a "fraudulent device" had been used to advance a claim would be enforceable and not subject to the need to comply with the "transparency requirements".

We have not heard the last in the "fraudulent claims" saga.

Richard Aikens*

THE NEW AND REVISED INSTITUTE FROZEN FOOD AND FROZEN MEAT CLAUSES

Institute Frozen Food and Frozen Meat Clauses

Introduction

As MacKinnon LJ famously remarked, "The truth is that this law of marine insurance is nothing more than a collection of rules for the construction of the ancient form of policy".[1] The Institute Clauses, as the direct successors to that ancient form of policy, thus play a pivotal role in marine cargo insurance. New and revised Institute Clauses for use with frozen and chilled food (the "Clauses") were issued by Lloyd's Market Association on 1 March 2017.[2] This note comments on the revisions and some of the potential legal issues arising under the Clauses, which have been updated to take account of the 2009 revisions to the Institute Cargo Clauses[3] and to incorporate current trade and insurance practices. The revisions to the Clauses, albeit modest in scope, constitute the most important changes to the standard cover for frozen and chilled food since the revisions of 1982, when the ancient SG Form of Policy was superseded by the Institute Clauses.[4]

The Clauses now provide four levels of cover for chilled and frozen food.[5] Starting with the broadest cover, these are: (1) all risks plus extended cover;[6] (2) all risks;[7] (3) all risks except variations in temperature plus limited cover for such variations;[8] and (4) limited perils, that is (C) perils—major traditional perils at sea.[9] There are also specially

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1. *Middows Ltd v Robertson* (1940) 68 Ll L Rep 45 (CA), 63.

2. I am grateful to Lloyd's Market Association for sight of a drafting note prepared by Clyde & Co LLP describing the revisions to the Clauses but the views expressed here, and any errors, are my own.

3. For a summary of the revisions introduced in 2009, see J Dunt and W Melbourne, "Insuring Cargoes in the New Millennium", ch.6 of D Rhidian Thomas (ed.), *The Modern Law of Marine Insurance Vol.3* (Informa, London, 2009).

4. The Institute Frozen Food and Meat Clauses were revised in 1986 in line with the revisions to the ICC in 1982. For analyses of the 1982 revisions, see R Grime, "Insuring Cargoes in the 1990s", in D Rhidian Thomas (ed.), *The Modern Law of Marine Insurance* (LLP, London, 1996) and A George, "The New Institute Cargo Clauses" [1986] LMCLQ 438.

5. In line with what had already been the position for frozen meat, where four levels of cover were available as standard.

6. Frozen/Chilled Food Extension Clauses CL 422.

7. Institute Frozen/Chilled Food Clauses (A) CL 430.

8. Institute Frozen/Chilled Food Clauses (A)—24 Hours Breakdown CL 423.

9. Institute Frozen /Chilled Food Clauses (C) CL 431.

tailored strikes clauses.[10] A parallel regime applies to frozen and chilled meat, with some differences,[11] particularly as to the commencement of the risk.

The Institute Frozen/Chilled Food Clauses (A)

The standard practice under the former "Institute Frozen Meat Clauses (A)1/1/86" was to insure frozen goods against all risks excluding losses resulting from "any variation in temperature". This hardly amounted to all risks cover, as losses due to "variation in temperature" were surely among the main reasons for having specific cover for frozen food. It is true that insurance cover was provided for variation in temperature but only on very limited terms, that is, where there was a breakdown of refrigeration resulting in its stoppage for a period of not less than 24 consecutive hours or one of the major traditional perils such as fire, collision, sinking etc operated.[12] This was a cumbersome form, with cover for variation in temperature excluded and then brought back based on limited perils: it caused problems in practice as carriers were naturally reluctant to provide evidence of a continuous 24-hour breakdown that would expose them to subrogated claims for recovery by cargo insurers.[13]

The new Institute Frozen/Chilled Food Clauses (A) now provide proper (A) Clause all risks cover in line with their title.[14] This is a significant improvement but a question that arises is how the inherent vice exclusion will operate in relation to all risks cover for frozen or chilled food, particularly following the decision of the Supreme Court in *The Cendor MOPU*.[15] The new Clause excludes loss "caused by inherent vice or nature of the subject-matter insured (except loss damage or expense resulting from variation in temperature whilst this insurance is in force)".[16] The exception to the exclusion clearly "otherwise provides" in terms of the Marine Insurance Act 1906, s.55(2)(c) so as to reverse the statutory exclusion of inherent vice.[17] The loss must "result from"[18] a variation in temperature, which presumably must contemplate loss ultimately resulting

10. Institute Strikes Clauses (Frozen/Chilled) Food CL 424.

11. For example, the limited perils or (C) Clauses cover for meat extends to variations in temperature where there is a continuous breakdown of 24 hours, unlike the (C) Clauses cover for frozen and chilled food, which only covers major traditional perils.

12. It is notable that the equivalent meat clauses were more appropriately entitled "Institute Frozen Meat Clauses (A) – 24 Hours Breakdown", which at least potentially alerted the assured to the limited nature of the cover provided.

13. This form of cover has been retained but only, it is assumed, for cargoes considered unsuitable for full cover, or for particularly hazardous transits.

14. This level of cover was previously available for meat only as a standard clause.

15. *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (The Cendor MOPU)* [2011] UKSC 5; [2011] 1 Lloyd's Rep 560; [2011] Bus LR 537.

