IV. CONCLUSION

In conclusion then, it may be said that contracts for carriage are subject to the general law of contract as developed by the courts both here and in England. Only where the application of the secondary obligations are concerned can these contracts be regarded as *sui generis*. But this applies only in so far as they are subject to the implied terms which have been developed to meet the needs of those who are involved in this type of contract. It must be remembered that the package limitation has not come before the courts either in New Zealand or in England. It may be that should it do so the courts will hold that the plain words of the rule mean no more and no less than what they in fact say.

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Marine insurance – an ancient art that meets modern demands

D. McKellar*

The following article is the text of a lecture delivered to the 1984 LL.M. Maritime Law class at Victoria University. It traces some of the historical roots of marine insurance, and then shows its continuing significance in maritime law today. The author suggests that updating of the relevant legislation is required.

I. BACKGROUND INFORMATION

The history of marine insurance can be traced back to the time when man started trading. It commenced as a type of self-insurance with traders carrying part of each other's cargoes so that in the event of a catastrophe they would not lose all their own cargo.

Early documentary proof of marine insurance dates from 2300 B.C. which can be found on an engraved stele unearthed in Mesopotamia known as the code of Khammurabi who was then the king of Babylon. Inscribed on the stone are some 282 clauses testifying that these early businessmen practised amongst other things a form of insurance known as "bottomry". This meant that where there was a mortgage on the hull the ship owner would be indemnified if the vessel was lost but paid over a substantial share of the profits if it reached its destination safely. This "bottomry" known as "Foenus Nauticum" was eventually developed by the Romans into insurance as it is understood today. In 50 B.C. Cicero wrote to Sallast asking him to underwrite some cash in transit from Laodicia to Rome. In 533 A.D. the Roman emperor Justinian proclaimed the first official bank rate in interest at 3½% per annum. The only exception was the "Foenus Nautilus" which was pegged at 12%, 6% being interest and 6% being a risk premium. Translated into modern insurance terms this means that nearly 1500 years ago the total loss rate for an unclassified sailing vessel on a Mediterranean voyage in unchartered waters without a compass or any other aid to navigation was 6%. Even in those days rates varied considerably and there were complaints that underwriters took money but were not so ready to pay out when a claim occurred. In the 14th century Francesco di Marco Datini wrote irritably to his wife that underwriters were not always

* A.I.N.Z., A.I.I.A., Managing Director, Thomas Macky & Co. Ltd., Attorneys for The Marine Insurance Co. Ltd.

trustworthy. His rates for his goods varied from 3.5% on wool to 8% on wine whilst for the same period a Florentine merchant was paying rates from 12%-15% for similar commodities.

The present day policy form (which is slowly being replaced by the new Institute Clauses) can trace its origins back to the Ordinance of Florence of 1523, as it is this wording that early English underwriters used. To commence with in England there were no insurance offices and marine insurance consisted of private transactions between individuals. The Royal Exchange founded in 1570 gave merchants a centre at which to meet and transact business. However, in the middle of the 17th century many coffee houses opened up all over London and these slowly became individual centres of commerce. The most famous of these coffee houses was founded in 1687 by a man called Edward Lloyd. To attract customers Lloyd built up a network of correspondents in principal parts around the Continent and England who sent news on the movement of vessels, thus attracting individual marine underwriters to his premises. From this coffee house began the origins of the famous marine insurance market Lloyds.

II. MARINE INSURANCE TODAY

The London market is still the centre of marine insurance because of its large capacity to absorb high value risks. The market is split up between Lloyds underwriters and insurance companies. Lloyds is not a company in itself but is a corporation under which individual syndicates underwrite, within strict sets of rules. The majority of commercial risks are placed with underwriters by insurance brokers who are insurance experts in their own right representing their clients. Their object is twofold in firstly obtaining the best type of cover available and secondly the most competitive rate for that cover.

The principle of marine insurance is a contract of indemnity to cover a fortuity, i.e. an accident or any loss or damage which is not an inevitability. Most cargo policies are valued policies and most risks are insured under open policies or open covers. These are contracts whereby the trader is automatically covered for all consignments in which he has an insurable interest under pre-determined conditions of cover and at specified rates.

The cargo underwriter will not only cover goods for physical loss or damage but will also provide cover, where required, for consequential loss. This type of cover is normally used on consignments of machinery where in the event of damage by an insured peril there is a delay in the starting up date of a factory with resultant consequential loss of profits. Another type of cover which is becoming more widely used is Seller's Interest, where an exporter may sell on F.O.B. or C. & F. terms with insurance being the buyer's responsibility. There are several variations of the Seller's Interest cover but the basic one provides a cover whereby if the contract should fall through, the insurance cover attaches retrospectively whilst the goods are either diverted to another market or are stored and then reshipped back to the country of origin.

III. MARINE INSURANCE CLAUSES

Up until recently cargo policies were underwritten on the old S.G. form with old type wording dating back to the 16th century. Recently the Institute of London Underwriters, who formulate the standard clauses to be used throughout the world in association with the Lloyds market and trade associations, have commenced issuing new sets of clauses on a plain policy form with modern terminology.

