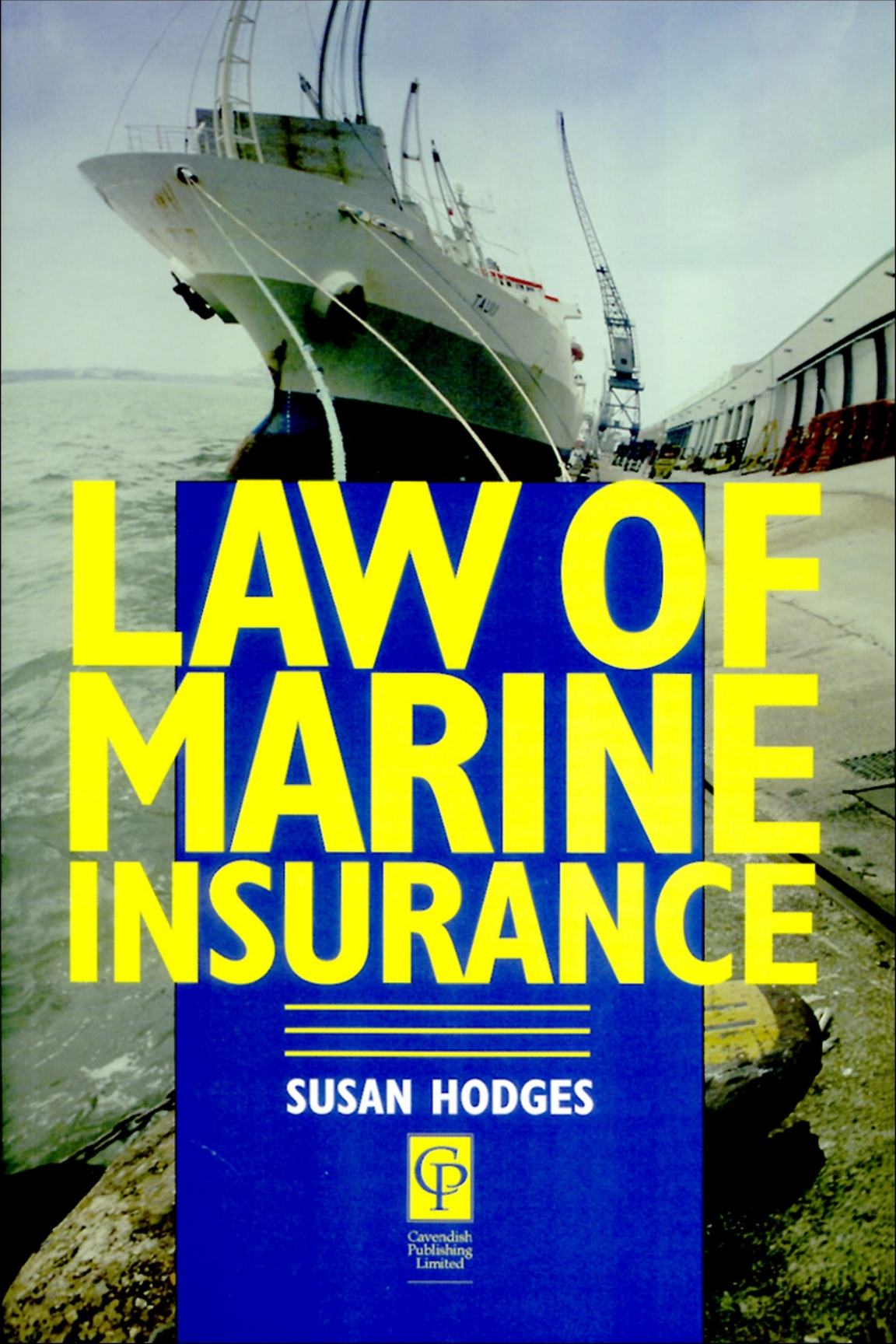

LAW OF MARINE INSURANCE

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CHAPTER 4

TIME AND VOYAGE POLICIES

A contract of insurance may be for a period of time, for a voyage, or for both time and voyage. Where the subject-matter is insured for a fixed period of time, the policy is called a 'time policy,' and where it is insured 'at and from' or 'from' one place to another or others, it is called a 'voyage policy'.[1] The purpose of this chapter is to examine the rules, and in particular, the provisions in the Act and clauses in the ITCH(95), the IVCH(95) and the ICC pertaining to the duration and scope of those policies. The terms of a time policy will be discussed in Part A and a voyage policy in Part B.

A – TIME POLICY

A DEFINITE PERIOD OF TIME

A time policy is, according to s 25, a policy which insures the subject-matter for a 'definite' period of time. A specific date for the commencement and termination of the risk must be stated in the policy. To avoid uncertainty, the hour for the commencement and termination of the insurance policy should also be specified, but if there is no such provision, it is generally understood that a day starts from 0000 and ends at 2400.

A time policy may simply specify two days as the time the period is to begin and end, for example, from 20 September to 20 February. In *Scottish Metropolitan Assurance Co Ltd v Stewart*,[2] Mr Justice Rowlatt was asked to decide whether those two days were included in the period. He was clear that there was no technical rule of construction to be applied and the words must be construed in accordance with the intention of the parties as it could be gathered from the circumstances of the case. In his view, when two days are nominated, both days are included in the period. Thus, an insurance expressed to run from 20 September included the whole day of 20 September.

If the policy is made in Great Britain, it is generally accepted that, unless the policy otherwise provides, Greenwich Mean Time[3] (not the time where the ship may be at the time of loss) applies, subject to the Summer Time Act 1972.[4]

There is now no statutory limit on the period of time which may be insured under a time policy; in practice, time policies on hull are generally issued for 12 months.[5]

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1 Section 25(1).

2 (1923) 39 TLR 497, KBD.

3 Now known as the 'UTC' (Universal Time Co-ordinated).

4 Sections 9 and 23(3) Interpretation Act 1978.

5 Section 25(2) which laid down the rule that a time policy for more than 12 months was invalid was repealed by the Finance Act 1959.

Time policy with an extension or cancellation clause

The most recent case which has queried whether a policy with specified dates for the commencement and termination of the risk, but incorporating an extension or cancellation clause, was still to be regarded as a policy for time is *Compania Maritime San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes*.[6] In this case, the club's rule stated that the policy was for a year, but with the entry that the policy was 'to remain in force until expiry or cancellation'. It was argued by the shipowner that as it continued indefinitely until determined by one side or the other, the insurance was not for a 'definite period of time' within the meaning of s 25 of the Act. Lord Denning MR had no doubt whatsoever that it was sufficiently specified, '… even though that period is determinable on notice, and even though the assurance will be renewed or continued automatically at the end of the period, unless determined; or will continue under a continuation clause'. In similar tone, Lord Justice Roskill's comments were:[7]

> '… a policy for a period of time … does not cease to be a time policy as defined merely because that period of time may thereafter be extended or abridged pursuant to one of the policy's contractual provisions … In my view the word "definite" was added to emphasise the difference between a period of time measured by time and a period of time measured by the duration of a voyage.'

Time policy with a geographical limit

A policy for a definite period of time but with a clause specifying that the policy will only remain in force whilst traversing within a certain geographical limit is nonetheless a time policy. This was the ruling in the Australian case of *Wilson v Boag*,[8] where the policy under consideration was for a period of four months, but with a clause that it will only remain in force 'within a radius of fifty miles'. During a voyage when the vessel was taken outside the 50-mile perimeter, she became disabled, and salvage charges were incurred which the plaintiff now sought to recover from their insurers. The Supreme Court of New South Wales held that the policy was not a voyage but 'a time policy in which is contained a limitation of the liability of the insurer to loss sustained while the launch is within a defined geographical area'. In each case, it is essentially a question of the interpretation of the terms of the policy.

Such a policy being for time is unaffected by the rules relating to a change of voyage, deviation, or delay. Thus, the fact that the insured vessel may have commenced on a voyage to a destination outside the limits is irrelevant: provided that the loss occurs within the prescribed geographical limit, it is recoverable.[9]

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6 [1977] 1 QB 49 at p 65, CA.

7 *Ibid*, at p 73.

8 [1956] 2 Lloyd's Rep, 564.

9 But the position would be different if such a cl was considered as a warranty: for a fuller discussion on warranties relating to geographical limits, see Chapter 7.

