INTERNATIONAL TRADE LAW

GENERAL PRINCIPLES OF MARINE INSURANCE LAW

The Marine Insurance Contract.

s1 Marine Insurance Act 1906 describes the contract of marine insurance as a contract of indemnity regarding marine losses, that is to say, losses incident to a marine venture. s1 Marine Insurance Act. 1906 states that "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."

The Nature of Indemnity.

Regarding the nature of indemnity see **The Zuhal K** [1] concerning whether a bond guarantee amounts to a contract of insurance or merely a guarantee : The court held that a bond is a guarantee. A bond is not an indemnity and is recoverable and thus repayable. Regarding the nature of an indemnity against marine losses, see **Re County Commercial.**[2]

The nature of a marine venture.

s3(2)(a)(b)(c). Marine Insurance Act. The marine perils are set out in s3(2) Marine Insurance Act & proviso.
The Marine Insurance Act states

1) *Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.*
2) *In particular there is a marine adventure where*
   a). *Any ship, goods, or other moveables are exposed to marine perils. Such property is in this Act referred to as 'insurable property'.*
   b). *The earning or acquisition of any freight, passage money, commission, profit or other pecuniary benefit, or the security for any advances, loan or disbursements, is endangered by the exposure of insurable property to maritime perils.*
   c). *Any liability to a third party may be incurred by the owner of or other person interested in or responsible for, insurable property, by reason of maritime perils.*

Maritime perils mean the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples, jettisons, barratry, and any other perils either of the like kind or which may be designated by the policy.

s1 Marine Insurance Act 1906, regarding the nature of the indemnity, states that a contract of marine insurance is a contract whereby the insurer (ie the underwriter) undertakes to indemnify the assured, in manner and to the extent thereby agreed (ie for the perils insured against), against marine losses, that is to say, the losses incident to a marine adventure..

For the nature of the marine policy see **The Captain Panagis.**[3] Policy 1 covered the hull. Policy 2 covered any loss not covered by Policy 1. The court held that it was a marine policy covered by the Marine Insurance Act 1906. An appeal[4] regarding deliberate casting away succeeded but does not detract from this part of the decision.

As to construction of a policy and the need to have regard to the policy as a whole to determine the intentions of the parties see **The Al-Jubail.**[5]

Period of Cover.

In order to determine the period of cover permissible regarding a marine insurance policy, s2 Marine Insurance Act 1906 provides that a policy may either by its terms or usage be extended so as to protect the assured against losses on inland waters or on any land risk incidental to a sea voyage. In this way the assured is able to cover both incidental land risks and marine risks in one policy.

1 **The Zuhal K** [1987] 1 Lloyd's Rep. 181 see 155 col 2
2 **Re County Commercial** (1922) 127 Law Times p20
3 **The Captain Panagis** [1985] 1 Lloyds 625 at p632 column 1. At first instance there is a good clear judgement which is well worth reading
4 [1986] 2 LL.R. 470
5 **The Al-Jubail** [1982] 2 Lloyd's Rep 637.

The most usual case for this arises regarding cargo insurance where the assured wants to insure goods from inland warehouse until final discharge or delivery at another inland warehouse or depot : known as warehouse to warehouse clauses. In **Ide v Chalmers,**[6] Jute was sent from Calcutta to London. The contract stated insurance was to be on the usual Lloyds conditions. The court held that this had to include cover from warehouse to warehouse, till safely delivered.

Today under the I.C.C. (a)(b)(c), clause 8 'The Duration Clause' contains what is known as the transit clause.

8.1 This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit & terminates either

8.1.1 on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein, on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein,

8.1.2 which the Assured elect to use either

8.1.2.1 for storage other than in the ordinary course of transit or

8.1.2.2 for allocation or distribution or

8.1.3 on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge, whichever shall first occur.

The courts tend to be quite strict in the application of duration clauses and seem to lean in favour of the underwriter particularly in respect of determination of the risk in such a case. Nonetheless, in **Westminster Fire & Reliance Marine Insurance**.[7] where a cargo was destroyed by fire in a transit shed, it was held that the cargo was covered by the policy, since it had not yet reached its final destination.

As to a case where risk did not commence in a policy which was from 'anywhere to anywhere' and a failure to show the cargo was in being at the time of the risk, see **Fuestday v Orion Oil Insurance,**[8] where it was held that if goods don't exist risk cannot attach since there is nothing for it to attach to. The subject matter was concentrated perfume essence in barrels. It is probable that only water was shipped instead of perfume[5] which rogues had switched some time before the risk could attach. Note that the scope of the policy was 'lost or not lost - against all risks & from anywhere to anywhere' which seems to be pretty all embracing and yet it failed to cover the loss.

Applicability of the Marine Insurance Act 1906 to vessels under construction.

s2(2) Marine Insurance Act 1906 provides for cover in case of a ship in the course of building or the launch of a ship, in that a policy may be issued in the form of a marine policy. In "so far as applicable -" provisions of the Act shall apply to it. Regarding the words "in so far as applicable " see **Quebec M.J. v Commercial Bank**.[9] The policy covered a loss due to unseaworthiness and an exemption from liability for unseaworthiness. The court held that the vessel must be seaworthy at the commencement of the voyage. The vessel could not withstand the change from freshwater to sea water and the boilers exploded. The vessel was river worthy but not seaworthy.

THE MARINE ADVENTURE

The Marine Adventure and Marine Perils are set out in **s3 Marine Insurance Act. 1906**. What the assured insures is not so much the article in question but the risk in the adventure. The subject matter insured represents his insurable interest. It is this insurable interest which gives him the legal right to make a marine insurance contract. The assured insures against the possibility of monetary loss, by reason of his taking a particular form of risk on entering on a particular Marine Adventure.

Hewitt Bros v Wilson,[10] distinguishes the interest insured from the insurable interest i.e. the subject matter is not the same as the loss risked by the assured. A misdescription of the subject matter was not held to be material. The assured knew of the misdescription but honestly believed that it was not material. The court held that it was insured under the *'covered at a premium to be arranged'* clause**. s20 Marine Insurance Act 1906.**

6 **Ide v Chalmers** [1900] 5 Commercial Cases 212

7 **Westminster Fire & Reliance Marine Insurance**. [1903] 19 T.L.R. 668.

8 **Fuestday v Orion Oil Insurance** [1980] 1 Lloyd's Rep 656

9 **Quebec M.J. v Commercial Bank** [1870] L.R. 3 P.C. 234.

10 **Hewitt Bros v Wilson** [1915] 20 Com Cas 241 at 243.

s3(1) Marine Insurance Act. 1906 : Every lawful Marine Adventure may be the subject matter of a contract of marine insurance. But note that not every act of unlawfulness will invalidate a policy.

s41 Marine Insurance Act 1906 : There is an implied warranty that the adventure insured is a lawful one, in so far as possible the assured will carry it out in a lawful manner. In **Euro -Diane v Bathurst,**[11] it was held that there is no such implied term as to lawfulness or that the assured will carry out the contract in a lawful manner exists in non marine policies on goods. A consignee (a diamond exporter) engaged in tax evasion in Germany. The court held that this did not invalidate the policy since it was outside the control of the assured and not part of a marine adventure.

Regarding the Marine Adventure, **s3(2)(a) Marine Insurance Act. 1906** provides in particular that there is a Marine Adventure where any ship, goods, or other moveables are exposed to Marine Perils.

Similarly **s3(2)(b) Marine Insurance Act 1906** states that there is a Marine Adventure in respect of freight passage money, commission, profit or other pecuniary benefit where such subject matter is exposed to Marine Perils.

s3(2)(c) Marine Insurance Act. 1906 provides that there can be a Marine Adventure where liability to a third party may be incurred by reason of a Marine Peril.

Third Party Cover.
Regarding third party liability, although the subject matter of marine insurance was not as such covered by the old Lloyds policy, its existence is recognised by **s3(2)(c) Marine Insurance Act 1906** and by **s5(2) Marine Insurance Act 1906** regarding the insurable interest and also by **s74 Marine Insurance Act 1906** which deals with the measure of indemnity for 3rd party liability, where it states that it is the amount that has to be paid by the assured to the third party.

Third Party Liability is split today between the marine policy and the P & I clubs. Thus in respect of collisions between vessels, cover is provided under clause 6 I.T.C.H. and clause 8 I.V.C.H. under the title collision liability. Other forms of third party liability which do not come within such clauses will be covered by the P & I clubs.

