly recoverable under The Nordic Marine Insurance Plan of 2013, Chapter 16, s 16(2)(c).

[761] *Field Steamship Co v. Burr* [1899] 1 Q.B. 579, at 587.

[762] Cl 13.3

[763] Rule B26 of the Rules of Practice of the Association of Average Adjusters 1997 (as amended in 2008)

In *The Leitrim*[764] the vessel was under a time charter which included a clause stating that the hire should cease in case of damage preventing the working of the vessel for more than 24 hours. The general average act in this case was the pouring of water into the hold where the cargo was stored so as to save the ship and cargo from destruction. The vessel had delayed at a port of refuge while undergoing repairs for the water damage and one of the main issues was whether the loss of hire was due to the general average act or due to the off-hire clause in the charterparty. It was decided that recovery of loss of hire during general average repairs should not be allowed as general average expense on mainly two grounds.

Before proceeding with the grounds, it is noteworthy that the loss of time incurred by the shipowner was not merely due to repairs, yet also due to the act of extinguishing the fire on board and the removal of the cargo for repairs to the hull, i.e. loss of time or delay was part of the general average act and had occurred during the currency of the common adventure. Loss of time was therefore arguably part of the general average act itself. It may be necessary to draw a distinction between loss of time and loss of hire in this respect on the ground that not every loss of time could amount to loss of hire as the latter would depend on the wording of the off-hire clause in the time charter. In the example of *The Leitrim*, the loss of time in extinguishing the fire on board could not have amounted to loss of hire if the off-hire clause in the charterparty had not extended to cover situations of the like. Accordingly the main issue in that case was whether the shipowner was entitled to some compensation in general average for the delay caused by the sacrifice, it was not whether he was entitled to recover the particular consequences of delay. This was on the ground that if losses due to delay had to be calculated it would cause inconvenience to the other interested parties because loss of hire is an accidental circumstance peculiar to the shipowner and charterer arising from the terms of their contract.[765]

Turning to the main two grounds, they were the following: that the loss of time is common to all the parties interested so that the damages by delay may be considered proportionate to the interests of the parties and may be disregarded; that were these losses to be calculated, there

[764] *The Leitrim* [1902] P 256. This case was decided under the 1890 York-Antwerp Rules which did not contain any provision similar to Rule C of the 1974 version of the Rules.
[765] *The Leitrim* [1902] P 256, at 265

would have been difficulty to ascertain the exact amount of loss on each of the interests as losses arising from delay would have been estimated and speculative.[766]

This decision was followed later on in *Wetherall v The London Assurance*[767] where a claim was made under a hull and machinery policy for loss of use of the vessel damaged by a general average act and repaired after the termination of the adventure. The claim was disallowed by the Court, however in this case the dispute had turned on the recoverability of the loss incurred not during delay "on the voyage" yet during delay subsequent to the termination of the voyage. The "voyage" referred to was the voyage in which all interests were concerned, i.e. the common adventure. Given that the decision was with respect to a hull and machinery policy where loss of hire is a consequential loss and not recoverable in general average under such a policy, it is submitted that it cannot be authority for loss of hire policies. The Court opined that if under the common law loss of hire during delay on the voyage was not recoverable in general average, loss of hire during delay subsequent to the termination of the voyage would *a fortiori* be disallowed.[768] This reasoning is tenable given that where the common adventure terminates, any loss arising subsequent to the termination cannot be determined as general average loss, yet could be considered as particular average loss.

6.8.2. Analysis of the law as to loss of hire arising during delay

Albeit the common law authorities are clear as to the non-recoverability of such losses, doubt was cast in one particular occasion in an *obiter dictum*.[769] This subsection shall elaborate on the grounds upon which the above mentioned common law judgments were delivered.

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[766] At 269

[767] [1931] 2 K.B. 448

[768] As far as York-Antwerp 2004 Rules are concerned, Rule C § 3 refers to delay "on voyage or subsequently", accordingly this paragraph could exclude a claim for a loss incurred after the termination of the voyage. The expression "or subsequently" had been introduced by 1994 Rules, after the decision in *Wetherall v The London Assurance*.

[769] It was recognised in an *obiter dictum* that loss of hire could be allowed in general average even if caused by delay at the port of refuge. It was stated in *Anglo-Argentine Live Stock Agency v Temperley S.S. Co.* [1899] 2 Q.B. 403, at 412: "Everyone concerned in the adventure suffers damage by the delay at the port of refuge. Each cargo-owner is delayed in the use or the sale of his goods. The freight-owner is delayed in getting payment of his freight, and *the shipowner is deprived of the use of his ship*. Yet none of these cases afford the foundation of any claim in general average according to our common law. Perhaps it is desirable that they should; and when the York-Antwerp Rules are by contract made applicable, some of them do form the subject of contribution. But the common law is clear, and it will be found laid down in the cases collected by Mr. Lowndes and referred to in s. 57 of his work." (emphasis added). This decision was made against the background of the York-Antwerp Rules 1890 where a clause similar to the current Rule C did not exist.

i. "Loss of time is proportionate to the interests of the parties"

In *The Leitrim*, one of the reasons of disallowing loss of hire as general average loss was because it was submitted that in cases like the one in *The Leitrim*, the damages by loss of time could be considered proportionate to the respective interests and be disregarded.[770] The Court recognised that there may be situations where loss of time is not common to all concerned and this could give rise to the question of whether in such a case the damages by loss of time could not be set off and disregarded. By way of example, there may be some loss of time at the port of refuge arising from repairs and although the shipowner may incur loss of hire, the assureds under a cargo policy insuring the goods on board such vessel may not incur any loss where the goods are still marketable. Moreover, even if all the interested parties suffer losses, it is controversial whether these losses can be proportionate to the interests and be set off in all circumstances. It was submitted by Lowndes that the proportion of the loss of interest during delay to the cost of the goods would most of the time bear the same proportion as the one of the loss of hire to the value of the ship[771] which appears to have been recognised in *The Leitrim*. Some thoughts can be expressed with respect to this submission. Firstly, it is not controversial that in both cases there is a deprivation of use during delay (in the former case deprivation of use of cargo and in the latter case deprivation of use of the ship). Nevertheless, it can be argued that in assessing the proportion in the latter case, the efficiently working state of the ship rather than the value of the ship shall be taken as the basis for the interest of the shipowner. This is given that although the value of the cargo is indispensable in assessing the loss of the cargo interest in case of deprivation of use of cargo, the value of the ship could have been relevant in assessing the loss of the shipowner as to the cost of repairs. Secondly, the loss of time may not necessarily be proportionate to the interests in situations where, for instance, on the second day of a delay the cargo loses its entire market (this may occur particularly for goods that require prompt delivery) whereas the shipowner incurs merely a two days loss of hire or less, depending on the wording of the off-hire clause. For these reasons, the argument resting upon proportionate losses during delay shall be approached cautiously.

ii. "Delay is not a direct consequence of general average act"

[770] *The Leitrim* [1902] P 256, at 268 and 269.
[771] Lowndes, R, *The Law of General Average: English and Foreign*, 4th ed., London: Stevens and Sons, 1888, at p 242

Another ground upon which loss of hire during delay was not allowed in general average is that it is not accepted as a direct consequence of general average act. [772] Under the MIA and York-Antwerp Rules the loss ought to be a loss that is the direct consequence of the general average act so as to be recoverable in general average.[773]

The decisions assessed directness with reference to mainly two tests, one based on foreseeability of the loss by the master at the time of the general average sacrifice[774] and the other based on the existence of subsequent accidents to the general average act breaking the chain of causation between the act and the loss.[775] It is submitted that these tests are not readily reconcilable although earlier cases cited both with approval.[776] It is not very clear whether the two tests should be applied together, and it is submitted that their application to circumstances involving loss of hire the calculation of which depends on time element may have fairly different and irreconcilable results. The latter test was most recently rejected and the former test was applied in assessing whether an accident following the general average broke the chain of causation,[777] this section shall therefore focus mainly on the application of the former test to situations involving delay.

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[772] Argued in *Wetherall v The London Assurance* [1931] 2 K.B. 448

[773] MIA s 66 provides: "A general average loss is a loss caused by or directly consequential on a general average act." See also York-Antwerp Rules Rule C "Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average".

[774] This test was established by Lowndes in *The Law of General Average: English and Foreign*, 4th ed., London: Stevens and Sons, 1888, at para 36 in the following passage: "We have to determine quod pro omnibus datum est, and since giving must always imply an intention to give, what we have here to ascertain must be what loss at once has in fact occurred, and likewise must be regarded as the natural and reasonable result of the act of sacrifice? Or in other words, what the shipmaster would naturally or might reasonably have intended to give for all when he resolved upon the act? If then upon the act of sacrifice any loss ensues, which the master did not in fact bring before his mind at the time of making the sacrifice, it would have to be considered whether it were such a loss as he naturally might or reasonably ought to have taken account of."

[775] It was cited in *Anglo-Argentine Live Stock Agency v Temperley S.S. Co.* [1899] 2 Q.B. 403 at 410, "Ulrich, in his Grosse-Haverei, p.5, says: "General average comprises not only the damage purposely done to ship and cargo, but also (1.) all damage or expense which was to be foreseen as the natural (immediate) consequence of the first sacrifice, since this unmistakably forms part of that which was given for the common safety; (2.) all damage or expense which, though not to be foreseen, stands to the sacrifice in the relation of effect to cause, or in other words was its necessary consequence. Not so, however, those losses or expenses which, though they would not have occurred but for the sacrifice, yet likewise would not have occurred but for some subsequent accident."

[776] *Anglo-Argentine Live Stock Agency v Temperley S.S. Co.* [1899] 2 Q.B. 403, at 410, that the master knew or ought reasonably to have known that the general average sacrifice could result in the losses incurred (Lowndes test); and that the loss or damage was the necessary consequence of the general average act (Ulrich test). Likewise in *Austin Friars Steamship Co Ltd v Spillers & Bakers Ltd* [1914] 1 K.B. 833 where the master had decided to put into a port of refuge yet the vessel had struck the pier, Bailhache J applied first the foreseeability test and decided that what in fact occurred (damage to pier and liability to third parties arising by damaging the pier) was in contemplation of the master. In relation to the subsequent accident test, he enunciated that the collision with the pier was a foreseen result and not the result of a subsequent accident.

[777] *Australian Coastal Shipping v Green* [1971] 1 Q.B. 456 at 482, *per* Lord Denning M.R.

According to the foreseeability test, an event does not break the chain of causation when the claimant, when he does the general average act, ought reasonably to have foreseen that a subsequent loss of the kind might occur or even that there was a distinct possibility of it,[778] the test is therefore mostly known as the "reasonable foreseeability test". Should this test be applied to situations involving general average repairs during which the owner incurs some loss of time, one of the questions that could arise would accordingly be whether a master could reasonably foresee that loss of hire would occur when he does the general average act, for instance where he deviates from the usual route for proceeding to a port of refuge.

Delay is usually foreseeable where a general average act occurs, for delay, as has already been discussed in this work, is almost always preceded by other events. In this respect delay may be considered as an event not breaking the chain of causation and that losses resulting from delay may therefore be taken as direct consequences of the general average act. [779] However, albeit delay may generate losses which can be considered as "direct consequence of general average act", Rule C § 3 of the York-Antwerp Rules expressly excludes any loss incurred through delay, which would also extend to loss of hire during general average repairs. The most obvious examples that could be incurred by delay are loss of market and demurrage which are expressly excluded in Rule C. These losses used to be considered as indirect losses to the general average act resulting from delay in earlier versions of the York-Antwerp Rules[780] which was based on the approach to loss of market at the time.[781] Later on, loss of market was regarded as a direct loss under English law[782] however the wording in Rule C in later versions of the York-Antwerp Rules remained and was not amended.

Whereas according to the foreseeability test it can be argued that loss of hire by delay during average repairs is a foreseeable event by the master at the time of the general average act it could be considered within s.66(1) and recoverable on this ground; given the express

[778] *ibid*, at 482.
[779] It is submitted that 1924 version of York-Antwerp Rules by providing "damage or loss sustained by the ship or cargo through delay on the voyage, and indirect loss from the same cause" recognised that delay could be an intervening cause and also an event not breaking the chain of causation. Accordingly direct and indirect losses incurred by delay are excluded according to this wording. The current Rules are not different in this respect.
[780] e.g. Rule C of York-Antwerp Rules 1924 provided "Damage or loss sustained by the ship or cargo through delay on the voyage, and indirect loss from the same cause, such as demurrage and loss of market, shall not be admitted as general average".
[781] It was enunciated in *Australian Coastal Shipping v Green* [1971] 1 Q.B. 456 at 481, *per* Lord Denning M.R. that the Rule C on delay had followed the authority in *The Parana* (1877) 2 P.D. 118
[782] *Australian Coastal Shipping v Green* [1971] 1 Q.B. 456 at 481, *per* Lord Denning M.R. referring to *Czarnikow (C.) Ltd. v. Koufos* [1969] 1 A.C. 350, 385, per Lord Reid

provision in Rule C §1 of the York-Antwerp Rules 1974 and 2004 as to demurrage, loss of hire during general average repairs would not be allowed in general average under the Rules.

Another consideration can be that delay following deviation to the port of refuge can be the general average act itself.[783] Delaying the voyage for not entering a port with danger and losses resulting therefrom[784] may well be regarded as the direct consequence of the general average act, which is the decision to delay the voyage for the common safety. This loss could be considered as within the meaning of the Rule C § 1[785] and it is not clear whether Rule C § 3 excludes merely delay as a consequence of the general average act or whether it also excludes delay being the general average act itself. In the context of the ABS Form losses arising from delaying the voyage for not entering a port with danger cannot arguably be recoverable in general average on the ground that the Form requires a loss or damage to the hull of the vessel which results in loss of hire in the absence of which cover may not be available.

Given the express wording in the York-Antwerp Rules 1974 as to wages and maintenance expenses at the port of refuge, these expenses could be recoverable in general average even though it can be argued that they are expenses incurred through delay and would not be struck out by the delay exclusion in the ABS Form.[786] However, loss of hire which is expressed as demurrage in the Rules is explicitely excluded from the scope of expenses recoverable in general average. The common law background for this provision should however be approached cautiously in light of the arguments put forward in relation to directness of loss of hire and general average act and to the suggestion that loss of time is proportionate to the interests of the parties of the common adventure.

As was discussed elsewhere in this work, the fact that loss of hire is calculated on a time basis shall not necessarily denote that it is caused through delay or loss of time. Arguing that loss of hire is not recoverable according to the ABS Form's delay exclusion could arguably be diametrically opposite to the very nature of the Form and would render the delay exclusion obsolete: a policy providing cover for a loss that is calculated on time basis would be struck

[783] See York-Antwerp Rules Rule A for the definition of general average act.
[784] "Wages and maintenance of crew" during the "prolongation of the voyage" when entering a port of refuge is admissible in general average by virtue of Rule XI (a).
[785] It provides: "Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average".
[786] Cl.13.3

out by the delay exclusion on the ground that common law authorities did not allow loss of hire incurred during average repairs to be recoverable in general average. It may therefore be suggested that the exclusion clause shall be interpreted to refer to expenses such as port dues payable during delay in port, yet not to loss of hire.

6.9. Aggregation of losses and delay

The ABS Form provides that the insurers shall pay a daily sum if the vessel is prevented from earning hire for a period in excess of a certain number of days (deductible) in respect of any one accident[787] and that if the vessel is prevented from earning hire on separate occasions, in respect of any one accident or occurrence, the total time that the vessel is off hire shall be taken into account for the purpose of ascertaining the claimable amount under the policy.[788] Certain issues in respect of delay arise accordingly as to the sum recoverable per occurrence.

According to the above wording and the particular expression "the total time that the vessel is off hire", the number of occurrences and whether a loss of time is a loss incurred by way of a first or second occurrence would arguably not affect the amount recoverable under the policy. By way of example, where the vessel collides with another vessel, the number of days during which the repairs were carried out and the inoperation of the vessel on site multiplied by the daily sum payable by the insurer would in total determine the owner's loss of hire. In a more complicated example, even if the vessel is firstly damaged by perils of the seas and repaired and consequently collides and incurs both on site delay and repairs, the sum recoverable would depend on the totality of the days the vessel is off hire even if the collision and perils of the seas are considered as one occurrence. Moreover a number of occurrences happening in short intervals may occasion a single delay (repairs following a series of collisions with different vessels). It would follow that the number of off hire days is determinative notwithstanding that the occurrences are aggregated. In this regard, a wording to the effect of "any one occurrence or in the aggregate all occurrences" would not have a significant effect on the sum recoverable, contrary to the position in property policies or hull policies where the

[787] Cl 1(b)

[788] Cl 8. It is submitted that this clause could operate where the policy itself does not contain any limits; see *Sealion Shipping v Valiant Insurance Co (The Toisa Pisces)* [2013] 1 Lloyd's Rep. 108 where the policy had the following limits clause: "Limited to 30 days each accident or occurrence or series of accidents or occurrences arising out of one event and in all." It also contained an excess clause providing "14 days any one occurrence, 21 days in respect of machinery claim".

sum recoverable per occurrence is usually a fixed sum and can give rise to elaborate disputes on aggregation of losses.[789]

Whereas the number of events may not have a significant impact on the sum payable under the policy, it may nonetheless affect the deductible to be paid by the assured per accident. Suppose that the vessel is damaged by perils of the seas in consequence of which on site delays occur; if the vessel subsequently collides with another vessel due to the damage caused by perils of the seas and is repaired for damages caused by both accidents, it may be argued on behalf of the assured that there was only one accident for the purposes of the deductible clause. The insurers would in that case have to pay the difference between the sum of the number of days of off hire resulting from both events and the excess stipulated in the policy. Determining the number of occurrence in loss of hire policies and its effect on policy excesses was acknowledged as being distinct from the determination of the number of occurrences in hull and machinery policies.[790] This view can suggest that albeit the loss of hire is caused by damage to hull or machinery, the fact that three ocurrences are treated as separate insured events under the hull and machinery policy cannot necessarily be a ground for considering them as separate occurrences for the purposes of deductibles payable under a loss of hire policy. By way of example, in *Sealion Shipping v Valiant Insurance*[791]the Court of Appeal approached the issue of determination of the number of occurrences for the purpose of the policy excesses from the point of causation and affirming the first instance decision, ruled that one excess should be payable where one occurrence led to another and the chain of causation was therefore not broken by a *novus actus interveniens*. It is submitted that for only one deductible to be payable under the ABS form, the events must involve both loss of or damage to the vessel or to its components and cause loss of hire; and that they must lead one to another.

6.10. Mitigation of losses by the assured and loss of time

The ABS Form requires the assured to effect, or cause to be effected, all repairs (temporary or permanent) with due diligence and despatch and provides that insurers have the right to require the assured to incur any expense which would reduce insurers' liability under the

[789] This issue was discussed in more detail in respect of hull policies in The Nordic Marine Insurance Plan of 2013, Chapter 16, commentary of the cl.16-7, available at http://www.nordicplan.org/Commentary/Part-Three/Chapter-16/#Clause-16-7

[790] *Sealion Shipping v Valiant Insurance Co (The Toisa Pisces)* [2013] 1 Lloyd's Rep. 108, at para 28.

[791] *Sealion Shipping v Valiant Insurance Co (The Toisa Pisces)* [2013] 1 Lloyd's Rep. 108

insurance provided that such expense is for insurers' account.[792] The duty to effect all repairs with reasonable despatch may at first sight recall the duty of the assured to prosecute the voyage with reasonable despatch in the absence of which insurers are discharged from liability where the delay becomes unreasonable.[793] It would arguably not be possible to imply the s 48 duty to prosecute the voyage with reasonable despatch into the loss of charter hire policies on the ground that s 48 merely applies to voyage policies whereas loss of hire policies are by nature time policies.[794]

The ABS Form does not impose upon the assured a general duty to sue and labour of the sort provided for in s 78 of the MIA 1906 or in standard forms such as Institute Time Clauses Hulls 1983[795] and Institute Cargo Clauses 2009.[796] The only provision under the Form which comes close to a sue and labour clause whereby the assured has to mitigate loss is clause 12 which concerns carrying out of repairs with despatch. Even in the event that the clause is admitted as a sue and labour clause, it is far from being clear as to its scope. s 78(1) of the MIA 1906 recognises the situation where the policy contains a sue and labour clause and provides that the assured is entitled to claim expenses properly incurred to mitigate the loss from the insurer. As it was discussed above in the context of marine delay in start-up policies, the remedy available to the insurer in the event where the assured fails to sue and labour is not entirely clear.[797] Where sue and labour is deemed to be a matter of causation,[798] the assured would not be entitled to claim sue and labour expenses incurred while mitigating the loss if the loss was caused by its own conduct. Applying this reasoning to a loss of hire situation, an assured who causes loss of time following the occurrence of a casualty by not

[792] Cl 12
[793] MIA 1906 s 48. This issue is covered under Chapter VIII.
[794] Cl 10 of the ABS Form provides that the policy is automatically cancelled if the vessel insured under the Form is sold or is unchartered. The Form is therefore charter contingent. However, even a policy is made on "chartered or unchartered" terms, the assured's loss of earning must be caused by the loss of or damage to the vessel and not by the fact that the vessel would have been out of the market anyway, *Cepheus Shipping Corporation v Guardian Royal Exchange (The Capricorn)* [1995] 1 Lloyd's Reports 622. In this case a vessel sustained a generator damage and was laid up in the close season, it was decided that the loss was caused because of the close season and not because of the damage to the vessel and consequent repairs.
[795] Cl 13
[796] Cl 16
[797] S 78(4) provides that there is a duty to sue and labour however does not mention the consequence of not complying with the duty.
[798] In *State of Netherlands* v. *Youell* [1998] 1 Lloyd's Rep 236, Phillips LJ commented that sue and labour was a separate obligation and that therefore insurers could not raise a defence on this ground under the policy. The matter was approached as one of causation whereby the assured would not be able to be covered for a loss which was caused by its own failure to sue and labour, see *Currie & Co* v. *Bombay Native Insurance Co* (1869) LR 3 PC 72; *Ngo Chew Hong Edible Oil Pte* v. *Knight* [1988] 1 SLR 414; *Fudge* v. *Charter Marine Insurance Co Ltd*, 1991, unreported, Newfoundland Supreme Court as cited in Merkin, Marine Insurance Legislation, 4th. ed., pp 107-108.

acting with reasonable despatch in notifying the hull insurers of the casualty (and consequently delaying tenders) could be taken to have caused his own loss. The loss of hire arising from his conduct would accordingly not be recoverable on the ground of failure to sue and labour.

Delay in effecting repairs can be caused by the assured's conduct where he selects a repair yard where repairs can be carried out at a lower cost and which is at a longer distance than a repair yard where repairs can be carried out at a higher cost yet which is at a shorter distance to the casualty. It is noteworthy however that in practice, repair yards are not always selected by the assured, but by hull insurers.[799] Moreover, it is fairly usual for insurers to receive tenders prior to deciding at which yard the repairs shall be carried out,[800] meaning that further delays may be incurred by assureds which may result in loss of hire under their loss of hire policies. However a term in the hull policy requiring the assured (who is also an assured under a loss of hire policy) to comply with the insurer's decision as to the choice of repair yard would not be binding on the loss of hire insurer unless the loss of hire policy makes express provision in this respect. The assured may therefore run the risk of incurring delays beyond his control while awaiting his hull insurer to decide on the tender, in consequence of which he may breach his duty to sue and labour under his loss of hire policy. The dilemma between a hull insurer who would prefer to keep the repair costs at a minimum and a loss of hire insurer who would require the assured to effect the repairs as quickly as possible has not yet been solved by an express provision under the ABS Form or the Institute Time Clauses-Hulls 1983.[801] It can be submitted however that where the choice of repair yard is not within the control of the assured, the loss of hire insurers may not reject the claim on the ground that the assured failed to sue and labour or that loss of hire incurred during the choice of repair yard was caused by the failure of the assured to sue and labour.

The last point requiring elaboration is the connection between s 78(3) of the MIA stating that expenses incurred in minimising a loss not covered by a policy cannot be claimed as sue and

[799] See for e.g. Institute Time Clauses- Hulls 1983, cl.10.2

[800] e.g. Institute Time Clauses- Hulls 1983, cl.10.3. Insurers may provide an allowance is made at the rate of 30% per annum on the insured value of the vessel for the time lost between the despatch of the invitations to tender and the acceptance of tender. However this amount covers merely fuel and stores and wages and maintenance of the Master Officers and Crew, including amounts allowed in general average, and for any amounts recovered from third parties in respect of damages for detention and/or loss of profit and/or running expenses, cl.10.3. This allowance does not therefore cover loss of hire of the assured incurred during the negotiations for the tender.

[801] This point was however resolved under The Nordic Marine Insurance Plan of 2013, Chapter 16, commentary of the cl.16-9 (choice of repair yard).

labour expenses and the exclusion of “expenses arising from delay” under the ABS Form. The exclusion would surely not encompass loss of hire incurred in minimising loss of time generally given that it cannot be considered as a claim arising from delay. As submitted previously, loss of hire by nature is a loss or expense directly connected to and measured by loss of time and cannot be excluded by a delay clause.

Conclusion

Against the general view that delay losses are excluded from the scope of hull and machinery policies on the ground that they are consequential losses, the first part of this chapter sought to bring out circumstances where delay can be part of the physical loss of or damage to the vessel and the limits to the suggestion that expenses incurred during repairs were within the scope of application of the delay exclusion. In addition, the chapter discussed some of the expenses arising during ordinary and general average repairs and assessed whether they could all be excluded as arising from delay. The chapter also doubted the common law background of the approach to not allowing expenses arising at the port of refuge and argued in favour of their recoverability in general average.

Moreover, it was argued in the chapter that the ABS Form as the standard form for loss of charter hire policy does not entirely respond to all types of loss of hire that can be incurred by assureds. The fact that the policy is charter contingent and provides cover merely where loss of hire occurs in the existence of a charter, and that the Form is confined to loss of hire occasioned by loss of or damage to vessel leaves out a good number of claims resting upon loss of time occasioned by several causes such as loss of time caused by crew member’s health, by port congestions and strikes, by the removal of damaged cargo etc. The ABS Form therefore provides a very limited scope of cover and should be revised.

In addition to the foregoing, the chapter traced back the common law authorities on recoverability of loss of hire arising from general average repairs some of which were decided on the basis of hull and machinery policies. Their applicability to the cover provided under loss of hire policies was doubted along with their approach to the directness of loss of hire to the general average act. As for the expenses arising during repairs, it was determined that albeit the York-Antwerp Rules contained clear provisions the common law authorities were fairly controversial as to their recoverability.

CHAPTER VII

IMPLIED CONDITION AS TO THE COMMENCEMENT OF RISK

Introduction

S 42 of the MIA 1906 states that in voyage policies insured "at and from" or "from" a particular place, there is an implied condition that the adventure shall be commenced within reasonable time, failure of which gives the insurer the right to avoid the contract. The words "at and from" or "from a particular place" do not import a warranty or a representation that the vessel is already at the place when the policy is made. [802] The fact that s 42 applies merely to voyage policies rests upon the idea that delay in the nature of abandoning the voyage or changing the risk undertaken with respect to the voyage initially insured should no longer be binding upon the insurer. Albeit there are a fair number of cases decided prior to the enactment of the MIA, the section has not been much litigated nor has it been the subject of commentaries following its enactment.