THE NAVIGATION CLAUSE

The aim of cll 1.1, 1.2 and 1.3 of the above clause of the ITCH(95) is to clarify that the insurance shall remain in force in spite of the occurrence of any of the listed contingencies.[10] Clause 1.2 and 1.3 to the ITCH(95) are new: the former qualifies cl 1.1 in relation to contracts for towage and pilotage services, whilst the latter relates to the use of helicopters for the transportation of personnel supplies and equipment to and/or from the Vessel. Clauses 1.1 to 1.4, which are relevant to the question of the duration of cover, will be discussed here, whereas cl 1.5, concerning scrapping voyages and the valuation of the vessel which is to be scrapped, will be discussed elsewhere.[11]

'At all times'

The purpose of cl 1.1 of the ITCH(95) (and of the IVCH(95)) is to confirm that the insured vessel is, subject to the provisions of the insurance, covered 'at all times'. It then proceeds to point out that the vessel is covered even whilst she is sailing or navigating:

- with or without pilots;
- to go on trial trips; and
- to assist and tow vessels or craft in distress.

Towage and salvage warranty

Having clarified that the policy shall remain in force during such events, cl 1 then proceeds to provide exceptions, in terms of a warranty, to the rule in respect to matters relating to towage: it is warranted that the vessel shall not:

- be towed, except as is customary or to the first safe port or place when in need of assistance, or
- undertake towage or salvage services under a contract previously arranged by the assured and/or owners and/or managers and/or charterers.

The clause also states that it 'shall not exclude customary towage in connection with loading and discharging'.

Except for customary towage, or towage to the first *safe* port or place[12] when the vessel is in need of assistance, it is a breach of a warranty for the insured vessel to be towed. It is also a breach of warranty for the insured vessel to undertake towage or salvage service under a previously arranged contract. Customary towage in connection with loading or discharging operations is specifically excluded from cl 1.1. This means that even though such operations may involve towage, nevertheless, the policy continues to remain in force.

10 Clause 1.1 of the ITCH(95) and cl 1.1 of IVCH(95); and cl 1.4 of the ITCH(95) and cl 1.2 of the IVCH(95), are identical.

11 Clauses 1.4 and 1.5 of the ITCH(95) were previously numbered as cll 1.2 and 1.3 of the ITCH(83).

12 It is not the first port, but the first safe port which may not necessarily be the nearest port in terms of mileage.

It is to be noted that the new cl 1.2 of the ITCH(95) has added another exception to the general rule regarding contracts for towage and pilotage services. It is envisaged by cl 1.2 that an assured may be obliged to enter into contracts for towage or pilotage services by reason of established local law or practice. Such contracts shall not prejudice the insurance even though their terms may not be favourable to the assured, who may have entered into a contract in which he has agreed to limit or except the liability of the pilots and/or tugs and/or towboats and/or their owners.

Couched in terms of a warranty, reference has to made to s 33(3) which spells out the legal effects of a breach. Though the insured vessel is covered 'at all times' the cover is stated to be 'subject to the provisions of this insurance'. As the warranty is a provision of the insurance, it becomes clear that the insured vessel will not be covered by the policy in the event of its breach. According to s 33(3), which has now to be read in the light of the case of *The Good Luck*,[13] the insurer would be 'discharged [now automatically discharged] from liability as from the date of the breach of the warranty'.

The use of helicopters

The use of helicopters for certain limited purposes – for the transportation of personnel, supplies and equipment – is covered by the new cl 1.3. The expression 'personnel' is likely to cause problems; whether it includes (besides crew members) the transportation of surveyors, engineers, and doctors to and/or from the vessel is unclear. The word 'supplies' is general enough to include medical supplies, food, provisions and stores.

Loading and discharging operations at sea

The loading and discharging of cargo at sea from or into another vessel are dangerous operations. Transhipment of cargo into smaller vessels has become increasingly common, and underwriters are not prepared to take the additional risks involved in such operations without making the assured pay an additional premium. Clause 1.4 of the ITCH(95) (cl 1.2 of the ITCH(83)) provides that:[14]

> 'In the event of the Vessel being employed in trading operations which entail cargo loading or discharging at sea from or into another vessel … no claim shall be recoverable under this insurance for loss of or damage to the Vessel or liability to any other vessel arising from such loading or discharging operations, including whilst approaching, lying alongside and leaving, unless previous notice that the Vessel is to be employed in such operations has been given to the Underwriters and any amended terms of cover and any additional premium required by them have been agreed.'

The use of the word 'trading' connotes a sense of routine or regularity: it implies that if loading or discharging at sea from or into another vessel is a one-off operation, or is carried out in an emergency, cl 1.4 will not apply.

13 [1991] 2 Lloyd's Rep 191, HL.

14 In the 1969 version of the ITCH, it was unofficially known as the 'mothership clause'.

Loss of or damage to the insured vessel

Clause 1.4 is concerned not only with the loss of or damage to the insured vessel but also with 'liability to any other vessel arising from such loading or discharging operations'. First, it is to be noted that any physical damage suffered by the insured vessel resulting from such an operation is clearly not recoverable. No provision, however, has been made for general average contribution and salvage which the assured may have to incur as a result of such an operation. As these claims are generally preferred as a part of the claim for the loss of or damage to the insured vessel, they are likely also to be excluded.

Liability to any other vessel

Not only is the damage sustained by the insured vessel not recoverable, but the liability of the assured to 'any other vessel' is also not covered. It is submitted that the word 'liability', referring to third party liability in this context, is wide enough to exclude cover for liability in respect of:

- damage sustained by any other vessel;
- loss of or damage to the property on board any other vessel;[15] and
- loss of life of persons on board any other vessel, arising from such loading or discharging operations.

The word 'liability' is general enough to include claims for loss of hire, general average, and salvage. However, should the damage suffered by the insured vessel and the 'liability' incurred to any other vessel arise as result of a *collision* with any other vessel, then the application of the 3/4ths Collision Liability clause has to be considered. As a general rule, the owner of the insured vessel has a right to recover from his insurers under the said clause, 3/4ths of his liability to the third party.[16] However, it would appear that, in spite of the applicability of the 3/4ths Collision Liability clause, cl 1.4 would not, unless notice has been given and the payment of an additional premium has been agreed, allow recovery for such a loss. As there is no paramount clause, it is unclear which provision, cl 1.4 or the 3/4ths Collision Liability clause, is to prevail. It could be argued that the matter may be resolved by applying the rule of proximate cause.[17] However, the term 'arising from' (and not proximately caused by) used in cl 1.4 may be construed as an indication that it is wide enough to cover the circumstance even when a collision is involved. If it were not for cl 1.4, such a loss would have been covered by the 3/4ths Collision Liability clause.

15 But see K Goodacre, *Institute Time Clauses Hulls* (1983, 1st edn), p 2, where it is pointed out that, '… the exclusion does not embrace loss of or damage to property on the other vessel, which can, of course, be cargo intended for transfer to the vessel insured'. But the wording of cl 1.4 of the ITCH(95) (cl 1.2 of the ITCH(83)) has made it clear that cargo loading or discharging at sea both 'from or into another vessel' are covered.

16 Whether cargo damaged in the process of being transferred from the other vessel onto the insured vessel can still be described as property 'on' the other vessel for the purpose of the 3/4ths Collision Liability cl is, of course, another question altogether.

17 Section 55.

THE CONTINUATION CLAUSE

The fact that a policy may contain a continuation clause will not, provided that a definite period is specified in the policy, prevent it from being a time policy. This was made clear by Lord Denning MR in *Compania Maritima San Basilo SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes*[18] who remarked that '… in any ordinary time policy, the Institute Time Clauses (Hulls) include a continuation provision in cl 4 [now cl 2] but that does not prevent the policy being a time policy'. The new cl 2 of the ITCH(95) states:

> 'Should the Vessel at the expiration of this insurance be at sea and in distress or missing, she shall, provided previous notice be given to the Underwriters prior to the expiration of this insurance, be held covered until arrival at the next port in good safety, or if in port and in distress until the Vessel is made safe, at a *pro rata* monthly premium.'

Under the new clause, the vessel is only held covered if, at the expiry of the policy, the vessel is:

- at sea *and* in distress or missing; or
- in port *and* in distress.

Simply being at sea, in distress, or at a port of refuge is no longer sufficient to attract the new held covered clause. Whether at sea or in port at the expiry of the policy, the vessel must now also be in distress before she would be held covered. In any event, she is held covered until her arrival at the *next* port in good safety or, if in port, until made safe. Under the ITCH(83), she would be been held covered 'to her port of destination'. By the new cl 2, to be held covered, the assured has to give notice to the underwriters 'prior to the expiration' of the insurance.

AUTOMATIC TERMINATION

A policy may either expire naturally at the specified time, or terminate prematurely as a consequence of an event spelt out in cl 5, the termination clause of the ITCH(95). Clause 5.1. states that, 'Unless the Underwriters agree to the contrary in writing', the insurance will terminate automatically at the time of:

- change of the Classification Society of the vessel; or
- change, suspension, discontinuance, withdrawal or expiry of her class therein; or
- any of the Classification Society's periodic surveys becoming overdue, unless an extension of time for such survey be agreed by the Classification Society.[19]

The importance of cl 5 cannot be over-stated: in bold type, it commences with a paramount clause that: 'This clause shall prevail notwithstanding any provision whether written typed or printed in this insurance inconsistent therewith'.