A study of the new Institute Cargo Clauses (A) will show them clearly set out under various headings and not only do they give a clearer definition of what is covered than the old style clauses but also clearly specify what is excluded. The Cargo Clauses are for use by merchants dealing with general cargo and there are more specialised clauses for specific commodities such as frozen foods, frozen meat, timber, sugar, grain etc. A study should be made of these separate trade clauses to see how they are tailor-made to suit the particular commodity.

As at the beginning of March 1984 there were several trade clauses which had still not been reissued in the new format and the long delay in reissuing them would suggest that the thoughts of the trade associations differ considerably from those of the underwriters. An example of this would be the Institute Frozen Meat Clauses (Full Conditions). The sister clauses, the Institute Frozen Food Clauses (Full Conditions) were replaced by the Institute Frozen Food Clauses which considerably reduced the type of cover available. This was made possible by the fact that the underwriters did not have to deal with specific trade associations and regretted issuing such wide cover previously. However, with the Institute Frozen Meat Clauses the underwriters have to satisfy the requirements of the International Meat Trade Association plus other organisations such as meat producers boards and corporations who obviously were not going to accept a reduction in cover. The problem really lies with the issuing of the Full Conditions type cover which was so wide ranging they provided more cover than originally intended by the underwriters.

In today's changing world it is impossible to produce specific clauses for every type of commodity that is shipped by road, rail, steamer or aircraft. Such examples are perishables by airfreight, horticultural products by both air and seafreight and live animals by seafreight. In such cases underwriters will take one of the standard Institute Clauses and then amend and extend them to meet the requirements of the client. In other cases there are specific clauses that are used to extend basic Institute Clauses to provide cover for an additional peril or risk such as Rejection Risk, Seller's Interest and Delayed Unpacking.

Wherever possible the cargo underwriter will try and meet his client's requirements when those requirements are reasonable but if he is wise, he will always use the basic Institute Clauses for the basis of his cover. The reasons for this are twofold. Firstly the reason for having standard Institute Clauses is so that Letters of Credit can be more easily transacted regardless of which countries the merchants are in and secondly the Institute Clauses are based on the history of law that can easily be referred to in the event of a dispute over a claim.

IV. THE UNDERWRITER AND THE SHIP OWNER'S LIABILITY

Both the Airway Bill or Bill of Lading and the Insurance Certificate form part of an overall contract known as the Contract of Sale. The carrier contracts to carry the goods from point A to B and at the same time contracts to take adequate care of those goods so that they will arrive safely. The underwriter who has no contract with the carrier but has a contract with the same cargo owner agrees to insure those goods from point A to point B under specified terms and conditions. When a cargo underwriter is rating the risk he takes into consideration that in many cases he will be able to recover the whole or part of the loss from the carrier if the goods arrive damaged and he can prove the loss was caused by the carrier's negligence. The amount it is possible to recover from the carrier will depend on the terms of the Contract of Carriage and whilst this was once easy it is becoming more complicated each year with new international conventions and individual countries passing new Acts concerning carriers within their own countries. Some countries have kept up with the international conventions and some are even looking ahead to future conventions whilst others are way behind in their legislation. At present most Contracts of Carriage by sea come under either the Hague or Hague-Visby Rules whilst on the horizon there are countries considering the Hamburg Rules.

The advent of containerisation has brought about new parties to Contracts of Carriage, namely freight forwarders, and to confuse the matter further there has been a substantial increase recently in non-vessel owning cargo carriers. It is not unusual for an importer in New Zealand to be unaware of which vessels are carrying his cargos on their intermediate section of the journey. Where in the past cargo from northern Europe would be shipped direct to New Zealand, it is not unusual for it to either be shipped to a port such as Singapore and transhipped down to New Zealand or in some cases travel per the trans-Siberian railway, be carried by a vessel from Russia to Japan, from there, Japan, to Singapore and from there, Singapore, to New Zealand. Gone are the days where the cargo underwriter could on a monthly basis grab his files and go and see the shipping company claims officer and work their way through the claim files deciding whether the ship owner was liable or not or whether a recovery owing to extenuating circumstances required a negotiated settlement. It is not only the confusion with legislation concerning the carriage of goods that has caused the situation to change. Shipping companies which are mostly now large corporations have downgraded their claims officers' position and passed most of their files to P. and I. Club representatives. In the same manner insurance companies have become large corporations and restructured themselves so that the marine departments have been downgraded and the first casualties have been the claims adjusters who were people who spent a career dealing solely in claims and recoveries against ship owners. They in turn when the going gets hot pass their files to solicitors.

These changes that were no doubt brought about by corporate management decisions in cutting costs have in actual fact worked the other way. A shipping claims officer and an insurance claims adjuster were paid set salaries and therefore the work they carried out on claims and recoveries were cost efficient and in addition claims and recoveries were settled properly. On the other hand both

solicitors and P. and I. correspondents are expensive commodities because you are paying for their professional qualifications and expertise and in addition to this claims and recoveries become much more drawn out, thereby causing further disputes over the loss of interest on monies that are eventually paid.