Regarding what can amount to the subject matter of a Marine Adventure remember that a 'Ship' is defined by **Rules 15 of the Rules of construction**, which provides that the term "Ship" includes Hull and materials and outfit, stores and provisions for officers and crew and regarding a steam ship, machinery, boilers, coals and engine stores if owned by the assured and where the vessel is engaged in special trade, trade includes fitting usual to the trade.

Regarding description of the subject matter see **Roddick v Indemnity Mutual**,[12] where it was held at 1st instance and affirmed on appeal that that in policy covering 'Hull & Machinery' that bunker coals and engine stores were not within the scope of the term 'Hull' though it but note that **rule 15** of the rules of construction would cover 'coals'.

Regarding ship's furniture **Hoggarth v Walker,**[13] held at 1st instance and affirmed on appeal that this covers things necessary for the carriage of grain cargo, although not used in that particular voyage. Dunnage mats and separation cloths were stowed in the forespeak of a grain ship which was not at that time carrying grain and so were not in use. During a collision damaging the bow of the vessel they were lost. The court held that they were covered by the policy.

s30(2). Marine Insurance Act 1906. In respect of the construction of the policy, subject to the provisions of the Act and unless the policy states otherwise, expressions in the rules shall apply to the marine policy.

s16(1) Marine Insurance Act 1906. Regarding the measure of insurance value of the subject matter insured, the definition of a ship is extended to include also, money advanced for seamen's wages and other dispersements (if any) incurred to make the ship fit for the voyage or adventure contemplated. Thus in defining a ship for the purpose of the Marine Insurance Act 1906 it is necessary to take into account the

11 **Euro -Diane v Bathurst** [1987] 1 Lloyd's Rep 178.
12 **Roddick v Indemnity Mutual** [1985] 1 Q.B. 836.
13 **Hoggarth v Walker** [1899] 2 Q.B. 401.

provisions of **s16(1) Marine Insurance Act 1906** although the money advanced for the seamen's wages in so far as it related to the advance notes is no longer in being. To this must also be added the charges of the insurance of the ship.

The Nature of Dispersements :
Moran v Uzielli.[14] The claimant insured disbursements for which he had made an advance to the shipowner. The court held that since he could arrest the ship under a Writ in Rem he had an insurable interest in a marine adventure.

Cargo :
Cargo is not defined by the **Marine Insurance Act. 1906**. However it will be remembered that by under **s90 Marine Insurance Act. 1906** moveables are defined as any moveable tangible property other than the ship and includes money, valuable securities and other documents.

Goods :
Under Rule 17 regarding Goods, it covers goods in the nature of merchandise (but it doesn't include personal effects), provisions and stores for the use on board and provides that in the absence of usage and custom, deck cargo and living animals must be insured specifically and not under the general heading of goods. The measure of insurable value of cargo is covered by **s16(3) Marine Insurance Act 1906**. In the insurance on goods or merchandise the insurable value is the prime cost of the property + expenses incidental to shipping and the charges of insurance on such.

Personal Effects :
Regarding Personal Effects Cover see **Duff v Mackenzie**.[15] Under a policy dealing with 'total loss' e.g. in respect of a cargo of grain it is an all or nothing affair, and one can only claim if all the grain is lost However, if it is in respect of the personal effects of the master, each effect is dealt with separately, so that there is a total loss of any one item, and that loss can be recovered.

Provisions and Stores :
Remember that provisions and stores fall within the definition of a ship under **Rule 15** and under **s16(1) Marine Insurance Act. 1906**.

Moveables :
The definition of moveables under **s90 Marine Insurance Act 1906** is required by sections 3, 40 & 71. **s3 Marine Insurance Act 1906** provides that there is a marine adventure where any moveables are exposed to maritime perils but by virtue of **s40(1) Marine Insurance Act 1906** there is no implied warranty that other moveables are seaworthy.

Total loss of part of valued goods.
s71(1) Marine Insurance Act 1906. Where part of the goods, merchandise, or other moveables insured by a valued policy is totally lost the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.

Deck Cargo :
Rule 17 Marine Insurance Act 1906. Usage means usage of the trade and not merely the practice of the insurance business. See **British & Foreign Marine v Gaunt**.[16] This policy contained no form of transport clause. The policy was on wool against all risks from sheep's back in South America to warehouse in Europe. The wool was brought by coasting ships to landing port and got wet. According to local usage, wool was customarily carried on deck and so the underwriter was held liable for the loss. Note this was a custom of the trade and not just of the insurance business. See this case again latter also in respect of inherent vice. See also **Apollonaris v Nord Deutcher**[17] which concerned a deck cargo on the Rhine Canal, deck cargo being usual on the Rhine, the risk was held to be covered by the policy

14 **Moran v Uzielli** [1905] 2 K.B. 555
15 **Duff v Mackenzie** [1857] 3 CBNS 16.
16 **British & Foreign Marine v Gaunt** [1921] 2 A.C. 41.
17 **Apollonaris v Nord Deutcher** [1904] 1 K.B. 252.

For a specific provision that goods loaded on deck would be warranted free of partial loss in policy see **Renton v Cornhill Insurance.**[18] It was held that the warranty did not apply to goods intended to be loaded on deck but which were damaged before being loaded. The underwriter was liable for damage to goods lost from lighters (A loading barge) prior to loading.

Average :
Particular average means a partial loss. A general average loss means a loss which is shared in part by all interested parties. Thus a bulk cargo jettisoned for the benefit of other cargo owners. Each of the beneficiaries must pay a proportion of the loss even though they have actually lost nothing themselves.

Under the I.C.C. cargo is used in the clause heading. The new style Lloyds policy provides for the nature of the subject matter to be inserted. In the case of cargo care needs to be taken in the manner in which the subject matter is described.

Description of the Subject matter.

s26(1) Marine Insurance Act 1906 requires that the subject matter should be described with reasonable certainty. This is particularly important in as far as a possible breach of **s18 Marine Insurance Act 1906** as to disclosure or **s20 Marine Insurance Act 1906**as to misrepresentation is concerned. Thus if the assured fails to disclose a material circumstance in respect of the goods or misrepresents a material circumstance then the underwriter may be able to avoid the policy although as long as the assured did not deliberately mislead the underwriter there will be a return of the premium under **s84(3)(a) Marine Insurance Act 1906**.

For examples of misdescription and non-disclosure see **Hewitt Bros v Wilson**.[19] Second hand machinery described as machinery under a policy covered by the old forms of cargo clauses, which contained an errors of description clause which provided for the cover at a premium to be arranged regarding errors in relation to the description of the goods.

The new I.C.C. omits this form of cover and clause 10 I.C.C. only provides for a change of voyage after the attachment of risk to be covered at a premium to be arranged subject to prompt notice being given to the underwriter. There is no satisfactory explanation for this omission, but it places a strong onus on the assured not to make mistakes.

Rule 16 :
Freight includes the profit which the ship owner gets from employing his own ship to carry his own goods and moveables and freight payable by a third party but doesn't include passage money. Regarding Passage Money see **Denoon v Home & Colonial**.[20] Passage money may be specifically insured where it is at risk under **s3(2)(b) Marine Insurance Act 1906.**

The measure of insurable value for freight.
s16(2) Marine Insurance Act 1906. Whether paid in advance or otherwise the insurance value is the gross amount at risk and the charges of insurance. "Other subject matter" needs to be set out in the policy with reasonable certainty.

The measure of insurance value in such a case provided for in **s16(4) Marine Insurance Act 1906.** 'This shall be the amount at risk when the policy attaches and the charge of the policy of insurance'.

CONSTRUCTIVE TOTAL LOSS

Regarding a constructive total loss and the general rule as to when there is a constructive total loss see **s60(1) Marine Insurance Act 1906.**

s60(2) Marine Insurance Act. 1906 gives particular rules for a constructive total loss both. in respect of ships and goods.

[18] **Renton v Cornhill Insurance** [1933] 149 L.T. 280.
[19] **Hewitt Bros v Wilson** [1915] 2 K.B. 737.
[20] **Denoon v Home & Colonial** [1872] L.R. 7 C.P. 341.

s60 Marine Insurance Act. 1906. Constructive total loss defined.

1 *Subject to any express provision in the policy, there is a constructive total loss, where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable or because it could not be preserved from actual total loss without an expenditure, which would exceed its value when the expenditure had been incurred.*

2). *In particular there is a constructive total loss.*

i). Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general repairs and those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contribution to which the ship would be liable if repaired; or

iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

Regarding insurable interest and advance freight see **s12 Marine Insurance Act 1906**. The person advancing the freight has an insurable interest in so far as the freight is not repayable in the case of loss.

Passage money is similar to the advance freight, in that it is payable before sailing, but is not repayable in the case of loss since there is no duty at common law if the ship is lost for the ship owner to forward the passengers to their place of destination.