18 [1977] 1 QB 49 at p 65, CA.

19 This part of the cl is new.

Clause 5.1 of the ITCH(95), which has widened the scope of the old cl 4 of the ITCH(83), has, however, to be read with cl 4.1.1 (the Classification Clause) which is another new addition to the ITCH(95). As cl 4.1.1 is related to cl 5.1, it is necessary to examine this cl here.

Change of Classification Society

The status of a Classification Society (and of a vessel's class) is, of course, a matter of great importance to underwriters, for the safety and seaworthiness of ships is to a very large degree dependent not only upon the vessel's class, but also upon the standing and reputation of the Classification Society with which she is classed. The new cl 4.1.1 and cl 5.1 of the ITCH(95), both concerned with matters relating to Classification Society, may, on first reading, appear to cover the same ground, but, in fact, they impose different responsibilities.

It would be appropriate to begin this part of the discussion with a few comments on the new cl 4.1.1 of the ITCH(95). Before the introduction of this clause, the assured, owners and managers virtually had a free hand to class the vessel with any Classification Society of their choice, and unilaterally to change Classification Society during the currency of the insurance if they so wish. The purpose of cl 4.1.1 is to impose a duty on the assured, owners and managers to ensure that the vessel is classed with a Classification Society agreed by the underwriters at the inception of, and throughout the period of, the insurance. The words 'throughout the period' clarify that once an agreement has been reached, any subsequent change of Classification Society would also require the approval of the underwriters.

Effect of an unauthorised change of Classification Society

Clause 5.1, which simply refers to a 'change of Classification Society', has now to be read with cl 4.1.1. Though the word 'change' is unqualified, obviously it has to be construed in the light of the new cl 4.1.1. This necessarily means that cl 5.1 must refer to a change, in breach of cl 4.1.1, occurring without the agreement of the underwriters.

Should the assured, owners or managers at any time, without the consent of the underwriters, change Classification Society, they would be in breach not only of cl 4.1.1, but also of cl 5.1. However, the effects of a breach of these clauses are different: whereas a breach of cl 4.1.1. would 'discharge' the underwriters from liability as from the date of breach, a breach of cl 5.1 would automatically terminate the insurance. Thus, one could validly ask which cl is to take precedence. In this regard, the paramount cl to cl 5, which has made it patently clear that cl 5 is to prevail in the event of a conflict, would have to be invoked.

The effect of an automatic termination of the insurance may be seen to be more serious than that of a discharge from liability. And even if one is to construe cl 4.1.1 as a warranty, and confer upon it the right of automatic discharge in accordance with Lord Goff's interpretation of the effect of a breach

of a warranty in *The Good Luck*,[20] it would appear that the effect of an automatic termination is still much more serious: unlike a discharge from liability, a termination – *a fortiori*, an automatic termination – brings the contract to an end.[21] The word 'automatic' is used, presumably, to stress the fact that the termination is not dependent upon any decision or action to be taken by the insurer to treat the contract or the insurance as at an end: it is automatically brought to an end by the repudiatory breach committed by the assured.

It is perhaps necessary to point out that, although a breach of a warranty does not bring the contract to an end, nevertheless, as perceived by Lord Goff,[22] for all practical purposes the effect is the same as if it was brought to an end. Thus, whether the effect of the breach be a discharge under cl 4.1.1, an automatic discharge under Lord's Goff's interpretation of a breach of warranty, or an automatic termination of the contract under cl 5, the net result is the same: the underwriter is freed from liability as from the date of breach. The contract is neither void nor voidable *ab initio*; all rights and liabilities accrued before the breach will continue to be enforceable.[23]

Clauses 4.1.1 and 5.1 are similar in two respects: both clauses are prepared to defer the discharge of liability in the case of cl 4.1.1, and the automatic termination in cl 5.1, until the vessel arrives at her next port. Further, both clauses state that the breach may be waived by the underwriters in writing.

Change, suspension, discontinuance, withdrawal or expiry of her class

It is significant to note that here we are not concerned with a change of Classification Society, but a change of class within 'that Society', meaning, when read with cl 4.1.1, the Classification Society which the underwriters have agreed that the vessel be classed.

A change, suspension, discontinuance, withdrawal or expiry of class could, according to cl 5.1, result from a loss or damage which is:

1 covered by cl 6 of the insurance[24] or which would be covered by an insurance of the vessel subject to current Institute War and Strikes Clauses Hulls – Time; or

2 not covered by cl 6 or which would not be covered by an insurance of the vessel subject to the current Institute War and Strikes Clauses Hull – Time.

In the case of the former, the assured could prevent the automatic termination by obtaining the prior approval of the Classification Society before she sails from her next port. But in the case of the latter, there does not appear to

20 [1991] 2 Lloyd's Rep 191, HL.

21 A distinction which was strenuously emphasised by Lord Goff in *The Good Luck* [1991] 2 Lloyd's Rep 191, HL.

22 *Ibid*, at p 202.

23 Though this point is not made perfectly clear in cl 5.1, nonetheless, the fact that the termination of the contract may be deferred until the vessel's arrival at her next port implies that the termination takes effect either from the date of breach or the later date.

24 Clause 6 of the ITCH(95) states the insured perils.

be any reprieve: the insurance terminates automatically, with or without the prior approval of the Classification Society, when the vessel arrives at her next port of call. This type of change is voluntary and, in a sense, inexcusable, because it was not caused or brought about by an insured peril. This, perhaps, explains why there is no provision for the obtaining of prior approval for a change, suspension, discontinuance, withdrawal or expiry of class, as is available in the first case.

A change of class is also covered by cl 4.1.1. A failure, for whatever reason, to maintain the vessel's class with the agreed particular Classification Society would constitute a breach of cl 4.1.1. The question which now arises is: which clause, 4.1.1 or 5.1, regulates the effect of such a breach? Unlike cl 5.1, clause 4.1.1 does not give any regard to the cause of the failure of the vessel to maintain her class. A failure to maintain the vessel's class with the agreed Society would discharge the underwriters from liability. But if cl 5.1 is to prevail, then it is necessary to inquire whether the change, suspension, discontinuance or withdrawal of her class has resulted from loss or damage covered by cl 6 of the ITCH(95) or by the IWSC(H). If it has resulted from such a cause, the automatic termination shall only operate if the vessel sails from her next port without the prior approval of the Classification Society. But if the change was for a reason other than the one stated above, then the policy would terminate automatically.

In the recent case of *Prudent Tankers Ltd SA v The Dominion Insurance Co Ltd, The 'Caribbean Sea'*,[25] the rules of a classification society on a matter relating to the ship's class were placed under scrutiny. The vessel was insured under the American Institute hulls clauses which provided that the policy would automatically terminate 'if the Classification Society of the Vessel or her class therein be changed, cancelled or withdrawn', a clause not dissimilar to cl 5.1. By the rules of the Classification Society in question, it was laid down that: 'in the event of grounding or damage to hull … the classification certificate loses its validity'. During the course of a voyage, the master formed the opinion that the vessel had touched the bottom, but made no inquiries as to the possibility of any damage. As the incident appeared trivial to him, he did not inform the Society of the incident but merely entered a protest when the vessel arrived at the next port. Subsequently, she sank as a result of the entry of sea water into her engine room.

The court found that the vessel did in fact take the ground, but the grounding did not have any causative effect on the casualty. The insurers argued that by reason of the said clause, the policy had automatically terminated at the time of the grounding. To this, Mr Justice Goff, as he then was, drew the distinction between a loss of the validity of the certificate and a loss of class. The loss of the validity of the classification certificate did not amount to a 'withdrawal of class'. As there was neither a change, cancellation nor withdrawal of class – matters which require a positive action from the Society – the defence failed.

25 [1980] 1 Lloyd's Rep 338.

Overdue periodic survey

It is also to be noted that by the new addition to cl 5.1, the cover would also terminate automatically if the Classification Society periodic survey was to become overdue. Unless an extension of time for such a survey can be agreed by the Classification Society, the insurance terminates automatically.

Change of ownership, flag, transfer to new management, or charter on a bareboat basis, or requisition for title or use of the vessel

Clause 5.2 of the ITCH(95) refers to ownership and matters relating to the use of the ship:

- change, voluntary or otherwise, in the ownership or flag;
- transfer to new management;
- charter on a bareboat basis;
- requisition for the title or use of the vessel.

Its primary objective is to protect the insurer from material changes in the risk on significant and fundamental matters such as ownership, class, flag, management and the use of the vessel.