There are mainly three aspects of s 42 which shall be analysed in this work: implied condition as to the commencement of risk in the period of pre-attachment of risk, pre-contractual non-disclosure of a circumstance which may result in delay at the commencement of the voyage and insurers' discharge from liability for delay in the post-attachment of risk period before the commencement of voyage. These aspects and the circumstances which negate the implied condition shall be considered in the following parts of this chapter along with an analysis of the proposals of the English Law Commission as to the reform of the section. Reference shall equally be made to the draft clauses proposed by the Commission in relation to the fair presentation of risk under insurance policies, [803] and examples shall be provided on the relevance of standard market terms to s 42 where necessary.

This chapter generally aims at assessing whether and to what extent the MIA changed the common law so far as s 42 is concerned, at identifying the possible motives behind such a change and at determining whether the wording of the section still allows the implication of certain common law concepts into the section. The latter assessment shall rest upon s 91(2)

[802] s.42(1), the part of this subsection was a codification of *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451, 453.
[803] Which shall also affect misrepresentation and non-disclosure provisions of the MIA.

which provides that the rules of the common law including the law merchant shall continue to apply to marine insurance contracts save in so far as they are inconsistent with the express provisions of the MIA.

7.1. Delay before the risk attaches

In a voyage policy on ship "at and from" a particular place, if the vessel is not at the place when the insurance contract is made, the risk attaches as soon as she arrives there in good safety.[804] What is required for the attachment of risk is not merely confined to the vessel arriving at the port of departure,[805] the vessel should arrive at the port *and* without unreasonable delay.[806] In these cases a delay in the commencement of the voyage could prevent the risk from attaching, or at the very least the attachment would be delayed if the length of delay does not amount to abandonment of the voyage.

There were also several US decisions which held that even if a vessel arrived at the departure port but stayed there without reference to any particular voyage, the policy attaches only from the time that preparations begin with reference to the voyage insured.[807] Similarly it was held that the risk did not attach where an entirely different voyage was intended although the ship was where the risk was to begin.[808] This would mean the mere arrival at the port without undue delay would not be sufficient for the risk to attach, there would also be the requirement of the vessel "being or getting ready for the voyage insured".[809] The delay in commencing the "insured voyage" would consequently result in non-attachment of the risk.[810]

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[804] Schedule I to the MIA 1906, Rule 3(b).

[805] As per Schedule I to the MIA 1906, Rule 2 and 3.

[806] *Colinvaux and Merkin's Insurance Contract Law*, looseleaf, September 2012, Sweet & Maxwell, A-0213. Please see *Seamans v Loring*, (1816) 1 Mason, 128 (Circuit Court, D. Massachusetts) where it was stated that given the delay was not justified, there was a complete non-inception of the voyage insured. Similarly in the leading pre-MIA case *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451 where the policy was on freight, the ship finally arrived at the departure port however with some delay. There was no representation as to the time of arrival of the ship and it was held that the risk had not attached. Contrast *Martin v Fishing Ins. Co.*, (1838) 20 Pick. 389 (Supreme Judicial Court of Massachusetts) where the policy was "at and from …, on the 16th day of July" the court held that the policy attached although there was no evidence that the vessel was at the named port on the specified day.

[807] *Synder v Atlantic Mutual Ins. Co.*, (1884) 95 N.Y. 196, the policy was "at and from". For other cases which held that the risk attaches where the ship arrives at the departure port *and* starts preparing for the voyage insured, please see *Lambert v Liddard*, 1 Marsh. R. 149, (1814) 5 Taunt. 480; *Kemble v Bowne*, (1803) 1 Caines, 75 (Supreme Court of New York).

[808] *Sellar v M'Vicar* (1804) 1 Bosanquet and Puller 23.

[809] The concept of "voyage insured" has to do with the nature and circumstances of the risk undertaken by the insurer and is therefore crucial for the purposes of "alteration of risk" which shall be dealt with below.

[810] In contrast, please see *Grant v King* (1802) 4 Esp. 175 where the vessel was not totally ready for the voyage, however this did not prevent the risk from attaching.

It may be submitted that this approach would also be in line with the concept of "risk" undertaken by the insurer under a voyage policy subject to MIA, which is a marine adventure involved in a particular voyage of a particular vessel. [811] According to each policy, the particular voyage may have to commence within a given period or on a specific day, in the absence of which and prior to the enactment of the MIA, the common law implied in the policies that the adventure should be commenced in reasonable time *for that particular voyage*. Whether in policies "at and from" the risk attaches when the ship arrives without unreasonable delay *and* terminates the preparations for the insured voyage is important for the purposes of s 42. The section's title is "implied condition as to commencement of risk", and not "as to commencement of voyage" and the section arguably relates only to the period until the attachment of risk.[812] For the purposes of this work, it will be assumed that the risk attaches where the vessel arrives at the port of departure as per MIA Schedule I rule 3 and the period as to preparations for the insured voyage will be considered as pertaining to the period of post-attachment of risk.

The fact that the risk has attached in an "at and from" policy does not necessarily mean that voyage has started as from that date and that s 48 on delay in voyage may start applying. [813] In particular in terms of goods, as transit contemplates their movement from one place to another, [814] s 48 on delay in voyage may start applying as from the moment where the vessel leaves the port of departure with the goods, or at the very least when the goods are laden on board for the insured adventure and are ready for the transit which is going to start immediately. [815]

It is important to note that delay in arriving at the loading port and delay at the loading port should be considered separately in terms of "at and from" policies. [816] The situation can briefly be described as follows:

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[811] Bennett, H, Good luck with Warranties, 594. By virtue of s.3(2)(a), there is a marine adventure where the ship, goods or other moveables are exposed to maritime perils, i.e. to "perils consequent on, or incidental to, the navigation of the sea" (s.3).

[812] This is also supported by the fact that Chalmers, in his book *A Digest of the Law relating to Marine Insurance*, 1901 referred merely to the case *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451, 453 which was a case on delay at the period of pre-attachment of risk and was with respect to a delay in the voyage to the departure port after the contract was made.

[813] The editors of *Arnould* suggest that s 48 applies after the risk has attached, 17th edition, 13-16.

[814] In the words of Roskill J in *Sadler Brothers Company v Meredith* [1963] 2 Lloyd's Law Reporter 293, at 307, transit "is being in motion".

[815] The connection of post-attachment delay and s 48 will be dealt with below.

[816] They were so considered in *Mount v Larkins* (1831) 8 Bing. 108, by Tindal C.J.

- The voyage to the departure port shall be performed in reasonable time after the contract is made and without unnecessary delay before the risk attaches,
- The "insured voyage" which is usually due to commence after attachment of risk shall be commenced within reasonable time.

In the former situation, the question is whether the risk has or has not attached (i.e. whether delay is or is not unreasonable). In the latter situation, where a delay occurs after the ship's arrival to the departure port, given that the risk will have attached the sole question would be when the delay becomes unreasonable so that the insurers are discharged from liability. Therefore it may be argued that post-attachment delays which occur prior to the commencement of transit (e.g. in case the ship prepares for the voyage insured) should be assessed according to the pre-MIA case law, and not according to the current s 42, the reason being that the section arguably covers only pre-attachment situations.

In a voyage policy "from" a particular place, the risk does not attach unless the ship starts on the voyage insured[817] in a fit state and totally ready for the voyage insured. [818] This would denote that after the vessel sails from the departure port, the application of s 48 would start, and any delay in commencing the voyage would be subject to s 42.

7.1.1. Implied condition precedent to the attachment of risk

The remedy for pre-attachment delay was discussed in the leading case *De Wolf v Archangel*[819] where the court held that in the absence of a representation as to the time of arrival at the departure port, it was an implied understanding that the vessel shall be there within such time that the risk shall not be materially varied.[820] Otherwise the risk does not attach. According to the authority, the subject-matter should arrive at the stated place and without unreasonable delay for the risk to attach. The case was the sole authority referred to by Chalmers for the interpretation of s 42(1), it is however a curiosity why the subsection states "avoidance" remedy and not non-attachment of risk as established by *De Wolf*. It may either be that the avoidance remedy invokes upon the situations where the assured fails to

[817] Schedule I to the MIA 1906, Rule 2.
[818] *Pittegrew v Pringle* (1832) 3 B. & Ad. 514
[819] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451 where delay in arriving to the loading port altered the risk materially.
[820] Representations made as to the time of arrival at the departure port or of sailing will be dealt with below.

disclose a material circumstance which could amount to delay[821] and/or that it is an expression which may no longer be interpreted in the same way given the relevant authorities since the enactment of the MIA.

As to the latter possibility, it is submitted that the decisions of the Court of Appeal[822] and the House of Lords in *The Good Luck*[823] set light to the controversy. The Court of Appeal in their judgment had held that a breach of warranty could give the insurer a "right to avoid" based on, *inter alia*, section 42 and that to read s 33(3) as conferring a right to avoid was not inconsistent with the recognition of waiver in s 34(2), since in s 42 both conditions were found. This analysis was rejected by the House of Lords leaving no room for doubt. According to the Court, the waiver in s 42 was a waiver of the implied condition, and not waiver of the right to avoid as was considered by the Court of Appeal. The waiver prevented any breach or any right to avoid arising at all whereas waiver in s 34(3) was a waiver of a breach of warranty after it occurs. This approach, although *obiter*, may be taken to mean that the implied condition in s 42 may not be equated to warranty.

In other cases the remedy was not made as explicit as it was in *De Wolf*. [824] In *Hull v Cooper*[825]where the main issue was whether there was a change of risk, the court did not refer specifically to discharge or non-attachment of risk[826] however it was suggested that the affirmative decision in the case was that a delay not varying the risk did not discharge the insurer. [827] This reasoning was applied in *Mount v Larkins*[828]where the difference as to the delay before and after the risk attached was made clear[829] and it was held that the insurers

[821] This issue will be discussed below.
[822] *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1990] 1 Q.B. 818.
[823] In *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1991] 1 AC 233
[824] In *Bah Lias Tobacco & Rubber Estates, Ltd v Volga Insurance Company Ltd* (1920) 3 Lloyd's List Law Reports 155, which involved a policy on cargo, a delay in the shipment of cargo due to war was waived by the insurers when the assured paid extra premium for that period. Delay in the commencement of the risk was qualified as "breach of condition", however no remedy was pointed out by the court.
[825] *Hull v Cooper* (1811) 14 East. 479
[826] The case involved the non-disclosure of the initial position of the vessel when the policy was made and the delay resulting therefrom in the arrival at the departure port.
[827] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451, 453.
[828] *Mount v Larkins* (1831) 8 Bing. 108
[829] Tindall C.J asked the question of what would be the difference between a delay in the outward voyage and a delay in the departure port and enunciated that the insurer had a right to calculate upon the outward voyage in order that the risk may attach, "as he has that the voyage insured shall be commenced within a reasonable time, after the risk has attached". This statement may be interpreted as identifying the two periods of delay at the commencement of the voyage, i.e. before and after the attachment of risk.

were discharged on the ground that the delay in arriving at the port of departure alters the risk undertaken by the insurer.[830] It is noteworthy that in this case the vessel had met bad weather and was driven back to two ports, in one of which the master had been building a house. In that respect, this could be considered as a delay in the nature of deviation[831] or at the very least an unjustifiable change of risk and discharge may therefore be a plausible. Nevertheless this should not be considered as authority for the suggestion that pre-attachment delay discharges insurers, the case is distinguishable from *De Wolf*[832] on the ground that delay in the former was caused by deviation.

7.1.2. Pre-contractual non-disclosure of a circumstance which may result in delay

The remedy available to insurers where the assured does not commence the voyage in reasonable time as per s 42 is avoidance of the policy. This is an option, i.e. the insurers may or may not elect to do so. In some texts including texts as to the draft Bill of MIA 1906, [833] the avoidance remedy was based on *De Wolf v Archangel Maritime*. [834]

Where a loss occurs during the preliminary voyage between the date the policy is made and the attachment of risk, the insurer would not be liable given that the risk is not yet attached. Determining avoidance of the policy *ab initio* as remedy for that limb of the voyage does not add much to the situation. An insurer would more likely not to elect to avoid a policy where he is obviously not liable for a loss occurring before the risk has attached. Identifying a remedy for delay at the commencement of the voyage could mostly be relevant for the part of the voyage after the risk has attached until the vessel sails from the loading port. [835] Besides, the insurers would have to return the premiums earned until the moment the delay became

[830] At 120, "Upon this special verdict it has been argued before us on the part of Defendant, that the unreasonable and unjustifiable delay on the part of the captain in completing the outward voyage on which he was then engaged, and commencing the homeward voyage on which the risk was intended to attach, discharged the underwriters from this policy; and we are of opinion that such unreasonable and unjustifiable delay on the part of the insured, in commencing the voyage insured against, is in the nature of a deviation, and does amount to such an alteration of the risk insured against, as to discharge the liability of the underwriters upon this policy"

[831] There is deviation where the route on the voyage is changed, i.e. after the voyage has commenced. Therefore being driven back to ports while sailing for the departure port may arguably not be considered in the nature of deviation.

[832] A similarity with *Mount v Larkins* can be drawn in *Driscol v Passmore* (1798) 1 B. & P. 202 although in that case, unlike *Mount v Larkins*, the course of the ship had to be changed by necessity and the insurers were therefore not discharged.

[833] Chalmers and Owen, Digest of the Law Relating to Marine Insurance, 1901, 52

[834] (1874) L.R. 9 Q.B. 451

[835] Support for this view can be found in *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451

unreasonable on the ground that there would be total failure of consideration[836]and this would not be the most favourable option for insurers who are not yet even liable for the loss.

In light of the above, it is curious on which basis avoidance of contract remedy was inserted in the MIA and a tentative answer may be based, but may not be confined to, on the following points.

i. Cases on delay and concealment

Under the MIA, avoidance is a concept relevant to utmost good faith.[837] Albeit the relevance of breach of utmost faith to delay at the commencement of the voyage insured is not always very obvious, it may however be inferred from several pre-MIA cases. It is clear from the wording of s 42 that the vessel does not need to be at the loading port at the time when the policy is made, yet the assured needs to make sure that it arrives there within reasonable time. Therefore, if at the time of the policy, the vessel is at a place other than the loading port, and if the assured, knowing that the vessel would not be at the loading port within a reasonable time conceals this fact from the insurer and does not inform the insurer as to the location of the vessel at the time, this fact may amount to breach of utmost good faith as it can be accepted as non-disclosure of a material fact.[838]

This issue was discussed in *Hull v Cooper*[839] which was referred to by *De Wolf* as authority that the assured is not bound to communicate to the insurers the actual location of the ship when the contract is made. [840] *Hull v Cooper* was with respect to a cargo policy whereby the ship was insured at and from a certain place yet was not there at the time of the policy, and arrived there after an interval. The possibility that the ship could be delayed for the departure port was not communicated to the insurers who did not call for information on the subject. The question was whether the intervening delay materially varied the risk initially undertaken by the insurers. Arguably, *De Wolf*'s reference to the case is doubtful, given firstly that the ratio of the case was with respect to whether the risk was varied, and secondly that it was a

[836] As per MIA 1906 s 84

[837] s.17 states that if the utmost good faith be not observed by either the assured or the insurer, the other party may avoid the contract. Likewise, s.18 provides that the insurer may avoid the contract where the assured fails to disclose a material circumstance known to him before the contract is concluded.

[838] Materiality is defined in s 18(2) as any circumstance which would influence the judgment of an insurer in fixing the premium or in whether he would accept the risk in the same terms as he did.

[839] *Hull v Cooper* (1811) 14 East. 479.

[840] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451, 456.

mere example of the confirmation of s 42(1), in that the ship does not have to be in the place where the risk is going to attach at the time of the policy.[841] This would not necessarily mean that the assured does not have to disclose the actual location of the ship, if the actual location may cause a delay in the arrival of the ship at the loading port and accordingly in the commencement of risk. Another point worth mentioning lies in that although the assured under a cargo policy may be aware of the exact place of the vessel at the time of the policy, may possibly not know when exactly the vessel would depart therefrom for the port where the risk would attach. [842]

Even in the event of information not communicated to the insurers, it is not free from doubt that the pre-contractual avoidance remedy could apply in all circumstances.[843] This may be supported by the fact that as per s 42 (2) the implied condition may be negatived if delay was caused by circumstances known to the insurer "before the contract was concluded". [844]

ii. Representations as to the time of sailing

Representations made by the assured as to the time of sailing may in particular be important in respect of "from" policies as in this type of policies the risk usually attaches when the vessel sails from the departure port. Representations may be made by the assured before entering the contract as to some estimation regarding the date the ship would sail, yet this would not necessarily mean the assured is bound to disclose the exact date. This is on the ground that due to modern systems of communication this may be a fact already known to the insurer.[845]

[841] See the speech of Lord Ellenborough C.J, at 479.
[842] In that respect, that information may not be a material circumstance which is deemed to be known by the assured in the ordinary course of business, in terms of s.18(1).
[843] Tindal, C.J in both *Vallance v Dewar* (1808) 1 Camp 503 and *Ougier v Jennings* (1808) 1 Camp 505 (both cited in *Mount v Larkins*), admitted that a delay at the commencement of the risk would discharge the policy if an intermediate voyage was not communicated to the insurers, unless such voyage is made usually and according to the normal course of trade in which the ship was then engaged. Similarly in *Driscol v Passmore* (1798) 1 B. & P. 202 the representation made by the assured was that the insured voyage would be performed following other voyages which was in fact true but due to subsequent events the vessel was prevented from so doing. It was held that the representation being true, the subsequent events not happening through misconduct did not discharge the underwriters. Accordingly, it is not very clear in relation to information not communicated to insurers as to the location of ship likely to cause delay at the commencement of the voyage, whether the common law remedy of discharge or the MIA remedy of avoidance shall apply.
[844] This echoes MIA s 18 (1) and s 18 (3)(b), which, read in conjunction, may denote that the assured does not have to disclose circumstances known to the insurer which caused delay.
[845] S.18(3)(b).

The early cases contain instances where the assured was not bound to disclose the time of sailing. By way of example in *Beckwith v Sydebotham*[846] the communication between a master and owner as to the fact that the vessel, before her homeward-bound voyage to the departure port had to be repaired and that it would take her longer to take in her cargo and to arrive to departure port, did not have to be disclosed to insurers. Imposing a duty to disclose the time of sailing on the assured would entail that each time repairs are needed at the commencement of the voyage to make the ship seaworthy, this fact would also have to be disclosed. Accordingly the view that the insurers should ask the assured as to the date of sailing or should insert a sailing warranty into the policy rather than the assured having to disclose it was favoured.

If the insurance policy contains a warranty as to the date or the period of sailing of the vessel from the departure port and the vessel is delayed in the voyage thereto whereby the assured breaches the warranty, the insurers would be discharged as from the date of the breach. The question would accordingly be confined to whether the insurers can also avoid the policy as per s 42 where delay in reaching the port of departure becomes unreasonable. The insurers would presumably not avoid the policy failing which they would have to return the premiums paid, given also that they cannot claim back a payment made for a previous claim.[847]

7.1.3. Delay within and beyond the control of the assured

Delay within and beyond the control of the assured may have impacts both on the duty of good faith which shall be preserved by the assured in the pre-contractual phase; and on the remedies available to insurers during the period of pre-attachment of risk.

As to the former, the materiality of information which relates to a delay at the commencement of the insured voyage could depend upon whether the assured has control over the circumstances resulting in delay.[848] The assured shall not be required to investigate matters outside his knowledge and the policy not be avoided for his failing to do so due to the fact that matters such as the likelihood of arrival of the vessel to the departure port by a certain date could be readily inquired by insurers. It would follow that a circumstance beyond

[846] *Beckwith v Sydebotham* (1807) 1 Campb. 118, where the policy was on ship, freight and cargo.
[847] This view rests upon the assumption that the risk has not attached and therefore no claim is payable under the policy.
[848] According to s 18(1), the assured is deemed to know every circumstance, which, in the ordinary course of business, ought to be known by him.

the control of the assured could arguably excuse the breach of duty of good faith or that representations which turn out to be inaccurate would not necessarily have an impact on the policy where they are made bona fide upon probable expectation, by the assured who has no control over the delay.

In *Bowden v Vaughan*[849]a representation was made by the brokers of a cargo owner who informed the brokers that the vessel carrying his goods would sail "in a few days", although an attack was very much expected that could cause delay. The vessel did not sail until a month after the policy was made and was then stopped during sea transit by the enemy. It was held that the representation of the owner of goods did not conclude the insurer and the owner of goods did not have any control over the time of the ship's sailing. It is noteworthy that such a representation could be held to affect the policy where the cargo owner had means of information and wilfully tried to avoid them, in which case a case for fraudulent misrepresentation[850] could be made. [851] This would give the insurers the right to avoid the policy *ab initio* if the misrepresentation is material. [852]

Where however there is no representation as to where the ship was when the policy was made, it is not material whether the delay which varies the risk is within or beyond the control of the assured, "in either case the risk is equally varied". [853] This may be the reasoning behind the omission of the concept of "justifiable delay" in s 42, [854] given also that the drafter's sole reference in terms of s 42 before the MIA was enacted was to *De Wolf v Archangel.* [855] Two points however need to be made with respect to this suggestion. Firstly, *De Wolf* case was decided on the facts which were relevant to pre-attachment delay only, therefore the judgment may not be taken as authority for necessary delays occurring in the period of post-attachment of risk. [856] Secondly, the decision could be sensible only with respect to losses arising until the attachment of risk, whether the requirement of commencing the voyage in

[849] (1809) 10 East, 416.
[850] Or at the very least, representation based on reckless indifference.
[851] See *Biays v Union Ins Co*., (1806) 1 Wash. C.C. 506 (Circuit Court, D. Pennsylvania).
[852] Although the fraudulent misrepresentation is not material, the insurers may elect to avoid the policy, *Sibbald v Hill* (1814) 2 Dow 263; *The Bedouin* [1894] P 1.
[853] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451, 456.
[854] Hodges, 147. Hodges argues that the statements of Tindall J in *Mount v Larkins* as to the fact that necessary delays excused the assured for their breach were rejected in *De Wolf v Archangel.*
[855] Chalmers and Owen, *Digest of the Law Relating to Marine Insurance*, 1901, 52
[856] Blackburn J. submitted that "Where the alteration in the course of the voyage after the risk has attached is justified by necessity it does not vary the risk", at 456. Necessary delays arising in the post-attachment period will be considered elsewhere in this work.

reasonable time is or is not breached by a circumstance beyond the control of the assured and resulting in delay, the losses would not be recoverable by the assured. Not giving credibility to *De Wolf* case in this respect could suggest that the risk would attach where delay at the commencement of the insured voyage occurs due to circumstances beyond the assured's control.

i. Draft Insurance Contracts Bill 2014 and representations as to circumstances potentially to cause delay at the commencement of the voyage

The English and Scottish Law Commissions published draft clauses on the duty of fair presentation of the assured in business insurance contracts,[857] which, if adopted, shall have the effect of amending the relevant sections on the assured's misrepresentation and duty of disclosure under the MIA 1906.[858] The draft clauses require the proposer to disclose every material circumstance which the proposer knows or ought to know, or to give the insurer sufficient information to put a prudent insurer on notice that it needs to make further inquiries (as to circumstances which may prove material).[859] The latter could arguably require a proposer under a cargo policy to disclose the location of the ship or its possible arrival date at the port of departure to the best knowledge of the proposer. A proposer will be deemed to comply with the duty of fair presentation where an expectation or belief is expressed in good faith.[860] It shall be seen how these draft clauses, if they become law, shall affect the representations as to the time of sailing and to the location of the vessel.

ii. Avoidance of delay clause in ICC 2009 and s 42

Avoidance of delay in cl.18 of the Institute Cargo Clauses 2009 reads that it is a condition of the insurance contract that the assured should act with reasonable dispatch in the circumstances within their control. Albeit there is no authority as to whether the clause may also have a connection to the scope of s 42 in that it is a general duty to act with reasonable dispatch commencing as from the contract of insurance is concluded, one of the questions that may arise would be whether the insurers could have a remedy under this clause as well as the remedy of avoidance as per s 42 where there is delay at the commencement of the voyage. As it is discussed in Chapter VIII of this work in relation to s 48, avoidance of delay clause

[857] Law Commission and Scottish Law Commission: Reforming Insurance Contract Law: Initial Draft Clauses, January 2014 and DRAFT/Insurance Contracts Bill published on 16 January 2014
[858] S 8(1)
[859] S 4(1)(a)
[860] S 4(1)(c)

was usually considered by judicial authorities as a warranty.[861] Should it be argued that the clause extends to situations where the delay at the commencement of the voyage is within the control of the assured[862] such delay could discharge the insurers.

7.2. Delay after the risk attaches, before the insured voyage commences

The previous part of this chapter focused on delay in the attachment of risk whereby it would not be incorrect to say that where there is no delay in arriving at the port of departure or where the delay is not so unreasonable, the risk would attach where the vessel arrives at the port. The vessel may however be delayed after arrival at the departure port prior to the sea transit, and the difference between pre and post-attachment delay have been touched upon in pre-MIA cases. [863] A delay occurring at this leg of the voyage would have a particular impact only on policies "at and from" and not "from", given that in policies "from" the risk does not attach until the ship starts on the voyage insured, [864] i.e. there may either be pre-attachment delay (covered by s 42) or delay in voyage (covered by s 48). Nevertheless policies "at and from" would present many caveats.

7.2.1. Delay at the commencement of the insured voyage

To determine the scope of s 42 is necessary in order to differentiate it from s 48 delay, i.e. delay in voyage. The scope of s 48 extend to the period after the *insured voyage* commences, [865] this could connote two things: Insured voyage is not necessarily equivalent to sea transit, and the fact that the risk has attached does not necessarily initiate the insured voyage at the very same moment. The situation may be more complicated in circumstances where the risk attaches, however the insured voyage may not be deemed to have started due to the fact that either the vessel is preparing for another voyage than the voyage insured, or that the vessel prepares for the insured voyage but the preparations delay the vessel. For the latter, it can be argued that the risk would not attach unless the preparations are completed,[866] however this would presumably be the case where delay is reasonable (and necessary) and not necessarily the case where it is unreasonable. The question would arise accordingly as to

[861] *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd* [1970] 2 NSWR 77; *Ostra Insurance Public Company Ltd v Kintex Shareholding Company (M/V Szechuen)* [2004] EWHC 357 (Comm)
[862] The clause applies in circumstances within the control of the assured.
[863] *Mount v Larkins* (1831) 8 Bing. 123.
[864] Schedule 1 to the MIA, Rule 4.
[865] See s 48 "... the *adventure insured* must be prosecuted" (emphasis added).
[866] This was discussed in *Smith v Surridge* (1801) 4 Esp. 25,where the repairs were necessary and did not discharge the insurers. Lord Kenyon decided that the risk attached during the repairs.

whether s 42 would also cover that situation. The current wording of the section as to "commencement of risk" and the reference of Chalmers to *De Wolf* raises doubts that the current s 42 may not be covering this situation. So that it can be covered, the voyage or adventure mentioned in both s 42 and s 48 must be taken to be *sea voyage*, rather than *insured voyage* according to which delay at the commencement of the *voyage* could also include a delay at the departure port, starting as from the date the vessel arrives to the port until the vessel sails. [867]

Albeit according to the wording of the sections 42 and 48, s 42 applies to pre-attachment situations whereas s 48 applies as from the voyage insured commences, most of the pre-MIA cases which were the authorities based on which the section 48 was drafted, "delay in voyage" referred to situations where delay occurred after the vessel sailed from the departure port, [868] i.e. to sea voyage. Likewise, in most of the pre-MIA cases, delay in the commencement of voyage for ships was the period of time until the sailing of the vessel from the departure port, [869] therefore the calculation of delay started as from the date of the policy until the date of the ship's sailing. [870] One of the questions that can be raised accordingly is whether delay after the risk attaches according to the MIA and to *De Wolf v Archangel* and before the ship sails from the port of departure, on the assumption that the situation is not governed by neither s 42 nor s 48, will be governed according to the common law authorities.