The Ikarian Reefer,[21] constructive total loss, for loss by grounding and fire or barratry if deliberate act of master and crew. Held : Negligent navigation - claim succeeded. Role of expert witnesses analysed.

The Kyriaki,[22] Vessel broke down and was towed to port. Cost of repairs exceeded the $2m agreed value under the policy : The court held that the claimant had established a constructive total loss.

THE POLICY

Relevant sections of Marine Insurance Act 1906 regarding the Policy are sections 21; 22; 23; 24; 86 & 89.
A Marine Insurance Policy must under **s23(1) Marine Insurance Act. 1906** contain the name of the assured or his agent. If the agent affects a policy in his own name, only the person or person's intended to be covered at the time the policy was effected will be able to claim under it (though a policy may be stated to be assignable).

s24 Marine Insurance Act 1906 requires that the policy be signed by or on behalf of the underwriter. In the case of a body corporate attach the corporate seal.

There may be numerous underwriters in a policy. In the event of an action by the assured then one of the underwriters is nominated to act as defendant on behalf of all the others. In the case of Lloyds, the policy signing office acts on behalf of the syndicates and binds all members of the syndicate, see **Eagle Star Insurance Co v Spratt.**[23]

Until the policy is actually delivered it can be revoked, even if the policy is signed. Delivery in this form may be physical, to the assured or deemed to have taken place merely by the policy being placed in a particular place for the assured. **Xenos v Wickham.**[24] Policy signed by the directors of the company and then ordered to be placed in the office safe till the assured called for it. The court held that there had been sufficient delivery to the assured and so it could not be revoked.

21 **The Ikarian Reefer** [1993] 2 Lloyd's Rep 68
22 **The Kyriaki** [1993 1 Lloyd's Rep 137
23 **Eagle Star Insurance Co v Spratt** [1971] 22 Lloyds Rep 116.
24 **Xenos v Wickham** [1866] LR 2 H.L. 296

s26 Marine Insurance Act 1906 The subject mailer should be designated in the policy with reasonable certainty : The assured must describe the subject matter to be covered clearly enough for the underwriter to understand the nature of his risk. A general description may be used e.g. ship, freight, goods, hull and machinery etc but it is essential that the assured does not mislead the underwriter otherwise the underwriter may be able to avoid the policy on the grounds of a failure to disclose a material circumstance or a misrepresentation as such. In either case the underwriter can avoid the policy.

If there is no fraud on the assured's behalf he is entitled to a return of premium. **Anglo-African Merchants Ltd v Bayley.**[25] Army surplus clothing stated to be 23 years old was not sufficiently described.

There is a danger also, of over describing, by virtue of details given any subject mailer not conforming to such description may be deemed to be outside the policy. **Overseas Commodities v Styles.**[26] Concerned an all risks policy which stated that tins of pork were marked 26 M.N.S. Some tins lacked the mark. The court held that the tins that were incorrectly described were not covered by the policy.

Where a general description is used, **s26(4) Marine Insurance Act 1906** states that usage or custom may be shown in evidence in order to prove what comes within it.

s26(3) Marine Insurance Act 1906 provides that the subject matter may be described in general terms. Such a policy is to cover the interest by the assured to be covered. By this is meant that the policy will cover what actual interest the assured had in the subject mailer at the time of entering the policy.

Until the new I.C.C. came into being there was a provision made for the assured to be covered regarding errors in description, at a premium to be arranged. This right is removed from new I.C.C. An assured needs to be specific either as to his description or if he wishes an errors of description clause to be added to the standard form.

s21 Marine Insurance Act 1906 A policy is deemed to be concluded when the contract is accepted by the underwriter, normally at the time when the underwriter stamps and initials the slip. This is a particularly important time regarding non disclosure and misrepresentation, since it is the time of conclusion of the contract and anything not disclosed or misrepresented at that time may prove fatal for the assured.

VALUED POLICIES

s27 Marine Insurance Act 1906 provides that the policy may be valued or unvalued.

s27(2) Marine Insurance Act 1906 *A valued policy is a policy, which specifies the agreed value of the subject mater insured. If the agreed value differs from the insured value in that it is less than the insured value there should be a return premium regarding the difference. If more than the insured sum the assured is said to be under insured. By s81 Marine Insurance Act the assured is his own u/w in respect of the uninsured balance.*

Gross over valuation may give rise to the underwriter being able to avoid the policy, for example :-

1). If the assured has overvalued the subject matter and the underwriter has no means of knowing this it may be treated as a non disclosure or a misrepresentation as to value. The Underwriter may avoid. **Slattery v Manse.**[27]

2). If the assured acts fraudulently regarding evaluation the underwriter may avoid. The greater the over valuation the more likely the court will presume fraud. **lonides v Pender.**[28] £9,700 worth valued £20,000.

3). If the difference between the true value and the over valuation is so large as to render it as though the assured has no insurable interest the court may find that the policy is in fact one of gaming and wagering and void under s4.

If the underwriter is to avoid on the grounds of under value he must specifically plead the defence of fraud, misrepresentation or non-disclosure. The mere fact of over value does not necessarily equal fraud. If the assured and the underwriter know of the over valuation then there will be no right to avoid the policy unless the court determines that the policy is a wager policy.

25 **Anglo-African Merchants Ltd v Bayley** [1969]1 Lloyd's Rep 268.
26 **Overseas Commodities v Styles** [1958] 1 Lloyd's Rep 546.
27 **Slattery v Manse** [1962] 1 Lloyd's Rep 61.
28 **lonides v Pender** [1872] 27 L.T. 244

There may be a number of reasons why a vessel or cargo ends up being over valued. The result is a higher premium. It is more difficult to prove a constructive total loss where there has been an over valuation. since the clauses (time and voyage) provide. that in determining if there is a constructive total loss the assured value should be taken to be the repaired value. See Clause 19 I.T.C.H.

Where the policy provides that losses under a certain percentage are not recoverable this means a greater loss is required before the assured can claim for a partial loss.

Example of over valuation : no fraud : no non disclosure raised **Medina Princess.**[29] Vessel insured for and valued at £350,000. At time when risk attached : probably worth £65,000 : only about £62,500 at the time of losses : in the course of the judgement in which the assured failed to show a constructive total loss. The judge described the assured's attempt in terms of 'recovery of a glittering prize.'

s27(3) Marine Insurance Act 1906. If the subject matter insured has an agreed value in the policy then in the absence of fraud and subject to the provisions of the act that value is conclusive between the assured and the underwriter : N.B. The underwriter could still plead non disclosure or misrepresentation as a defence.

s29(4) Marine Insurance Act 1906. Regarding floating policies : The value of the goods shipped is not conclusive if the evaluation is not declared before the loss of the subject matter.

s75(2) Marine Insurance Act 1906 provides that the underwriter may always show that an assured had only a partial interest : or no interest in the subject matter or he may show that the whole or part of the subject matter was never at risk. See **Denoon v Home & Colonial.**[30] Insurance effected on freight for £1,000 : the freight valued at £2,000 : only half the cargo was loaded later the vessel was lost : the underwriter showed that only half the goods were at risk : and as only half the risk was underwritten liability £500.

s27{4) Marine Insurance Act 1906 The value agreed in the policy is not conclusive for determining a constructive total loss unless the policy states otherwise. Usual to include a constructive total loss. clause e.g. clause 19 I.T.C.H. The insured value in the policy is deemed to be the repair value under the Marine Insurance Act

If the policy made no such provision then under **s60(2)(ii) Marine Insurance Act 1906**. a vessel is deemed a constructive total loss where the cost of repairing a vessel would exceed the value of the vessel repaired and where the section applies it would be the true value. The effect of the institution clause is to substitute the insured value for the true repaired value. For this reason where a vessel is greatly over valued it may prove almost impossible to show a constructive total loss.

s32(2)(c) Marine Insurance Act 1906. Regarding double insurance. An assured must give credit for any money received on other policies on the same subject matter and risk, and is bound by any value stated under the policy on which he claims.

If he has already claimed money in excess of the value stated in the policy under which he now claims he will have no right to claim under that particular policy.

UNVALUED POLICIES

Where the value of the subject matter is not given in the policy or agreed between the parties the measure of insurance value of the subject matter is found by reference to **s16 Marine Insurance Act 1906**..

s16 Marine Insurance Act 1906. provides a guide re ship : freight goods : and other subject matter in order to determine the value for the purposes of the policy, but the formula inevitably leads to the subject matter being over insured, or under insured. If under insured the assured is deemed to be his own underwriter for the difference. The under insurance must be considered regarding loss, claims for salvage, general average and recovery under sue & labour clause.

s28 Marine Insurance Act 1906.. Insurance value in an unvalued policy is to be determined according to the provisions of the Act. In so far as the subject matter has been over insured on an unvalued policy **s84(3)(e) Marine Insurance Act 1906**. a proportionate part of the premium is returnable.