The occurrence of any one of the above events, voluntary or otherwise, would automatically terminate the insurance at the time of change. The automatic termination, however, may be deferred if:

- the vessel has cargo on board and has already sailed from her port of loading or is at sea in ballast; and
- a request for its deferment is made.

The automatic termination is deferred 'whilst the Vessel continues on her planned voyage, until arrival at final port of discharge if with cargo, or at a port of destination if in ballast'.

Clause 5.2 also provides that in the event of a requisition for title or use of the vessel 'without the prior execution of a written agreement by the Assured', the automatic termination of the policy will be deferred, whether the vessel is at sea or in port, until 15 days after the requisition. The corollary of this is that, if the vessel is requisitioned with the prior execution of a written agreement by the assured, the policy would terminate automatically without any period of grace, whether the vessel is at sea or in port. As the above general ground for deferment is also applicable to requisition for title or use of the vessel, it could be argued that, if its terms are complied with, the automatic termination could be deferred.

Return of premium

Clause 5 of the ITCH(95) has incorporated a new cl relating to a return of premium in the event of an automatic termination. It states that:

'A *pro rata* daily net return of premium shall be made provided that a total loss of the Vessel, whether by insured perils or otherwise, has not occurred during the period covered by this insurance or any extension thereof.'

The 'period covered by this insurance' could mean either the period intended to be covered by the insurance or the period from the commencement of the risk right up to the time of the automatic termination or any extension thereof. It is submitted that the words 'extension thereof' refer to the extensions mentioned in cl 5, where the automatic termination is deferred:

- until the vessel arrives at the next port in the event of a breach of cl 5.1; or
- until the vessel arrives at the final port of discharge if with cargo, or port of destination if in ballast, in the case of cl 5.2; or
- for 15 days after such requisition whether the vessel is at sea or in port in the event of requisition for title or use.

It is submitted that, read as a whole, it must refer to the period covered by the insurance from the inception to the time when the automatic or the deferred automatic termination takes place. The provision could for clarity have been better worded.

B – VOYAGE POLICY

A voyage policy is defined by s 25 as one where the subject-matter is insured 'at and from' or 'from' one place to another, or others. It is to be noted that s 25 is of general application, and, therefore, a voyage policy may be effected upon ship, goods or freight.

A policy on ship is nowadays almost invariably insured for a period of time, but there is nothing in law to prevent an assured from taking out a voyage or a mixed policy on ship. Time polices are more straightforward in the sense that there can be little doubt as to when a policy commences and terminates: as time and date are specifically set out, there can be no uncertainty or confusion as to the precise moment when the policy begins and ends. Furthermore, problems associated with the implied condition as to commencement of risk, change of voyage, delay, and deviation cannot arise in a time policy.

To avoid confusion, this study on voyage policies will be divided into two parts: the first will deal exclusively with a voyage policy on ship, and the second with goods which are nearly always insured for a voyage. Topics such as when a voyage policy attaches and terminates, and events which can cause a voyage policy to come to a premature end, will be discussed.

VOYAGE POLICY ON SHIP

As can be seen from the above definition, any subject-matter may be insured for a voyage 'from' or 'at and from' a particular place. This has to be set out in the Policy Schedule under the heading, 'Voyage or Period of Insurance'. Unless the policy otherwise provides, the words 'from' and 'at and from' will have the meaning given to them by rr 2 and 3 of the Rules for Construction. A voyage policy on hull may be effected in the form of the IVCH(83) or the IVCH(95).

'From'

When a ship is insured 'from' a particular place, 'the risk does not attach until the ship starts on the voyage insured' from that particular place. Whether a ship has or has not commenced on a particular voyage is in each case a question of fact. The act of quitting her moorings or breaking ground is generally recognised as an act signifying the commencement of a voyage.

This alone, however, is not sufficient to trigger the attachment of the policy. For r 2 to operate, she must start on the 'voyage insured'. This necessarily means that moving the ship from one part of the port to another will not count as starting on the voyage insured, nor does the moving out of port for a purpose other than for starting on the 'voyage insured'.[26] For the risk to attach, the physical act must be accompanied with the intention to start on the voyage insured.

Alteration of port of departure

Needless to say, if a ship is to sail from a port other than the named port, the risk does not attach.[27] This is clarified in s 43 as follows:

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

Sailing for a different destination

The same result would arise if the ship is to start on a voyage to a destination other than that contemplated by the policy.[28] In this instance, s 44 would prevent the attachment of risk. Section 44 states:[29]

> 'When the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.'

'At and from'

A ship may be insured 'at and from' a particular place; this is governed by r 3, which envisages two circumstances:

- Rule 3(a) states: 'Where a ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately'.
- Rule 3(b) states: 'If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the

26 *Sea Insurance Co v Blogg* [1898] 2 QB 398.

27 See *Way v Modigliani* (1787) 2 Term Rep 30 at p 31; *per* Buller J '… it certainly is not necessary that she should be in port at the time when it attaches, but she must have sailed on the voyage insured, and not on any other'.

28 See *Simon, Israel & Co v Sedgwick* [1893] 1 QB 303, CA and *Wooldridge v Boydell* (1778) 1 Doug KB 16.

29 Section 44 cannot possibly apply to an 'at and from' policy, for the risk would have already attached when the ship is 'at' the particular place. Any change of destination can only arise after the commencement of the risk, in which case s 45 on 'change of voyage' would apply: for a discussion on the law relating to a change of voyage, see below.

policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival'.

In both cases, the crucial moment for determination is 'when the contract is concluded'. According to s 21, a contract is 'deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not …'.

There is a, however, a third situation which is not covered by the Act, namely, that of a ship which has already sailed from the named port at the time when the contract is concluded.

Ship already at named port

The first instance covers the circumstance when the ship is already at the named port, the *terminus a quo*, at the time when the contract is concluded. If the word 'at' is given a literal interpretation, the risk would attach as soon as the ship arrives at the named port.[30]

But a ship well may be 'at' a particular place for a purpose other than for the insured voyage. If, for example, she is at the named port for another voyage or for a purpose (for example, repairs) which is unrelated to the insured voyage, it would be difficult to argue that the policy attaches the moment she arrived at that port.

If the ship is, at the time when the contract is concluded, at the named port for the purpose of sailing on another voyage, s 44 would apply. In such an event, the risk does not attach when a ship sails for a different destination.[31] In the same vein, there is no reason why a policy should attach to a ship which is undergoing preparations (at the particular port), not for the insured voyage but for another voyage. In *Tasker v Cunninghame*,[32] the House of Lords, citing *Lambert v Liddiard*[33] as authority, declared that:

> 'In the common case where it is "at and from" etc without any special words to restrict the meaning of the word "at", the beginning to load the cargo, or preparing for the voyage, seem to be the principal circumstances to determine the commencement of the risk.'

It is submitted that the keys words here are 'for the voyage', meaning the insured voyage. For the risk to attach, the ship must be at the named port either for or preparing for the insured voyage.

It has been suggested that as the word 'at' is lacking in precision, a presumption could be made that the policy attaches the moment the ship is 'at' that place in good safety. And unless it is rebutted, r 3(a) would apply, and the ship is insured during the whole of her stay at that port. The presumption, Arnould suggests, can always be rebutted with proof of the risk intended to be insured by the parties.[34]

30 See *Smith v Surridge* (1801) 4 Esp 25 where the ship was at the named port on the 13th, and the policy was effected on the 15th.

31 See *Simon Israel Co v Sedgwick* [1893] 1 QB 303; 7 Asp MLC 245.

32 (1819) 1 Bligh 87, HL.

33 (1814) 5 Taunt 480; 1 Marsh R 149.

34 Arnould, para 541.

Ship not at the named port

The standard words 'at and from' a particular place do not constitute a warranty or a representation that the ship is actually at the named port when the contract was concluded: this is clarified by s 42. Rule 3(b), however, is specially designed to cater for the event when the ship is not at the named port when the contract is concluded, but is expected to arrive there within a reasonable period of time. Naturally, the policy cannot attach until she arrives there in good safety.

In *Haughton v Empire Marine Insurance Co*,[35] for example, the vessel was damaged by coming into contact with an anchor after entering the harbour and whilst passing over a shoal up to her place of discharge. It was held that the policy attached as soon as the vessel arrived within the port named.

In *Foley v United Fire and Marine Insurance Co of Sydney*,[36] though the insurance was on chartered freight, nevertheless, the principle of law applied therein is equally relevant to a policy on ship. The policy was held to have attached soon after the arrival of the ship at the named port. The fact that the whole of the cargo of the previous voyage was not discharged did not prevent the attachment of the risk. The words 'at and from' (Mauritius), said Kelly CB, 'in their ordinary signification include the whole period the ship was actually at Mauritius'.[37]

Rule 3(b) has expressly declared that 'it is immaterial that she is covered by another policy for a specified time after arrival'. A degree of overlapping could arise, but this is inconsequential.