According to *Mount v Larkins,* [871] the effect of delay before and after the risk attaches would be the same for the insurer, i.e. discharge on the ground that he has another risk substituted instead of the one which he has insured against. It would follow that whereas a delay until the

[867] In *Mount v Larkins* (1831) 8 Bing. 123, Tindall C.J asked the question of what would be the difference between a delay in the outward voyage and a delay in the departure port and enunciated that the insurer had a right to calculate upon the outward voyage in order that the risk may attach, "as he has that the voyage insured shall be commenced within a reasonable time, after the risk has attached". This statement may also be interpreted as identifying the two sections of delay at the commencement of the voyage, i.e. before and after the attachment of risk.

[868] This suggestion is illustrated in *Williams v Shee* (1813) 3 Camp. 469; *Schroeder v Thompson* (1817) 7 Taunt 462; *Company of African Merchants v British and Foreign Marine Insurance Co.* (1873) L.R. 8 Ex. 154; *Hamilton v Sheddon* (1837) 3 Meeson & Welsby 49; *Phillips v Irving* (1844) 7 Manning & Granger 325.

[869] In *Palmer v Marshall* (1832) 8 Bing 317, where the policy was "at and from", by "commencement of the voyage", the Court meant sailing of the vessel from the departure port. See also *Hull v Cooper* (1811) 14 East. 475; *Grant v King* (1802) 4 Esp. 175; *Chitty v Selwyn and Martyn* (1742) 2 ATK. 358. For the view that "voyage" usually means the sailing from one port to another with all practicable, safe and convenient expedition, please see Phillips, *Treatise on the Law of Insurance*, vol. 1, 563. This work of Phillips was also cited in *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451.

[870] As in *Palmer v Marshall* (1832) 8 Bing 317

[871] (1831) 8 Bing. 123

risk attaches is a condition precedent to the attachment of cover, a delay following the attachment of risk until the insured voyage commences and a delay in voyage both relate to the continuation of cover and their remedy could arguably be the same, i.e. discharge. This issue shall be discussed in more detail in this chapter.

i. ICC 2009 and s 42

The Institute Cargo Clauses 2009 do not contain an express clause as to delay at the commencement of the voyage. Although the application of the s 42 may seem obsolete in light of the modern market terms on cargo, there is room to argue that it may be implied in so far as it is applicable. [872] One of the questions that may accordingly arise is whether s 42 can be implied into ICC 2009, and if affirmative, whether it would apply – unless ICC unambiguously replaces the relevant section of the MIA- merely before the sea voyage starts, or whether it would also apply before the land element of the voyage starts.[873] As to the former, although the ICC 2009 comprises land elements and the adventure to be prosecuted may not be confined to "marine adventure", any adventure analogous to a marine adventure is covered by a policy in the form of a marine policy. The provisions of the MIA, *in so far as applicable*, will therefore apply.[874] This may favour the view that the assured should act with reasonable dispatch to start the voyage without unreasonable delay.

As to the latter, i.e. whether s 42 would apply before the land element of the voyage starts, it shall firstly be identified whether the application of s 42 is confined to sea voyages or whether it can also comprise the land element of a voyage. There is no direct authority on the very issue, yet there is authority regarding the application of s 48 to policies containing warehouse-to-warehouse or transit clause. [875] In order to draw an analogy between the two

[872] The application of s 48 in the context of modern clauses will be considered elsewhere in this work.
[873] Under ICC 2009, the risk attaches where the goods are first moved in the warehouse and therefore ICC covers certain risks occurring during land transit as well as sea transit.
[874] MIA s.2(2), emphasis added.
[875] In *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] VR 129 which was on the interpretation on s 54 of the Australian Marine Insurance Act 1909 which is identical to s 48 of the MIA 1906, was delivered by the Australian Supreme Court of Victoria Appeal Division. It was stated that the land transit element of a policy was covered by the Marine Insurance Act including the provisions which relate to "voyages" (of which both s 42 and 48 are parts) on the basis of the textbook of Chalmers, M., *Marine Insurance Act 1906*, 7th ed,. pp.4-5 and of *Leon v Casey* [1932] 2 KB 576, 585-7 per Scrutton LJ and 590 per Greer LJ. It is noteworthy that in *Verna*, the duration of the risk was from "warehouse to warehouse", and not from shelf to shelf as in the current ICC 2009. Nevertheless it is submitted that this judgment can be authority for the suggestion that the land transit can be covered by the sections of the Marine Insurance Act as to voyage. In *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd* [1970] 2 NSWR 77, at 78 and 80, Macfarlan J described the policy which incorporated the then conventional transit clause, as a "voyage policy" although the description of voyage policy was not there in issue. This finding is important for the purposes of s 42 as the condition in s 42 is implied only

sections, the meaning of "adventure" in s 42 and "insured adventure" in s 48 need to be equated. It is submitted that "adventure" in s 42 is no different from the "adventure insured" in s 48 and the word "insured" can be implied into s 42 given that in some of the post-attachment delay cases the insurers were discharged where the vessel had not commenced the insured adventure in reasonable time because of for instance lengthy repairs[876] and this was held to be a breach of the implied condition.

So that s 42 and 48 can apply, the policy has to be a voyage policy, whereby the adventure insured thereunder is a "marine adventure" the definition of which was provided for in the MIA. The definition is not exclusive and includes ships, goods or other moveables when they are exposed to maritime perils,[877] i.e. "the perils consequent on, or incidental to, the navigation of the sea".[878] The definition may suggest that land risks do not form part of perils incidental to the navigation of the sea and that therefore a voyage policy and accordingly s 42 and 48 would not apply to the leg of the voyage with the land element.[879] However land risks which are incidental to marine adventure do not prevent a policy from being a policy of marine insurance.[880] Therefore if it can be argued that s 42 applies to land element of the policy, the land transit should also be commenced in reasonable time by virtue of s 42.

Whereas the above is plausible in respect of land risks, the analogy between s 42 and 48 as to their application to land risks is doubtful regarding the following points: Albeit both sections endorse different parts of an adventure which may or may not apply to land risks, s 42 distinctively from s 48 mentions that the adventure should start within reasonable time *although the ship is not at the place* where the adventure is to start. This may seem to import an element as to sea leg of the voyage only. Moreover in s 42, voyage policy is defined as a policy "at and from" or "from" a particular place, namely from a port where the subject-

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in voyage policies. For the view that the s.48 of the MIA is confined to sea voyage, please see Dover, B, *Analysis of Marine Insurance Clauses*, pp.19 and for the view that the MIA only covers sea voyages please see Merkin, *Marine Insurance Legislation*, 4th ed., pp.2.

[876] *Smith v Surridge* (1801) 4 Esp. 25; *Motteux v London Ass. Co*., 1 Atk. 545.

[877] S.3(2)(a).

[878] S.3(2).

[879] This suggestion was rejected in *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] VR 12 so far as the equivalent of s 48 in the Australian MIA 1909 was concerned.

[880] S.2 of MIA 1906 reads that a contract of marine insurance may be extended so as to protect the assured against losses on any land risk which may be incidental to any sea voyage.

matter insured is exposed essentially to maritime perils. The s 42 may therefore not apply to all of the period of risk under ICC 2009 which covers goods "from shelf to shelf". [881]

On the assumption that *Verna* is not applicable and that the expression of "marine adventure" under the MIA applies only to marine risks, delay at the commencement of the voyage may solely be relevant to the period prior to the start of the marine adventure, [882] i.e. it would not apply to the land leg of the insured transit whereby by virtue of cl.8.1., the risk attaches where the goods are first moved in the shelves for the commencement of the insured transit. [883] The marine adventure for goods commences at a later stage, when the goods are loaded on the ship. Therefore the policy would attach at an earlier stage according to the express provisions of ICC and delay in the commencement of the marine adventure cannot result in non-attachment of risk. However one may ask whether the insurers can nonetheless avoid the policy by virtue of a delay in the commencement of the insured voyage at the port of departure.

ii. Other standard market terms and s 42

Many standard market terms on hulls do not contain a specific clause about delay at the commencement of the voyage,[884] therefore it is left entirely to the parties to stipulate clauses to that effect in their respective policies, in the absence of which the s 42 of the MIA shall apply in so far as the policies are voyage policies. However the position of War and Strikes Clauses on Hulls present a certain degree of ambiguity. [885] Given that the wording contains similarities to some freight clauses, the common position under these clauses shall be considered below.

Some standard market terms on freight contain no express clause as to the attachment of risk, [886] yet some mention an automatic termination prior to the attachment of risk[887] in which case the insurance does not become effective. This would mean that in case a war breaks

[881] The contrary view was adopted in *Verna* case in respect of pure voyage policies "at and from".
[882] S.42 reads that "the adventure shall be commenced within reasonable time". It is submitted that the "adventure" refers to marine adventure.
[883] This is a change to the classical attachment of risk in goods, whereby the risk does not attach until the goods are on board the ship, MIA 1906 Schedule 1, Rule 4.
[884] Institute Voyage Clauses-Hulls 1983
[885] Institute War and Strikes Clauses-Hulls-Voyage 1983 and 1995, cl.5 and cl 6
[886] Institute Voyage Clauses Freight 1983 and 1995
[887] Institute War and Strikes Clauses-Freight-Voyage 1995 cl.5, which is equivalent to Institute War and Strikes Clauses-Hulls-Voyage 1983 and 1995, cl.5 and cl 6

prior to or following the attachment of risk or requisition, there may be automatic termination. It would follow that, a delay resulting from the breaking of war –or any other peril enumerated under the relevant clause- would not have any impact on the policy on the ground that the insurance will have already terminated. The rather doubtful issue is whether the insurer can cancel the policy[888] where there is delay prior to the attachment of risk and where delay does not result from the enumerated perils in the clause. If affirmative, the remedy of avoidance expressed in s 42 shall not apply. This suggestion presumes that avoidance of the policy and cancellation of the policy are different remedies, the former having effect *ab initio* and the latter having effect as from the date of cancellation.

7.3. Alteration of risk at the commencement of the voyage

It was suggested that the implied understanding that the risk is to commence within a reasonable time rested upon the same principle upon which the doctrine of deviation is founded, i.e. *that the adventure is to be pursued in the usual manner*. [889] The main reason why delay can be considered as a form of deviation[890] is that at both instances there is an alteration of risk undertaken by the policy caused by the assured. Alteration of risk is not a concept akin merely to delay during sea voyage but also to delay before and after the risk attaches.[891] The reason why alteration of risk is not allowed in a voyage which commences after some unreasonable and unnecessary delay is that it is considered as a "voyage at a different period of the year, at a more advanced age of the ship, and in short, a different voyage than if it had been prosecuted with proper and ordinary diligence". [892]

What is not free from doubt is whether delay in commencing the insured voyage alters the risk in the same way as delay in prosecuting the voyage (s 48) does. [893] If affirmative, it would follow firstly that some of the excuses for deviation and delay which are excuses of the alteration of voyage beyond the control of the assured as enumerated in s 49 could also be relevant for s 42 delay, albeit they currently only apply to s 48 delay by virtue of the express

[888] As per cl.5.1.
[889] Phillips, 387.
[890] It was comprehended within the concept of deviation in *Company of African Merchants v British and Foreign Marine Insurance Co* (1873) LR 8 Exch. 154.
[891] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451 was on pre-attachment delay and whether there was alteration of risk was discussed by the court.
[892] *Mount v Larkins* (1831) 8 Bing. 108.
[893] For the view in favour of this suggestion, please see Bennett, Good Luck with Warranties, 595.

provision to that effect in s 49.[894] Even if this is not plausible, it may be suggested that some pre-MIA cases can still be authority for the suggestion that delay at the commencement of the insured voyage can be excused if delay can be justified. Secondly, the consequence would be that the remedy for alteration of risk should be identical for both deviation and s 42 delay, i.e. discharge of insurers from liability, however the remedy of discharge should be confined to the period after the vessel reaches the port of departure and after the risk attaches, before the vessel sails for the sea voyage.

Suggesting that delay at the commencement of the voyage could be an instance of deviation and that therefore the insurers should be discharged has to be approached cautiously. Deviation refers to an alteration of the voyage which can only occur after the voyage has started. Therefore the cases on delay at the commencement of the voyage referring to deviation need to be carefully scrutinised as this may be either because the alteration is so material that, just as deviation, it gives end to the policy; [895] or because there may indeed be a change of course which results in delay where the change of course cannot be deemed as a "deviation" in the sense given to it by the MIA. In the latter circumstance, so long as the change of course is justified, delay may not, on its own suffice to discharge the insurers. [896]

The need for a delay capable of varying the risk undertaken by the insurer is not expressly codified in s 42(1). There may be two possible reasons for this. Firstly it may be that the omittance of alteration of risk requirement was intended when the MIA was enacted, [897] given also that the remedy available to insurers under the MIA was identified as avoidance and not discharge, i.e. the usual remedy for deviation which also characterised the remedy for delay, as illustrated in almost all pre-MIA cases. In this sense, variation of risk requirement may therefore no longer have to be assessed. [898] However it is submitted that this view is arguably not tenable on the ground that not any delay, but delays altering the risk undertaken by the policy should be capable of taking the insurers off risk. That was the background against which all the pre-MIA cases were decided. Therefore although avoidance is an available

[894] A comparison between the pre-MIA cases on justifiable delay at the commencement of the voyage and their relevance to excuses enumerated under s 49 will be dealt below, under "Justifiable (excusable) delay".
[895] As in *Palmer v Marshall* (1832) 8 Bing 317.
[896] *Driscol v Passmore* (1798) 1 B. & P. 202.
[897] *Arnould*, 17th ed. at para 13.50 submits that the principle on which *De Wolf v Archangel* was decided is no longer law even though the omittance of variation of risk requirement may well have been unintended.
[898] The opposite was expressed by the editors of *Arnould* in the editions before the 17th edition.

remedy for insurers, it is unlikely that avoidance of the policy where delay is not so unreasonable to alter the risk would be possible.

7.3.1. Types of alteration of risk by delay

An adventure which is due to start in reasonable time after the date of the policy may be delayed and may have to be prosecuted in a different season. [899] The mere change of season does nevertheless not necessarily change the risk undertaken by the insurer especially where delay is not excessive. [900] Moreover even if there is a change of season, where the circumstances resulting in delay did not happen through misconduct of the assured or there is sufficient evidence to prove that the voyage was not abandoned by the assured, the change of risk does not discharge the insurers. [901]

There is also room to argue that where the adventure is not to be started in a specific season according to the policy, the insurers have to insert sailing warranties so that the change of risk discharges the insurers.[902] Change of season can be excused where delay is not voluntary[903] however it cannot be excused where according to the usage of trade, the vessel in any event has to sail in the season which is reached by delay. It was argued in *Palmer v Marshall*[904] that given that the vessel was described as a yacht in the policy and that according to the usage as to yachts it was to sail only in summer, a delay from January to May did not change the risk undertaken by the policy. [905] The argument was rejected on the ground that the assured should have insured it accordingly if he wanted to be covered for a period exceeding the reasonable time. Conversely in *Vallance v Dewar*[906] and *Ougier v Jennings*[907] it was admitted that a delay at the commencement of the risk would discharge the policy if an intermediate voyage causing delay in the attachment of risk was not communicated to the insurers, unless such voyage was made usually and according to the normal course of trade in which the ship was then engaged. The basis on which the insurers were not discharged was

[899] As in *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451. As to the fact that the change of season arising from delay does not necessarily vary the risk, please see *Driscol v Passmore* (1798) 1 B. & P. 202.
[900] In *Hull v Cooper* (1811) 14 East. 475 the delay was slightly more than two weeks.
[901] Please see *Driscol v Passmore* (1798) 1 B. & P. 202. Excessive delay amounting to abandonment of the voyage will be considered below.
[902] *Beckwith v Sydebotham* (1807) 1 Campb. 118
[903] *Smith v Surridge* (1801) 4 Esp. 25.
[904] *Palmer v Marshall* (1832) 8 Bing 317
[905] A similar decision was given in *Palmer v Fenning* (1833) 9 Bing. 460 where the ship was described in the policy as a yacht which according to the usage of trade usually sails in summer did not excuse the alteration of the risk.
[906] *Vallance v Dewar* (1808) 1 Camp.503
[907] *Ougier v Jennings* (1808) 1 Camp. 505

because the usage of trade had the effect of a notice to the insurers about a possible delay in the attachment of risk, i.e. a circumstance which was known to insurers before the contract was concluded. [908]

i. The delay has to be unreasonable

As the implied condition requires that the voyage has to be commenced in reasonable time, the delay has to be so unreasonable as to alter the risk undertaken by the insurers. [909] The exact meaning of "reasonable time" as it appears in s 42 is not free from doubt and its meaning would not be a primordial issue where the policy contains a named day as to when the vessel should be at the loading port. [910] The controversy as to when the risk becomes varied would therefore be avoided. In policies which do not state an express time of arrival at the departure port or a time of sailing therefrom, the criteria which need to be taken into consideration in order to calculate the period of delay, i.e. whether the voyage commenced in reasonable time, are essential.

Reasonableness should be decided on a case-by-case basis as it is a question of fact[911] and in the pre-MIA cases this issue was mostly left to the verdict of the jury. It refers to the length of delay and not to its purpose or justification[912] although there may be room to argue that an unreasonable delay may contain an element of lack of justification given the below discussion.

The House of Lords established in terms of contracts of affreightment that an obligation to discharge a ship in reasonable time must be construed with reference to the circumstances existing at the time of the performance, and that provided that the owner did not act negligently or unreasonably, he is not responsible for a delay arising from an event beyond

[908] This echoes s 42(2) although the subsection was not drafted having taken these two judgments into consideration.
[909] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451.
[910] Or if the policy allows a time frame allowing delay, an extension of that time could be considered as unreasonable delay, *Doyle v Powell* (1832) 4 B & Ad 267. This case was in respect of an allowed waiting period of two months in the discharge port, extension of that period by the assured discharged the insurers.
[911] s. 88.
[912] That "unreasonable time" was a question of fact was addressed in *Bain v Case* (1829) 3 Car. & P. 496 where a vessel had remained one hundred and nine days at a port because of a blockade. It was stated by the assured that the stay was for the hope of getting permission to land cargo as negotiations were pending with the government. The verdict of the jury was that the length of time was not unreasonable. The judgment did not state a particular reason, therefore it may be suggested that the purpose of delay could have been regarded as justifiable by the jury. However in many post-MIA cases on delay, unreasonable and unjustifiable delays were considered separately. For the distinction drawn between the two concepts, please see below 3.3.

his control. [913] It was stated that the rule was of general application and did not only apply to contracts for the carriage of goods. [914] This judgment raises the question whether not commencing the voyage in reasonable time may discharge insurers may have to be decided according to the circumstances existing at the time of the performance, in that the assured is responsible for a delay where delay was caused by the assured's act or was within its control. [915] This would import an element of justification into the phrase "reasonable time". The counter-argument could be that the condition that the adventure should be commenced in reasonable time is not an obligation of the assured against the insurer, [916] in that sense it is different from the obligation of the shipowner against the consignee to discharge the ship in reasonable time the breach of which gives the consignee the right for an action for breach of contract and that it is not clear whether the rule laid down by the House of Lords as to the determination of "reasonable time" could apply for s 42 situations.

It is noteworthy however that the remedy of avoidance in s 42 may be an initiative to make the condition an obligation of the assured, the breach of which can be regarded as a breach of contract which gives the insurer the right to avoid the contract. Such a construction may make it possible to apply the reasoning of the House of Lords in *Hick v Raymond*. It was suggested that the language of s 42 allows a construction that the reasonable time must be determined with reference to the risk contemplated at the time of the insurance and that this construction gives effect to the rule laid down in *De Wolf v Archangel.* [917] The complexity with this argument may lie in that firstly in some circumstances the risk may not be fully contemplated at the outset or to confine the calculation of reasonable time to the risk contemplated at the time of the insurance may run the risk of overseeing the mutual agreements between the assured and the insurer reached after the contract was made. Another option could be to construe reasonable time according to circumstances at the time when the voyage might reasonably be presumed to commence.[918]

[913] In *Hick v Raymond* [1893] A.C. 22
[914] Per Lord Watson at 32
[915] This was discussed in *Arnould*, 9th ed., pp.640.
[916] Arnould, pp.640.
[917] Arnould, pp.641. This view was amended in the 17th edition, on the ground that the principle on which *De Wolf v Archangel* was decided is no longer law, at 13-50. According to the editors, neither the rule in *Hick v Raymond* nor *De Wolf v Archangel* can apply so as to determine what is a reasonable time within the meaning of s 42.
[918] This view was expressed in *Grant v King* (1802) 4 Esp. 175 in the context of unreasonable delay amounting to abandonment of the voyage insured.

It is submitted that the authority of the House of Lords in *Hick v Raymond* cannot apply to s 42 and import an element of justification of delay for the interpretation of "reasonable time" where delay is beyond the control of the assured. Reasonableness under the MIA is a question of fact as was the reasonableness of delay in the pre-MIA judgments which referred merely to length of delay. Whether a delay was justified was however a question of law,[919]therefore it could be submitted that even though a delay is beyond the control of the assured and can be characterised as justified, this shall not necessarily denote that the delay is reasonable.

Another important aspect that requires consideration is the time when the calculation of "reasonable time" should commence and terminate in a s 42 situation. According to earlier case law, it starts with the time when the policy is made[920] until the vessel arrives to the departure port or until the vessel sails therefrom, according to the place where the risk will attach. This was discussed in *Mount v Larkins*[921]and reference was made to *Hull v Cooper*[922] where Lord Ellenborough stated the principle that a delay in the arrival of the vessel at the place where the risk is to attach alters the risk undertaken by the insurer. [923] According to other cases, the delay could be calculated as from the time of the policy until the arrival of the vessel at the place where *the voyage will commence*. It is submitted that attachment of risk does not necessarily denote the commencement of the voyage.

Considering the increasing speed of maritime trade, some of the delays that were considered as reasonable in terms of their length in the pre-MIA cases would presumably not be so considered now.

ii. Unreasonable delay amounting to abandonment of the voyage

There is abandonment of a voyage where all thoughts of voyage are laid aside by the assured with whose privity the vessel lays in the port of departure for an unreasonable amount of time

[919] See for instance the excuses for delay and deviation which are instances of justified delays and deviations at s 49

[920] In *Grant v King* (1802) 4 Esp. 175, there was a delay of six months after signing of the policy and it was decided that a mere length of time elapsed between the *signing of the policy* and the commencement of the voyage would not be sufficient to avoid a policy. In *Mount v Larkins* (1831) 8 Bing. 108, the jury's verdict in the first instance (the case was appealed in different grounds) was that the delay between the *making of the policy* and the commencement of risk was unreasonable. For other cases mentioning signing of the policy as starting point for calculation of reasonable time, please see *Palmer v Marshall* (1832) 8 Bing 317; *Chitty v Selwyn and Martyn* (1742) 2 ATK. 358; *Vallance v Dewar* (1808) 1 Camp.503.

[921] (1831) 8 Bing 120

[922] (1811) 14 East. 479

[923] See also *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451.

prior to the commencement of voyage.[924] Any delay which is not for the purpose of preparation for the insured voyage alters the risk and discharges the insurer.[925]

In *Grant v King*[926] there was a delay of six months after signing of the policy and it was decided that a mere length of time elapsed between the signing of the policy and the commencement of the voyage would not be sufficient to avoid a policy. Rather, so that the delay be material, it should be such as to amount to an abandonment of the voyage.[927] According to Lord Ellenborough whether the voyage has been abandoned had to be decided according to the "existing circumstances at the time when the voyage might reasonably be presumed to commence" and the circumstance that was taken into consideration was the cause of the delay, i.e. the extreme difficulty to procure crew members. The speech also refers to the fact that so long as there is an explanation for delay and that the assured can prove that the delay was more than "a mere waste of time", delay would not be sufficient to "avoid"[928] the policy. This raises the question whether although the excuses for delay enumerated in s 49 of MIA do not apply in the case of delay at the commencement of the voyage, however long a delay is, necessary delays in order to start the voyage may excuse the assured and prevent insurers from being discharged. Justification for an unreasonable delay could mean that the voyage insured has not yet been abandoned, yet if the vessel lies at the departure port with no intention of the assured to sail in reasonable time for the voyage, the excessive length of time spent at the port may amount to abandonment of the voyage and would take the insurers off risk.[929] There is currently no section in the MIA dealing with this situation, it may therefore be submitted that alteration of risk by the assured through abandonment of the voyage following the attachment of risk and before the sea voyage commences shall be dealt with by expression provision under the MIA.

[924] *Chitty v Selwyn and Martyn* (1742) 2 ATK. 358. The vessel laid in port for four years before it sunk there.
[925] *Palmer v Fenning* (1833) 9 Bing. 460. The case was about a yacht, waiting at the port as there was an intention to sell it and no preparation was made for sailing for five months.
[926] *Grant v King* (1802) 4 Esp. 176
[927] This view has its root in *Chitty v Selwyn and Martyn* (1742) 2 ATK. 358
[928] In the sense of "discharge"
[929] Support for this view can be extracted from Chalmers, MacKenzie and Owen, Douglas, *A Digest of the Law Relating to Marine Insurance*, London: William Clowes and Sons, 1901, p.53. A section 44 was found in the edition entitled "abandonment of adventure by delay" following s 43 (implied condition as to commencement of risk) which is now s 42 under the MIA 1906. The s 44 read: "Where the assured abandons the adventure insured, the contract of marine insurance is determined". The annotation of the section referred to the distinction between the "implied condition that the risk shall not be altered by delay" and the "abandonment of the voyage by not commencing the voyage within reasonable time". The section had references to decisions such as *Palmer v Marshall* (1832) 8 Bing 317 and *Palmer v Fenning* (1833) 9 Bing 460 however was not enacted to MIA 1906.