[29] **Medina Princess** [1965] 1 Lloyd's Rep 361.

[30] **Denoon v Home & Colonial** [1872] L.R. 7 C.P. 341

FLOATING OR OPEN POLICIES

s29 Marine Insurance Act 1906.

1) *A floating policy is a policy which described the insurance in general terms, and leaves the name of the ship and other particulars to be defined by subsequent declaration.*
2) *The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner*
3) *Unless the p otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.*
4) *Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject matter of that declaration.*

The basic use of a floating policy is to enable the owner of goods to make a number of shipments and by declaring each shipment, to receive cover and whereby at the end of successive shipments a policy is issued and delivered. A shipper may take out a Floating Policy to cover all shipments made by him over a particular period, up to a particular amount for example for 6 months up to £500,000. Once the policy is entered into it will automatically attach to all shipments which fall within the terms of the policy and this is so even if the assured fails to make a particular declaration regarding a shipment.

29(2) Marine Insurance Act 1906 Declarations may be by endorsement on the policy or other customary manner.

s29(3) Marine Insurance Act 1906. The assured is required to declare shipments in the order in which they take place. Once there is a shipment, the assured should declare the vessel, the general nature of the cargo, and the value of the shipment. Where the policy is to cover up to a specific sum, once that sum is reached, the policy is said to be fully declared. The nature of the adventure should be sufficiently identified for the underwriter to be able to check the goods coming within the policy.

Unless the policy specifically provides otherwise, the assured cannot chose for himself which shipments to declare and which not to. It is clear from **s29(3) Marine Insurance Act 1906**. that shipments within the terms of the policy will be treated as within that policy even though the assured has not made a proper declaration. Thus in **Dunlop v Townsend.**[31] the assured innocently failed to make a particular declaration Held : Shipment must count regarding the floating policy as a result the policy was fully declared at a time earlier than would have been the case had the shipment not counted.

The declaration should be made as soon as possible after shipment. It is usual for such policy to make it a term that a declaration be made immediately on shipment. Failure to make a declaration till after a loss has been suffered or after safe arrival of cargo. **s29(4) Marine Insurance Act 1906** regarding this shipment it is treated as unvalued and the measure of insurable value will have to be worked out under the provisions of **s16(3) Marine Insurance Act 1906**.

A declaration made before a loss or arrival, which includes the value is treated as a valued policy regarding the declaration and will be conclusive under the provisions of **s27(3) Marine Insurance Act 1906**

As long as failure to declare is done innocently then the assured may make the declaration after loss or arrival. **s29(3) Marine Insurance Act 1906**. Errors in a declaration may be rectified after the loss or arrival of goods as long as the omission or error was made in good faith.

If the policy requires the declaration to be made as soon as possible after shipment, a failure on the part of the assured to do so may mean that the underwriter can avoid liability regarding that particular shipment, although it still counts for the purpose of policy being fully declared. **Union Insured of Canton v Wills** [1916] 1 AC. 281. In order to prevent a loss of cover by a policy becoming fully declared the assured may provide for a series of Floating Policies to follow and succeed each other.

[31] **Dunlop v Townsend** [1919] 2 Q.B. 127

CHAPTER EIGHT

DISCLOSURE AND GOOD FAITH

An insurance contract is a contract of uberimae fidei and in particular, a contract of marine insurance is a contract based upon UTMOST GOOD FAITH. If the utmost good faith be not observed by either party, the contract may be avoided by the other party. **s17 Marine Insurance Act 1906**. However, the duty of disclosure lies most heavily upon the assured and his agent.

s18 Marine Insurance Act 1906. Disclosure by assured.

1) *Subject to the provisions of this section the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.*
2) *Every circumstance is material which would influence the judgement of a prudent insurer in fixing the premium, or determining whether he will take the risk.*
3) *In the absence of inquiry the following circumstances need not be disclosed namely*
   a) *Any circumstance which diminishes the risk*
   b) *Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such ought to know.*
   c) *Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.*
4) *Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.*
5) *The term ' circumstance' includes any communication made to, or information received by the assured.*

The Moonacre.[32] Yacht insured - held covered at a premium to be arranged if vessel used as a houseboat during lay up period : a maintenance man lived aboard : the vessel was declared a constructive total loss following a fire : the underwriter sought to avoid policy and claimed inter alia that the vessel was off risk because no declaration regarding man (accepted by the court) : non-declaration that a radio had been stolen from the ship the year before (rejected) : non-declaration because the assured's signature on a renewal proposal form had been forged by an employee of the broker (accepted).

Bangue Keyser Ullman v Skandia Insurance,[33] The duty of utmost good faith & disclosure was not breached when the assured did not disclose to an underwriter that their agent had committed a fraud against the assured since the fraud had nothing to do with the policy being taken out and would not influence the premium set by the undderwriter or whether or not he would have issued the policy if he had known about it.

As far as a material circumstance comes to the knowledge of the assured in the currency of one Floating Policy, while no breach of s18 **Marine Insurance Act 1906**. occurs regarding that particular policy, it would appear such circumstance should be disclosed before commencement of a policy to follow and succeed. In **Rivaz v Goerlissi,**[34] the assured took out a series of consecutive policies and consistently under valued the cargo under earlier policies. The court held, under a pre 1906 version of **s18 & 21 Marine Insurance Act 1906** that the later policy could be avoided on the grounds of non disclosure If he had got away with it he would have got several extra shipments free. This is now discussed, in the context of the **Marine Insurance Act 1906** by **The Litsion Pride : Black King Shipping Corp v Massie.**[35] It would appear that the assured would have to disclose the particular circumstance during the currency of a particular policy in order to comply with the NOW effects of s17 in respect of utmost good faith. Is utmost good faith a continuing duty ? Compare **s17** with **s18** and **s20 Marine Insurance Act 1906**.

32 **The Moonacre** [1992] 2 Lloyd's Rep 501
33 **Bangue Keyser Ullman v Skandia Insurance** 26.7.90
34 **Rivaz v Goerlissi** [1880] 6 Q.B.D. 222.
35 **The Litsion Pride : Black King Shipping Corp v Massie** (1985] 1 Lloyd's Rep 437.

The Duty of Disclosure of the Broker

s19 Marine Insurance Act 1906 Disclosure by agent effecting insurance.

Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent the agent must disclose to the insurer

(a) Every material circumstance which is known to himself and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him and

(b) Every material circumstance which the assured is bound to disclose, unless it came to his knowledge too late to communicate to the agent.

Pan Atlantic v Pine Top,[36] : Reinsurance : Assured took all records to the underwriter but gave the underwriter a potted version of the contents which the underwriter relied on instead of consulting the records : in the summary the assured omitted additional losses which the court held were material circumstances : Held : The underwriter could avoid the policy.

Roadworks v Charman.[37] Slip amended. The court held that material alterations must be communicated to each underwriter by broker and not just leading underwriter.

s20 Marine Insurance Act 1906 Representations pending negotiation of contract.

1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it untrue the insurer may avoid the contract.
2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.
3) A representation may be either a representation as to a matter of fact, or to a matter of expectation or belief.
4) A representation as to matter of fact is true, if it be substantially correct that is to say, if the difference between what is represented and what is actually correct would be considered material by a prudent insurer.
5) A representation as to a matter of expectation or belief is true if it be made in good faith.
6) A representation may be withdrawn or corrected before the contract is concluded.
7) Whether a particular representation be material or not is in each case a question of fact.

A big shipper may carry out his insurance by using a Floating Slip. Each shipment as declared is entered on the slip. At the end of a particular period a p is issued regarding those shipments and a premium set out in respect of them.

ASSIGNMENT OF POLICIES

An assignment means the transfer of property and is particularly used regarding the transfer of rights under a contract and in particular the transfer of a policy of marine insurance from one party to another.

s15 Marine Insurance Act 1906 states that the fact that the assured has parted with his interest in the subject matter will not automatically transfer to the assignee the assignor's rights under a contract of insurance : to achieve that result there must have been an express or implied agreement with the assignee. For example if A sells a ship no provision for the transfer of a time policy on the ship and the ship is lost in what would have been the currency of the policy : the purchaser can't claim under the policy nor can the former owner as he will have parted with his interest before the loss takes place.