Ship already sailed from named port

The Act has omitted to cover a third situation, namely, when the ship had already sailed on the insured voyage at the time when the contract was concluded. Whether the policy had attached retrospectively is unclear. If it could be proved that the intention of the parties was to insure her for the voyage on which the ship had already set sail, there is no reason why the policy should not be allowed to attach retrospectively. But whether she would also have to comply with the 'good safety' requirement before she sailed on that voyage is another question which the court could one day be called upon to answer.

Meaning of 'good safety'

For an 'at and from' policy to attach, the ship must not only be 'at' the named port, but must also be there in a state of 'good safety'. This requirement has to be satisfied whether she is already at the named port when the contract is concluded, or arrives there after the contract has been concluded.

35 (1866) LR 1 Exch 206.

36 (1870) LR 5 CP 160.

37 *Ibid*, at p 162.

What constitutes 'good safety' is now well settled by cases such as *Parmeter v Cousins*[38] and *Bell v Bell*.[39] In the first case, the ship which was in a leaky condition, unfit to take in a cargo, and was kept afloat only by constant pumping was held not to be in a state of 'good safety'. The standard of 'good safety' is evidently lower than that of seaworthiness. So long as she exists as a ship and is physically capable of lying afloat, she is in good safety. She would still be classified as being in 'good safety' even if she is damaged. She does not even have to be safely moored to meet the requirement.[40]

In *Bell v Bell*,[41] the vessel, though leaky, was able to lie for a month loading in a river. The insurer's defence was to the effect that, as the ship was not in good political safety, having been seized and condemned on her arrival at the named port, the policy did not attach. This was rejected by the court, which held that the policy had attached, for the ship was in a state of good physical safety. The case is authority for the proposition that 'good safety' means good physical, and not political, safety.

Implied condition as to commencement of risk

From the moment a contract of marine insurance for a voyage is concluded, it is expected that 'the voyage insured shall be very shortly commenced, or is, at all events, in the near contemplation of the parties …'.[42] It is understood by the insurer that the vessel would sail within a reasonable time from the date of the conclusion of the contract. However, the commencement of an insured voyage, whether under a policy 'from' or 'at and from' a particular place, could well be affected by delay. Any excessive delay would naturally vary the risk upon which the insurer has agreed to undertake.

Section 42, therefore, imposes upon the assured the duty to commence the adventure within a reasonable period of time. It applies to all voyage polices regardless of the subject-matter insured. As the wording of section calls for close examination, it would be helpful to cite it here in full:

> 'Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.'

The first part of s 42 establishes the rule that it is not necessary in a 'from' and 'at and from' policy for the ship to be at the particular place when the contract is concluded. In so far as a 'from' policy is concerned, the risk attaches only when she starts on the voyage insured. As regards an 'at and from' policy, the fact that the ship may not be 'at' the particular place when the policy is concluded does not pose any problem, for r 3(b) allows for the risk to attach as soon as she arrives there in good safety.

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38 (1809) 2 Camp 235.

39 (1810) 2 Camp 475.

40 See *Haughton v The Empire Marine Insurance Co* (1866) LR 1 Ex 206.

41 (1810) 2 Camp 475.

42 *Per* Tindal CJ, *Palmer v Marshall* (1832) 8 Bing 317 at p 318.

The second half of s 42 imposes on all voyage policies the implied condition that the adventure shall be commenced within a reasonable period of time. Before proceeding to examine the scope of this implied condition, it is necessary to point out the difference between a delay in the commencement of the adventure, and a delay arising during the course of the insured voyage; the former is governed by s 42, and the latter by s 48: they refer to different periods in time.

Delay in the attachment of risk and/or in the commencement of voyage

The commencement of the insured voyage in a policy 'from' a particular place could be delayed in either one or both of the following ways. The delay could arise in the course of the ship's (preliminary) voyage to the particular place and/or in the commencement of her insured voyage 'from' that particular place. In either case, the result is the same: there is delay hindering the commencement of the insured voyage 'from' the particular place, resulting in a delay in the attachment of the risk.

In an 'at and from' policy, a ship could encounter delay either during the course of the preliminary voyage to the particular place, and/or delay in the commencement of the insured voyage 'from' the particular place. In other words, a delay could occur either before and/or after the attachment of the risk. In the one case, there is a delay in the attachment of the risk, and in the other, a delay in the commencement of the insured voyage under a policy the risk of which had already attached. In either event, it would result in a delay in the commencement of the insured voyage.[43]

In a pre-statute case, *Mount v Larkins*,[44] Chief Justice Tindal expressed the rationale for the implied condition in the following terms:

> 'The underwriter has as much right to calculate upon the outward voyage, on which the ship is then engaged, being performed in a reasonable time, and without unnecessary delay, 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. In either case the effect is the same, as to the underwriter who has another risk substituted instead of that which he has insured against; and in both cases, the alteration is occasioned by the wrongful act of the assured himself.'

It appears that, in this regard, no distinction need be made between a policy where the risk has attached and one where it has not. The key issue in each case is whether the delay has brought about a variation of the risk. It has to be emphasised that it is not a question of whether the risk has increased, but that '... the insured has, without necessity, substituted another voyage for that which was insured and, thereby varied the risk which the underwriter took upon himself'.[45]

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43 See *Mount v Larkins* (1831) 8 Bing 121 at p 122 where the policy, 'at and from Singapore', was concluded on 28 February, but the ship did not arrive at Singapore till 30 March, and did not sail from there on her insured voyage till 3 May. There was delay all round, and Tindal CJ remarked that, 'But what is the difference … whether this … unjustifiable delay takes place in the course of the ship's voyage to Singapore, or after the ship is at Singapore …'.

44 *Ibid*.

45 *Per* Tindal CJ, *Mount v Larkins*, *ibid*.

The defence of lawful excuse

It is noted that, unlike s 46 on deviation and s 48 on delay arising in the course of the voyage, s 42 does not say anything about lawful excuse. Take, for instance, the case of a ship which is unable, for causes beyond the control of the assured (for example, peril of the seas), to commence the insured voyage within a reasonable period of time. Would the assured be able to plead that, as the commencement of the voyage was delayed for necessary repairs to be effected on the ship, he should be excused?

The words 'without necessity' and the last few words of the above quotation are indeed interesting, for they are capable of being construed as embodying a defence for the assured. The main problem in this area of the law which requires consideration is whether the defence of lawful excuse is available to the assured.

In *De Wolf v The Archangel Maritime Bank Insurance Co Ltd*,[46] Mr Justice Blackburn, who delivered the judgment of the court, took time to explain the above comments made by Chief Justice Tindal, said:

> 'This may be relied on as an expression of opinion that the delay, if necessary, would not discharge the underwriters. It may be so, where the fact that the vessel is on a preliminary voyage is known and communicated to the underwriter, so as to make that the basis of the contract …'

Naturally, if the delay or the likelihood of delay is known to the insurer before the contract is concluded, then the implied condition is negatived. The effect of notice, and of waiver, of the delay are both spelt out in s 42(2).[47]

Mr Justice Blackburn then went on to say:

> '... there was no communication made to the underwriters as to where the ship was at the time when the policy was made. And we think it, under such circumstances, not material whether the delay which varies the risk was occasioned by the fault or the misfortune of the assured. In either case the risk is equally varied.'

Parliament, of course, if it had wanted, could have easily conferred the assured with the defence of lawful excuse, and inserted the words 'without lawful excuse' (after the word 'if') into s 42, as it had done so for ss 46 and 48.

But having said that, it has to be pointed out that there is a group of cases, decided before the *De Wolf* case, namely, *Smith v Surridge*,[48] *Palmer v Marshall*,[49]

46 (1874) LR 9 QB 451 at p 455-456.

47 See *Bah Lias Tobacco & Rubber Estates v Volga Insurance Co Ltd* (1920) 3 Ll L Rep 155 at p 202, KBD in which the insurer who had accepted an additional premium to cover a period during which the loss occurred were precluded from raising the defence of unreasonable delay.

48 (1801) 4 Esp 25, where the insurer was not discharged from liability by reason of the fact that the delay of about … five months was involuntary; it was necessary for the ship to be repaired.

49 (1832) 8 Bing 318; where the insurer was discharged from liability because the delay was unexplained and not for the purpose of the voyage.

Palmer v Fenning[50] and *Mount v Larkins*,[51] which have made the defence of lawful excuse available to the assured. In *Smith v Surridge*,[52] the insurer was held bound by the contract, as the delay was involuntary; whereas in the remainder of the cases, the insurer was 'discharged' from liability because the delay was 'unaccounted'. There are obviously two points of view under the common law.