7.3.2. Consequence of alteration, s 42 and post-attachment delay

Many cases which were decided prior to the enactment of the MIA where delay had occurred after the attachment of risk and before the sea voyage commenced mention discharge as remedy for delay at the commencement of the voyage. [930] The reasoning which underlies the fact that the insurer should be discharged if an unreasonable delay occurs is because it would be exposed to the risk of every accident which may happen in port because of the unreasonable delay, something which is not intended to be covered by the insurer in addition to the risk of the voyage. [931]

i. s 42 and breach of warranty

The fact that the remedy for delay after the risk attaches before the insured voyage commences is discharge may be due to the fact that it can either be identified as a branch of the law relating to alteration of risk or as an implied warranty. Warranties are enumerated in the MIA from s 36 until s 41 under the title "Warranties, etc" whereas implied condition as to commencement of risk appears under a different title "The Voyage". This may arguably be a ground to suggest that the drafters treated s 42 differently than warranties, considering also that the remedy for s 42 is avoidance and not discharge. Nevertheless, the use of the word "avoidance" may not necessarily mean it was used in the sense of avoidance *ab initio*.[932] In some of the early cases, avoidance of contract was used in a non-conventional manner to mean "discharge from the contract". [933]

Moreover avoidance of contract was not an alien term to warranties before the MIA was enacted. In the first draft of the Bill of the MIA, the remedy for the current s 33(3) of the MIA which was at that time s 34(3) read that if a warranty is not complied with, the insurer

[930] *Grant v King* (1802) 4 Esp. 175; *Smith v Surridge* (1801) 4 Esp. 25; *Palmer v Marshall* (1832) 8 Bing 317; *Chitty v Selwyn and Martyn* (1742) 2 ATK. 358; *Vallance v Dewar* (1808) 1 Camp.503; *Palmer v Fenning* (1833) 9 Bing. 460; *Hull v Cooper* (1811) 14 East. 479 (it was only mentioned whether there was change of risk, the decision did not expressly refer to discharge from liability, however in *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451, 453, it was stated that the affirmative decision in *Hull v Cooper* was that a delay not varying the risk does not discharge the insurer.

[931] This was what happened in *Smith v Surridge* (1801) 4 Esp. 25 where the vessel could not sail from the port in reasonable time firstly because of necessary repairs and subsequently because the water was uncommonly low.

[932] It could do so where for instance the assured fails to disclose information known to him as to the possibility of delay at the commencement of the voyage.

[933] *Grant v King* (1802) 2 Esp. 175; *Smith v Surridge* (1801) 4 Esp. 25; in *Bah Lias Tobacco & Rubber Estates, Ltd v Volga Insurance Company Ltd* (1920) 3 Lloyd's List Law Reports 155 the defence of the insurer was that the unreasonable delay "voided" the policy.

may avoid the contract. [934] The subsection also stated that this remedy applied to the promissory warranties in sections from 35 to 42, [935] whereby excluding the section of delay at the commencement of the voyage from the class of promissory warranties. Therefore under the draft Bill, the section as to delay at the commencement of the risk was not considered as a warranty, yet had the same remedy as warranties. It was rather considered as a voyage condition.

It is not clear whether the Law Commission identifies s 42 now as a voyage condition or a warranty. The Commission enumerated it along with s 48 and others[936] in its Consultation Paper No 204[937] under the title "implied warranties" and described them as "conditions which operate in the same way as warranties, in that the risk may never attach or the insurer may be discharged from liability". [938] This view curiously does not reflect the current remedy for delay at the commencement of the voyage that is avoidance of contract. However in other parts of the Consultation Paper, sections 43, 44, 45, 46 which had been mentioned under "implied warranties" title as "implied voyage conditions" were expressed as conditions precedent to the attachment of risk, rather than as warranties and that accordingly the proposals did not affect them. [939] Finally the Law Commission asked the consultees whether the implied voyage conditions from s 42 to s 49 should be repealed; although few had responded to their query, the majority of the consultees expressed the view that they should be retained. [940] In an earlier consultation paper[941] delay at the commencement of the voyage was mentioned as an implied voyage condition[942] however was not made part of the proposal as to whether the implied voyage conditions should be repealed or made subject to the same causal connection test as express warranties. [943]

[934] See Chalmers and Owen, *Digest of the Law Relating to Marine Insurance*, 1901, 43. This may enforce the view that the term "avoidance" currently used in s 42 means discharge.
[935] Which are now MIA ss 34 to 41.
[936] ss 40(2), 41, 42, 43, 44, 46, 48 and 49 respectively.
[937] English Law Commission Consultation Paper No 204 and Scottish Law Commission Discussion Paper No 155, published on 26 June 2012 entitled "Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties".
[938] 12.16.
[939] From 16.19 to 16.24.
[940] 16.25.
[941] The Law Commission Consultation Paper no 182 and the Scottish Law Commission Discussion Paper no 134 on *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured*, published in 2007.
[942] 2.63
[943] 8.131-8.132.

The s 42 of MIA 1906 is identical to s 48 of the Australian Marine Insurance Act 1909. The Australian Law Reform Commission considered in their Review of the Marine Insurance Act 1909 Report No 91[944] that the effect of the section is "to discharge the insurer from liability by some act of the insured or some other person which occurred after the contract was concluded"[945] and that the provisions about delay[946] should be treated in the same way as the reforms proposed in respect of warranties. The Australian Law Reform Commission proposed accordingly to repeal the provisions equivalent of s 42 and 48 of the MIA 1906[947] and permitted this concept to be dealt with as an express term of the contract. They regarded the provisions relating to the non-attachment of risk[948] differently and decided to retain them on the ground that they were not relating to a breach of a contractual term. s 48 of MIA 1909 (equivalent to s 42 of the MIA 1906) was not considered within this classification, however if it can be demonstrated that the pre-MIA 1906 cases relating to pre-attachment delay referred to the non-attachment of risk rather than discharge from liability, [949] it may be that the Australian Commission's proposals for these sections, i.e. to retain them could also be valid for s 48 of MIA 1909 in so far as it relates to pre-attachment delay.

ii. <u>The English Law Commission's proposals on marine warranties and s 42</u>

Albeit the Law Commission does not expressly include s 42 into the class of warranties, they do not expressly exclude them from the operation of warranties. It would thence be worth touching upon the impacts of the proposals of the Commission as to warranties on s 42 and assess whether their application would be practicable in terms of s 42.

The type of warranty the s 42 may be related to (should it ever be related to warranties) is submitted to be a warranty of future conduct. This is due to the fact that the assured does not have to make sure that at the time of the contract the vessel is at the place where the adventure should start. It does therefore not have to affirm the existence of the vessel at the place where the voyage insured is to be commenced from, accordingly there is no warranty as to a present fact. However it may be argued that the assured promises to fulfil the condition that the voyage shall commence in reasonable time, a promise as to a future conduct.

[944] The Australian Law Commission, *Review of the Marine Insurance Act 1909 Report No 91* (hereinafter referred to as ALRC 91)
[945] 9.212
[946] Both s 48 of MIA 1909 and s 54 of MIA 1909 (which is equivalent to s 48 of MIA 1906)
[947] i.e. s 48 and s 54 of MIA 1909
[948] i.e. the sections as to alteration of port of departure and sailing for different destination.
[949] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451.

Automatic discharge

Where the assured breaches a warranty, the insurers are automatically discharged from liability as from the breach, regardless of whether the assured is unaware of the breach at that date. [950] The most problematic aspect of warranties in respect of s 42 is that the insurers would also not be aware of whether the warranty has been breached. This is due to the fact that delay, so as to discharge the insurers, has to be unreasonable and the moment when delay becomes unreasonable in a specific circumstance cannot be determined by the insurers. In this regard, it is not an easily identifiable moment compared to the breaches of other warranties such as the warranty of seaworthiness[951] where, whenever the vessel becomes unseaworthy, the warranty is deemed to have been breached at the commencement of the voyage. As per s 42, although the voyage must be commenced within reasonable time, the implied condition is not necessarily breached at the commencement of the voyage, yet it is breached whenever the delay becomes unreasonable. The problem in identifying the moment of breach for automatic discharge purposes is essential for waiver of the breach by the insurer. If s 42 can indeed be considered as a warranty, the waiver relating to a breach of s 42 can merely be waiver by estoppel and not waiver by election, given that following *The Good Luck*, the insurers have no longer a right to elect. [952]

Two possibilities may be advanced so as to overcome the above mentioned complexities. Firstly, the current s 42's avoidance remedy gives the insurer the right to elect to do so and presumably by informing the assured as to the election to be made. This would mean that the information as to avoidance may also contain an offer to reconsider the premium subject to the acceptance of the assured. This may operate as a waiver. Alternatively the English Law Commission proposes that the breach of a warranty shall suspend the insurer's liability instead of automatically discharging it, so that if the breach is remedied before the loss the insurer has to pay the claim. [953] Here again, given that to identify the moment when the delay

[950] *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1991] 1 AC 233.
[951] s.39.
[952] s.42(2) as to the waiver of the breach of delay at the commencement of the voyage is analysed elsewhere in this work.
[953] English Law Commission Consultation Paper No 204 and Scottish Law Commission Discussion Paper No 155, 15.14-15.17. See further the Law Commission and the Scottish Law Commission's DRAFT/Insurance Contracts Bill published on 6 March 2014 s 9 which abolishes the remedy of discharge as from the date of the breach of warranty and provides that an insurer shall not be liable after an express or implied warranty is breached until the breach is remedied (if it can be remedied).

becomes unreasonable is not straightforward, the time of breach and accordingly the starting point of the suspension would not be readily ascertained. Another complexity is how the assured is going to remedy the breach of not commencing the voyage in reasonable time. [954] Breach of the requirement to commence the voyage in reasonable time may be an example of the circumstances where remedy may be impossible. Once the delay in commencing the voyage becomes unreasonable, it may arguably not be made good even though the assured acts with reasonable or even utmost despatch and speed.

Causative link between breach and loss

It was proposed by the Law Commission[955] that the harshness of the concept of warranties could be avoided by introducing a causative link between the breach of warranty and the loss suffered by the assured, making the warranty material to the loss. [956] One of the difficulties of the proposal was that some warranties may be relevant to the risk of loss, but may not have a causal connection to the loss. [957] Particularly in policies on ship or cargo, it is curious how a breach of a warranty as to the commencement of risk could contribute to a type of loss that is recoverable thereunder. Firstly such delay would probably not cause loss to cargo or to hull as these are physical losses and secondly, the extent of the causative link required between the breach and the loss is not clear. The Australian Law Reform Commission having reviewed marine insurance law in 2001, recommended that a breach of warranty should only justify avoiding a claim if it proximately caused the loss[958] however the position of the English Law Commission was not so evident in respect of proximate causation. If the Australian approach is adopted, it would be even more contentious whether the breach of the implied condition could cause the loss under these policies.

iii. <u>Whether post-attachment delay is breach of a condition subsequent or innominate term</u>

The concept of condition subsequent is an unsettled area in general contract and insurance law. In most cases, it was equated with warranties in terms of consequence, i.e. discharge of insurers from liability. [959] There is authority regarding that the condition subsequent becomes

[954] The Law Commission recognises the fact that it may be fairly difficult, if not impossible to remedy the breach in some circumstances, English Law Commission Consultation Paper No 204, 15.20.
[955] For the first time in 2007, in the Law Commission Consultation Paper no 182.
[956] According to s.33(3), a warranty is a condition which must be exactly complied with, whether it be material to the risk or not, in the sense whether it increases the risk.
[957] The Law Commission Consultation Paper No 204.
[958] ALRC 91.
[959] In the context of charterers' liability insurance, *Glencore International A.G. v Ryan* (*The Beursgracht (No 1))* [2002] C.L.C. 547 which was an appeal by insurers who had alleged at first instance that the assured had to

effective following the inception of risk, the breach of which gives the insurers the right to terminate the contract[960] and not to avoid it *ab initio*. [961] Usually the occurrence of an event determines the previously binding contract.

A term about doing something in reasonable time does not necessarily make time of the essence of the contract nor would the absence of reference to urgency would be sufficient to justify elevating an implied term into promissory warranty or condition, [962] everything would depend on the context. It was discussed in *The Beursgracht (No 2)*[963]that so as to assess the *quality* of the breach, the length of delay had to be considered to see whether the delay was so inordinate that the insurers should not be bound. As to the *effect* of the breach, the court asked whether the delay could cause real or serious prejudice to insurers. [964]

It is submitted that s 42 does not cover the situation where there is delay after the attachment of risk, before the sea voyage commences. Therefore insurers may be advised to stipulate express provisions requiring the assured to act with reasonable despatch in commencing the sea voyage after the risk has attached, the breach of which would result in the discharge from liability of insurers. Both pre-attachment and post-attachment delays are post-contractual events, therefore it is controversial whether, in the absence of pre-contractual non-disclosure

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make declarations in reasonable time due to a condition subsequent, where at the appeal the issue was discussed as to whether it was a "warranty or condition". It was decided that the term was an innominate term. It was held by the Privy Council in *Union Insurance Society of Canton v George Wills* [1916] 1 A.C. 281 that warranties could sometimes be described as condition subsequent to insurer's liability, the breach of which would automatically discharge insurers. The assured in that case sued insurers for a total loss of shipment of goods as to which they had made a declaration after the attachment of risk but not "as soon as possible after the sailing of the vessel", which was required by the policy. Although the following was not an obvious distinction made by the Court, it is submitted that the case can be authority for the suggestion that whereas the promise needs not be material to the risk where it is a warranty, so that a promise can be qualified as a condition subsequent, the object of the promise (i.e. to protect the interests of the insurer) has to be so material to the risk that it forms a substantive condition of the contract.

[960] In the context of charterers' liability insurance, in *Glencore International A.G. v Ryan* (*The Beursgracht (No 1))* [2001] 2 Lloyd's Rep. 602, the insurers alleged that the failure of the assured to make a declaration in reasonable time was a breach of condition subsequent. In the context of sale of land, it was held that the breach of condition subsequent gave the right to elect to terminate the contract, and not to rescind ab initio, *Howard-Jones v Tate* [2011] EWCA Civ 1330.

[961] In the South African case *Lehmbackers Earth Moving and Excavators (Pty) Ltd. v. Incorporated General Insurances Ltd.*, (1984) (3) S.A. 513, the court considered the remedy for making of fraudulent claims (which was a post-contractual event) as breach of subsequent condition, which could therefore not amount to avoidance ab initio.

[962] *Glencore International A.G. v Ryan* (*The Beursgracht (No 1))* [2002] C.L.C. 547.

[963] *Glencore International A.G. v Ryan* (*The Beursgracht (No 2))* [2001] 2 Lloyd's Rep. 608.

[964] At 618.

which may later on cause post-contract delay, avoidance *ab initio* remedy would be plausible. [965]

7.3.3. Limits to the remedy of alteration: Justifiable (excusable) delays

The MIA in s 49 expressly provides that delay in sea transit may be excused if the delay occurs owing to certain circumstances enumerated in the section. That these involuntary or justifiable delays would not discharge insurers is in line with the fact that such delays are within the definition of "risk", i.e. something unforeseen and over which the assured has no control. [966] The MIA does not provide excuses for delay at the commencement of the voyage and it cannot be inferred from s 49 that the excuses would also apply to s 42. One of the main reasons for this is because delay in voyage was seen as a form of deviation and that therefore benefitted from the same excuses for deviation provided for in pre-MIA cases. [967] Delay at the commencement of the voyage is another instance of delay which had no relevance to deviation other than having relevance to alteration of risk.

Many pre-MIA cases excused assureds for post-attachment delays[968] however whether these cases may be authority after the enactment of the MIA is not free from doubt. [969] This is due to the fact that the circumstances where the implied condition as to commencement of the voyage may be negatived[970] are expressly stated in s 42(2) and it may be suggested that they are enumerated in an exhaustive way. Should this be the position, the policy behind differentiating the availability of excuses for delay in sea transit and at the commencement of the voyage must be made clear. It was discussed above [971] that the case *De Wolf v*

[965] In *Black King Shipping Corporation and Wayang S.A v Mark Ranald Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep. 437, at 515 Hirst J considered that whether there is a pre or post-contractual event, the meaning of "avoidance" in section 17 should not be interpreted as avoidance *de futuro*. This case was with respect to fraudulent claims, i.e. events occurring after the contract is concluded. This case is no longer authority in respect of remedy for fraudulent claims, therefore may not be taken as authority for analogies to post-contract delays.

[966] In *Rosa and Others v Insurance Company of the State of Pennsylvania (The Belle of Portugal)* [1970] 2 Lloyd's Rep. 386 where the policy was a time policy contained the clause "This policy shall not be prejudiced by any unintentional delay or omission in the reporting thereunder", the insurers had alleged that the policy did not attach given that the reporting of the amount of cargo on board was not reported in due time. The United States Court of Appeals (Ninth Circuit) decided that the delay was not intentional, it was merely due to heavy rain which curtailed the sending capacity of the radio and was accordingly within the clause.

[967] *Company of African Merchants v British and Foreign Marine Insurance Co.* (1873) L.R. 8 Ex. 154.

[968] *Grant v King* (1802) 4 Esp. 175; *Driscol v Passmore* (1798) 1 B. & P. 202; *Ougier v Jennings* (1808) 1 Camp. 505.

[969] For the submission that they no longer stand as authority, please see Hodges, *Cases and Materials on Marine Insurance Law*, 147.

[970] In other words, where the assured would be excused in case of such delay.

[971] Under 1.2.3.

Archangel[972] which does not allow the breach of the duty to commence the voyage in reasonable time to be excused in case of justifiable delays could merely apply to pre-attachment delays. It would follow that post-attachment delays occurring prior to the commencement of the voyage insured should be evaluated according to the pre-MIA cases to find out whether they allow excuses for breach in case of justified delays.

Many different wordings were used for justifiable or unjustifiable delays such as "delay unaccounted for", [973] "necessary delay", [974] "delay not occasioned by the wrongful act of the insured himself". [975] Pre-MIA cases allowed delay at the commencement of the voyage where delay was for the purpose of the voyage[976] and what was for the purpose of the voyage depended on each particular circumstance. The justification for delay was widely interpreted, in the sense that so long as there is an explanation for delay and that the assured can prove that the delay was more than "a mere waste of time", delay would not be sufficient to avoid the policy. [977] Some examples of justifiable delays were where delay was for the purpose of waiting for a wind or for provisions; [978] for necessary repairs or where delay was due to low level of water; [979] where delay occurred due to an intermediate voyage which was made usually and according to the normal course of trade in which the ship was then engaged[980] and the insurers were accordingly discharged. [981]

In *Driscol v Passmore*[982] where delay at the commencement of the voyage was due to an earlier deviation which was justified, the resulting delay was also excused. However this case should be an exception and should apply only with respect to a voyage comprised of intervals. This is given that deviation which is a change of route to the destination can occur after the voyage starts. However in *Driscol* the voyage insured was one of the intervals and the delay

[972] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451.
[973] *Palmer v Marshall* (1832) 8 Bing 317.
[974] *Chitty v Selwyn* (1742) 2 ATK. 358.
[975] *Mount v Larkins* (1831) 8 Bing. 108.
[976] In *Palmer v Marshall* (1832) 8 Bing 317, Park J stated that according the language of the policy implied that if the vessel is ready for sea, she shall sail without delay unless the delay be accounted for. According to Alderson J, the delay in sailing must be a delay incurred "for the purpose of the voyage" in order to be justified and he referred to *Langhorn v Alnutt* (1812) 4 Taunt. 511 which was a case on delay in sea transit and not delay at the commencement of the voyage.
[977] *Grant v King* (1802) 4 Esp. 175.
[978] *Palmer v Fenning* (1833) 9 Bing. 460, 463 per Alderson J. The case was about a yacht, waiting at the port as there was an intention to sell it and no preparation was made for sailing for five months.
[979] *Smith v Surridge* (1801) 4 Esp. 25.
[980] *Vallance v Dewar* (1808) 1 Camp.503; *Palmer v Fenning* (1833) 9 Bing. 460.
[981] *Smith v Surridge* (1801) 4 Esp. 25.
[982] *Driscol v Passmore* (1798) 1 B. & P. 202

in the commencement of the voyage was therefore the delay in starting that particular interval. In a voyage with no interval or with intervals which are not separately insured, deviation would normally result in a delay in sea voyage which is within the scope of s 48.

Where there is a sailing warranty in the policy as to a specific day, and if it is breached by the assured, whether delay in the post-attachment period is excused by the fact that it is due to a peril which is covered by the policy is controversial. [983] It is submitted that a peril such as detention resulting in delay could in some circumstances amount to an abandonment of the voyage. [984] In this case this would put an end to the insurance contract and it would probably be immaterial whether the warranty of sailing was complied with.

The relation of justifiable and unreasonable delays

If it is correct that post-attachment delays which are justifiable excuse assureds, it would be necessary to inquire into whether the delay has to be both unreasonable and unjustifiable so as to discharge insurers.

The wording of s 42 implies[985] that in order to be "unreasonable", the only element with respect to delay that should be taken into consideration would be the length of delay and not the purpose thereof. [986] This finds support in the speech of Tindal C.J in *Palmer v Marshall*[987] which was a judgment on post-attachment delay where he submitted "…Where the delay is unexplained, and so great as to fix it with the character of unreasonableness in the mind of every reasonable person". [988] It would follow that a delay "unaccounted for" or "unjustified" should be differentiated from "unreasonable" delay, whereby the former rests upon the circumstances which would cause delay but would excuse the assured, and the latter being simply an excessive delay for the purposes of the voyage insured. A lengthy delay which may however be justified does arguably not discharge insurers.

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[983] In *Hore v Whitmore* (1778) 2 Cowper 784, where the policy was "at and from", stated that the ship was to sail on a specific day free from detention. The ship was ready to sail before the time however was detained by an embargo and had to sail later than the set date. It was held that the delay was not excused and the sailing warranty which was "positive and express" was not complied with.

[984] It is not clear whether, in light of the law decided in *Grant v King* (1802) 4 Esp. 176 and *Chitty v Selwyn* (1742) 2 ATK. 358 that delay would amount to abandonment of the voyage if it is caused by necessity or caused by other perils which are beyond the control of the assured and covered by the policy. The concept of "abandonment of the voyage" is discussed above.

[985] "…that the adventure shall be commenced within a reasonable time…"

[986] Unreasonable delay has been considered in other parts of this work in terms of s 48, unreasonable delay within the scope of s 42 was also considered in this chapter, under 2.1.

[987] (1832) 8 Bing 317.

[988] At 319.

Justification of a lengthy delay may also rest upon an event which is beyond the control of the assured. In *Smith v Surridge*[989] there were two delays the first of which was due to repairs which were necessary and the second one was due to low level of water which prevented the vessel from sailing, it was an involuntary delay which did not discharge the insurers. If repairs are made for the purpose of the voyage, the risk will commence notwithstanding the length of repairs, [990] however they must be made without unnecessary and unreasonable delay, in which case the insurers will be discharged.[991] Albeit transit risks which may cause delay can be more numerous compared to circumstances at the commencement of voyage, there should be nothing preventing assureds from relying on excuses for post-attachment delay, i.e. on unforeseeable events which are beyond their control.

7.4. Negating the implied condition

Under s 42, the circumstances which are capable of excusing a breach of s 42 are expressly stated in s 42(2). There is controversy and no case law as regards whether the subsection is confined merely to waiver and circumstances known to the insurer before the contract was concluded, or whether it could also include the aspect of usage of trade as an excuse for the breach. [992] The doubt expressed by Chalmers as to usage[993] has been left as a doubt and not been incorporated into the subsection. It would however be noteworthy in this respect to touch upon an analogy between the MIA 1906 and the Sale of Goods Act 1893.

A provision appears in the Sale of Goods Act of 1893[994] as to usage, namely s 55 on the exclusion of implied terms and conditions. S 55 states that where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived either by an express agreement, or by the course of dealings between the parties, or by usage if the usage be such as to bind both parties to the contract. [995] Chalmers goes on stating that when one party relies on and gives evidence on trade usage, the other party can either prove the non-

[989] (1801) 4 Esp. 25.
[990] *Motteux v London Ass. Co*., 1 Atk. 545.
[991] Phillips, *Treatise on the Law of Insurance*, vol. 1, 526.
[992] In Chalmers and Owen, *A Digest of Marine Insurance*, 52, Chalmers commented on the subsection "This seems fair, but is a somewhat doubtful proposition." by reference to *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451, 457 and to the concept of usage as an excuse for the breach.
[993] The doubt was also relied upon a statement in *Arnould on the Law of Marine Insurance*, 6th ed., 409, namely that usage could excuse a breach of the implied undertaking to commence the voyage in reasonable time. The passage referred to *Vallance v Dewar* (1808) 1 Camp.503 which was discussed above at 2.1.
[994] The Act was also drafted by Sir McKenzie Chalmers.
[995] Chalmers, *The Sale of Goods Act 1893*, 103.

existence of the usage, or its illegality or unreasonableness or that it formed no part of the agreement between the parties. The Sale of Goods Act 1893 and the concept of usage of trade as negativing an implied condition or warranty may not be authority for interpreting the MIA, yet may be of help in understanding the background against which the drafters prepared the legislation.

Another question that may be raised is what effect usage of trade may have on avoidance *ab initio*, in case it can be implied into s 42(2). Would it prevent the insurer from avoiding the policy on the ground that usage of trade is a circumstance known by the insurer? Alternatively, in case the expression "circumstances known to the insurer before the contract is concluded" in s 42(2) can be expanded to cover also circumstances which ought to be known by the insurer, usage of trade could constitute such a circumstance which could excuse the assured. This would however be confined presumably to situations where the assured fails to make a representation as to an event which may delay the commencement of the voyage, given the remedy of avoidance *ab initio*.

7.4.1. Waiver by the insurer

The second part of s 42(2) states that the implied condition may be negatived by showing that the insurer waived the condition. The first part of the sentence enunciates that the option to negative is available *before the contract was made*, the assured can accordingly prove that the insurer waived the delay before the contract was made by a representation or by stipulating a clause in the policy prevailing over the implied condition. It is however not clear what "*or by showing that he waived the condition*" connotes. It arguably gives the assured to prove that the insurer waived the condition after the contract was made and after finding out about the delay. [996] The Bill of the MIA 1906 was drafted slightly differently than the current subsection, it read: "The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was made, or by showing that he *acquiesced in the delay*" (emphasis added). The italicised part is arguably distinct from the current version of the section in that the waiver of an implied condition (and not the waiver of the delay) is not necessarily equivalent to acquiescing in the delay, where the latter would presumably refer only to post-delay waiver.

[996] This was the situation in *Bah Lias Tobacco & Rubber Estates, Ltd v Volga Insurance Company Ltd* (1920) 3 Lloyd's List Law Reports 155

The second part of s 42(2) may echo the waiver of an implied warranty. [997] The Court of Appeal in *The Good Luck*[998] had held that a breach of warranty could give the insurer a "right to avoid" based on, *inter alia*, section 42 and that to read s 33(3) as conferring a right to avoid was not inconsistent with the recognition of waiver in s 34(2), since in s 42 both conditions were found. This analysis was rejected by the House of Lords leaving no room for doubt.[999] According to the Court, the waiver in s 42 was a waiver of the implied condition, and not waiver of the right to avoid as was considered by the Court of Appeal. The waiver prevented any breach or any right to avoid arising at all whereas waiver in s 34(3) was a waiver of a breach of warranty after it occurs. This approach, although *obiter*, may be taken to mean that the implied condition in s 42 may not be equated to a warranty.