In dealing with the claim the insurance companies' attitude is that insurance is a service industry and the reason that the client paid a premium was to have his claims paid swiftly and efficiently. On the other hand the shipping company or carrier is in business to carry goods and payment for damage to goods will always be a secondary consideration bordering on being a necessary evil. The P. and I. correspondent on the other hand is representing the mutual P. and I. Club who are protecting the carrier's interest and it is their duty to reduce the payments as much as possible, therefore avoiding the mutual club having to call up additional monies. There is therefore not a very good scenario for recoveries from shipowners or carriers to be swiftly dealt with in an element of mutual understanding.

Another area where a review of the present system is required is in the dealing of General Average. Originally when established, the theory behind General Average was a good and equitable means of dealing with a major casualty where it was necessary to sacrifice individual interests for the sake of the whole venture. More and more General Averages are being disputed especially in relation to the standard of vessels and their crews and it is therefore time that the principles of General Average are adjusted to meet modern requirements or even that General Average is removed and the loss let lie where it falls.

V. FUTURE TRENDS IN SHIPPING AND MARINE INSURANCE

In today's quickly changing times the marine underwriter as with all other types of businessmen must keep up with modern trends, otherwise he will no longer be in business.

With regard to international conventions we have the Hamburg Rules which have existed for a number of years and hopefully will continue to exist for the foreseeable future but on the other hand a prudent underwriter must look ahead to the possibility of the Hamburg Rules becoming law, however remote that may be.

It was not so long ago that a major shipping company attempted to introduce the Insured Bill of Lading onto the United Kingdom, Australia, New Zealand run. There are some instances of the Insured Bill of Lading being used overseas and it would become a definite form of Bill of Lading if the Hamburg Rules were introduced. Strangely enough the Hamburg Rules would also spell the death knell for General Average. It is very likely that with or without the Hamburg Rules shipowners will push for Insured Bills of Lading in the future but it will have to be on a voluntary basis and not a compulsory basis.

Methods of transporting cargo are also changing virtually daily as modern technology is introduced to meet consumer demand. This not only affects the cargo underwriter as to what cover he can provide or what rate he is to charge but also how far the shipowner's liability will apply. An example of this is the growth in the horticultural trade by seafreight over long distances in comparison with the

traditional frozen meat trade. Frozen meat is a fairly hardy product and whilst it might be carried -18°C, this will not necessarily seriously affect the meat providing the period is for a reasonably short time and the meat is brought back down to its original temperature. On the other hand products such as kiwifruit only have a 1°C variation in temperature, yet they are carried on the same vessels using the same type of refrigeration equipment. Should the ship owner be equally liable if the kiwifruit temperature varies by 2°C that would cause similar damage to frozen meat if the temperature varied by more than 6°C?

A fairly new type of container that is being used for shipments of onions from New Zealand to the Continent of Europe is known as the mechanically vented container or fantainer. If the onions were sent in a conventional container on deck with the door off on such a long voyage there is very little chance of the onions arriving in marketable condition. Yet if the basic and simple electric motor in the fantainer were to break down the onions would be left in a steel enclosed box with no ventilation with an inevitable loss occurring. An even newer type of container can carry stonefruit and vegetables long distances through controlling not only the temperature in the container but also the gases. No doubt even more sophisticated containers will appear in due course with low tolerances of temperature variations and sophisticated equipment requiring more expertise for necessary repairs on the voyage by the ship's crew. Who is going to draw the line as to what can reasonably be recovered from the carrier when losses occur because the temperature has risen by 2°C or because the ship's electrical officer was unable to correct a fault in a container controlling the gases inside the container, especially when that container was not provided by the shipping company itself?

One area concerning shipping and insurance that has become a growth industry in recent years has been fraud. One type of fraud that is well known to the general public through publicity in newspapers is the deliberate sinking of ships either with non-existent cargoes on board or after the cargo has been secretly discharged at an intermediate port. The most spectacular of these frauds occurred on 17 January, 1980 when the 213,928 tonne dead weight tanker *Salem* was sunk off the Senegal coast. Another and similar type of fraud is the offering of extremely cheap freight rates with the vessel's owner knowing they are commercially unviable and then sailing the vessel secretly to an unknown destination and discharging and selling off the cargo. While no doubt these two more spectacular types of fraud will continue there is a third and far more dangerous type of fraud which is increasing rapidly known as documentary fraud. This type of fraud has been brought about for several reasons. One reason has always been there and that has been the trader's natural greed for a quick bargain, therefore leaving himself open for the perpetrator to set up a fraudulent shipment. However the other main reason has come about through both the easy access to documents and the use of photocopies for the speedy processing of documents, especially for airfreight consignments and short haul seafreight consignments. Anyone with patience and a good quality photocopier can speedily forge documents to his requirement that are accepted by both banks and overseas consignees.