Yangtzee Ins Assoc v Lukmanjee.[38] A Policy was effected for a cargo of logs. The Logs were sold. The contract stated delivery ex ship, cash against documents. The logs were lost halfway between the ship and shore. Under ex ship contracts property passes when cargo arrives on the deck of the servicing barge. The court held that the assured had no interest under the policy.

36 **Pan Atlantic v Pine Top** [1992] 1 Lloyd's Rep 101

37 **Roadworks v Charman** [1994] 2 Lloyd's Rep 99

38 **Yangtzee Ins Assoc v Lukmanjee & Co** 1918] A.C. 585

It is usual in the case of cargo to permit assignment of the policy. It is in the nature of International trade and and in particular in c.i.f. contracts that this be so since it is necessary for the seller to produce to the purchaser a policy or certificate of insurance.

In the case of a steam vessel it is likely the existing policy of the seller will contain a clause restricting or preventing assignment of the policy, for example I.T.C.H. Clause 5 : Voyage Clause 3: There is to be no assignment of an interest in the insurance or any monies payable under the insurance unless there is a dated notice of assignment of the insurance signed by the insured and endorsed on the policy and the policy with such an indorsement is to be produced before payment of any claim or the return of any premium.

It is correct to restrict assignment regarding vessels since the underwriter may wish to have some knowledge of the person to whom the vessel is to be transferred.

Unless there is a restriction on assignment, **s50 Marine Insurance Act 1906** permits the policy to be assigned. For the purchaser of the insured property to be able to sue under a policy it is necessary for the seller to make sure the interest he has in the subject matter has only passed after, or at the same time as the assignment of the insurance contract.

s51 Marine Insurance Act 1906. An attempt by an insured to sign a policy after he has parted with his interest will be of no effect. This does not prevent the original insured assignee taking any benefit in the policy which may have vested in him while the subject matter belonged to him.

It is important to keep separate the situation where the assured suffers loss during the currency of the policy. In the situation where the assured has parted with the subject matter without signing the policy at or before that time and later there is a loss to the subject matter. As long as loss or damage takes place while the subject matter is owned by the assured then the benefit regarding that loss may be assigned unless the policy says otherwise.

In **Poles v Inis,**[39] A,B & C : 3rd shares each in a ship A & B jointly insured their shares for £500. B later sold his share to C but made no assignment of policy. The Ship was lost at sea. Held : Only A could recover regarding his share. Compare this with

Lloyd v Fleming.[40] The assured took out a policy on goods. Only after the goods had suffered loss did he assign his rights under the policy Held : The assured could recover.

North of England v Archangel.[41] Stated that in order for there to be a valid assignment before loss of the subject matter : Three circumstances must be considered

a) Person assigning must still have an insurable interest in the subject matter.
b) Assignment must take place within the currency of the risk.
c) Should be a proper assignment to the other party of the assured's insurable interest.

To be deprived of his rights under a policy it is necessary that the assured should have completely parted with his interest in the subject matter. For example a cargo owner may pledge documents to the bank or other third party in return for an advance of money this does not take away the assured's rights regarding the goods and his interests under the policy continue.

s50. Marine Insurance Act 1906 Where there is a proper assignment the assignee may sue in his own name. More importantly however, one should note that **s50(2) Marine Insurance Act 1906**. provides that assignment while passing all the rights of the assured under the policy to the assignee, also permits the underwriter to raise any defence arising regarding the contract of insurance as against the assignee as the underwriter would have been able to do had the assignor being suing. Thus if the underwriter could have raised the defence of non disclosure (**s18 Marine Insurance Act 1906**.) against the assignor, he can raise the same defence against the assignee.

39 **Poles v Inis** [1843] 11 M & W 10.
40 **Lloyd v Fleming** [1872] L.R. 7 Q.B. 299.
41 **North of England v Archangel** [1875] L.R. 10 Q.B. 249.

The application of this is particularly fierce in the case of an assignee of cargo : for if the seller has miss-described the goods, if the plaintiff sues for a loss he may be defeated by the underwriter's defence of a failure to properly disclose the nature of the subject matter. With the omission from the I.C.C. of held covered clauses - errors of description clause - the assignee of cargoes may find this defence arising more often. It has been said that the underwriters will not generally raise such a defence against an assignee unless there are other circumstances. However these other circumstances have yet to be clearly stated. It is doubtful whether an underwriter able to avoid a major pay out under such a defence would not avail himself of it.

s50(3) Marine Insurance Act 1906. allows that endorsement may be one way of showing assignment but that assignment may also be in any other customary manner : despite this it has been held that mere delivery by an assured to an intended assignee was not sufficient to produce a legal assignment of the policy see **Baker v Adam**.[42]

THE SLIP

The slip is a rectangular piece of paper, which contains the abbreviated details the assured wishes to be contained in the policy, namely, the name of the assured or his broker description of the subject matter risks underwritten sum insured possibly the agreed value : any particular warranties or specific clauses necessary.

s21 Marine Insurance Act 1906. Initialling of the slip is deemed to be the conclusion of the contract with that underwriter : of importance regarding s18, 19 & 20. **Eagle Star v Sprat.**[43]

Although the slip evidences the conclusion of the contract yet it can't be produced in evidence until a formal insurance policy has been issued. There is no legal duty to issue a policy merely because a slip had been signed. Once the policy is issued the slip is of limited importance but it can be produced in evidence to explain certain matters regarding the insurance

s89 Marine Insurance Act 1906. reference may be made to the slip or cover note in legal proceedings - to rectify some matter in the policy. It may be necessary to produce the slip to clarify the true intent of the parties for example to rectify a wrong description or to correct the policy where the risk and its commencement is incorrect. See for example **Motteux v Governor & Co of London Assurance.**[44] Slip produced : to show that the insurance ought to have been "At and From" whereas the policy insured the subject matter "From".

The slip may not contradict express terms of the policy unless it can be shown that the error was caused by a common mistake of the parties. See **American Employers v St Paul.**[45]

The Mata Hari : Pindos S.S. Co v Raven.[46] The Slip contained a warranty. The assured unsuccessfully trying to prove the warranty should not be on the slip and not contained therefore in the policy. In fact it related to a renewal of policy by a broker. The broker placed the warranty on the slip. The plaintiff should have been more vigilant.

THE BROKER

There are two parties usually to a marine insurance policy, the underwriter and the assured. It is usual to effect a marine insurance through a broker. Thus when effecting a Lloyds policy, a Lloyds broker is used. Regarding issuing of a policy, this is carried out by Lloyds signing office acting on behalf of the syndicates underwriting the risk.

As an agent the broker is subject to the usual rules of agency. He acts within the terms of his express authority and implied or usual authority accorded to brokers in the usual functions of a broker.

For the assured to limit implied or usual authority he must ensure that third parties are given notice of this limitation.

42 **Baker v Adam** [1910].
43 **Eagle Star v Sprat** [1971] 2 Lloyd's Rep 116.
44 **Motteux v Governor & Co of London Assurance** [1739].
45 **American Employers v St Paul** [1978] 1 Lloyd's Rep 417.
46 **The Mata Hari : Pindos S.S. Co v Raven** [1983] 2 Lloyd's Rep 449.

CHAPTER EIGHT

Perhaps the most important of the rules of agency is that an agent must not put himself in a position where his interests conflict with those of the assured. The broker may not act for both the assured and the underwriter unless he makes a full disclosure to the assured.

Anglo African v Bailey.[47] There was an attempt in the course of legal argument to show that a Lloyds broker may obtain assessor's reports on behalf of an underwriter. The court didn't have to decide the issue as such. However, they felt (obiter) that a custom of this sort was unreasonable.

North & South Trust v Berkely.[48] The court held that an attempt to show there was a custom regarding the practice of underwriters using Lloyds brokers as a channel of communication in the obtaining of reports was unreasonable since it resulted in a conflict of interests. It would be alright however if the assured has given his permission. To prove the existence of any custom, the custom must be both legal and reasonable.

Once a broker has been instructed it is his duty to carry out his authority effectively and to notify the assured if any problems arise in respect of this.[49] It is the duty of the broker to carry out his instructions exactly as given - but if in fact the instructions are ambiguous then the broker is not liable if he puts a reasonable construction on the instruction given to him.[50] Although the broker does not owe a duty of care as such to the underwriter he must not act in a fraudulent manner..[51] If the broker acts in breach of his authority, the assured will have an action for damages. The assured will sue for all loss arising out of the breach it is not based specifically on the amount that would have been recoverable under a particular policy.[52] If in the course of negotiations the broker fails to disclose a material circumstance or misrepresents such and as a result the assured is unable to recover under the policy then the assured has an action in damages.