The predecessor of what is now s.33(3) contained the word "avoidance" for breach of warranty instead of "discharge". [1000] The option of avoidance granted to the insurer would mean that the contract would remain in full force and effect if the insurer does not elect to avoid. The waiver of the implied condition in s 42, when considered in the context of the right to avoid could be read such that if the insurer waives the condition, he would not have the right to avoid the contract for breach of the condition. One of the reasons why the term "waiver" in s 42(2) may not be considered as referring to a breach of warranty is that while s.34(3) mentions the *waiver of breach* of warranty, s.42(2) is about *waiver of the implied condition* and not about the waiver of the "breach" of it. This view would very much doubt whether the waiver could operate after the delay occurs. In the sole case which was decided on waiver after the enactment of the MIA, the insurer by accepting extra premium for the lengthy delay after it occurred was taken to have waived the "condition". In *Bah Lias v Volga Insurance* [1001] the insurance was a voyage policy on cargo "at and from", against fire including fire antecedent to the shipment. There was a shortage of shipping of the cargo as a result of war, a fire occurred on board one year after the policy of insurance was made and

[997] Under American law, the waiver was considered as a waiver of implied warranty; Phillips, s.602, Buglass, *Marine Insurance and General Average in the United States*, 47. The automatic discharge remedy under English law and its relevance to waiver was discussed elsewhere in this work in light of the Law Commission's proposals about warranties, please see 2.3.1.
[998] *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1990] 1 Q.B. 818
[999] In *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1991] 1 AC 233
[1000] The second sentence of s.33(3) read "If it be not so complied with, the insurer may avoid the contract [as from the date of the breach of warranty, but without prejudice to any liability incurred by him before such date]."
[1001] *Bah Lias Tobacco & Rubber Estates, Ltd v Volga Insurance Company Ltd* (1920) 3 Lloyd's List Law Reports 155

part of the cargo was accordingly lost. Notice of loss was given to the insurers and increased premium had been paid during the two months in which the loss had occurred in respect of the delay. It was held that the insurers in accepting the premium, had waived the breach of condition. It is not very clear however whether the main reason for deciding in favour of the assured was the fact that there was a breach of condition which was later on waived by the insurer. It may actually be that there was no unreasonable delay in the commencement of the adventure in the first place as the shortage of shipping was due to the war which prevented the completion of shipment and accordingly the risk from attaching.

The view of the House of Lords in *The Good Luck* is also doubtful in that it presumably confines waiver of the implied condition to the period before the delay becomes unreasonable. [1002] A breach of condition, i.e. of a term going to the root of a contract, gives the innocent party the option either to affirm the contract or to accept the breach of condition. The assured, by causing a lengthy delay in the commencement of the voyage may be taken to have repudiated the contract. In this scenario, s 42(2) may be construed in such a way that it allows the insurer to affirm the contract, by not avoiding for breach of implied condition after the unreasonable delay occurs.

If avoidance in s 42(2) is considered as automatic discharge from liability and not avoidance *ab initio*, delay at the commencement of the voyage can only be waived at the time of the making of the policy by an express provision. However according to the current version of the clause, this suggestion is not tenable given that the insurers are entitled to elect to avoid, which leaves out any possibility of automatic discharge. This would give the insurers the right to waive the condition after the commencement of voyage is delayed. This being said, as was submitted in this chapter, the current s 42 regulates merely pre-attachment delays and therefore the option of automatic discharge from liability can nonetheless be available to insurers for the post-attachment delays.

7.4.2. Circumstances known to the insurer

S 42(2) reads that the implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was made. Prior to the

[1002] The part which states that the waiver prevents any breach arising at all.

enactment of the MIA 1906, this issue was discussed in *De Wolf v Archangel*[1003] at two different instances. The first related to the statement that the delay may be excused on the ground that it is necessary where the insurer knows about the event which causes delay. [1004] This does not form part of the ratio in *De Wolf* as the necessity of delay was not discussed, nor was there an issue about whether the insurers knew about the preliminary voyage. Nevertheless s 42(2) may have arguably settled this point. The second relates to two views previously expressed by Phillips. [1005] The way they were expressed in *De Wolf* was as follows: 1) That there is an implied understanding that the risk is to commence in reasonable time so that it shall not be varied unless the policy contains an express provision in this respect, [1006] and 2) that a representation, although not embodied in the policy may qualify or rebut the implied understanding. [1007]

Firstly what needs to be distinguished is what type of representation may qualify as the one in the latter suggestion. According to Phillips, "if the assured, prior to effecting the policy, discloses a fact, or an intention to do any act, not inconsistent with the express provisions of the policy, but which, if not disclosed, would be a violation of a warranty implied by the fact of making the insurance, but not by the obvious and necessary construction of the language of the policy, the underwriters are bound by such representation, and the policy is valid notwithstanding such fact or the execution of such intention…". [1008] The reasoning upon which the statement was based was that usage and implied warranties constituted part of the contract and preliminary and simultaneous statements could be introduced as an intention of the parties. The consequence is that, although the assured is not bound to make any representation relating to the subject of any implied warranty, if he states a material fact touching the warranty of commencement of the voyage, [1009] the implied warranty will be subject to the representation. The reasoning of Phillips and the possibility that the representation binds the insurer rather than the implied warranty are therefore confined to the representations which the assured are not bound to make.

[1003] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451
[1004] The judgment at 455 referred to *Mount v Larkins* (1831) 8 Bing. 123, where the preliminary voyage was known to the insurers although the report did not give a specific information about whether it was known. The court in *De Wolf* thought it was scarcely possible that it should be otherwise.
[1005] Phillips, *Treatise on the Law of Insurance*, ss.602, 690
[1006] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451, 457
[1007] *De Wolf v Archangel Maritime* (1874) L.R. 9 Q.B. 451, 457
[1008] Phillips, ss.602. The example given for such representation was a representation of an intention to vary from usage.
[1009] At pp.336

As to representations about the location of the vessel when the contract is made, *De Wolf v Archangel* referred to *Hull v Cooper*[1010] as authority that the assured is not bound to communicate the location to the insurer.[1011] The reason for this was that the risk is not to attach unless the vessel arrives at the port of departure within reasonable time, therefore to know the location of the vessel at the time of the contract is not material to the insurer. Conversely, it was stated that if the time when the risk is to attach might be indefinitely delayed by circumstances affecting the passage to the departure port from the place where the vessel was, to know the location of the vessel at the time of the contract would be material to the insurer. This approach of *De Wolf* is doubtful. Firstly because if *Hull v Cooper* can be authority with respect to materiality of representations of the assured, it can only be authority for representations as to the location of the vessel at the time the contract is made. There may be several other circumstances which may exist before the contract is made, and which may result in delay after the policy is made. Secondly, the policy in that case was a policy on goods, whereby the assured may not be expected to make representations as to the location of the vessel when the insurance policy is made given that either it may not be known to him, or that it may not have control over the timely prosecution of the voyage to the departure port. It would follow that an assured under a hull policy which is made on a voyage basis may be bound to make a representation as to the location of the vessel at the time of the contract. Thus, the suggestion of Phillips as to the fact that a representation made which was not bound to be made by the assured may qualify the warranty may not be tenable.

Whether a representation needs to be made by the assured should be determined according to the materiality of the representation.[1012] Except for the usage of trade which is a situation known or presumed to be known by the insurer, other circumstances which may amount to delay may have to be disclosed to the insurer as they would be material. In this scenario, only the representations which are not material yet which are made to insurers may qualify the warranty. If the insurer after the representation is made does not stipulate any particular term in the policy, may have actually be taken to have waived the implied term.

[1010] *Hull v Cooper* (1811) 14 East. 475
[1011] At 456.
[1012] S 18(2)

In the pre-MIA cases *Vallance v Dewar*[1013] and *Ougier v Jennings*[1014]the usage of trade as to an intermediate voyage meant that the assured did not have to disclose the fact that the ship would sail on such a voyage, the usage of trade was equivalent to notice or representation made to insurers. It was suggested that this point has been settled by s 42(2) which provides that the the implied condition will be negative where the delay is caused by circumstances known to the insurer. [1015] A strict interpretation of s 42(2) may however not necessarily allow this finding. The subsection states "circumstances known to the insurer", and not "circumstances which are presumed to be known by the insurer", [1016] accordingly it may be open to insurers to argue that although a usage of trade is expected to be known by the insurer, it was actually not known and that therefore the existence of usage of trade which caused delay at the commencement of the voyage may not negative the implied condition. It is submitted however that given the fact that s 42(2) was found "doubtful" by Chalmers in light of *De Wolf* and as to trade usage, it may be argued that the subsection also comprises circumstances which are ought to be known by the insurer. This would also be in line with pre-MIA cases.

The phrase also restricts the possibilities available to the assured to negative the condition by the expression "before the contract was concluded". According to s 42(2) where a war (an event known to everyone) breaks or there is a strike before the contract is made in the area where the voyage insured by the policy would take place the condition may be negatived. It is not clear whether it would also be negatived where there is an anticipation of war arising prior to the conclusion of contract, however breaking after the contract is made and causing delay at the commencement of the voyage. There may be many instances where delay occurring after the date of the policy is caused by circumstances arising before the date of the policy. From insurers' point of view, in order to avoid the argument that the circumstances causing delay were known to the insurers, insurers may stipulate warranties as to the time of sailing in the policies.

[1013] *Vallance v Dewar* (1808) 1 Camp.503
[1014] *Ougier v Jennings* (1808) 1 Camp. 505
[1015] *Arnould*, 9th.ed., vol.1, 643
[1016] According to s 18(3)(b), the assured does not have to disclose any circumstance which is known or presumed to be known to the insurer. The subsection goes on stating that "the insurer is presumed to know matters of common notoriety or knowledge, and matter which an insurer in the ordinary course of his business, as such, ought to know". Usage of trade in respect of the voyage insured could be considered as a matter that the insurer ought to know in the ordinary course of his business.

Conclusion

This chapter analysed delay at the commencement of the voyage in two parts, namely delay before and after the risk attaches under a voyage policy. It has been seen that as to the former, the common law provided as remedy that the risk would simply not attach according to *De Wolf v Archangel*. In that respect, delay before the risk attaches was considered as a breach of condition precedent to the attachment of risk before the enactment of the MIA. The current remedy of avoidance of policy is therefore a curiosity and by no means reflects the common law remedy. This chapter argues that a possible motive behind introducing this alien remedy could lie in avoiding misrepresentations as to the time of sailing, which under the common law, was not a matter that should be disclosed.

The chapter further elaborated that delay at the commencement of the voyage after the risk attached before the vessel sailed on the voyage whereby s 48 is triggered was not canvassed by the MIA. It was argued on the ground of common law authorities that delay during this part of the voyage could present an alteration of risk by the assured and could discharge the insurers as from the time delay becomes unreasonable.

This work tentatively proposes that the remedy of avoidance should be abolished on the ground that it does not reflect its common law background, and the section should be redrafted to include both pre and post-attachment delays. It is recognised that the section may be considered obsolete given that the section applies merely to policies “at and from” or “from” which are currently not in use. Instead, certain standard market conditions such as Institute Cargo Clauses 2009 contain an avoidance of delay clause requiring the assured to act with reasonable despatch in all circumstances within their control which could be taken to cover s 42 situations. Nonetheless, firstly on the ground that the avoidance of delay clause has not been litigated in England and its scope is therefore unclear and secondly so as to apply to policies which are not drafted on standard market terms, it is submitted that s 42 should be retained, subject to amendments and additions.

CHAPTER VIII

DELAY IN VOYAGE

Introduction

The Marine Insurance Act 1906 provides that the adventure insured must be prosecuted with reasonable despatch and in the absence of a lawful excuse, the insurer is discharged from liability when the voyage is not so prosecuted.[1017] It is also provided that if the cause excusing the delay ceases to operate, the ship must resume her course and prosecute the voyage with reasonable despatch.[1018] The purpose of those sections and sub-sections is "to minimise the period of risk while the ship and goods are at sea".[1019]

This chapter shall analyse firstly the common law origins of the sections with a particular focus on the concept of alteration of risk initially undertaken by the insurer which is the foundation of the analogy of delay to deviation and secondly the criteria in determining whether a delay is unreasonable. Furthermore it shall be assessed whether s 48 operates as a warranty with a particular emphasis on reports issued by the English and Scottish Law Commissions and the Australian Law Reform Commission. In addition to the foregoing, latter parts of the chapter shall shed light on the reflections of s 48 on standard market terms, in particular Institute Cargo Clauses, and shall examine the transit clause insofar as it relates to delay beyond the control of the assured and shall inquire the scope of "ordinary course of transit" so as to determine in which circumstances a delay can take the goods off the ordinary course of transit. Finally the scope of avoidance of delay clause which has not yet been litigated in England shall be analysed with reference to judgments delivered in other common law jurisdictions.

8.1. Delay and Deviation

[1017] S 48
[1018] S. 49(2).
[1019] This was enunciated in *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129, per Kaye J in the context of s 55 and 56(2) of the Australian Marine Insurance Act 1909 which respectively are identical to s 48 and s 49(2) of the MIA 1906.

Before the MIA 1906 was enacted, delay was held to be an instance of deviation in many of the judgments[1020] on the ground that just as deviation, unreasonable or unexcused delay causes change in the risk undertaken by the insurer.[1021] At the time, "deviation" was a concept akin to voyages where the purpose of the voyage was not followed although there was no strict deviation from the course of the voyage in the locality sense.[1022] Given that deviation is now a change of the voyage insured in terms of locality, an unreasonable or unexcused delay can be considered as a change of the voyage insured in terms of time,[1023] and the distinction between deviation and delay having been made clear in the MIA in ss 46 and 48. One possibility remains however where deviation and delay may need to be considered together: Where delay is caused by a deviation in the course of the voyage, the insurer is discharged from liability when the deviation occurs, i.e. before even delay is in place.[1024]

The difference between delay and deviation has not been canvassed to a great extent by courts after the enactment of the MIA. The distinction between "prolongation" of the voyage and deviation was nevertheless discussed in the context of their respective representation of time and locality. In *Union Castle Mail Steamship Co Ltd v United Kingdom Mutual War Risks Association*[1025] a war risks policy provided cover for expenses incurred by the assured by reason of prolongation of the voyage arising from compliance with directions of certain authorities; however expenses incurred during the period of prolongation were not recoverable. In an *obiter* passage, Diplock J enunciated that prolongation of the voyage had merely a temporal and not a geographical meaning, referring also to the word "period" preceding the word prolongation. Moreover he observed that prolongation had not started until the voyage would have normally ended. In the facts of the case, the prolongation could have readily been determined given that the insured vessels were due to their ports of loading on specific dates. The vessels had also deviated multiple times and one of the points

[1020] This was in particular expressed by Lord Mansfield in *Hartley v Buggin* (1781) 3 Dougl. 39.
[1021] For the speech of Tindal C.J as to the alteration of risk by unreasonable delay, see *Mount v Larkins* (1831) 8 Bing. at 122.
[1022] See *Hamilton v. Sheddon* (1837) 3 M & W 49. This can no longer be the case given the clear wording in s 46.
[1023] This was recognised in respect of unjustifiable delay in Chalmers and Owen, *A Digest of the Law Relating to Marine Insurance*, 1901, 57.
[1024] The impact of this shall be discussed below in the context of clauses giving liberty to deviate.
[1025] *Union Castle Mail Steamship Co Ltd v United Kingdom Mutual War Risks Association* [1958] 1 All ER 431

discussed as *obiter* was the connection between deviation and prolongation of the voyage.[1026] However Diplock J observed that there can be deviation without prolongation of the voyage if the voyage is terminated within the expected period of time. It is noteworthy that the policy was a time policy on hull and machinery however Diplock J assessed the prolongation of the voyage by reference to the dates the vessels were due to their port of loading from their round voyage. Albeit this case cannot be considered for interpreting s 48 on the ground that s 48 applies to voyage policies only, it may shed light upon the connections of deviation and delay.

Before the MIA was enacted, several judgments were cited by Sir McKenzie Chalmers to illustrate the s 48 and to point out the fact that delay was no longer an instance of deviation.[1027] However as will be discussed in this chapter, it is controversial whether those authorities otherwise clarify the scope of s 48.

8.1.1 Liberty clauses on deviation and their impact on delay

In most of the pre-MIA cases on delay and deviation involving policies with clauses granting liberty to deviate, delay amounting to deviation was often considered within the scope of the liberty clause. In *Hyderabad v Willoughby*[1028] the policy contained a clause covering the assured "in the event of deviation and change of voyage at a premium to be hereafter arranged". The goods having to be carried to a warehouse after having been rejected at the discharge had to be kept there for a month until the arrangements were made for delivery. Insurers sought to avoid liability on the ground that there was deviation and unreasonable delay. It was held that the deviation was for the purpose of the voyage and therefore justifiable, but the delay in the warehouse was unreasonably long and it could be taken to be an unjustifiable deviation. Nevertheless, given that the liberty clause had allowed deviation, the insurers were entitled to a reasonable additional premium and they were not discharged from liability. Delay was accordingly excused under a liberty clause allowing deviation. Other examples existed where "delay" and "deviation" were used interchangeably in the

[1026] If the prolongation of the voyage was going to be treated as having a geographical sense, then the assured would have to have given credits for savings made during the deviations (such savings of as canal dues, port charges at ports omitted, additional freight earned).
[1027] *Company of African Merchants v British Ins. Co* (1873) L.R. 8 Ex. 154; *Pearson v Commercial Union Ins. Co* (1876) 1 App. Cas. 498
[1028] *Hyderabad v Willoughby* [1899] 2 Q.B. 530.

context of liberty clauses allowing delay, however "deviation" was not used strictly in the locality sense.[1029]

There has been no case law after the enactment of the MIA which touched upon deviation, delay and liberty clauses in the context of marine insurance. However this point was invoked in an *obiter dictum* in the US case *The Citta di Messina*[1030] in relation to bills of lading.[1031] The ship had waited for nearly two weeks for cargo at a port, of which she had obtained a small amount. District Judge Hough, referring to *The Company of African Merchants v Foreign Marine Insurance Company*[1032] stated that delay amounted to deviation even upon the course of the voyage prescribed in the policy although the MIA excluded delay from the definition of deviation. At the time of the judgment under US law, delay in the course of transit amounted to deviation, accordingly the scope of the liberty clause also comprised delay. Nevertheless, according to the express distinction made under the MIA between delay and deviation, the application of s 48 would have the result that where delay is in no way connected to deviation (in the sense of locality), i.e. where it does not follow deviation, liberty clauses excusing deviation may no longer be held to excuse delay.

It can be suggested that the only possibility that after the enactment of the MIA delay can be excused under a liberty clause allowing deviation, is where firstly deviation is for the purpose of the voyage and justifiable, and then that the deviation and delay are so connected in that deviation causes delay. This suggestion finds support in the House of Lords judgment *Pearson v Commercial Union*[1033] where Lord Cairns noted that "any delay usual in the circumstances, any deviation usually or conveniently made from the straight line, provided the delay and deviation are connected with" would be justifiable in the words of the policy.[1034] According to this reasoning, mere delay which is not caused by deviation or which occurs on the course of voyage prescribed in the policy can no longer be treated as

[1029] In *Syers v Bridge* (1790) 2 Dougl. 526 delay was allowed under a liberty clause excusing "cruising for six weeks" and it was held that this signified deviation (in the sense of time and not locality) was allowed.
[1030] *The Citta di Messina* (1909) 169 F. 472, District Court, S.D New York.
[1031] The bill of lading had the following liberty clause "To proceed and stay at any port or place for loading and discharging or for any other purpose whatsoever".
[1032] (1872-73) L.R. 8 Ex. 154
[1033] *Pearson v Commercial Union* (1876) 1 App. Cas 498, the policy had a clause which read "liberty to go into dry dock".
[1034] At 502

deviation[1035] and therefore liberty clauses excusing deviation can no longer excuse such delays.

8.1.2. Mixed policies-time policies and s 48

The current s 48 states that an unreasonable delay discharges the insurers in the case of a voyage policy. Given that the section does not expressly refer to time policies, the section could arguably mean that there would be no requirement to prosecute with reasonable despatch in time policies and accordingly that any delay during the term of the policy would not put an end to the liability of an insurer. It is submitted that in light of the earlier case law, this proposition is not free of doubt.

In the House of Lords judgment *Pearson v Commercial Union Assurance*[1036] the policy was a time policy against fire which described the ship as "lying in the Victoria Docks" and gave the ship "liberty to go into dry dock". The ship before entering the dry dock had to remove paddle-wheels, which had to be re-fitted on the way back to the Docks. As it was more economic for the assured to re-fit the paddles before entering the Docks, they were re-fitted on a river which was not in the usual transit from the dry dock to the Docks whereby a delay was caused. In deciding whether delay was occasioned according to usage and therefore excused the assured, the Court approached delay in a time policy as a non-fulfilment of a contractual condition (i.e. the ship being covered by the policy during three months so long as she lies in the Docks and so long as she is in a dry dock). The delay in this case was held to be collateral to the object of the end in view and therefore unjustifiable, accordingly the ship was not covered by the policy as from the time when the delay occurred.[1037]

Another possibility is that the policy is both a voyage and time policy, [1038] i.e. a mixed policy, [1039] in which case would arise the issue of whether and when an unreasonable delay

[1035] Whereby judgments such as *Phillips v Irving* (1844) 7 Man. & G. 325 and *Columbian Insurance Company v Catlett* (1827) 25 U.S. 383 would be no longer law.
[1036] *Pearson v Commercial Union* (1876) 1 App. Cas. 498
[1037] Collateral purpose of delay which can be interpreted as commercial convenience for the assured has been the subject of many judgments after *Pearson v Commercial Union*, for the examples see *Fedsure General Insurance Limited v Carefree Investments (Proprietrary) Limited* (477/99) [2001] ZASCA 88.
[1038] Institute Time Clauses Hulls 1995 cl.2, the policy is for a fixed period however the assured is held covered if the vessel is in distress at sea, until her arrival at the next port in good safety. The part of the journey of the vessel in reaching the port in good safety can be considered as a "voyage". Similarly, see International Hull Clauses 2003 cl.12. The fact that the conditions are entitled "Time Clauses" shall not necessarily connote that the policy is a time policy in its entirety.
[1039] s 25(1).

could discharge the insurers. For the voyage part of the policy, unless the policy is not altogether considered as a time policy,[1040] the s 48 would apply. In *The Company of African Merchants v Foreign Marine Insurance Company*[1041] the policy was a combination of a voyage policy (being a policy on voyage to the west coast of Africa) and a time policy because the assured had the right to keep the ship in that area for an unlimited period (in the sense that the length of delay was held covered) upon the condition of staying and trading there. [1042] On the ground that the ship stayed there for a purpose not connected to trading, it was held that the delay discharged the insurers. This judgment raises interesting questions in terms of time policies, given that delay in this case had occurred during the period which, according to the Court, makes the policy partly a time policy.

Another relatively recent judgment involving mixed policies and delay in voyage is *The Al-Jubail IV*[1043] delivered by the Singapore Court of Appeal. The ship was held to be insured under a mixed policy affording a cover of 12 months and starting as from and on the voyage from Singapore to the Persian Gulf.[1044] On its voyage, the ship encountered heavy seas and had to be repaired whereby the voyage was delayed. Insurers alleged that they were discharged from liability according to s 48 as the delay was allegedly unreasonable. Lai J. decided that the time spent for repairs was reasonable and that the insurers were not discharged from liability. The case did not particularly discuss the application of s 48 to mixed policies, yet elaborated on mixed policies in the context of unseaworthiness.

According to the above it would not be a fallacy to argue that as far as time policies are concerned, delay can be considered as a breach of a contractual condition and discharge the insurers if the purpose of delay is unjustifiable. In mixed policies, s 48 would apply to the voyage part of the policy and a delay could discharge the policy altogether where the assured cannot prove that delay had occurred for a purpose connected to the voyage.

[1040] A time policy with the intention of covering a voyage was held to be a time policy only, *Marina Offshore Pte Ltd. V China Insurance Co (Singapore) Pte Ltd* [2007] 1 Lloyd's Rep 66.
[1041] *Company of African Merchants v Foreign Marine Insurance Company* (1872-73) L.R. 8 Ex. 154. The policy in this case was upon a ship at and from Liverpool to the west or south-west coast of Africa "during her stay and trade there", at a premium varying with the duration of the risk. After arriving at the coast of Africa, the ship stayed there for some weeks for a purpose not connected with the voyage, however the delay was within the currency of the policy.
[1042] At 156.
[1043] *M Almojil Establishment v Malayan Motor and General Underwriters (Private) Ltd. (The Al-Jubail IV)* [1982] 2 Ll. L. Rep. 637.
[1044] Lai J At p 641

8.2. Unreasonable Delay: Length and/or Justification of Delay

S 48 of the MIA 1906 enunciates that the assured should prosecute the voyage with reasonable despatch and the insurers are discharged from liability when the delay becomes "unreasonable". Many judgments delivered prior to the enactment of the MIA touched upon this term[1045] and a recapitulation thereof is required so as to ascertain the criteria which determine when a delay becomes unreasonable.

8.2.1. Criteria of Unreasonable Delay arising from common law: Length and Justification

Unreasonable delay was discussed in many pre-MIA cases[1046] although its criteria had not been noted as clearly as they were in *Langhorn v Alnutt.*[1047] Prior to further touching upon this judgment and its significance, an earlier case *Hartley v Buggin*[1048] needs to be considered so as to determine the difference between the length and purpose of delay and their impact on the development of the concept of "unreasonableness" of delay. In *Hartley v Buggin*, the policy gave the assured the "liberty to exchange goods and slaves" during the voyage insured. Instead of exchanging goods and slaves, the ship was used as a floating slave depot which had occasioned a delay of seven months. As the fact that the ship being used as a depot was not within the purpose of the voyage and the liberty granted, delay was held to be unjustifiable and discharged the insurers. The length of delay and whether it was unreasonable was not canvassed by the court. The fact that there was no account for delay was sufficient for the change of risk by delay and discharge of insurers from liability.