If s 42 is based on the ruling of the *De Wolf* case, the latest case on the subject, then there can be no doubt that there is no defence for a breach of the implied condition. Unless it is a case of sheer oversight, the fact that s 42 has omitted to incorporate the defence of lawful excuse goes a long way to support this view.

Legal effect of breach

At one time, there was some suggestion made by the common law that a breach of the implied condition would prevent the attachment of the risk under the policy. Words to the effect that the insurer was 'discharged from liability' were also used. Section 42, however, states that the insurer may 'avoid the contract'. This suggests that, even though the risk may have attached and/or the voyage has commenced, the contract must still be on foot, regardless of the delay. For if the position were otherwise, there would be no need to give the insurer the option of whether to proceed or not to proceed with the contract. Should the latter course of action be adopted, the contract is rendered void *ab initio*. Given this construction, the word 'condition' (as opposed to a 'warranty') appearing in s 42 has been awarded its traditional meaning, as understood in the law of contract, as giving rise to a right (at the election of the innocent party, the insurer) to treat the contract as repudiated.

Change of voyage

A 'change of voyage' is defined in s 45 as:

> 'Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy …'

As the section has not made any specific reference either to ship, goods or freight, it must apply to all voyage policies.

The underlying principle of the law on change of voyage was highlighted by the House of Lords in *Tasker v Cunninghame*, where the Lord Chancellor said:[53]

> 'When a ship is insured at and from a given port, the probable continuance of the ship in that port is in the contemplation of the parties to the contract. If the owners, or persons having authority from them, change their intention, and the

50 (1833) 9 Bing 460, in which there was no justification whatsoever for the delay. Alderson J (at p 46) said that for a delay to be justifiable it should be 'for the purpose of the voyage such as waiting for a wind, provisions, or the like'.

51 (1831) 8 Bing 121, where the insurer was discharged from the contract because the postponement of the voyage, occasioned by the wrongful act of the assured himself, was unreasonable and unjustified.

52 (1801) 4 Esp 25.

53 (1819) 1 Bligh 87, HL.

> ship is delayed in that port for the purpose of altering the voyage and taking in a different cargo, the underwriters run an additional risk if such a change of intention is not to affect the contract.'

Any voyage policy could terminate prematurely because of a 'change of voyage' which has a specific meaning in the law of marine insurance. There are two important parts to the section; the first relates to the words 'after the commencement of the risk', and the second to 'voluntarily changed'.

'After the commencement of the risk'

First, it is pertinent to note that a change of voyage is a different concept altogether from that of sailing for a different destination referred to in s 44. In the case of sailing for another destination, the intention to sail for a destination different from that contemplated by the policy is manifested right from the very beginning when the ship sets sail. As the assured has no intention whatsoever of performing the insured voyage from the very inception, the risk does not attach.

A change of voyage can only arise 'after the commencement of the risk'. In a 'from' policy, the voyage must have started from the particular place named in the policy for the risk to attach. Any alteration of destination arising during the course of the insured voyage would attract s 45. In an 'at and from' policy, the risk must have attached when the ship arrives 'at' the particular place in good time and in good safety before s 45 can apply. In such a circumstance, the determination to change may be made either:

- in the interim period when the ship is 'at' the particular place (from which time the policy attaches) and before she sets sail on the insured voyage; or
- during the course of the insured voyage.

'Voluntarily changed'

To constitute a change of voyage, the destination of the ship must be 'voluntarily changed' by the assured. In other words, any change caused by an Act of God or *force majeure* would not discharge the insurer from liability. This point is illustrated in *Rickards v Forestal Land, Timber and Railways Co Ltd*,[54] where the master of the ship had to comply with an order from the German government to seek refuge in neutral ports or to return to Germany. One of the issues which was raised in the House was whether there was a change of voyage. To this, Lord Porter's response was:

> 'The master's act was both necessitated by moral force and reasonably necessary for the safety of the ship … There was no voluntary change … The master was acting, not on his own initiative, but on the orders which … morally as a good subject he ought not to have resisted … as the master's action was caused by circumstances beyond his and his employer's control, and was involuntary … the voyage was not changed within the provisions of section 45 of the Act.'

54 [1941] 3 All ER 62 at p 96, HL.

Legal effect of change of voyage

Section 45(2) specifies the legal consequence of a change of voyage as follows:

> 'Unless the policy otherwise provides, where there is a change of voyage the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.'

Determination to change

In a somewhat roundabout fashion, the liability of the insurer is, by s 45, fixed at 'as from the time when the determination to change' is manifested. Whether the vessel has or has not actually departed from the course of the voyage contemplated by the policy is irrelevant. It is the mental state of the assured which is to be looked at, and not the actual physical act of change in course. In *Tasker v Cunninghame*,[55] it was argued by the assured that as nothing was done to alter the voyage, and no progress made in unloading the cargo, this was to be considered as resting in mere intention, and the loss must be considered as a loss under the policy. This defence was roundly rejected by the Lord Chancellor, whose reply was:

> 'Undoubtedly a mere meditated change does not affect a policy. But circumstances are to be taken as evidence of a determination, and what better evidence can we have, than those who were authorised had determined to change the voyage. In my opinion the voyage was abandoned.'

Change of voyage clause

Clause 2 of the IVCH(95), commonly referred to as the 'held covered' clause, states:

> 'Held covered in case of … change of voyage … provided notice be given to the Underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed.'

Such a provision is allowed by s 45(2) by the words, 'Unless the policy otherwise provides'. Naturally, as the case of *Simon Israel Co v Sedgwick*[56] has pointed out, albeit a policy to goods, it is not possible to invoke a 'held covered' clause if the policy had not attached. This again reinforces the principle that a change of voyage can only arise after the risk has attached.

Deviation

Deviation is an important subject not only in marine insurance, but also in the law of contract of affreightment. The line between a deviation and a change of voyage may at first sight appear to be indistinct. In one case, it was said that, 'It is often a nice question on the facts whether an interruption of the voyage amounts to a deviation only or is a change of the voyage'.[57] Thus, it may be helpful at the outset to differentiate them.

55 (1819) 1 Bligh 87, HL.

56 [1893] 1 QB 303; 7 Asp MLC 245.

57 *Per* Lord Davey, *Thames & Mersey Marine Insurance Co v Van Laun* [1917] 23 Com Cas 104 at p 111, HL.

Deviation is defined by s 46(1) as follows:

> 'Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.'

A deviation occurs when the ship leaves her prescribed or customary course, but with the intention of ultimately returning to that course to complete the insured voyage. The intention to arrive at the named port is never lost sight of. The *terminus ad quem* is not changed, but the proper and usual course of performing the voyage is changed. In *Wooldridge v Boydell*,[58] the learned Lord Mansfield, who clearly had a keen insight into the subject, with his usual lucid style, said:

> 'Deviations from the voyage insured, arise from after-thoughts, after-interest, after temptation; and the party who actually deviates from the voyage described means to give up his policy. But a deviation merely intended but never carried into effect is no deviation. In all the cases of that sort, the *terminus a quo*, and *ad quem*, were certain and the same.'

A change of voyage, on the other hand, occurs when there is no intention of completing the insured voyage; the destination is changed. In each case, the test is whether there is any intention of sending the ship to the *terminus ad quem* specified in the policy. Lord Davey of the House of Lords in *Thames and Mersey Marine Insurance Co v Van Laun & Co* said that:[59] 'The usual test is whether the ultimate *ad quem* remains the same.'

The course of the voyage

That deviation can only be considered in the context of a voyage the course or route of which has already been mapped out either by the policy or by custom is obvious. To determine whether a ship has or has not deviated from its voyage, it is first necessary to ascertain what the course of the voyage contemplated by the policy is. The route which a ship may take for a voyage is either specified by the policy, or is the usual and customary course.[60]

If the course is specifically designated, it must be strictly complied with.[61] If it is not so designated, then the 'usual and customary' course has to be taken. What the usual and customary route of a vessel is, is of course, a question of fact. It could vary, *inter alia*, with the class of the vessel, and the trade in which is she engaged. It is generally recognised as the safest, most direct, and most expeditious course between the two destinations: it is a matter of common mercantile notoriety.[62]

The degree or extent of a deviation is irrelevant. Any alteration of course, however slight or trivial, constitutes a variation of the risk contemplated by the policy. That the risk may not have increased is also considered as immaterial.

58 (1778) 1 Doug KB 16 at p 18.

59 [1917] 23 Com Cas 104 at p 111, HL.

60 See s 47 for the position where several ports of discharge are specified in the policy.

61 See *Eliot v Wilson* (1776) 4 Bro Parl Cas 470.

62 See *Clason v Simmonds* (1741) cited in 6 Term Rep 533.

The matter of fact is, the new risk is not what the insurer had bargained for. It is for this reason that the insurer is discharged from his liability under the contract.