Punjab National Bank v De Boinville.[53] The bank instructed a broker to take out policies on its own behalf and on behalf of subsequent owners of cargo covered by Documentary Credits. The Broker failed to declare various named interests and so the underwriter was able to avoid the policy for non-disclosure. The Bank & cargo owners sued the broker, who claimed there was no privity with cargo owners and no duty owed to them. Held : Privity with the bank. The broker owes a duty of care both to the assured and to persons he knows are due to become assignees of the policy in due course.

Macmillan v Knott.[54] An insurance broker who fails to make a valid insurance contract with an underwriter on behalf of his client is liable to the client for any losses the client suffers as a result of the failure to provide a valid insurance. However, even though the client may well insure in order to be able to meet claims by third parties i.e. the victims of his negligent acts, those third parties cannot sue the broker directly - they have to claim against the client. If the client successfully claims against the broker the client will then have the funds available to pay the third party. In this case the client was bankrupt so the third party victim would only receive a portion of his claim from the client as an unsecured creditor - but he was prevented from claiming the full amount direct from the broker.

s19 Marine Insurance Act 1906. : Duty on the broker to disclose every material circumstance which he knows or ought to have known in the course of his business. Where action is brought against the broker by the assured there are possible defences for the broker

a) Proposed policy was illegal.
b) Policy was partially illegal.
c) Policy void A gaming or wagering policy
d) Claim that the policy was avoidable by the underwriter on grounds other than those arising out of the brokers own conduct : so that the underwriter would have been able to avoid the policy in any event

47 **Anglo African v Bailey** [1969] 1 Lloyd's Rep 268.
48 **North & South Trust v Berkely** [1970] 2 Lloyd's Rep 467.
49 **Hurrel v Burrard** 1863
50 **Vale v Van Open** [1921]. Direction given for the subject matter to be insured against all risks. Held : Sufficient for the policy to cover against all marine risks.
51 **Empress Insurance v Bowring** [1905].
52 **Smith v Logan** [1788].
53 **Punjab National Bank v De Boinville** [1992] 1 Lloyd's Rep 7
54 **Macmillan v Knott** [1989] 2 Lloyd's Rep 98

In such a case its been stated that the assured may produce evidence to show that the underwriter would not in fact have avoided the policy as against the assured. **Everett v Hogg Robinson**.[55] In a case such as that the court should require strong evidence to show that the u/w would not in fact have avoided or that the u/w would probably have settled the claim as against the assured. Aim - to avoid collusion between assured and underwriter against the broker.

Sedgewick Tomenson v Reassuransi U.U.[56] A broker with authority to accept policies on behalf of an underwriter is limited to accepting risks covered by the extent of the authority given to him by the underwriter : Here the maximum amount of risk authorised was $50,000 - so the underwriter not liable. (Presumably the broker would then be liable to the assured for failure to effect a valid policy).

No right of arrest for failure to pay premium.
The Sea Friends.[57] Brokers are not under the SCA entitled to an action in rem to arrest a vessel for non payment of premium. Limited to an action in personam.

Warranties

Contrast warranties under ordinary contract law principles and the Sales of Goods Acts with marine insurance warranties. The marine insurance warranty is the equivalent of a condition but with the additional feature that the underwriter is automatically exempt from liability, though the underwriter may chose to waive the breach. However, there is no duty on the underwriter to elect and thus no concept of implied waiver.

33. Marine Insurance Act 1906 Nature of Warranty

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

(2) A warranty may be express or implied.

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

The Good Luck : Bank of Nova Scotia v Helenic Mutual.[58] An underwriter undertook to notify a bank if a vessel which the bank was financing became uninsured : The shipowner took out a policy with a warranty against entering a war zone - subject to a held covered at a premium to be arranged clause if sent to a war zone : The shipowner never gave notice to underwriter so the held covered clause did not operate. The vessel was struck by an exocet missile in Gulf and lost. The bank lost money : Held : 33 MIA affords a complete defence to the underwriter for a breach of express warranty and the underwriter is automatically exempt from liability - the contract of insurance is not avoided - but there is no liability on the underwriter. No election is required, though the underwriter could choose to waive the statutory right (highly unlikely). Thus vessel was uninsured : The underwriter was aware of the breach before the incident and so was held liable to bank for a failure to advise that the vessel was no longer insured.

The Tiburon.[59] Dramatic example of the effect of failing to comply with a Marine Insurance warranty Here the assured warranted that the Flag, Ownership and Management of the vessel were all German - in fact the operator was an Austrian company. Held policy invalid so assured unable to recover under a war risk policy for the vessel which fell victim to an exocet missile off Karg Island.

55 **Everett v Hogg Robinson** [1973] 2 Lloyd's Rep 217.
56 **Sedgewick Tomenson v Reassuransi U.U.** [1992] 2 Lloyd's Rep 334 :
57 **The Sea Friends** [1991] 2 Lloyd's Rep 322
58 **The Good Luck : Bank of Nova Scotia v Helenic Mutual** [1991] 2 Lloyd's Rep 191 see also All ER Annual Review 1991 p298
59 **The Tiburon** [1990] 2 Lloyd's Rep 418

34. Marine Insurance Act 1906. When breach of warranty excused

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

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

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

35. Marine Insurance Act 1906 : Express warranties

(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

36. Marine Insurance Act 1906 Warranty of neutrality

(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

(2) Where a ship is expressly warranted 'neutral' there is also an implied condition that, so far as the assured can control the matter she shall he properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

37. Marine Insurance Act 1906 No implied warranty of nationality

There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

38. Marine Insurance Act 1906 Warranty of good safety

Where the subject-matter insured is warranted 'well' or 'in good safety' on a particular day. it is sufficient if it be safe at any time during that day.

39. Marine Insurance Act 1906 Warranty of seaworthiness of ship

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

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

40. Marine Insurance Act 1906 No implied warranty that goods are seaworthy

(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

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

ICC CARGO CLAUSES A, B & C. Clause 5

5.1 In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft, unfitness of vessel craft conveyance container or lift-van for the safe carriage of the subject-matter insured, where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

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

41. Marine Insurance Act 1906 Warranty of legality[60]

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

42. Marine Insurance Act 1906 Implied condition as to commencement of risk : The voyage

(1) 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.

(2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

ICC A, B & C : Held covered upon due notice of change of destination Clauses 9 & 10

9 If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before delivery of the goods as provided for in Clause 8 above, 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, subject to an additional premium if required by the Underwriters, either

9.1 until the goods are sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the goods hereby insured at such port or place, whichever shall first occur, or

9.2 if the goods are forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named herein or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

10 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.

43. Marine Insurance Act 1906 Alteration of port of departure

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.

44. Marine Insurance Act 1906 Sailing for different destination

Where 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.

ICC A, B & C Clause 8. Change of destination.

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

45. Marine Insurance Act 1906 Change of voyage

(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

[60] See the Euro-Diane supra

(2) 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.

ICC A, B & C Clause 8. Change of Voyage and Deviation

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

46. Marine Insurance Act 1906 Deviation

(1) 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.

(2) There is a deviation from the voyage contemplated by the policy-

(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

47. Marine Insurance Act 1906 Several ports of discharge

(I) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

(2) Where the policy is to 'ports of discharge,' within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.

48. Marine Insurance Act 1906 Delay in voyage

In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch, 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.

49. Marine Insurance Act 1906 Excuses for deviation or delay

(1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused-

(a) Where authorised by any special term in the policy; or

(b) Where caused by circumstances beyond the control of the master and his employer; or

(c) Where reasonably necessary in order to comply with an express or implied warranty; or

(d) Where reasonably necessary for the safety of the ship or subject-matter insured; or

(e) for the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate. the ship must resume her course, and prosecute her voyage, with reasonable dispatch.

Ratification.

Regarding actions of the broker concerning the assured, the broker has to act in accordance with his express authority. If his broker acts in breach of his authority it is possible for the assured, if he wishes, to adopt the action of the broker : and no action will lie for breach.

Where the broker purports to have authority and enters into a contract with the underwriter then the assured may if he wishes ratify the unauthorised act. The effect of ratification : The otherwise unauthorised act is treated as if authority existed at the time when the broker first purported to act on his behalf. For example, if on the 1st Jan the broker without authority entered into a contract on behalf of the assured to insure the assured's ship and on the 5th of Jan the underwriter discovers that the broker had no authority to act, but when on the 6th the assured discovers the unauthorised act and ratifies it, then as long as the assured is deemed to have ratified within a reasonable time there will be a policy between the assured and the underwriter based on the broker's actions on Jan 1st.