Langhorn v Alnutt[1049] was delivered few years later and clarified the position as to the criteria that require evaluation for deciding whether a delay is unreasonable. The policy contained a clause giving the assured liberty to touch and stay at all ports for all purposes whatsoever. The ship waited in port for about four months and according to the evidence provided for, to obtain forged documents. Chambre J stated that "Length of delay creates a degree of

[1045] *Hamilton v. Sheddon* (1837) 3 M & W 49; *Company of African Merchants v. British Insurance Co* (1873) LR 8 Ex 154; *Pearson v. Commercial Union Assurance Co* (1876) 1 App Cas 498; *Phillips v. Irving* (1884) 7 Man & G 325; *Hyderabad (Deccan) Co v. Willoughby* [1899] 2 QB 530; *Smith v. Surridge* (1801) 4 Esp 25; *Grant v. King* (1802) 4 Esp 175; *Schroder v. Thompson* (1817) 7 Taunt 462; *Samuel v. Royal Exchange Assurance* (1828) 8 B & C 119; *Bain v. Case* (1829) 3 C & P 496; *British American Tobacco v. Poland* (1921) 7 Ll LR 108; *Niger Co Ltd v. Guardian Assurance Co* (1922) 13 Ll LR 175.
[1046] *ibid.*
[1047] (1812) 4 Taunt. 511
[1048] *Hartley v Buggin* (1781) 3 Doug. K.B. 39
[1049] *Langhorn v Alnutt* (1812) 4 Taunt. 511

suspicion and calls for explanation"[1050] and Gibbs J gave a detailed judgment as to the criteria of an unreasonable delay. He enunciated that whether the ship's stay was for a purpose within the scope of the adventure was a question of law and would have to be answered by the courts, whereas whether the ship stayed for an unreasonable time for that purpose was a question of fact to be answered by the jury.[1051] According to this judgment, unreasonable delay has two components, namely the purpose and length of delay. If the former question is answered negatively, i.e. if delay is incurred for an unaccountable purpose, the delay is altogether unjustified and the insurers are discharged. It follows that whether delay's length was unreasonable may not have to be considered.[1052] Nevertheless if the former is answered affirmatively, the next issue is whether the delay occasioned for the purpose of the adventure was unreasonably long.[1053] This reasoning was also invoked after the enactment of MIA 1906 in *British-American Tobacco Company Ltd v H.G. Poland*[1054] where under a policy on goods, a delay of three months was occasioned due to waiting to obtain a permit to forward the goods. Having decided that the delay was for the purpose of the voyage, the court agreed with the first instance judge's finding that the goods were forwarded at the earliest convenience and therefore the length of delay was not excessive. In *Hyderabad v Willoughby*[1055] a delay for a month having occurred in corresponding to arrange how the cargo could be sent on in order to continue the transit was held to be unreasonably long although it was for the purpose of the voyage and therefore justified.[1056]

In examining whether the length of delay was so excessive for the voyage insured which is a question of fact, one of the issues that can be argued by the assured is that such delay is within the usage of trade in which the voyage is embarked upon. As was stated in *Columbian*

[1050] At 518
[1051] At 519
[1052] As was the case in *Hartley v Buggin* (1781) 3 Doug. K.B. 39.
[1053] In *Phillips v Irving* (1844) 7 Man. & G. 325 the purpose of delay was within the scope of the adventure insured as it was due to necessary repairs, and when she was ready to take in cargo, the freight market was unusually low and the port was crowded with shipping. The freights offered would, if accepted have occasioned great loss to owners. The delay therefore being justified, the next question was whether the length of delay for that purpose was unreasonable. The same reasoning had been applied in *Bain v Case* (1829) 3 Car. & P. 496 where a delay in waiting permission to land cargo was for the purpose of the voyage and therefore justified, and the length of delay of one hundred and nine days was held to be not so unreasonable.
Langhorn v Alnutt was followed in Canada, please see *Reed v Weldon* (1869) CarswellNB 23 delivered by New Brunswick Supreme Court.
[1054] *British-American Tobacco Company Ltd v H.G. Poland* (1921) 7 Ll.L.Rep. 108.
[1055] *Hyderabad v Willoughby* [1899] 2 Q.B. 530.
[1056] This part of the judgment was followed by *Tension Overhead Electric (Pty) Ltd v National Employers General Insurance Co Ltd* [1990] 4 SA 190, see the judgment of Van Schalkwyk J at 196.

Insurance v Catlett, [1057] whether delay is "unreasonable" should depend upon the nature of the voyage and usage of trade. The delay in that case was justifiable as it was for the purpose of selling the cargo and a price limit was set for by the assured for such sale. Although the delay was long, considerable delays at that port were not uncommon and therefore the length of delay was not unreasonable. It was also noted that if the owner of goods (who was also the owner of the vessel) had set a very high limit for selling the cargo and had further delay been caused accordingly, the delay could have been "unreasonable". [1058]

In a policy such as in *Company African Merchants*[1059] the protraction of the voyage can be held covered, yet this would not mean that any delay should be allowed. However long a delay can be, it has to occur for the purposes of the voyage contemplated in the policy.[1060] One of the criticisms that may be brought to the fact that this case was mentioned as an illustration of a s 48 situation is that it does not discuss the length of delay,[1061] yet merely the fact that it was incurred for a purpose unconnected with a voyage. In want of such an emphasis, it could follow according to this authority that any interruption of the voyage the purpose of which is unconnected with the voyage could discharge the insurers.

According to the common law authorities, it can be submitted that if a delay is incurred for a justifiable purpose and that the length of delay is not so excessive for that purpose, a delay is not unreasonable. The fact that the purpose rather than the length of delay is to be looked at so as to determine whether a delay is unreasonable can be further supported by the fact that unreasonable delay and deviation have the identical remedy[1062] and the identical excuses[1063] which rest solely on the basis of "purpose". It may accordingly follow that there must be something in the nature of deviation, a change of risk in terms of purpose of the voyage that would make the delay unreasonable.

[1057] *Columbian Insurance v Catlett* (1827) 25 U.S. 383.

[1058] In that case, it was decided that considerable delays at the port where the ship delayed are not uncommon, so as to take the advantages of the freight market. The reason why delay would in that case be "unreasonable" rests upon the fact that delay would be incurred for a purpose unconnected to the purpose of the voyage and would therefore be unjustifiable.

[1059] This case was mentioned in Chalmers and Owen, *A Digest of the Law Relating to Marine Insurance*, 1901, 57 as an example for a s 48 type situation.

[1060] Blackburn J at 157 noted that the parties knew and contemplated that the ship could protract its course, yet the protraction could be excused if it was for the purpose of trading as the policy covered the ship during her "stay and trade".

[1061] The interruption of the voyage in that case was four weeks.

[1062] s. 46 provides that the insurer is discharged from liability as from the time of the deviation.

[1063] s. 49.

8.2.2. Abnormal delay and the knowledge of the assured

The knowledge of the assured at the time of the contract as to the probability of the occurrence of an excessive delay and its concealment may be considered as a fact material to the risk that could give the insurers the right to avoid the insurance contract on the ground of material non-disclosure. In *Schloss Brothers v. Stevens*[1064] it was argued on behalf of the insurers that the fact that the deficiencies of means of transport were such as might involve an excessive delay was known to the assured and concealed. The court, without elaborating on the matter, pronounced that there had been no concealment of facts which were material to the risk and went on discussing whether an abnormal delay was within the wording "all risks by land and by water". The question has not been canvassed by courts since then.

The above issue would raise the question of whether the concealment of the knowledge of an event which could cause an ordinary delay of the voyage may also be treated as non-disclosure. It is submitted that the answer may be negative given that an ordinary delay resulting from the perils insured against ought also to be expected by insurers and would therefore consitute a fact known to the insurer. [1065]

8.2.3. Unreasonable delay in s 48 and the delay exclusion

According to s 48, insurers are discharged from liability as from the time the delay becomes unreasonable. It will be submitted in this work that some authorities considered that s 48 operates as a warranty which would require that the discharge of insurers from liability would be automatic in the event where the warranty is breached. [1066] When this provision is read in conjunction with the exclusion of delay losses in s.55(2)(b), the most obvious finding would be that the insurer would be discharged as from the time the delay becomes unreasonable and therefore no question would arise as to whether the delay exclusion would also exclude losses caused by unreasonable delay: the insurers would not be liable for losses arising after they were discharged from liability.

[1064] *Schloss Brothers v. Stevens* [1906] 2 KB 665

[1065] By virtue of s.18(2)(b), the circumstances which are known or ought to be known to the insurer need not be disclosed.

[1066] The House of Lords held in *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C. 233, that where a warranty is breached, insurers are automatically discharged from liability.

The question remains however whether a policy subject to MIA would merely exclude cover for delay losses arising before the delay becomes unreasonable.[1067]

8.2.4. Excusable delays

i. Unreasonableness under s 48 and excuses for delay

It is not clear whether the notion of unreasonableness referred to in s 48 reflects the common law position, i.e. whether it involves both the length and purpose of delay. This observation is based on several grounds.

The scope of s 49 where excuses for delay and deviation are enumerated in a non-exhaustive way is not entirely clear when considered together with s 48, if the concept of unreasonableness under s 48 is taken to reflect the same position as under the common law. Reading s 48 in conjunction with s 49 results in the suggestion that delay has to be unreasonable in the first place so that the question whether such delay can be excused under s 49 could arise.[1068] This is given that not any delay, but unreasonable delays discharge insurers and therefore those are the only types of delays that can be excused under s 49. In other words, there has to be an unreasonable delay under s 48 which may or may not be excused under s 49.

Importing an element of excuse or justification into the concept of "unreasonableness" under s 48 would therefore connote that the delay, if justifiable and not extraordinary in its length for complying with the purpose of the voyage, would not be unreasonable as per s 48 in consequence of which s 49 would not even be triggered. This accordingly raises the question of whether the concept of unreasonableness under s 48 refers mainly to the length of delay and not to its purpose. This reasoning can also be supported if the expression "lawful excuse" in s 48 is taken to refer to s 49 excuses,[1069] whereby unless a lengthy delay is not excused by one of the circumstances enumerated under s 49 or like circumstances, it would discharge the

[1067] i.e. before the insurers are discharged from liability. The insurer would be liable of any loss incurred before the breach of warranty by virtue of s.33(3)(c) which provides "…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". For the view that even where the delay is not unreasonable, s.55(2)(b) will allow insurers to exclude losses proximately caused by delay, see Merkin, *The Marine Insurance Legislation*, 63. A similar view was expressed in Bennett, *The Law of Marine Insurance*, 15.29.

[1068] This was illustrated in *Hyderabad (Deccan) Co v. Willoughby* [1899] 2 QB 530 where delay was held to be unreasonable, yet necessary for the prosecution of the voyage and therefore justified.

[1069] According to Bennett, para 18-42, "since in the circumstances laid down by section 49, there would almost certainly be no discharging deviation or delay in the first place, section 49 would appear merely to provide clarification of what constitutes a lawful excuse and reasonableness".

insurers. It can therefore be concluded that the concept of unreasonableness under s 48 can arguably be different than its counterpart under the common law and relate merely to the length of delay, and not also to its justification.

For the unreasonable delay to be excused, the excuse must be lawful[1070] yet it is controversial whether lawful excuses are confined to the ones enumerated in s 49 or whether excuses such as delaying for the purpose of furthering the voyage insured or delays occurring in usage of trade[1071] could also be included in this wording. The way s 49 is drafted does not expressly result in an inference that the list of excuses is exhaustive and it was submitted by many academics that the list in s 49 was inclusive instead of exhaustive.[1072] This would give way to the argument that common law justifications for delay could still excuse the assureds, i.e. delays incurred for the furtherance of the voyage insured and delays incurred in usage of trade. As to the former, s 49 requires further elaboration.

The excuses in s 49 may be or may not necessarily be triggered for the purpose of the adventure insured. By way of example, an instance similar to *Hyderabad v Willoughby*[1073] may be an example for both delay for the furtherance of the voyage insured and s 49(1)(a),[1074] however delaying in order to help a ship in distress (as per s 49(1)(c)) would arguably not necessarily be for the purpose of a voyage insured. Therefore confining the phrase "lawful excuse" in s 48 to circumstances mentioned under s 49 would considerably restrict the scope of justifiable delays and would oversee the approach taken in most of the pre-MIA common law cases. It may also be that delays may be excused under more than one subsection.[1075]

Excuses for a warranty?

One of the reasons why the breach of the requirement that the assured should prosecute the voyage with reasonable despatch cannot be considered as a breach of warranty is as follows.

[1070] See the phrase "without lawful excuse" in s 48. This wording is also provided for in s 46(1).
[1071] As they arise in common law cases which shall be discussed below.
[1072] See *Arnould,* 17th ed., 14-72, in support of his view referred to Halsbury's Laws of England, Vol.17, para.784, n.(r)) where Cohen submitted : "It seems somewhat doubtful whether this section of the Act was intended to enumerate all the causes which will excuse deviation or delay" (unchanged in 4th edn, see Vol.25, p.91, n.(1)).
[1073] *Hyderabad (Deccan) Co v. Willoughby* [1899] 2 QB 530
[1074] Delay was necessary for the safe accomplishment of the journey of the cargo was therefore justified. There was a liberty clause in the policy giving rise to a liberty to deviate.
[1075] An analogy may be drawn from *Rickards v Forestal Land Timber & Railways Co Ltd (The Minden)* (1941) 70 Ll. L. Rep. 173, where deviation could be excused under both s 49(1)(b) or 49(1)(d).

No cause however good or necessary would excuse a non-compliance with a warranty and merely two exceptions to this rule appear under s 34 of the MIA 1906. These are: 1) the warranty ceases to be applicable to the circumstances of the contract by reason of a change of circumstances; 2) the compliance with the warranty becomes unlawful by any subsequent law. s 49 excuses are fairly distinct from those exceptions and are based on the principle that delays with a cause mentioned in s 49, or if the common law background is also included, with a justifiable cause would excuse the assured. S 49 excuses may therefore not be considered as excuses for a breach of warranty, which would also have an impact on the approach to s 48 as an implied warranty.

ii. The Law Commission's approach

The English and Scottish Law Commissions and the Australian Law Reform Commission's approaches to s 48 were elaborated in the previous chapter. For the purposes of this chapter, it shall be reminded that the English and Scottish Law Commissions,[1076] without making proposals about ss 48 and 49 given that they were voyage conditions and not warranties[1077] asked the consultees whether these sections should be retained.[1078]

The Australian Law Reform Commission however, considered the provisions about delay[1079] in their Review of the Marine Insurance Act 1909 Report No 91[1080] and proposed that the equivalent of ss 48 and 49 of MIA 1906 should be treated in the same way as the reforms proposed in respect of warranties, i.e. that they should be repealed and be dealt with as an express term of the contract.[1081] The insurers' remedies would also be limited to discharge from liability for loss proximately caused by the breach.[1082] If for a moment, the ALRC's proposal as to repealing the relevant sections could be adopted in England, the main question that should be raised would be whether standard London market wording has adequate terms

[1076] The Law Commission Consultation Paper No 204 and The Scottish Law Commission Discussion Paper No 155, Insurance Contract Law, The Business Insured's Duty of Disclosure and the Law of Warranties, published on 26 June 2012.
[1077] And that accordingly their proposals on warranties did not affect those voyage conditions, 16.24. It is noteworthy that s 48 was accepted as a voyage condition, "operating as a warranty", at para 12-16. The s 48 was enumerated under the heading "implied warranties" although it was not submitted that delay should be considered as an implied warranty.
[1078] 18.33.
[1079] Both s 48 of MIA 1909 and s 54 of MIA 1909 (which is equivalent to s 48 of MIA 1906)
[1080] The Australian Law Commission, *Review of the Marine Insurance Act 1909 Report No 91* (hereinafter referred to as ALRC 91)
[1081] ALRC 91, 9.213-9.214.
[1082] 9.214. The English and Scottish Law Commissions did not mention the issue of causal connection in their report on The Business Insured's Duty of Disclosure and the Law of Warranties as a proposal. Therefore this part of the ALRC's proposal shall not be covered here.

covering this aspect. The ICC 2009 and its wording are discussed below in terms of the clauses about prosecution of the voyage with reasonable despatch. Standard cargo policies available in the market provide that the insurance remains in force during delay beyond the control of the assured, and that the assured shall act with reasonable despatch in all circumstances within their control (avoidance of delay clause).[1083] Whether these clauses are reflections of s 48 in the standard form cargo policies shall be discussed in the following sections. Nevertheless many standard market policies remain silent as to delay while covering the assured for change of voyage or deviation.[1084] Given that delay is no longer an instance of deviation, those clauses may not be construed so as to hold the assured covered for delay.

8.2.5. Excuses arising from common law

There is no clear authority as to whether justifications which are not enumerated in the MIA yet which had been the subject of pre-MIA judgments could excuse unreasonable delays. As pointed out before, in the assumption that the s 49 excuses are not exhaustive yet inclusive, excuses arising from common law could justify unreasonable delays along with s 49 excuses. Such excuses can be classified under two headings, namely delays occurring in usage of trade in which the voyage is embarked upon, and delays for the furtherance of the voyage insured.[1085]

Delay occurring in usage

Usage of trade may affect both the length of delay and the assessment of whether delay is necessary/justifiable in the field of trade in which the assured operates.[1086] In terms of usage and time policies, it was stated in *Pearson v Commercial Union*[1087] that doing what is usual though not necessary is excused if it is done for the purpose of the voyage insured (i.e. in this case to go into dry dock).[1088] Therefore, in the facts of the case, delay, so as to be justifiable, should have been incurred for the purpose of going back to the Docks, and not in re-fitting

[1083] See ICC 2009 cl.8 and cl 18 respectively

[1084] Institute Voyage Clauses Freight 1983 and 1995 cl.3 provide that the assured shall be held covered in case of deviation or change of voyage which is subject to notice and agreement on payment of extra premium. The identical provision is found in cl.2 of the Institute Voyage Clauses Hulls 1983 and 1995.

[1085] Given that the latter was discussed in the previous chapter, only the former will be canvassed in this chapter.

[1086] In *Columbian Insurance v Catlett* (1827) 25 U.S. 383 Story J noted that the parties entering into a contract of insurance were governed by the ordinary length of voyage and the course of trade. A delay however unreasonable, if necessary to accomplish the objects of the voyage and if bona fide made, could not discharge the insurers. What delay constitutes deviation would depend on the nature of the voyage and the usage of trade.

[1087] (1876) 1 App. Cas 498, per Lord Penzance at 508

[1088] The other two judges Lord Cairns and Lord O'Hagan noted that the usage did not facilitate the transit of the ship to the docks and that it did not have to be known to the insurers as it was collateral to the voyage insured. *Arnould*, 9th ed., vol I, s 414 expressed the view that the result might have been different in a voyage policy.

the paddles in the river which is not on the usual course of transit from the dry dock to the Docks.[1089]

In another common law decision relating to usage *Phillips v Irving*[1090] it was held that whether delay is unreasonable should be determined not by any positive or arbitrary rule but according to the state of things existing at the time at the port where the ship happens to be. This was a judgment where it was held that delay was for the purpose of the voyage insured given the circumstances at the port and was not unreasonable. However what establishes usage and its relevance to justification and length of delay need to be ascertained. The length of time usually spent in waiting to sell or to obtain a cargo at a particular port may assist an assured in proving that the actual delay incurred at the port was not unnecessary, yet may not establish a fixed period of time that could be considered as usage.[1091] Usage of trade may also well affect whether delay is unreasonable where the usage of trade limits the right to take in cargo to a particular period, and not to a certain amount of time.[1092]

8.3. Ordinary Course of Transit and Delay beyond the Control of the Assured

8.3.1. Delay which is not in the "ordinary course of transit" discharges the insurers

An interruption in the voyage has significance in terms of ICC 2009 cl.8.1 which states that the assured is covered during the ordinary course of transit and 8.1.2. which provides that storage other than in the ordinary course of transit terminates the insurance. Not any interruption during the transit but "…a delay or interruption which, objectively viewed, is not part of the usual and ordinary means of effecting transit, and which is occasioned by some collateral purpose, will disturb the ordinary course of transit".[1093] Whereas cl.8.1.2 imports a subjective element into the election-making of the assured for storage which is required for

[1089] For instance while going back to the Docks, if the ship had waited a certain tide in the river and got delayed because of that, the delay which was usual but not necessary would have been within the limits of the policy cover.
[1090] *Phillips v Irving* (1844) 7 Man. & G. 325
[1091] This was raised in *Oliver v. Maryland Insurance Company* (1813) 11 U.S (7 Cranch 487) by Lord Chief Justice who also stated: "The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed this was regulated by usage and custom. The usages and customs of a port, or of a trade, are peculiar to a port or trade. But the necessity of waiting where a cargo is to be taken on board until it can be obtained is common to all ports and all trades".
[1092] *Columbian Insurance v Catlett* (1827) 25 U.S. 383.
[1093] *Fedsure General Insurance Limited v Carefree Investments (Proprietrary) Limited* (477/99) [2001] ZASCA 88, per Howie JA at para. 12.

termination,[1094] it also requires the objective test as to whether delay or interruption is or is not part of the usual and ordinary means of transit.

i. Interruption of transit brought about by requirements of transport

In the context of cl.8.1 of ICC ordinary course of transit was taken to be when goods are in transit for the reasonable furtherance of their carriage to their ultimate destination.[1095] More generally, ordinary course of a voyage or transit would involve the ordinary length of voyage which can be determined according to the course of trade in question and any interruption of the voyage brought about by requirements of transport.[1096] This may be the reason why premiums are paid to insurers for the ordinary length of the voyage in that particular trade and not for an unnecessary interruption of the voyage.[1097] Such an ordinary interruption is diametrically opposite to interruption of transit by the voluntary decision of the assured whereby the cover ceases.[1098]

Breach of cl 8.1.1 under ICC A 1982 was also considered in *ELAZ.*[1099] The Court approached the interruption merely from the point of the purpose of it and given that the purpose of delay was on-shipment of goods for their carriage to their ultimate destination, the interruption was within the ordinary course of transit and did not discharge the insurers. Nevertheless, length of delay and whether it was unreasonably long even if it was incurred for a justified purpose was not canvassed. It was also noted in the judgment that the burden is on the assured who must prove that on the balance of probabilities the loss occurred whilst the goods were in the

[1094] At para 14.

[1095] *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 by reference to Ackner J. in *SCA. (Freight) Ltd. v Gibson* [1974] 2 Lloyd's Rep 533, at p. 535. That case involved a land transit policy (the Lloyd's Goods in Transit (CMR) Policy), containing a term giving cover in the "normal course of transit". Ackner J had further noted that it was a question of degree, as to what is or is not a reasonable furtherance of the carriage of the goods.

[1096] As was stated in *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 with reference to *Leaders Shoes (Aust.) Pty Ltd v Liverpool and London and Globe Insurance Co Ltd* [1968] 1 NSWR 279, unduly protracted steps in the cargo's transportation are not within, and may terminate, the "ordinary course of transit".

[1097] This view follows the views of Story J in *Columbian Insurance Co. v Catlett* (1827)12 Wheat. 383, 388.

[1098] In *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd* [1970] 2 NSWR 77 Macfarlan said at 80 that "The purpose of a warehouse-to-warehouse clause is to insure during a limited land movement… it has never been suggested it is intended to cover indefinite storage at some place not brought about by the requirements of transport, but determined by the voluntary decision of the consignee".

[1099] *ELAZ International Co v Hong Kong & Shanghai Insurance Co Ltd* [2006] HKEC 825. In case of a voyage from China to Mexico via Texas, the goods (garments) had been loaded in a trailer-container at Texas, for the remaining part of the transit. They remained at Texas for 31 days, and then were stolen. The insurer alleged that the loss occurred while the goods were not in the ordinary course of transit according to 8.1.1. and 8.1.2.1 of the ICC A 1982.

ordinary course of transit,[1100] it follows that the onus is on the assured to prove that the interruption occurred due to a justified purpose. This approach is also in line with the pre-MIA authorities.

The moment cover ceases

Under ICC cl.8, the moment the cover ceases is of importance when there is interruption due to storage other than in the ordinary course of transit.[1101] Cl.8.1.4 enunciates a general limit of sixty days at the expiration of which the cover ceases automatically. However the situation of an interruption in the course of the voyage prior to the expiration of the sixty days is a curiosity. The motive behind the 60 day limit after the discharge overside of the goods is to safeguard the insurer against unduly protracted land carriage after the sea transit.[1102] It would follow that unless the purpose of the storage is something else than conveying the goods to their destination as soon as is practicable the cover ceases at the expiration of sixty days. This is a maximum period goods can be covered by the policy if the goods are being stored for delivery to their destination and is subject to the avoidance of delay clause. [1103]

Assuming that the cover may cease before the expiry of sixty days when the goods are stored other than in the ordinary course of transit, the question that could follow is whether it would cease when the decision is made to store them other than in the ordinary course of transit or when the goods are actually stored.[1104]

Albeit under common law, delay in voyage ceases cover when the delay becomes unreasonable, i.e. when the purpose was unjustifiable and the length of delay excessive for the specific voyage insured, in situations involving modern standard market terms on cargo, cover was held to have ceased when the goods are unloaded for storage in the warehouse

[1100] *ELAZ International Co v Hong Kong & Shanghai Insurance Co Ltd* [2006] HKEC 825, at para 101.
[1101] See cl.8.1.2
[1102] This was stated in *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd* [1970] 2 NSWR 77 with reference to Chorley and Giles, *Shipping Law*, 5th ed. (1963), p.441.
[1103] Avoidance of delay clause (cl. 18) of ICC 2009 shall be analysed at the end of this chapter.
[1104] In *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129, the insurer alleged that the insurance terminates when the assured decides to leave the goods until a certain date (the decision was made to leave them for a month in the customs house). Beach J (in the first instance) confirmed this view, and commented that this was in line with *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd* [1970] 2 NSWR 77. It shall be noted that the policy in *Wiggins* case did not contain any clause referring to "ordinary course of transit" and this point was raised by Ormiston J in *Verna*)

which causes the interruption not brought about by requirements of transport.[1105] From that moment onwards, insurers would not be liable for a loss occurring after the moment of unloading. It would follow that the goods do not have to stay in warehouse for a considerable amount of time for the transit to terminate.[1106] It is noteworthy that the insurance policy in this case did not contain a warehouse-to-warehouse clause and was not a marine insurance policy. However it was enunciated in *Commercial Union Assurance Co. v The Niger Co Ltd*[1107] in terms of warehouse-to-warehouse clause that "in transit" does not necessarily require the goods to be in constant motion or subject to a brief interruption in motion. According to the circumstances then existing, the length of suspended movement would be determinative in finding out whether transit comes to an end. It would follow that, by way of analogy to pre-MIA cases which elaborated on purpose and length of delay, where the purpose of delay/interruption is not brought about by requirements of transport or does not arise from the course of trade, the cover ceases there when the decision to interrupt the transit is exercised, i.e. when the goods are unloaded from the carrying vehicle to be stored in the warehouse. However, where the purpose of interruption is in line with the purpose of the transit,[1108] any delay great in length is determinative in whether the transit comes to an end. This latter situation would seldom arise in practice given that in most of the circumstances delay may not become excessive before the expiry of sixty days, yet it would be more determinative in a policy where there is no such time limit for the expiry of transit.