Intention to deviate is immaterial

Intention is all important in the case of a change of voyage, but is immaterial in deviation. According to s 46(3), '… there must be a deviation in fact to discharge the insurer from his liability under the contract'. A mere meditation to deviate has no effect on the contract.[63] The ship must have actually departed from its proper course before the insurer could discharge himself from liability.

Without lawful excuse

Section 46 has to be read with s 49, which spells out a list of excuses for deviation (and delay). It also provides that when 'the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch'.[64] These excuses have to an extent become of lesser importance because of the 'held covered' clause of the IVCH(95) and cl 8.3 of the ICC.

Legal effect of deviation

Section 46 states that, 'the insurer is discharged from liability as from the time of deviation …'. The contract is not rendered void *ab initio*, and therefore any liability arising before the deviation remains in tact: the insurer is liable for all loss incurred prior to the deviation. The effect of this, however, may be displaced by a term in the contract such as a held covered clause.

Held covered

The heading of cl 2, though captioned as 'change of voyage', nevertheless provides cover in the case of deviation. It states:

> 'Held covered in case of deviation ... provided notice be given to the Underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed.'

In *Greenock Steamship Co v Maritime Insurance Co*,[65] a held covered cl was held to apply even though the event for which the vessel was held covered was not discovered until after a loss had occurred.[66] The court also held that the extra reasonable premium which the insurer may levy has to be calculated as 'if the parties had known of the deviation at the time that it happened'.

63 See *Kingston v Phelps* (1795) cited in 7 Term Rep 165, where the master who had made up his mind to call at an unauthorised port was strangely enough forced by stress of weather into that very port. It was held that he had not deviated, as his intention was never carried into effect. The actual deviation was involuntary and would now fall within s 49(1)(b) as a circumstance 'beyond the control of the master'.

64 See *Delaney v Stoddart* (1785) 1 TR 22.

65 [1903] 1 KB 367.

66 The held covered cl read as: 'Held covered in case of any breach of warranty, deviation … at a premium to be hereafter arranged.'

A similar problem arose in *Mentz, Decker & Co v Maritime Insurance Co*,[67] where Mr Justice Hamilton was asked to answer the question whether a notice given after a loss was effective under a held covered clause which specifies that 'due notice' must be given by the assured on receipt of advice of a deviation.[68] It was argued that the assured should not be allowed to claim the benefit of the clause because the notice given after a loss could not be said to be given with 'due notice'. The judge, applying the decision of the above case, held that the notice given by the assured, though given after loss, was sufficient to satisfy the terms of the clause.

Both the above cases have established the principle that a notice given after a loss is still valid. The question which arises from this is: can an assured afford to delay or postpone the giving of his notice on receipt of advice of a deviation, or of the event which is held covered?

'Immediately'

Mr Justice Hamilton expressed the view that a delay should not prevent an assured from recovering under the policy when 'nothing practicable' can be done on receipt of the notice.[69] Does this mean that, in such a circumstance, the assured may take his time in giving his notice?

In *Thames and Mersey Marine Insurance Co v Van Laun*, Lord Halsbury LC of the House of Lords appears to give the impression that an assured is allowed a reasonable period of time to give his notice. He remarked that:[70]

> '... it is an implied term of the provision that reasonable notice should be given, that it is not competent to the assured to wait as long as he pleases before he gives notice and settles with the underwriter what extra premium can be agreed upon.'

It has to be pointed out that the his lordship was able to read this term into the contract because there was nothing in the held covered cl in question stipulating a time limit for the giving of the notice.[71] It is doubtful whether the same term may be implied in cl 2. It is submitted that there is no room for the application of the 'reasonable notice' rule under the IVCH(95). The word 'immediately' appearing in cl 2 connotes a sense of greater urgency than the words 'due notice' or a reasonable period of time. As soon as the assured is aware of the event he has to give his notice at once.

67 [1910] 1 KB 132 at p 135.

68 The cl read as: 'In the event of the vessel making an deviation … it is mutually agreed that such deviation … shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation …'.

69 Cited with approval in *Hewitt v London General Insurance Co Ltd* (1925) 23 Ll L Rep 243.

70 (1917) 23 Com Cas 104 at p 109, HL.

71 The held covered cl was in the following terms: 'In the event of any deviation from the terms and conditions of this policy … it is understood and agreed that notwithstanding such a deviation the interest hereby assured shall be held covered at a premium to be arranged.'

Delay in voyage

As in the case of a change of voyage and deviation, unreasonable delay in the prosecution of the insured voyage could also bring about a premature end to a voyage policy. The question of delay is dealt by s 48 in the following manner:

> 'In the case of a voyage policy, the adventure must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.'

Whether the ship has or has not prosecuted the voyage with reasonable despatch is, of course, a question of fact.[72] The excuses spelt out in s 49 for deviation are also applicable to delay.

Legal effect of delay

As there is nothing in the IVCH(95) on delay, the matter is governed by s 48. Clause 2 of the IVCH(95), the change of voyage clause, does not apply to delay and delay is, therefore, not held covered. The insurer is discharged from liability only as from the time the delay becomes unreasonable. This means that the right of the assured of recovery for any loss arising before such time is preserved. Reference, however, has also to be made to s 55(2)(b), which states that:

> 'Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against.'

VOYAGE POLICY ON GOODS

Goods are almost invariably insured for a voyage in a policy incorporating either the ICC (A), (B) or (C). As they generally have to travel on land before and after a sea voyage – to be conveyed from the warehouse or place of storage to the port of loading, and from the port of discharge to the warehouse or place of storage – they are usually insured for both land and sea risks. Provided that the land risks are 'incidental' to the sea voyage, a policy of mixed sea and land risks may be taken out. This is permitted by s 2(1) of the Act and, as will be seen, the transit clause of the ICC is an example of such a policy.

The scheme of coverage set out in the ICC is complex and confusing. The duration of the cover is governed by cll 8, 9 and 10. Briefly:

- clause 8.1 sets out the general rules relating to attachment and termination of the insurance;
- clause 8.2 covers the particular circumstance where a change of destination occurs after the completion of the sea voyage;
- clause 8.3 in declaring that the insurance 'shall remain in force' confirms that the events listed therein will not terminate the insurance – its purpose is to dispel any doubts which one might have as regards the continuance of the cover should any one of the enumerated events arise;

72 See s 88.

- clause 9 relates specifically to a termination not of the contract of insurance, but of the contract of carriage and its effects on the contract of insurance; and,
- clause 10 – the 'change of voyage' clause – states that a change ordered by the assured is held covered.

Attachment of insurance

Under the ICC, the period of cover is contained in the 'transit clause,' clause 8 – sometimes referred as the 'warehouse to warehouse clause' – which reads as follows:

> 'This insurance attaches – from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit …'

Though the provision is straightforward enough, nonetheless it is necessary to mention that the word 'leave' clarifies that the insurance does not attach whilst the goods are in the process of being loaded, nor whilst they are being conveyed other than with the intention of commencing the insured transit. The cover will only attach when the goods physically depart from the premises 'at the place named ... for the commencement of the transit'.[73]

Continuance of insurance

By cl 8.3, the insurer agrees to maintain cover should any one of the following circumstances arise: during delay beyond the control of the assured; any deviation; forced discharge; reshipment or transhipment during the voyage; and any permitted variation of the contract of carriage arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.

The objective of this clause is to remove any doubts which one might have regarding the validity of the cover should any one of these circumstances take place.

Delay beyond the control of the assured

A cargo owner does not, as a general rule, have control over the performance of the voyage. This necessarily means that the effect of delay, as laid down in s 48, could prove to be harsh on him. To mitigate the severity of this, cl 8.3 was inserted to preserve the cover during a delay; provided that the delay is beyond the control of the assured, the insurance continues to operate, presumably regardless of the period and the reasonableness or unreasonableness of the delay, as none of these considerations is mentioned in the clause.

The converse to the rule in cl 8.3 is that the policy will terminate if the delay is within the control of the assured. Thus, a cargo owner who has himself caused the delay (for example, in procuring or loading the cargo) would not be

73 The words 'at the place named herein for the commencement of the transit' were inserted to clarify the position and to avoid the problems encountered in *Re Traders & General Insurance Association Ltd* (1924) 18 Ll L Rep 450; see also *Symington & Co v Union Insurance Society of Canton Ltd* (1928) 3 Ll L Rep 280; 31 Ll L Rep 179.

able to plead the benefit of cl 8.3. Furthermore, he would also be in breach of cl 18, the 'avoidance of delay' or 'reasonable despatch' clause which declares that:

> 'It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.'

The scope of this cl is wider than s 48; it is not confined to the sea voyage, for the words 'in all circumstances' include land transit. The penalty is presumably the same as that stated in s 48, namely that the insurer is 'discharged from liability as from the time when the delay became unreasonable'.