For there to be a ratification the broker must purport to be acting for an identifiable principal : though not actually named. There is no case for ratification if the broker appears to be acting on his own behalf i.e. the broker must be a disclosed agent. Only those person on whose behalf the broker purports to act may ratify the broker's actions. **Boston Fruit v British and Foreign Marine**.[61]

s86 Marine Insurance Act 1906. assured may ratify an unauthorised act even after he has become aware of a loss covered in the policy. It is necessary that an assured ratify an unauthorised act within a reasonable time of becoming aware of the broker's actions. The effect of ratification can be seen from its effects on non disclosure of a material circumstance.

If brokers effect an unauthorised policy 1st Jan and at that time the assured had no knowledge of a particular material fact then if the assured becomes aware of the material fact & of the unauthorised policy on the 3rd of Jan he may ratify the policy & there will be no defence of non-disclosure for the purposes of s18 M.I.A.

However, as a result of the decision in **The Litsion Pride**,[62] it appears that the assured would have to make a disclosure of the material fact in order to avoid being in breach of the continuing duty of utmost good faith for the purposes of s17 **Marine Insurance Act 1906**.

If the effect of ratification would be to unduly prejudice the third party the court may refuse to allow such ratification : such prejudice to the third party is likely to arise where the assured with the knowledge of the unauthorised act does not ratify in a reasonable time.

It would be unfair to allow ratification in circumstances where the performance of the contract ratified should have been performed already. Late ratification would attempt to place the other party in breach of contract for a contract which did not exist at the time when it should have been performed - specially where the principal has refused to clarify the situation to the other party.

THE PREMIUM

The premium may be defined as the consideration received by the underwriter for his having agreed to underwrite the risks. It is the money paid by the assured in order to insure the subject matter. Unless it is otherwise agreed, the premium is payable under the terms of **s52 Marine Insurance Act 1906**. at the time when the underwriter is ready to issue the policy. The words 'unless otherwise agreed' in s52 M.I.A. cover the case of settlement by account. This method is frequently used, whereby a broker settles with the underwriter at the end of a particular period for all premiums due on policies effected by him during that period.

In drawing up the policy the broker acts as agent for the assured not the underwriter. As it is usual to effect marine insurance policies through brokers **s53 Marine Insurance Act 1906**. provides that the broker is directly responsible to the underwriter for payment of the premium. Where monies are payable under the terms of the policy to the assured, then it is provided by **s53 Marine Insurance Act 1906**. that the underwriter is directly responsible to the assured for the payment of such monies. This may be in respect of

61 **Boston Fruit v British and Foreign Marine** [1906] A.C. 336.

62 **The Litsion Pride** [1985] 1 Lloyd's Rep 437.

losses or return of premium. If the underwriter pays such money to the broker and the broker does not pay the assured then the underwriter will remain liable to the assured for such monies.

The Admiral C.[63] discusses the custom and the direct instruction that claims be collectable though the broker. The claimant's broker had gone into liquidation. If the claimant collected through him the money would have gone into his account and P would have had to join a queue of creditors. The court held that the claimant could collect through another broker. An assured may order the underwriter to pay such monies to the broker.

The Broker's Lien.

This lien is a possessory lien and may be defined generally as the right to retain property belonging to another, until settlement is made for monies owed by that other person. There are two forms of lien in the case of a broke namely : A particular lien and a general lien.

1). A particular lien is the right to withhold the subject matter of a particular transaction until monies owing in respect of that transaction have been paid.

2). A general lien is the right to withhold subject matter in respect of monies owing, but the monies may be owing in respect of a number of transactions under which money is owed. As the broker is directly responsible to the underwriter for payment of the premium, the broker is given a particular lien on the policy which may be in his possession until the premium and broker's charges in respect of that policy are paid. **s53(2) Marine Insurance Act 1906**.

In certain special cases brokers may be able to exercise a general lien but to do this certain requirements set out in **s53(2) Marine Insurance Act 1906** must be met. Thus it must be shown that a person dealing with the broker has taken out a number of policies at varying times with that broker and that the broker believed that the particular person was acting purely for himself and not in the capacity of agent for someone else. If the broker can satisfy the above test he hay keep all or any of the policies held by him until all premiums are paid to him. It does not matter that the broker later discovers that the person taking out the policies with him was in fact acting for another person as agent. The broker will fail however, in an attempt to exercise a general lien in this form if at the time when a policy was taken out he had reason to believe that the person effecting the policy was in fact acting as agent for another person.

To the extent that one broker employs another to effect insurance the broker actually effecting the insurance may retain the policy issued until the premium and the broker's charges are paid, although the assured may already have paid such monies to his own broker. In **Fisher v Smith.**[64] A instructed B, a broker, to insure his ships. B employs C another broker to effect the insurance. C has a lien on the policies for the premium and charges in respect of each policy even though A may have paid B. If C wishes to exercise a general lien in such case it must be shown that C did not know that B was acting as agent of A.

Once the broker has taken delivery of an issued policy there is, in general, no way in which he can cancel the policy even though he may be keeping it solely because he has not been paid a premium due by the assured. According to Ivamy, in the absence of express authority from his principal, a broker cannot cancel a policy whether it is left in his hands or not.

Effect of receipt of premium on the policy.

The Lloyd's Policy states that the u/w has been paid 'the consideration due unto him for this assurance by the assured. By s54 M.I.A. the effect of these words is to prevent the u/w from denying that he has received the premium by the assures, that is to say, by this acknowledgement the underwriter is estopped from denying payment. This is so whether or not the premium has actually been paid to the underwriter, unless it can be shown that there has been some fraud in respect of the acknowledgement.

s54 Marine Insurance Act 1906. does not prevent the underwriter from recovering the premium from the broker nor does it prevent the broker from recovering the premium from the assured.

63 **The Admiral C** [1981] 1 Lloyds 9

64 **Fisher v Smith** (1878) 4 A.C

At a Premium to be arranged.

Where due to the nature of a policy it is not possible to decide upon the premium to be paid in relation to the risks to be covered by the policy then the parties may leave the amount to be paid as premium until a later date.

Such an arrangement is usually evidence in the policy by the use of the term 'at a premium to be arranged.' By **s31 Marine Insurance Act 1906**. it is declared that where a premium is left to be arranged and this in fact is not done, then a reasonable premium is to be payable.

By **s88 Marine Insurance Act 1906**. what is reasonable is a question of fact. **s31 Marine Insurance Act 1906**. recognises the custom of providing for certain events which may happen but which are not normally covered in the policy. In such a case it is usual to state that an additional premium will become payable as and when the particular event occurs. In such a case the premium to be paid may be left to be arranged at a later date. Events covered by way of an additional premium include for example deviation, change of voyage, [errors in description of the subject matter especially in the case of goods under the old Lloyds policy - but not under I.C.C. unless specifically requested by the assured], breach of any particular warranties which may have been given in that policy - I.C.C. Clause 9 and see also I.T.C.H. & I.V.C.H. Clause 5.

Enforcement

Where the premium has been paid but due to certain events the underwriter is able to avoid the policy or the risk has not attached under the polciy[1] then the premium is generally returnable to the assured. Such return of premium depends upon there being no fraud on the part of the assured and there being no illegality in respect of the policy.

s82 Marine Insurance Act 1906. provides that in the event of a premium being declared returnable or a part of that premium being returnable, then the assured may recover it directly from the underwriter or if the premium has not been paid then it may be retained by the assured or his agent. By **s83 Marine Insurance Act 1906**. it is declared that if a policy provides for the return of a premium or part of the premium on the happening of a particular event then that premium or that part of the premium becomes returnable to the assured upon the happening of the particular event set out in the policy.

Pyman v Marks.[65] A time policy was effected on a ship, a pro rata return of premium to be made if the vessel is sold or transferred to new management. The vessel was seized and condemned for carrying contraband cargo. Held : not a transfer to a new management - no return of premium may be claimed.

Similarly clause 22 I.T.C.H which provides for the return of part of the premium should certain events take place, for example a pro rata return of a premium for each period of 30 consecutive days for which a vessel is laid up in port.

Return of premium for failure of consideration.

In general the return of a premium or a part of it arises where there has been some failure in the consideration for which it has been paid. That is to say the assured has paid for a greater benefit than he has actually received. The circumstances giving rise to a return of premium in this manner are governed largely by s84 **Marine Insurance Act 1906**. which states that in the event of a failure of consideration and in the absence of fraud or illegality the assured may recover the whole of the premium paid.

Fraud and illegality.

In **Vandyck v Hewitt,**[66] goods were insured from London to a port in an enemy country. The ship is captured. The court held that the insurance was void as trading with the enemy is illegal and therefore the premium is not returnable.