An example of a non-marine policy, not having a time limit for the expiry of transit was found in *Tension Overhead Electric (Pty) Ltd v National Employers General Insurance Co Ltd.*[1109] The policy was a contract works policy whereby the subject-matter insured was "materials in transit for incorporation in the works, other than on the contract site". The goods arrived at the premises of the consignee and were stored in a premise adjacent to the consignee's factory for five days, before they were forwarded to their destination. The

[1105] This was the case in *Nec Australia Pty Ltd v Gamif Pty Ltd; Neway Transport Industries Pty Ltd; Australian Eagle Insurance Co Ltd; Colonial Mutual General Insurance Company Ltd and Webden Pty Ltd* [1993] FCA 252, see para 40.
[1106] In *Nec Australia Pty Ltd v Gamif*, the length of delay for the stolen goods was not made the subject of thorough discussion, however it was stated that part of the stolen goods could wait in the warehouse for a considerable amount of time pending their sale and then delivered to the customers. If there was no theft, part of the goods would have been sold over varying periods of time.
[1107] *Commercial Union Assurance Co. v The Niger Co Ltd* (1922) 13 Ll. L.R 75, per Lord Sumner at pp. 81-2, the pages were referred to in *Nec Australia Pty Ltd v Gamif* [1993] FCA 252, para 28.
[1108] As in *Commercial Union Assurance v The Niger Company*
[1109] *Tension Overhead Electric (Pty) Ltd v National Employers General Insurance Co Ltd* 1990 4 SA 190, South Africa, Witwatersrand Local Division.

consignee had intended to send the goods off the day after the goods were stolen from the store yet the court decided that the intention of the assured could not change the objective meaning of "in transit". The question was whether the goods were in transit when they were stolen. The explanation of the assured in storing the goods for so long was that he did not wish to expose the goods to additional risks at the building site. The Court decided that the fact that the assured has a perfectly valid explanation for the delay does not mean the goods are still in transit.[1110] The interruption of transport could be of such duration that whatever the purpose of the interruption was, the transit must be said to have come to an end.[1111] Whether a delay terminates the insurance had to be assessed according to the nature, duration and the circumstances giving rise to delay, and that in each case the overriding consideration should be whether delay had occurred as "part of the usual and ordinary means … of … effecting … transit". [1112] In this case as well, delay not in the ordinary course of transit operated as a warranty discharging the insurers. As this case shows, where the purpose of the delay is excused, the moment when the transit is deemed to have terminated is when the delay becomes unreasonably long for the voyage. This is in line with some pre-MIA authorities on s 48, with the sole difference that in modern cargo clauses and non-marine policies, reasonable despatch applies also to land transits and not only to sea transit.[1113]

ii. Storing pending payment for goods: whether storage in the ordinary course of transit

Some types of commercial sales inevitably involve a certain amount of time before the goods are paid for and the goods may therefore have to be stored in a warehouse pending payment. In particular, documents against payment or sales through letter of credit whereby payment is made upon receipt of documents by the buyer's bank and their check pursuant to the conditions of the letter of credit, could involve a certain amount of interruption to transit. In *Miruvor Ltd v National Insurance Co Ltd*, [1114] the assured was the consignor of eight shipments from Hong Kong to Paraguay. As Paraguay was landlocked, the goods had to be made via Brazil where they were discharged and stored in a warehouse. The consignee, through forged bills of lading produced to the carrier's agents, managed to obtain the goods without paying for them. The assured brought a claim against the insurers whereby the issue

[1110] At 195.
[1111] At 195. In this respect, the judgment is in line with *Hyderabad v Willoughby* [1899] 2 Q.B. 530.
[1112] At 196, the Court referred to the speech of Lord Cairns in *Pearson v Commercial Union* (1876) 1 App. Cas 498.
[1113] This point is further discussed in this chapter, in light of *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129.
[1114] *Miruvor Ltd v National Insurance Co Ltd* [2003] HKEC 237, Court of Appeal of Hong Kong

was whether the goods had been stored other than in the ordinary course of transit at the assured's election.[1115] The case involved a sale by documents against payment, whereby the assured had to store the goods pending payment by the buyer of the goods. Albeit insurers are protected by the duration clause whereby the transit terminates at the expiry of sixty days after the discharge of the goods over the vessel,[1116] the rather complex question is whether they can be discharged before the expiry of such period.

The answer would lie in whether such delay is within the control of the assured[1117] or whether storage is in the ordinary course of transit. Where storage is due to events such as in *Miruvor*, i.e. where the assured is not the consignee and has to await payment under its sale contract in order to release the goods and documents, storing the goods in a warehouse is for the furtherance of the transit as it aims at delivery upon receipt of payment. Considering that insurers would also not be on risk indefinitely as per the time limit of sixty days after the discharge of goods, any temporary storage for eventual delivery should not take insurers off risk prior to the expiry of such period as it would relate to the requirements of transport and not to a voluntary decision of the assured.

In the same line was decided *First Art Investments Ltd v Guardian Insurance Ltd*[1118] where the contract between the consignor (assured) and consignee was on terms "D/P 30 days",[1119] the goods were retained by the carrier's agents on behalf of the carrier and were released to the consignee within thirty days after their unloading from the aircraft, although no documents were presented to the agents. The Court held that if the relevant documents are presented within sixty days[1120] the transit comes to an end, otherwise any delay in presenting the documents within those sixty days would not terminate the transit.[1121] Albeit the consignee's financial arrangements might have involved possible delay in presentation of

[1115] The insurers relied upon cl.8.1.2 of the ICC A.
[1116] This point was raised in *First Art Investments Ltd v Guardian Insurance Ltd* (2002) unreported decision of Judge Hallgarten QC in the Central London County Court dated 14 February 2002, cited in *Miruvor Ltd v National Insurance Co Ltd* [2003] HKEC 237 delivered by the Court of Appeal of Hong Kong. Hallgarten J noted that insurers are well aware of the complexities in such sales, and insofar as the delay increases insurers' risk, the problem is solved by the duration provision of 60 days, whereby insurers are protected by the time limit.
[1117] This will be dealt with below.
[1118] *First Art Investments Ltd v Guardian Insurance Ltd*, (2002) Unreported decision of Judge Hallgarten QC in the Central London County Court dated 14 February 2002, cited in *Miruvor Ltd v National Insurance Co Ltd* [2003] HKEC 237
[1119] The abbreviation stands for "documents against payment 30 days", which according to the Court, either meant that the documents would be taken by the consignee by presentation of bills of exchange payable at 30 days or that the consignee had 30 days to pay against the documents.
[1120] This was the general time limit for the duration of transit after the goods were discharged.
[1121] Per Hallgarten J, at para 24.

documents, such delay is usual between the arrival of the goods at their destination and the presentation of documents for their collection which are known fact to carriers and insurers.[1122] It is submitted however that not all the contractual arrangements between the consignee and consignor may be known to insurers, and if interruption of the voyage is not usual in the course of trade, the wording of the policy as to "transit" shall not be interpreted by reference to the circumstances and facts agreed by the consignee and consignor. It is doubtful whether ordinary transit should comprise the storage period until the goods are released against payment (if that period ends before the expiry of sixty days), even where payment is delayed. Storage pending payment would rather be of interest under the contract between the consignee and consignor, and in the absence of clear evidence that insurers knew about the possibility that the goods could be stored against the risk of not having been paid on time, that storage should be taken to be not in the ordinary course of transit. It may be ordinary in the course of business and under a sale contract, however this shall not mean that it is ordinary according to the term "transit" in an insurance policy.[1123]

In *Industrial Waxes v Brown*[1124] the policy was a marine insurance policy under a Lloyd's open cover incorporating Institute Cargo Clauses (W.A) for five shipments from New Orleans to Valparaiso in Chile for inland shipment. The ICC contained a warehouse to warehouse clause whereby thirty days after the arrival of the vessel at Valparaiso the cover would cease however the open cover contained a warehouse extension clause which stated that thereafter the assured could be held covered against payment of additional premium. This was subject to notification by the assured of an event giving rise to the held covered clause. The insurance certificates included a storage declaration clause which read: "Including, *if so declared hereon*, risk whilst in store after arrival at port of discharge… for 30 days thereafter held covered at an additional premium".[1125] The goods stayed in the customs warehouse for five months and then were destroyed due to a fire. The issue was whether the assured could benefit from further coverage provided under the policy which was subject to notification and payment of additional premium after the expiry of thirty days following discharge at the final destination. It was held that provided that the assured declares he seeks coverage for 30 days after the goods are warehoused, it could do so with no cost according to the storage clause

[1122] Per Hallgarten J, at para 21.
[1123] It is submitted that support for this view can be found in *Nec Australia Pty Ltd v Gamif Pty Ltd; Neway Transport Industries Pty Ltd; Australian Eagle Insurance Co Ltd; Colonial Mutual General Insurance Company Ltd and Webden Pty Ltd* [1993] FCA 252, para 31.
[1124] *Industrial Waxes Inc v Brown* (1958) 258 F.2d 800, United States Court of Appeals Second Circuit.
[1125] Emphasis added.

however for the period which follows the assured had to pay additional premium. Given that the assured had neither made any declaration nor had paid any additional premium, the cover ceased when the goods were stored in the warehouse. Albeit this case involved specific clauses upon which the central matter turned, its relevance to the standard market terms currently in use can be elaborated as below.

In that case, the five months delay was for the purpose of awaiting the procurement by the purchaser to make the payment to meet the sight documents. It was not disputed whether a delay of five months in the warehouse was unusual or unexpected and such delay was found in the first instance as a matter of common knowledge to exporters to the West Coast of South America.[1126] It could be argued therefore that such delay was in the ordinary course of transit and storing for that purpose could not be outside the ordinary course of transit. It would follow that the transit would not terminate upon unloading of the goods for such storage, but at a later stage, at the expiry of sixty days after such completion. Accordingly any loss occurring until then should be covered by the policy if caused by a covered peril.

While however the assured is the consignee of the goods, there is a higher risk that any decision to store the goods for an amount of time could be held to disturb the ordinary course of transit, however not necessarily.[1127]

iii. Commercial convenience of the assured versus requirements of transport

In several standard market policies on cargo, delay during transit which is beyond the control of the assured does not cease cover.[1128] Yet causing interruption of transit due to a decision of the assured based on commercial convenience and not requirements of transport takes the goods off risk. This decision may be expressed by the assured by electing to store the

[1126] At 801.

[1127] See *Groban v American Casualty Company* (1972) 331 F.Supp. 883.

[1128] Institute Cargo Clauses 1982 cl.8.3, Institute Cargo Clauses 2009 cl.8.3. Certain earlier cargo clauses in the US used the same wording that the "…insurance shall remain in force during deviation, delay beyond the control of the Assured…", as in the Extended Cover Clauses cl.2(i) in Corn Trade F.P.A. Clauses 1961 (North Atlantic Shipment) and Corn Trade F.P.A Clauses (1961). American Institute of Marine Underwriters All Risks Cargo Clauses 1/1/2004 suggest a more complex regime in this respect compared to ICC 2009. The provisions as to the termination of transit after the expiration of 60 days following the completion of discharge (see cl.8.1.4 in ICC 2009 and 6(A)(1)(c) in AIMU 2004) and as to continuance of cover for delay beyond the control of the assured (see cl.8.3. of ICC and cl.6(A)(2)(a) of AIMU) are essentially similar in both documents. However AIMU provides in cl.6(A)(1)(c) that in the event of delay in excess of 60 days after completion of discharge which is beyond the control of the assured the insurance is held covered against a premium for an additional 30 days provided that the assured gives notice as promptly as possible, or in any event before the expiry of 60 days after completion of discharge.

goods.[1129] The election, when made where delay and storage is inevitable until the sale documents are received[1130] may not be considered as purely for commercial convenience of the assured. However when the circumstance causing delay is known to the assured when the contract is made and the assured, knowingly leaves the goods at the storage awaiting the circumstance to cease, this would rather be considered as an instance of delay for the commercial convenience of the assured.[1131]

This view was also found in *Nec Australia Pty Ltd v Gamif Pty Ltd and others*[1132]where it was held that the transit may be interrupted to permit efficient and economical loading, unloading or storage, however the interruption cannot be merely for commercial convenience of the assured.[1133] A temporary storage[1134] must be for the furtherance of the carriage of goods to their final destination[1135] and the transit may be interrupted by circumstances associated with requirements of their transportation.[1136]

8.3.2. Delay beyond the control of the assured in cl.8.3 of ICC

The term has several equivalents[1137] and has been in use in the transit clauses of ICC 1982 and 2009. In some circumstances deciding whether delay was or was not within the control of the assured may not be so complex, if for instance the assured deliberately avoids shipping,[1138] or where the interruption is caused due to a mistake on the side of the assured.[1139] However it may not be very clear whether the term is identical in meaning to its

[1129] Within the meaning of cl.8.1.2 of ICC

[1130] As was the case in *Miruvor Ltd v National Insurance Co Ltd* [2002] HKEC 1033, pending payment for goods.

[1131] *Safadi v Western Ass Co* (1933) 46 Ll. L. Rep. 140, see also *Fedsure General Insurance Limited v Carefree Investments (Proprietrary) Limited* (477/99) [2001] ZASCA 88

[1132] For the full citation, *Nec Australia Pty Ltd v Gamif Pty Ltd; Neway Transport Industries Pty Ltd; Australian Eagle Insurance Co Ltd; Colonial Mutual General Insurance Company Ltd and Webden Pty Ltd* [1993] FCA 252, delivered by the Federal Court of Australia.

[1133] At para 27.

[1134] The term "in transit" was defined in the policy as involving temporary housing.

[1135] As was the case in *ELAZ International Co v Hong Kong & Shanghai Insurance Co Ltd* [2006] HKEC 825 in the context of interruption of the transit for on-shipment, which eventually aimed at delivering the goods at their final destination.

[1136] At para 28.

[1137] By way of example, in the policy which was the issue in *Safadi v Western Assurance Company* (1933) 46 Ll. L. Rep. 140, the policy read "Transhipment, if any, otherwise than as above, and/or *delay arising from circumstances beyond the control of the assured*" (emphasis added).

[1138] This argument was mentioned in *Commercial Union Assurance v The Niger Co* [1922] 12 Ll.L. Law Rep. 235, at 236.

[1139] In *Groban v American Casualty Company* (1972) 331 F.Supp. 883 the policy stated that the goods were covered during delay beyond the control of the assured. The policy also contained a marine extension clause whereby the assured had the right to declare the goods for warehouse-to-warehouse coverage from the point of origin to the point of destination, the assured was held covered in case of omission or error in the description of

equivalents, for instance to "delay arising from circumstances beyond the assured's control". In *Safadi*,[1140] it was noted that "cause or circumstances and matters beyond the control of the assured" could excuse the assured where those circumstances are in existence and are known to be in existence by the assured at the time when the contract of insurance is made, at the time goods are sent on by the assured (in case of a cargo policy) and at the time, if available, the documents representing the goods are forwarded.[1141] In that case, the assured alleged that due to an insurrection at the destination, the goods were left in the customs warehouse for longer than usual, fearing they would be lost if they were left therein. The evidence found showed that the assured could have perfectly pay the customs duties and send the goods on to their destination, as the insurrection was an ongoing event for two years and it was known to the assured at the time the insurance contract was made. It is noteworthy however that in other types of transit which have the potential to last longer than usual, the knowledge of the assured at the time of the contract should not determine whether the circumstance giving rise to delay was within the control of the assured. The circumstances may change radically while the goods are in transit. Delay may be within the control of the assured if goods are left in the warehouse for longer than the expiry of the time limit for the period of cover for commercial convenience of the assured.[1142]

Another issue involving delay beyond the control of the assured is whether it can excuse a prolonged detention of goods after the expiry of the time limit for the transit of goods. This argument was raised by the assured in *Safadi v Western Assurance Company*[1143] and was argued on the ground of excuses available under s 49 of the MIA 1906.[1144] The Court did not have to deal with those issues as on the fact of the case it was clear that the delay was not beyond the control of the assured. However the counter-argument of the insurers was also stated, and rested upon the fact that the cover ends by the expiration of the time limit mentioned in the transit clause[1145] and the clause with respect to delay beyond the control of

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the voyage or vessel. The assured misstated that the voyage was from Freetown to New York whereas it was a voyage from Marampa Mines to New York through Freetown, this was due to a mistaken information on the side of the assured. The goods when arrived at Freetown had been discharged and remained on the Freetown pier awaiting loading aboard the vessel for the next stage of the transit. It was held that the assured was protected by the marine extension clause and that the considerable interruption of the transit at Freetown was beyond its control and therefore the transit had not terminated.

[1140] *Safadi v Western Assurance Company* (1933) 46 Ll. L. Rep. 140

[1141] At 143.

[1142] At 143.

[1143] (1933) 46 Ll. L. Rep. 140.

[1144] This issue will be dealt with elsewhere in this chapter.

[1145] In this case it was 30 days.

the assured could by no means extend the period of cover itself, it merely operated during the course of transit. This contention was found "right" by the Court yet this point was mentioned as *obiter*. Therefore albeit *Safadi* may not be authority for the suggestion that delay beyond the control of the assured could only excuse the assured during transit, i.e. until the time limit expressed as to the period of cover ceases, it is controversial whether there is a need of authority at all given that in ICC 2009 and 1982, sub-clause 8.3. is made subject to the other sub-clauses enumerating the circumstances terminating the transit.[1146] It is noteworthy that in *Wiggins*[1147] it was held and then repeated in *Verna*[1148] that delay beyond the control of the assured is not capable of extending the sixty days period, neither can it render the exclusion of delay losses in s 55(2)(b) inapplicable.[1149]

Excuses for delay and delay beyond the control of the assured

Any delay may be taken to be within the control of the assured if the assured gives the decision to delay the voyage or to store the goods longer than usual in a warehouse. Yet the essential question is whether the purpose of introducing this term into cargo policies is to keep the goods covered where the circumstances giving rise to the decision of the assured (if any) to delay the transit are not within the control of the assured. The answer to this question can arguably be found in *Safadi*.[1150] A circumstance may lead the assured to make a decision and this may cause delay in transit, in such a case in order for delay to be considered as a delay beyond the control of the assured, the circumstance resulting in the decision of the assured[1151] has to be beyond the control of the assured and that the decision needs not be made seeking for commercial convenience.[1152]

Given that commercial convenience sought by the assured is an instance related to the purpose of delay, the next issue is whether delay beyond the control of the assured which is incurred either for the furtherance of the voyage or incurred because of circumstances

[1146] The relevant part of the sub-clause 8.3 reads "Clauses from 8.1.1 to 8.1.4.
[1147] *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd* [1970] 2 NSWR 77
[1148] *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129, per Ormiston J
[1149] *Lam Seng Hang Co Pte Ltd v The Insurance Corporation of Singapore Ltd* [2001] SGHC 31
[1150] The Court went into the facts amounting to the decision of the Syrian importers (assured) to store the goods for a long time in the Beyrout Customs House. The question was whether the insurrection at the time of the transit and which had been going on for more than 2 years at the time, i.e. the circumstance which allegedly resulted in the decision of the assured to store the goods for longer than usual, made the delay a delay beyond the control of the assured because the insurrection was beyond the control of the assured.
[1151] Decision of the assured may be not to pay customs duties to release the goods from warehouse, or to delay payment under a letter of credit.
[1152] Commercial convenience is elaborated elsewhere in this chapter.

enumerated in s 49 could be excused, even if not expressly so excused under a policy.[1153] Moreover, this question may be of relevance where the assured makes a decision to delay the voyage but where the delay is incurred for the furtherance of transit or incurred because of a circumstance stated in s 49, i.e. whether such a decision would make the delay a delay within or beyond the control of the assured. In *Hyderabad (Deccan) Co v Willoughby*[1154] the delay although not expressly stated to be a "delay within the control of the assured" was discussed as such upon the facts.[1155] It was incurred for the purpose of the furtherance of the voyage[1156] and therefore was justifiable. However the assured was merely slow in arranging the forwarding of goods, and delay was accordingly held to be unreasonable. If this judgment is considered in light of ICC 1982 and 2009, the question would be whether a delay within the control of the assured would be sufficient to take the goods off risk if delay is not unreasonable in terms of its length and is justifiable in terms of its purpose.[1157]

8.4. Duty of the Assured to Act with Reasonable Despatch

The Institute Cargo Clauses 2009 currently in use reads that it is a condition of the policy that the assured shall act with reasonable despatch in all circumstances within their control.[1158] The earlier version of the clause[1159] had the identical title and content although the clause was named "reasonable despatch clause".[1160] Given that the clause mentions "reasonable despatch", the question arises whether it is a version similar to s 48 or whether it encompasses a different liability for the assured in terms of sue and labour given that the clause contains the phrase "in all circumstances within their control"[1161]which may arguably not be confined to prosecuting the sea voyage or the land transit with reasonable despatch.

[1153] This issue would not arise in policies incorporating ICC 1982 and 2009 given that delay beyond the control of the assured does not terminate the transit.
[1154] *Hyderabad (Deccan) Co v Willoughby* [1899] 2 Q.B. 530
[1155] For the view that the delay in that case was a delay within the control of the assured, see *Arnould*, 17th ed., 13-40, fn.179.
[1156] The delay was both in the interest of the assured and insurer and was to secure the safe accomplishment of the journey of the cargo.
[1157] According to *Arnould*, 17th ed., 13-40, fn.179 the fact that delay was within the control of the assured in both *Safadi* and *Hyderabad* meant that the assured could not be protected by cl.8.3.
[1158] Cl.18.
[1159] Institute Cargo Clauses 1982 cl.18
[1160] *Ibid*.
[1161] In Gilman and Merkin, *Arnould's Law of Marine Insurance and Average*, it was stated that the clause applied both to delay in transit and delay in responding to a casualty, 18th ed., at para 19-37. "In all circumstances" could also denote a general reasonable despatch requirement which all other clauses in ICC are subject to. This shall be discussed below. For the view that "in all circumstances" refer to land transit and that accordingly the clause has a wider scope than s 48, please see Hodges, 66.

The clause has yet to be judicially construed in England however few cases in other common law jurisdictions shed light on this matter[1162] which shall be further considered below.

If it can be argued that avoidance of delay clause is an instance of s 48, accordingly the following would need to be validated. The avoidance of delay needs to operate as a warranty whereby the insurers are discharged from liability, however the avoidance of delay clause does not expressly stipulate that the delay has to be unreasonable to discharge the insurers, therefore it is not clear whether any interruption during the course of transit under ICC which is within the control of the assured would trigger avoidance of delay clause. Another point of reference in ascertaining whether the clause operates as a warranty would be the burden of proof. Moreover, the clause starts with the words "*It is a condition of this policy…*"[1163] and albeit qualifying the clause as "condition" would not necessarily render it a condition, there is no clear authority as to whether it would be a hindrance to qualify it as a warranty in the absence of authority in this respect under English law. Finally, whether s 48 is confined to the prosecution of the sea voyage with reasonable despatch or whether it also extends to land transit shall be covered. Albeit avoidance of delay clause operates during the period of risk under ICC which is wider than the period of sea voyage, it is preliminary to ascertain whether the clause replaces s 48 in ICC or whether it operates in addition thereto.

8.4.1. Scope of the clause

The use of the phrase "in all circumstances" raises the issue as to whether the clause does not apply only during the ordinary transit (which excludes unreasonable delay to the adventure) which is covered by the policy but applies also after a loss occurs and in pursuit of a claim.[1164] Before proceeding with whether the clause has such a wide scope of application, the link between transit clause[1165] and avoidance of delay clause needs to be noted.

i. Transit clause and avoidance of delay clause

ICC cl.8.3 "control of the assured" and avoidance of delay

Whether avoidance of delay clause is a clause strengthening the position of the insurer in terms of the transit clause in that it imposes on the assured a duty to act with reasonable

[1162] For the illustrations under Australian law see *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd* [1970] 2 NSWR 77; *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129.
[1163] Emphasis added.
[1164] Arnould, 17th ed., 19-35.
[1165] In particular, cl.8.3. of ICC 2009

despatch for the circumstances within their control is fairly controversial and unclear under ICC 2009. The American Institute Cargo Clauses All Risks 2004 proposes a clearer clause and notes that the assured is under such a duty both during the transit *and*[1166] in all circumstances within their control.[1167] This arguably denotes that avoidance of delay clause is not confined to a duty to act with reasonable despatch during the ordinary course of transit.

A history of the clause needs to be provided for so as to ascertain the intention of insurers in introducing the clause into cargo policies. Institute Cargo Clauses (Wartime Extension) used during the World War II[1168] provided unlimited cover during delay and the "reasonable despatch clause"[1169] was part of the policy and excluded cover for delay which the assured could control.[1170] The wording continued in ICC (Extended Cover) introduced in 1952 however the delay in the transit clause was limited to "delay beyond the control of the assured".[1171] The avoidance of delay clause was retained in the following sets of clauses along with the transit clause whereby the transit terminated in case of delay within the control of the assured.[1172]

Against this background, it may be submitted that prior to the introduction of "delay beyond the control of the assured" term to the transit clause, the avoidance of delay clause which provided that the assured should act with reasonable despatch in all circumstances "within their control" was retained so as to qualify the unlimited cover for delay in the transit clause and may arguably be considered to have been confined solely to that purpose. After the introduction of the "delay beyond the control of the assured" into the transit clause, the avoidance of delay clause may arguably not be interpreted as merely emphasising that the insurer would be discharged from liability where there is an interruption during the transit

[1166] Emphasis added.
[1167] American Institute Cargo Clauses All Risks 2004, cl.6(A)(5) provides "It is a condition of this insurance that there shall be no interruption or suspension of transit unless due to circumstances beyond the control of the Assured, Assignee, Consignee or Claimant and the Assured, Assignee, Consignee or Claimant shall act with reasonable dispatch in all circumstances within their control."
[1168] Institute Cargo Clauses (Wartime Extension) 1/5/1941
[1169] As it then was.
[1170] O'May, *O'May on Marine Insurance*, 491. No reasonable despatch clause was contained in Institute Cargo Clauses (F.P.A) 11/2/1946 although the clauses stipulated "delay beyond the control of the assured"; the same could be said of ICC (W.A) 11/2/1946 and ICC (All Risks) 1/1/1951.
[1171] O'May, 491.
[1172] The reasonable despatch clause appeared in many sets of clauses: Coal Clauses (Great Britain-Coastwise Voyages) 1/1/1953 cl.15; ICC (Extended Cover) 1/2/1956 cl.6; Institute War Clauses 1/10/1955 cl.7; Institute Strike Clauses (Extended Cover) 1/2/56 cl.6.

which is within the control of the assured. The avoidance of delay clause should comprise a wider or a different scope and should not be a mere repetition.[1173]

The connection between the warehouse-to-warehouse clause, delay beyond the control of the assured and the avoidance of delay clause had been the subject of *Wiggins Teape v Baltica*[1174] which sheds light on the scope of application of these clauses and their overlaps. In that case, the goods could not be taken to the final destination given that there was insufficient storage and were stored by the assured at the port of discharge which was a commercially convenient place for the assured and before the expiration of the sixty days were lost in a fire. It was held by the Supreme Court of New South Wales that the goods were protected by the policy provided that the goods reached the final warehouse within sixty days from the discharge of the goods and provided that the assured acted with reasonable despatch in all circumstances within its control. According to Macfarlan J, avoidance of delay clause was a condition governing all other clauses[1175] and pointed to a policy concerned with transit.[1176] In the opinion of Macfarlan J, the policy covered the goods only during transit with reasonable despatch and reasonable despatch meant a despatch which is related to the movement of goods.[1177] The avoidance of delay clause would become obsolete if the assured could discharge the goods at the discharge port and leave them there for sixty days for a

[1173] For the views which considered the clause in terms of the transit clause only, please see Goodacre, *Marine Insurance Claims*, 313;

[1174] *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd* [1970] 2 NSWR 77. The policy incorporated the ICC 1958, which contained a warehouse-to-warehouse clause (clause 1) which provided that the period of cover after the completion of discharge overside the goods from the oversea vessel at the final port of discharge should not extend beyond 60 days. The policy further stipulated clause 2 whereby the insurance was to remain in force during delay beyond the control of the assured (which is the equivalent of cl.8.3. of ICC 2009). Cl 14 of the policy was avoidance of delay clause.