Loss proximately caused by delay

Clause 4.5 of the ICC (A), (B) and (C), which echoes the rule contained in s 55(2)(b), states:

> 'In no case shall this insurance cover –
>
> loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above).'[74]

Though the policy may remain in force, any loss proximately caused by delay is not recoverable.[75]

'Any deviation'

Clause 8.3 provides that the insurance shall remain in force during 'any deviation'. By this clause, the assured is neither required to give notice nor to pay any additional premium. Presumably, the reason for the rule is that, in practice, the deviation of a ship must almost invariably be beyond the control of a cargo owner.

Variation of the adventure

It is to be observed that cl 8.3 applies only when the variation of the adventure arises from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment. Any unauthorised variation would not be covered by the policy. As the insurance 'shall remain in force,' the assured is not required to give notice to the insurer or to pay any additional premium.

Termination of insurance

Normal termination

In the normal course of events, the insurance will terminate when the goods arrive at any one of the three termini enumerated in cll 8.1.1 to 8.1.3. The phrase 'whichever shall first occur' qualifying all three clauses sets 60 days as the limit, or the cut-off point, of the cover. In the usual run of cases, the insurance would

74 The only claim for delay which may be recoverable is that arising from general average under cl 2. That the insurer will compensate the cargo owner's proportion of general average even though arising from delay has been preserved by this exception.

75 See *Pink v Fleming* (1890) 25 QBD 396.

have terminated in accordance with either cll 8.1.1, 8.1.2 or 8.1.3, before the expiration of the 60 days.

Premature termination

The 'ordinary course of the transit'[76] envisaged by cl 8.1 could, however, be shortened, or end prematurely, by reason of the occurrence of an event stipulated in cll 8.2, 9 or 10. The statutory laws on change of voyage (s 45); deviation (s 46); and delay during the voyage (s 48), described above, apply to all voyage policies. A cargo owner, however, is generally not in control of the voyage or of matters as to how it is to be prosecuted. A variation of the adventure, a change of destination or voyage, delay, and deviation could occur; and any of these events could be caused by the assured (the cargo owner) himself or, they could be beyond his control. Thus, clause 8.1 defining the duration of the risk – the points of attachment and termination – has to be read with cll 8.2, 9 and 10, all of which could affect the duration of the cover.

Change of final destination

Clause 8.2 is an example of a particular circumstance of a premature termination of the cover. For it to apply, the sea voyage must have terminated at the final port of discharge; the cargo discharged overside from the oversea vessel; and the goods 'forwarded to a destination other than that to which they are insured hereunder'. Strictly speaking, 'change of final destination of the cargo' would be a more suitable name for this provision, which is necessary because of the coverage for land transit. Whether such a change of destination is contemplated by s 45 (which relates to a change of voyage) is another question altogether. Section 45, it is observed, refers to the destination of the *ship* and not of the cargo.

As was seen, cl 8.2 is limited in scope; and unlike cl 9 on termination of the contract of carriage, and cl 10 on a change of voyage ordered by the assured, there is no held covered provision for such a change of destination. The clause provides for termination of the original insurance as from the time when the goods commence transit to its new destination.

It is interesting to note that the clause is silent as to the party who has instructed the change of destination. It simply states that, 'If … the goods are to be forwarded to a destination other than that to which they are insured hereunder, this insurance … shall not extend beyond the commencement of transit to such other destination'. It cannot apply to a change of destination (and of voyage) ordered by the assured, for this is specifically covered by cl 10.

Clause 8.2, it has been said, is 'intended to deal with the situation of a resale to a customer of the assured, and to make it quite clear which insurance would be in force (that of the original assured or his customer), the clause provides for termination of the original insurance …'.[77] If this is the objective of the clause, more positive language should have been used to make this clearer. As it stands, it is not at all happily worded.

76 See *Safadi v Western Assurance Co* (1933) 46 Ll L Rep 140.

77 See NG Hudson, *The Institute Clauses* (1995, 2nd edn), p 24.

Termination of contract of carriage clause

Whether cl 9 applies to a change of destination which has been ordered not by the assured (cargo owner), but by the shipowner (or carrier) is the question which has to be considered, especially in the light of the fact that there is now no longer a held covered clause dealing directly with a change of voyage, as was previously available in the 1963 version of the ICC.[78] The relevant parts of cl 9 read as follows:

> 'If owing to circumstances beyond the control of the Assured … the contract of carriage is terminated at a port or place other than the destination named therein … then this insurance shall also terminate unless prompt notice is given to the Underwriters and continuation of cover is requested when the insurance shall remain in force …'

Two elements have to be satisfied before a termination of the insurance can take place:

- 'the contract of carriage is terminated at a port or place other than the destination named therein'; and
- the circumstances are beyond the control of the assured.

A typical scenario contemplated by cl 9 is probably the case where a ship, unable to continue with the voyage because she has suffered severe damage, discharges her cargo at an intermediate port thereby causing a termination of the contract of carriage.[79]

A carrier (shipowner or charterer) who has, under a contract of carriage, agreed to carry cargo from A to B, for which the cargo owner (the assured) has accordingly insured them for the said voyage could, after the commencement of the voyage from A, terminate the contract of carriage by voluntarily sailing to C, a port other than the destination named in the said contract of carriage. Such a change of destination ordered by the carrier, though 'beyond the control of the Assured', would result not only in a termination of the contract of carriage, but also of the insurance 'unless prompt notice is given to the Underwriters and continuation of cover is requested …'. As worded, cl 9 appears to be wide enough to embrace a change of voyage, with or without good reason, ordered by the carrier.[80]

It is to be observed that, unless prompt notice be given with a request for a continuation of cover and the payment of an additional premium, if so required by the underwriters, the policy will terminate.

Admittedly, the policy is not held covered, but the assured could prevent the termination of the insurance by issuing prompt notice with a request for a continuation of cover. Unlike a held covered clause, here, the assured has to

78 The 'Change of Voyage' Clause of the 1963 version of the ICC stated: 'Held covered at a premium to be arranged in case of change of voyage …'.

79 Another obvious example is where the contract of carriage is prematurely terminated by unavoidable extraneous forces, eg, war.

80 However, Hudson, *The Institute Clauses* (1995, 2nd edn), p 26, holds the view that, 'there is now no provision in the Institute Cargo Clauses to hold the assured covered in the event of an illegal change of voyage by a shipowner or other carrier'.

take steps to forestall the termination of the insurance.[81] Further, it should be noted that cl 9 covers not only a termination of the contract of carriage, but also any termination of transit before the delivery of the goods as provided by cl 8. Like the sea voyage, land transit can also be terminated by circumstances beyond the control of the assured.

The continuation of cover granted is limited and will terminate as provided by either cll 9.1 or 9.2

Change of Voyage clause

Clause 10 is a departure from the general rule on change of voyage declared in s 45, by which the insurer is discharged from liability as from the time of change. Clause 10 states:

> 'Where, after attachment of this insurance, the destination is changed by the Assured, held covered at a premium and on conditions to be arranged subject to prompt notice being given to the Underwriters.'

Though named the 'change of voyage' clause, nevertheless it uses the word 'destination', and not 'the destination of the ship' as in s 45(1). As 'destination' is unqualified, it can refer to the destination of the ship at the named port, and also to the destination of the cargo which is to be delivered at the 'final warehouse or place of storage'. It has to be emphasised that this clause is applicable only when the 'destination' is changed by the assured himself. It clearly has no application to a change of voyage and/or destination which is beyond the control of the assured; such events are covered by cll 9 and possibly 8.2.

'Note' on 'held covered' clause

It is to be observed that in all the ICC,[82] there is, at the end of the policy, a 'Note' (in italics) emphasising that:

> 'It is necessary for the Assured when they become aware of an event which is "held covered" under this insurance to give prompt notice to the Underwriters and the right to such cover is dependent upon compliance with this obligation.'

Unlike cl 9, where the policy will automatically terminate unless it is prevented from so doing by prompt notice, a held covered clause has the opposite effect. The assured remains covered by the policy until such time as he becomes aware of the event for which he is 'held covered' and, on becoming aware of the event, fails to give prompt notice to the underwriters.

For completeness, it is necessary to refer to the case of *Simon Israel Co v Sedgwick*,[83] where the goods insured were intended to be shipped to Madrid when, by a blunder, they were shipped to Carthagena. Even though the policy in question contained a held covered clause, it did not help the assured, as the risk had not attached.

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81 By this clause, the policy may be revived by the assured giving prompt notice and paying the additional premium. In a held covered clause, the policy continues to apply until such time as when the assured becomes aware of the loss and fails to give prompt notice to the insurer.

82 But not in the IVCH(95) or the ITCH(95).

83 [1893] 1 QB 303.