By **s84(3) Marine Insurance Act 1906**. it is provided that the assured may recover the premium or a part thereof in the following cases

a). Where the policy is void or avoided by the underwriter from the commencement of the risk. Unless

65 **Pyman v Marks** [1906] 13 C.C. 64

66 **Vandyck v Hewitt** [1800] 1 East 96

the risk is apportionable, there will be no return of premium if the risk has actually attached and the u/w avoids the policy during the currency of the risk on the basis of a breach of some warranty or implied condition e.g. a deviation or a change of voyage.

b). Where the subject matter or a part of it has never been at risk. In this case either the whole or a proportionate part of the premium is returnable. However, if the sum is insured 'lost or not lost' and unknown to both parties at the time the contract is concluded the subject matter has arrived safely then no return of premium may be claimed. If the underwriter knew of the safe arrival and the policy is 'lost or not lost' the premium will be returnable. **Bradford v Symmondson.**[67]

c). If the assured has no insurable interest during the entirety of the risk, the premium is returnable but not if the policy is a gaming or a wagering policy. In **Allkins v Jupe**,[68] insurance was effected on profits and commission without benefit of salvage. The policy was void as being a wager policy and no return of premium was payable. But compare this with a loss of freight which should not be affected by **s4 Marine Insurance Act 1906**.

In respect of risk not attaching or only attaching to a part of the subject matter insured or if the assured has no insurable interest or only a partial interest in the subject matter insured, then the underwriter is permitted to raise these points as a defence or a partial defence to a claim made under the policy.

s75(2) Marine Insurance Act 1906

a). If the assured has an interest which may be terminated during the currency of the risk, no return of premium will be made if the interest is in fact so terminated. Such an interest is known as 'defeasible interest.' Note that under **s7 Marine Insurance Act 1906** a defeasible interest is insurable.

b). If the assured has over insured under an unvalued policy a proportionate part of the premium is returnable.

c) Where the assured has over-insured by double insurance, a proportionate part of the several premiums paid is returnable. If however the policies concerning double insurance were effected at different times and any policy has at any time carried the entire of the risk then no part of the premium paid in respect of that policy is repayable. Where the assured knowingly effects double insurance, no return of premium is payable. **s32 Marine Insurance Act 1906**.

Fisk v Masterman[69] Cotton at sea. Policy expired. Storm. No one would insure. The storm abated. The vessel was safe. There were a spate of offers of insurance and several brokers in London and in Liverpool had been asked to insure the vessel. The result was over insurance at the same time without knowledge. There was a pro rata return of premiums.

An example of a return of premium where only part of the subject matter is actually at risk can be seen in the following facts. Goods are insured on the basis that 500 bales of cotton are to be shipped. In fact only 250 bales were shipped. In such a case, the assured would be entitled to the return of one half of the premium paid.

In so far as a return of premium is payable where the underwriter avoids the policy as from the commencement of risk, there being no fraud or illegality see **Anderson v Thornton,**[70] where an assured represented that the ship to be insured sailed from port on Jan 12. In fact she sailed on Jan 1st. The underwriter could avoid the policy on the grounds of misrepresentation of a material circumstances. As long as the misrepresentation is honestly made, the assured may recover the premium paid.

Under s**84(2) Marine Insurance Act 1906**. if the premium is apportionable in respect of the risk insured and there is a total failure of the consideration in respect of an apportionable part, then the premium in respect of that part may be recovered by the assured.

67 **Bradford v Symmondson** [1881] 7 Q.B.D 456.
68 **Allkins v Jupe** [1877].
69 **Fisk v Masterman**
70 **Anderson v Thornton** [1853]

In so far as a return of premium may not be claimed where the parties do not know of the safe arrival of the subject matter at the time of the policy being taken out see **Bradford v Symondson.**[71] An underwriter on overdue cargo reinsures his risk with another underwriter. At the time of the reinsurance, it was unknown to both parties, that the ship carrying the cargo had safely arrived. Held : No part of the premium is returnable and the reinsurance policy attaches in respect of that risk because the policy is "lost or not lost."

Note that in respect of the held covered at a premium to be arranged clause it was held in the **Liberian Insurance v Moss,**[72] that for such a clause to operate there must be some form of market in which the premium can be ascertained. If this is not so the clause has no effect.

A frequent example of providing for additional premiums arises in the case of War Insurance in that a policy may provide for War Regarding cover at additional premium should the vessel enter a war zone. See for example **The El Champion,**[73] where a vessel entered a war area and incurred a higher premium payable by the owner and reclaimable from the charterer. The case reflects the more usual requirement under a charter party whereby a charterer is made responsible for any additional premiums which may become payable as a result of the vessel entering a war zone.

Where a charterer agrees to be responsible for such additional premiums it is important that he ensures that he receives the benefit also under the insurance.

If he does not do so, although the underwriter may have to pay the ship owner under the additional cover for which the charterer has paid, yet the underwriter may be able to sue the charterer in the place of the ship owner under the doctrine of subrogation on the basis that the charterer is in breach of contract in ordering the vessel into an unsafe or war zone.

Under the Institute Clauses, for example I.V.C.H. clause 2 regarding a change of voyage or I.T.C.H. clause 3 as to breach of warranty regarding cargo, the underwriter agrees to hold the assured covered, provided notice is given to the underwriter. Immediately the assured becomes aware of the breach the assured must agree to any amended terms of cover and any additional premium which the underwriter may require.

These Hull clauses differ from I.C.C. held covered clauses. Clause 10 I.C.C. provides that the assured will only be held covered at a premium and on conditions to be arranged subject to prompt notice to the underwriter in the event of the destination being changed.

The Burden of Proof upon the claimant assured and the underwriter.

Perils Insured against.
The claimant assured has to establish that a loss has resulted from risk or peril insured against.

The Marel,[74] vessel sank off coast of Spain : assured claimed on Hull Policy : Held Assured had to prove on a balance of probabilities that the vessel was lost due to a peril of the seas : Since the assured failed to show how or why the vessel was lost the claim failed. the C.A. dismissed appeal. (How, however, can anyone show how a vessel is lost at sea in unknown circumstances as in The Marie Celeste type syndrome ? What is the point of insurance ?)

La Pointe.[75] vessel sank in dock - sea water entered the vessel due to negligent repair of a valve : Held : Fortuitous loss due to a peril of the sea -underwriter liable under MIA - allegation of non-disclosure dismissed.

Exclusions.
In order to avoid a policy the burden of proof is placed upon the underwriter to establish that the relevant circumstances covered by an exclusion are present.

National Oil v Sturge,[76] Regarding exclusion clause - civil war, insurrection and Rebellion.

71 **Bradford v Symondson** [1881] 7 Q.B.D. 456
72 **Liberian Insurance v Moss** [1977] 2 Lloyd's Rep 560
73 **The El Champion** [1985] 2 Lloyd's Rep 275 at p280

74 **The Marel** [1994] 1 Lloyd's Rep 624 :
75 **La Pointe** [1991] 1 Lloyd's Rep 89 :
76 **National Oil v Sturge** [1991] 2 Lloyd's Rep 281 :

Noten v Harding.[77] ICC(s) Cargo of leather gloves - shipped with excessive moisture which evaporated, condensed on inside of metal container then dripped back onto the goods causing mildew. Held - recovery excluded due to inherent vice.

The liability of surveyors for classification.

The Morning Watch : Mariola v Lloyds Times 21.2.90 : The Morning Watch was classified Al at Lloyds : Buyer claimed the vessel in fact unseaworthy : Buyer relied on the survey : Held : Whilst it was forseeable that a buyer might rely on a survey - an insufficient degree of proximity existed. No liability in tort for negligence.

Recoverable losses include post loss expenditure.

Smit Tak v Youell.[78] Costs of wreck removal.

The duty to sue and labour – ie to minimise losses.

The Vasso.[79] Vessel sank with cargo Cargo owner claimed on ICC A policy. Underwriter alleged the loss was the fault of the shipowner providing the underwriter with a right of action in subrogation of assured against the shipowner. However the shipowner had already claimed for loss under an IVCH policy and taken funds out of the country. The underwriter claimed that the cargo owner should under clause 16 ICC A have sued & laboured to prevent the shipowner taking funds out of country by applying for a mareva injunction. Held Clause 16 is to preserve the subject matter - a mareva not necessary. The underwriter must pay the cargo owner.

77 **Noten v Harding** [1990] 2 Lloyd's Rep 283 :

78 **Smit Tak v Youell** [1992] 1 Lloyd's Rep 154

79 **The Vasso** [1993] 2 Lloyd's Rep 309 :