[1175] At 80. It is not clear whether "all other clauses" denote all other clauses which are related to delay, such as the transit clause or should be taken to be wider than this contention. It was further noted at p.80 that the warehouse clause, the clause granting cover for delay beyond the control of the assured and the clause as to termination of transit due to circumstances beyond the control of the assured emphasised that the transit should be prosecuted with reasonable despatch. This approach in *Wiggins* was commented on in *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 per Kaye J who noted that the construction to be given to the avoidance of delay clause depends "upon its terms when read in conjunction with all the provisions of the Institute Clauses". He further noted that the movement of the goods after having been discharged was a matter essentially within the control of the assured. The purpose of the policy would be reached by requiring the assured to deliver the goods to the final destination with reasonable despatch.

[1176] The phrase "in transit" was considered as "in movement" in *Parkinson v Mathews and Drysdale* 1930 WLD 58, at 62 by Feetham J. This shall not however mean that storing goods for a short period without abandoning the aim to deliver them could be taken to take the goods off risk. Albeit the policy in *Wiggins* did not contain any such clause as the transit clause 8.1. in ICC 2009, the phrase "the transit continues during the ordinary course of transit" would also strengthen the position of insurers as any delay which is not in the ordinary course of transit would terminate the policy, notwithstanding the occurrence of the circumstances mentioned in 8.1.1. to 8.1.4.

[1177] *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd* [1970] 2 NSWR 77, 81.

reason not connected with the requirements of transport. This reasoning was criticised by the assured in *Verna*, on the ground that the sixty days was a fixed period of time and was irreconcilable with the reasonable despatch and that it would require an express term within the transit clause if the intention of the insurer was to extend the reasonable despatch clause to the transit provisions.[1178]

According to the author, what was purported to be noted was the movement of the goods to their final destination, i.e. final warehouse which excludes storage of goods for an indefinite period in a place commercially convenient for the assured. This reasoning does not however distinguish between the operation of the clause covering the goods during delay beyond the control of the assured and the avoidance of delay clause and therefore the consequence of the breach of the avoidance of delay clause was held as ceasing the cover once the goods were stored at the port of discharge due to circumstances within the assured's control.

ICC cl.8.1 "ordinary course of transit" and avoidance of delay

The phrase "ordinary course of transit" in cargo policies may reinforce the avoidance of delay clause, however there is doubtful precedent as to whether avoidance of delay clause could operate on its own, separately therefrom. In *John Martin of London Ltd v Russell*[1179] one of the defences of the insurer was that the insurance ceased on discharge of goods if consignees did not intend to send the goods to the final warehouse. The avoidance of delay clause was not specifically invoked by the insurers in support of this contention, and did not form any part of their defence. Pearson J in deciding whether the insurance policy came to an end given that the goods discharged to the transit shed should be taken to be in the "final warehouse"[1180] noted that the transit and avoidance of delay clauses together "afford clues to assist the search" where the goods do not go to the final warehouse.[1181] Upon this decision that "came as something of a shock" to the market,[1182] new transit wording containing the

[1178] Mentioned in Kaye J's speech in *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129.
[1179] *John Martin of London Ltd v Russell* [1960] 1 Lloyd's List Law Reports 554, the policy was on Institute Cargo Clauses (Extended Cover) and contained an avoidance of delay clause and a transit clause with no provision as to "ordinary course of transit". In this case, the goods were discharged and left in a transit shed awaiting delivery to ultimate consignees.
[1180] This was the first contention of the insurers.
[1181] At 563. This was the sole statement of Pearson J as to the operation of avoidance of delay clause along with the transit clause. The point has not been further elaborated. Holding that the transit shed was not the "final warehouse" and that there was no condition that goods were only covered so long as they were intended to go to a final warehouse, Pearson J decided that there was still insurance cover at the time of loss.
[1182] Historic Records Report HR5, at p 103, as cited in Dunt and Melbourne, *Insuring Cargoes in the New Millenium: The Institute Cargo Clauses 2009*, para 6.80.

words “during the ordinary course of transit” was re-introduced. The rationale behind this wording was to “overcome the lack of indication of transit in the Institute Cargo Clauses” and to “strengthen Clause [18], the Avoidance of Delay” Clause.[1183]

In light of the history of the foregoing, it may be argued that avoidance of delay clause should be read together with the words “ordinary course of transit”[1184] yet it shall not necessarily mean that the scope of avoidance of delay clause is confined to the scope of the ordinary course of transit. Invoking that the goods are not in the ordinary course of transit may raise the argument that there is also a breach of the avoidance of delay clause,[1185] it may also be that the avoidance of delay clause would, on its own, could be triggered even if there is no “ordinary course of transit” wording.[1186] This would probably not be an issue to arise in practice now given the existence of both clauses in the current ICC wording.

In terms of an act of the assured affecting the ordinary course of transit and the avoidance of delay clause, the moment cover ceases is highly important. In *Verna*, Beach J in the first instance noted that the insurance terminated when the assured made the decision to leave the goods in the customs house for more than a month, he was also in breach of the avoidance of delay clause insofar as delivery of the goods to their final destination was concerned. According to Ormiston J in *Verna*, Beach J primarily rested his conclusion on the reasonable despatch clause, however it was preferable to start by looking at cl 8 (transit clause) as, if the transit terminated according to this clause, that finding would be conclusive.

ii. <u>Post-casualty situations and avoidance of delay clause</u>

It was submitted that the scope of this clause included delay to the adventure itself and also involved the requirement of reasonable despatch of the actions taken by the assured after the occurrence of a casualty.[1187] One of the examples to be given in this respect can be notice of

[1183] *Ibid*.
[1184] *Ibid.*
[1185] In that sense, the “ordinary course of transit” strengthens the avoidance of delay clause as was put in Historic Records Report HR5, at p 103.
[1186] This could not be tested in *John Martin of London Ltd v Russell* [1960] 1 Lloyd’s List Law Reports 554 given that the clause was not raised by the insurer. Support for this argument can also be submitted by reference to Historic Records Report HR5, at p 103. “Strengthening the avoidance of delay clause” could be interpreted such as to instances where the clause self-sufficiently discharges the insurers.
[1187] Arnould, 17th ed., 19-35. The earlier edition of Arnould’s Law of Marine Insurance and Average, Vol.II, 16th. ed., para 704 submitted that the scope of the clause was with respect to post-casualty actions of the assured. In so far as clauses such relating to sue and labour are concerned, this could support the suggestion that the avoidance of delay clause governs all other clauses in the Institute Clauses as was stated in *Wiggins Teape*

loss suffered to the insurer and not delaying the claim for an indemnity. The Institute Clauses contain a separate duty of the assured clause which requires the Assured, their employees and agents to take all reasonable measures for the purpose of averting or minimising losses incurred after a casualty and to ensure all rights against all third parties are preserved.[1188] There may be a degree of overlap between the two clauses in terms of scope of application, yet their distinction lies in the persons who are within the scope of the clauses.

Under ICC 2009, the only person who has to act with reasonable despatch is the assured. Whether this would also include the assured's agents or servants[1189] has yet to be judicially construed, however in case of ambiguity, the clause should be construed against the insurer and the term "assured" should be construed narrowly.[1190] The Duty of Assured clause provides that the duty is not only of the Assured yet also of their employees and agents. It may accordingly be submitted that in terms of the overlapping scope of the two clauses, the point of distinction would be the consequence of the breach of the provision and the person who commits the breach. By way of example, if a customs agent of the assured delays notifying the assured of a loss, although an avoidance of delay clause may arguably not be invoked, the breach of a duty of the assured clause which is not confined to the assured can be raised by insurers as a defence.

There is also the possibility whether the avoidance of delay clause affects notice of an event subject to which the assured is held covered under the policy.[1191] There are however several caveats with respect to this suggestion. The Institute Clauses contain a special "Note" recorded at the foot of the policy which requires the assured to give prompt notice of such an event when they become aware of it.[1192] The operation of the clause is that the right to be held covered is dependent upon prompt notice, otherwise the insurance terminates. The term

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Australia Pty Ltd v Baltica Insurance Co Ltd [1970] 2 NSWR 77, 80 per Macfarlan J; *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129, per Kaye J.

[1188] ICC 2009 cl.16.

[1189] Arnould, *ibid*, suggested that "the assured" shall be construed narrowly, as applying only to the assured or his alter ego.

[1190] In other jurisdictions, examples of the clause including also the assignee of the policy and consignee can be found. American Institute Cargo Clauses All Risks 2004, cl.6(A)(5) provides "…and the Assured, Assignee, Consignee or Claimant shall act with reasonable dispatch in all circumstances within their control."

[1191] For instance, in case of change of voyage or termination of the contract of carriage due to circumstances beyond the control of the assured.

[1192] The *Note* in ICC 1982 mentions merely "an event which is held covered under this insurance" whereas ICC 2009 requires prompt notice in the event of termination of contract of carriage and change of destination.

"prompt notice" is likely to be taken to denote "notice in reasonable time".[1193] Therefore, should the suggestion that the avoidance of delay clause governs all the other clauses in the ICC be tenable, it may strengthen the position of insurers when it is read in conjunction with the Note.[1194] Albeit ICC 2009 cl.8.3. which states that the insurance is still in force during delay beyond the control of the assured is not a held covered clause within the meaning of the Note,[1195] it is subject to cl.9. This may suggest that if delay is beyond the control of the assured however causes termination of the contract of carriage (e.g. in particular where the delay is a frustrating delay), although the cover continues during such delay, if the assured purports to be covered after the occurrence of frustrating delay may have to give prompt notice when it becomes aware of the frustrating delay. In that sense, avoidance of delay clause, if it governs all clauses may support the requirement of prompt notice provided for in the Note.[1196]

8.4.2. Operation of the clause

i. Whether the clause operates as a warranty and burden of proof

There is currently no binding authority under English law as to whether the clause operates as a warranty however it was enunciated in a relatively recent judgment that "There are plainly strong arguments in favour of treating this as a breach of warranty".[1197] Various views were expressed as to the meaning of "It is a condition of this insurance". One of the views was that this wording was distinct from "duty" in the duty of the assured clause, which merely gives rise to a claim for damages in the event of breach.[1198] It was further stated that insofar as the clause related to delay in the adventure,[1199] it would not bring an alternative ground of

[1193] *Liberian Insurance Agency Inc v Moussa* [1977] 2 Lloyd's Rep. 560, 566-7 per Donaldson J. Donaldson J expressed some doubt as to whether the note was contractual, nevertheless expressed the view that he was satisfied it accurately stated the law.
[1194] Note the judgment of Kaye J in *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 according to whom if avoidance of delay clause was confined to after casualty situations where the assured fails to giving notice of the loss suffered, the "note recorded at the foot of the policy would be tautological".
[1195] It shall rather be construed as a clause defining the period of risk as the clause does not require the assured to give prompt notice to insurers if it seeks to be held covered, as provided for in cl.9 and cl.10. A similar was expressed in Arnould, 17th ed., 14-26.
[1196] It is to be noted that this would seldom occur in practice, given that cl.8.3 is also subject to the usual circumstances terminating the transit (cl.8.1.1 to cl.8.1.4) whereby the policy may already have come to an end while the frustrating delay.
[1197] See *Ostra Insurance Public Company Ltd v Kintex Shareholding Company (M/V Szechuen)* [2004] EWHC 357 (Comm), per Cooke J, at para 52
[1198] O'May, 491.
[1199] Which is equivalent to s 48, except that it is subject to whether it encompasses a wider scope of application, and not only in sea transit. This shall be discussed below.

defence to insurers which can in any case be discharged as per s 48.[1200] As for the application of the clause to actions of the assured following a casualty or in pursuit of a claim, it was contended that the clause could be construed as an innominate term.[1201]

If avoidance of delay clause can indeed apply in circumstances after the occurrence of a casualty in terms of the assured's actions, delay in notifying the casualty may result in loss of evidence (e.g. loss of witnesses or sound memory of the events) and accordingly difficulties in challenging third party claims for insurers.[1202] This may be the type of serious breach arising from delay which may give insurers the right to treat the contract as terminated.[1203]

s 48 and avoidance of delay clause

The avoidance of delay clause has many similarities to s 48 which provides that the adventure insured must be prosecuted with reasonable despatch, determining their similarities and distinctions may be of help in construing the avoidance of delay clause.

One of the questions that need to be addressed accordingly is whether s 48 applies both to land and sea transit. It was submitted in Australia in *Verna*[1204]that the purpose which is reached by the prosecution with reasonable despatch requirement in the MIA with respect to sea risks, is achieved in relation to land risks by the avoidance of delay clause.[1205] However in England before the MIA 1906 was enacted, it was noted in *Mount v Larkins*[1206] that all elements of the adventure, both land and sea voyage elements must be prosecuted with "proper and ordinary diligence".[1207] A view supporting this approach was expressed in *Verna* by Ormiston J. The "adventure insured" in terms of s 48 is a "marine adventure" whereby the

[1200] Arnould, 17th ed., para 19-35. It was also submitted that this "would seem certain to be a matter outside "the ordinary course of transit" so that the cover would cease in any event under the terms of the Transit Clause".
[1201] Arnould, 17th ed., para 19-35. Reference was made to *McAlpine Plc v BAI (Run Off) Ltd* [1998] 2 Lloyd's Rep. 694 (Colman J.); [2000] 1 Lloyd's Rep. 437 CA; *Friends Provident Life & Pensions Ltd v Sirius Intl Insurance* [2005] 2 Lloyd's Rep. 517. According to the editors of 17th edition, the word "condition" should be taken to mean a "term" of the insurance, 19-35.
[1202] As were mentioned in *McAlpine Plc v BAI (Run Off) Ltd* [1998] 2 Lloyd's Rep. 694. See *Moussi H. Issa NV* v. *Grand Union Insurance Co Ltd* [1984] HKLR 137, *obiter* that the reasonable despatch clause would not elevate the breach of the Bailee Clause in the Institute Cargo Clauses into a breach of condition so that any failure to preserve rights against third parties would operate automatically as a defence.
[1203] As to the fact that the consequence of a breach is such as substantially depriving the innocent party of the whole benefit of the contract, see *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. (The Hongkong Fir)* [1961] 2 Lloyd's Rep. 478; [1962] 2 Q.B. 26
[1204] Per Kaye J, *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129.
[1205] This view was expressed in respect of s 54 of the Australian Marine Insurance Act 1909 which is identical to s 48.
[1206]*Mount v Larkins* (1831) 8 Bing. 108
[1207] *Ibid*, per Tindal CJ at p. 122

subject-matter is exposed to maritime perils[1208] moreover an insurance policy may, by its terms, be extended to cover the assured for land risks[1209] and the provisions of the MIA, "in so far as applicable", would apply to the policy where there is an adventure analogous to the marine adventure.[1210] The wording "in so far as applicable" would raise the question of whether, if MIA applies to the entirety of sea and land risks, s 48 would be implied into a marine insurance contract for both land and sea legs. In that sense, avoidance of delay clause can be considered as an instance of s 48 in ICC. Otherwise, i.e. where s 48 can merely be implied in terms of the sea leg, the question is whether avoidance of delay replaces s 48 in ICC for that part of the voyage. In *Verna*, Ormiston J noted that the equivalent section of MIA 1909 applied both to marine and land risks.[1211]

Other than the period of application of the clause and the s 48, they are distinct in that s 48 operates when the delay becomes unreasonable, however no such requirement is provided for under the avoidance of delay clause. It would follow that any delay within the control of the assured, would trigger the application of the clause.[1212]

In the leading cases decided under Australian law, avoidance of delay clause was held to operate as a promissory warranty whereby the insurer is discharged from liability when the assured does not act with reasonable despatch.[1213] It is controversial whether this approach is in line with the reference to s 48[1214] in construing the avoidance of delay clause. This is due to the fact that s 48 may not be strictly taken to be a promissory warranty, given its background as a branch of the law relating to deviation. Albeit this categorisation may not make an obvious difference in terms of consequence of the breach of the term,[1215] it may

[1208] S 3 of MIA 1906, "maritime perils" also include "perils, of the like kind or which may be designated by the policy"
[1209] S 2(1)
[1210] S 2(2)
[1211] It was stated that the land transit element of a policy was covered by the Marine Insurance Act including the provisions which relate to "voyages" (of which both s 42 and 48 are parts) on the basis of the textbook of Chalmers, M., Marine Insurance Act 1906, 7th ed,. pp.4-5 and of *Leon v Casey* [1932] 2 KB 576, 585-7 per Scrutton LJ and 590 per Greer LJ.
[1212] For a similar view, please see *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129, per Ormiston J.
[1213] *Wiggins Teape Australia Pty Ltd v Baltica Insurance Co Ltd* [1970] 2 NSWR 77, 80-81 per Macfarlan J. This was not the very wording used by the judge, yet the judge noted "the policy only covers the goods during transit with reasonable despatch". Also see *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129.
[1214] Or to the equivalent of this clause in the MIA 1909, i.e. s 54
[1215] In both cases of breach of warranty and change of risk undertaken by the insurer, the consequence would be discharge from liability for insurers.

nevertheless be of interest in respect of the burden of proof. Construing the avoidance of delay clause as a warranty would place the onus on the insurer to prove that the loss occurred after the breach of warranty whereas the assured has to prove that he suffered a loss at a time and place when covered by the policy.[1216]

ii. s 49 excuses and avoidance of delay clause

Albeit the avoidance of delay clause is not expressly qualified, it may be seen as a reflection of s 49(1)(a) which provides that delay in prosecuting the voyage is excused where authorised by a special term in the policy. One may however argue whether s 49 may be implied into ICC and whether the avoidance of delay clause may accordingly be subject to the enumerated excuses. Firstly, it is not very clear whether s 49 applies merely to sea voyage or also to land risks: s 49(2) provides that the "ship" must resume her course and prosecute her "voyage" with reasonable despatch whereas s 48 provides a rather general phrase "adventure insured". It could follow therefore that the excuses apply only in the sea leg of the entire adventure insured unlike s 48, [1217] although whereas some excuses can operate only at sea,[1218] some of them are drafted as referring to a more general scope.[1219]

Moreover, s 49 excuses are not all beyond the control of the assured in the sense that delaying the voyage for instance for saving human life at sea may perfectly be voluntary and within the control of the assured, however such delay is justifiable. The question arises therefore whether "delay beyond the control of the assured" in the avoidance of delay clause refers to an unjustifiable delay, brought about for commercial convenience of the assured and not merely for a purpose that is justifiable. Should the clause be ever litigated, the issue whether the clause would operate to discharge the insurers where delay is both within the control of the assured and is justifiable shall have to be canvassed.

Finally, it is noteworthy that given that the avoidance of delay clause mentions merely "the assured", some subsections of 49(1) may not be applicable to excuse the assured, in particular

[1216] It is necessary to remember that in most of the pre-MIA cases, the assured had the onus of proving that the loss occurred during the period of cover, see as example *Hyderabad (Deccan) Co v. Willoughby* [1899] 2 QB 530; *Smith v. Surridge* (1801) 4 Esp 25; Grant v. King (1802) 4 Esp 175; *Schroder v. Thompson* (1817) 7 Taunt 462.
[1217] This point was discussed by Ormiston J in *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129 in respect of the equivalents of ss 48 and 49 in MIA 1909, i.e. ss 54 and 55.
[1218] E.g. 49(1)(e), (f), (g)
[1219] E.g. 49(1)(c)

in the instance of s 49(1)(b) which provides that delay may be excused if caused by circumstances beyond the master or his employer's control.

Conclusion

This chapter examined that the common law concept of unreasonableness rested upon two criteria, namely the length of delay and the purpose of delay; whereas it was argued that construing the concept of unreasonableness in s 48 in the same line as the common law origin of the concept created problems of interpretation in terms of the excuses of delay in s 49. Therefore it was suggested that the concept of unreasonableness in s 48 could merely refer to the length of delay.

Moreover it can be concluded that s 49 excuses are not exhaustive and the common law excuses for delay in voyage such as excuses emanating from the usage of trade could still be implied in s 48 and excuse the assured where the length of delay is unreasonable for the voyage insured. Excuses or justifications for delay during transit were also raised in the context of standard market terms on goods whereby it can be submitted that delays purely incurred for commercial convenience of the assured rather than for the furtherance of the insured voyage would put an end to the transit. The chapter also touched upon the avoidance of delay clause which has not yet been litigated in England and its connections with other clauses relating to delay in transit. It is submitted that avoidance of delay clause can be considered as an equivalent of s 48 of the MIA however its difference therefrom can lie in that it arguably is an innominate term rather than a warranty and its scope of application is wider compared to s 48, i.e. that it would cover both land and sea transit. For these reasons, one can argue that s 48 has not entirely been replaced by standard market wordings and therefore its presence in the MIA is not totally obsolete.

CONCLUSION

The main objectives of this thesis were firstly to assess whether there is clarity and certainty in the approach of the marine insurance law to the recoverability of delay losses, and secondly whether the law deals with the risk of delay effectively in terms of delay's impact voyage policies. So as to achieve the first objective, the research aimed at presenting how the law currently deals with the recoverability of delay losses under several types of marine insurance policies, at discovering the rationale behind the principles underlying the current law, at determining the motivations behind the general exclusion on delay and at discovering the limits to the exclusion. Attempts were made in this thesis to achieve the second objective by analysing the current law on delay's impact on attachment of risk and termination of cover and the common law backgrounds of the relevant MIA provisions. The thesis sought to inquire into whether the current provisions were obsolete given the standard form market wordings and hence whether they should be repealed.

The research identified several motivations behind the generic exclusion of delay losses. Firstly, delay was usually considered as the last cause in time and was excluded according to the former causation doctrine. The new doctrine on proximate causation established by *Leyland* sets out a more complex rule and is likely to limit considerably the situations where delay can be considered as a proximate cause.

Secondly, the old authorities of the 19th century referred to delay as an event which was "always excluded" by drawing an analogy with naturally occurring losses caused by inherent vice and ordinary wear and tear. Some authors such as Gilman and Merkin argued that these authorities should still be good law subsequent to the enactment of the MIA and *Leyland* even though earlier authorities on causation should not. It is submitted by the author of this thesis that the authorities of the 18th century on delay had not purported to exclude delay as a separate peril, yet as an event in the chain of causation where the loss was generally held to have been caused by a peril that was statutorily excluded. Moreover the examination of the background of the 19th century authorities reveals that the only type of delay which was considered as a cause of loss which shall be excluded was extraordinary delay. This thesis therefore concludes, contrary to the generic view, that the background of the MIA exclusion on delay may merely extend to extraordinary delays, and not to every delay. In this respect,

the research further submits that the exclusion of the MIA was ambiguous and should be interpreted, *inter alia*, according to the doctrine of fortuity. Applying the doctrine to the delay exclusion resulted in the finding that ordinary delays which can be considered as inevitable and delays within the control of the assured which can be treated as intentional can be the types of delay losses excluded under the provision. This argument clarifies and limits the scope of the delay exclusion.

Thirdly, delay in delivery was generally excluded on the ground that it was considered as a speculative risk in consequence of which the assured could either make a profit or suffer a loss, rather than a pure risk whereby the assured can only incur a loss. In that regard, it was held to be akin to a business risk that ought to be borne by the assured and that cannot be recoverable under cargo policies. This argument is further enhanced by the proposition of some authors such as Dunt that under English law, it was settled law that cargo policies merely insure against goods as tangible things and not against financial losses such as losses arising from delay in delivery. The thesis doubted the validity of this third motivation behind the generic exclusion of delay and sought to identify the restrictions of this approach. It is submitted that delay in delivery losses could be considered as a loss caused by frustration of the adventure insured and could therefore be recoverable where the delay exclusion is too generic and ambiguous, as in the case of s 55(2)(b). Contrary to the view that cargo policies only insure against physical losses to goods, this work supports that the case law did not allow such a general statement and therefore delay in delivery losses which are not physical losses to cargo cannot be considered as consequential to cargo policies on this ground and be excluded.

Fourthly, the thesis analysed previous case law which established that the delay exclusion would strike out any loss calculated by reference to loss of time. It was submitted that the mere fact that a loss is so calculated shall not make loss of time or delay *the* or *a* cause of the loss and that the policies providing cover for such types of losses and containing delay exclusions shall not be interpreted to exclude these losses.

In attempting to answer the question of whether the law on delay is clear and certain, the analysis of the law on delay proved that contrary to the general view, delay was actually not always an excluded event and the scope of the general exclusion of delay was fairly limited in light of a careful reading of pre-MIA case law and the current rule on proximate causation.

These limits must either be implemented into the relevant provision through redrafting, or must be acknowledged by courts in future disputes involving delay losses.

In examining whether the current law of marine insurance deals with the risk of delay effectively, focus was placed on the impact of the risk of delay on the attachment and termination of risk. The research shed light to the history and purpose of the relevant sections of the MIA, i.e. ss 42 and 48 and studied whether they reflected the initial purpose for which they were enacted. Following the entry into force of the MIA, only a few judgments were delivered in England addressing issues arising from the application of these sections, although there was considerable litigation in respect of the equivalent of s 48 in standard form market wordings in other jurisdictions such as Singapore, Australia and Hong Kong. These findings along with the query of the Law Commission on whether these provisions should be repealed as obsolete resulted in the assessment of the effectiveness of the law as it currently stands.

This research resulted in the finding that the provisions of the MIA are not very clear and do not entirely reflect their common law backgrounds. Firstly, a thorough reading of the case law revealed that the common law distinguished between delay in the attachment of risk and delay after the attachment of risk, before the commencement of the sea voyage. The current s 42 deals only with delay in the attachment of risk and adopts an alien remedy, i.e. avoidance of policy instead of the remedy of non-attachment of risk that was established by leading common law authorities. It is therefore necessary to redraft the provision to reflect its background on the ground that the MIA is an Act codifying the case law before its enactment. Furthermore, contrary to earlier case law, the MIA does not cover the situation of delay in the period of post-attachment of risk which is also outside the scope of application of s 48, i.e. delay in sea voyage. Thus, this issue should either be addressed by an additional provision in the MIA or by stipulating express provisions in marine insurance contracts whereby insurers would be relieved of their liability where the voyage is delayed after the attachment of risk before the sea voyage commences. In addition, the standard form market conditions do not expressly and undoubtfully replace the relevant MIA provisions.

For the foregoing reasons, it was submitted in this work that the provisions of the MIA pertaining to the impact of delay on voyage policies should be retained subject to amendments so as to reflect the purpose for which and the background against which they

were drafted. The relevant discussion in the thesis provided grounds for the decision of the Law Commission to retain the relevant provisions, which was based on the feedback received from a small number of consultees supporting the general view that the provisions are not obsolete.

To conclude, this thesis submits contrary to the general view, that delay was not always an excluded risk, that the general exclusion is fairly limited in scope and that the provisions of the MIA relating to the impact of delay on voyage policies should be retained subject to amendments reflecting their common law backgrounds.

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