16. Clause 4.4.

17. Express words are not necessary to "otherwise provide". A broad view is taken construing the policy as a whole; see *Soya GmbH Mainz KG v White* [1983] 1 Lloyd's Rep 122 (HL); *Arnould's Law of Marine Insurance and Average* "*Arnould*", 18th edn (Sweet & Maxwell, London, 2013), [22–28].

18. It is unclear whether, in this context, the words "resulting from" are to be contrasted to the earlier words in the same sentence "caused by" to widen the causative connection beyond proximate cause. See J Dunt, *Marine Cargo Insurance*, 2nd edn (Informa Law from Routledge, Abingdon, 2016), [7.36–7.36], where the authorities are summarised.

from failure or misuse of the refrigeration machinery, as this will inevitably be the final link in the chain that leads to temperature variation. Where that failure is caused by an external casualty or event, the decision in *The Cendor MOPU* holds that this is an all risks loss and no question of inherent vice, as a contributory or competing cause, can arise.[19] This would cover all major casualties (fire, collision, sinking, etc) as well as perils of the sea and other all risks losses which result in a failure of the refrigeration machinery. It is reasonable to construe this carefully crafted exception to the exclusion as going beyond mere confirmation of the existing legal position, in which case it cannot be intended to apply to such cases, ie, cases where an external all risks peril operates. It would appear therefore that there is cover for inherent vice where the loss is due to a variation in temperature even where the cause of the variation is not combined with all risks perils or, indeed, the cause is unknown. It might further be arguable that there is cover for inherent vice itself resulting from a variation in temperature even where inherent vice is the predominant cause of the loss. Could inherent vice itself be recoverable under the Clauses as an all risks loss, bearing in mind that it may be treated as fortuitous and insurable, because inherent vice "may be just as capricious in its incidence as damage caused by perils of the seas"?[20]

The Frozen/Chilled Food Extension Clauses

As we have seen, the ill-named Institute Frozen Food Clauses (A) provided very limited cover against variation in temperature. It was the practice therefore to extend cover by use of the Frozen Food Extension Clauses 1/1/86.[21] These brief Clauses were "for use only" with the (A) Clauses and fundamentally widened the insurance cover, seemingly beyond all risks[22] to "deterioration of, or damage to the subject-matter insured" arising during the currency of the insurance, subject to the goods being in sound condition at attachment. The inherent vice exclusion was deleted (thus "providing otherwise" in terms of the Marine Insurance Act 1906, s.55(2)(c)) and replaced by a clause which excluded (i) bone taint, salmonella and pre-existing infection, and (ii) fault in "preparation dressing cooling freezing wrapping or packing". The delay exclusion was also deleted (reversing s.55(2)(b) of the 1906 Act) and replaced by a much more limited (but clearer) exclusion of "claims arising from loss of market".

The new Frozen Chilled/Food Extension Clauses[23] incorporate the former brief Extension Clauses into the (A) Clauses, which are fully set out in a self-standing set of clauses, which reduces potential confusion, as the whole document can be more easily construed as one. These Extension Clauses, like their predecessors, provide unusually wide and extended cover, as it is sufficient to show that the goods were sound on shipment and had deteriorated on arrival—neither inherent vice nor delay are excluded. Nevertheless,

19. See, in particular, Lord Clarke at [137].
20. See *T.M. Noten BV v Harding* [1990] 2 Lloyd's Rep 283, 287, *per* Bingham LJ, citing *Arnould*, 16th edn (1981), vol.2, [782] (now 18th edn, [22–25]).
21. CL 334.
22. GN Hudson, T Madge and K Sturges, *Marine Insurance Clauses*, 5th edn (Informa, London, 2012), 55.
23. The word "Institute" did not and still does not appear in the title.

it is submitted that a fortuity needs to be inferred, as this is fundamental to insurance.[24] Although there is little or no authority on the Frozen Food Clauses, *The Joint Frost*[25] is an example of a case where the judge treated a policy incorporating extension clauses as a policy against "marine risks".

Methods of transport: risks undertaken

The revised Clauses have been updated to take account of modern methods of refrigerated transport, for example, the increased use of transport by air for chilled and refrigerated goods.[26]

Legal issues: the Special Note

The Clauses have also been improved to eliminate potential legal issues. For example, the "Special Note" at the end of the former Institute Frozen Food Clauses (A) provided that "This insurance does not cover loss damage or expense caused by embargo, or by rejection prohibition or detention …". The contractual status of a similar Note was questioned by Donaldson J in *Liberian Insurance Agency Inc v Mosse*,[27] where he said that he "entertained some doubt whether this 'note', which is not a numbered clause, is to be construed as having contractual effect". In the revised Clauses, the note has been omitted and the exclusions of embargo and rejection have now been more appropriately placed at the end of Cl.6 with the other exclusions.

There are drafting improvements. For example, the Frozen Food Extension Clauses 1/1/86 excluded "fault in preparation … wrapping or packing" and also "unsuitability of packing or preparation".[28] This confusing duplication[29] has been clarified by substituting "packaging" for "packing" in the exclusion to the extension of cover to make it clear that pre-shipment "wrapping or packaging" of the frozen article is the issue rather than packing of the consignment itself as in the standard packing exclusion. Both are now separately and more clearly identified by this simple and nicely drawn drafting change.

Transit Clause

The Transit Clause for frozen food attaches the insurance when the goods are "loaded into the conveyance at the freezing/cooling works". This remains the more appropriate

24. Inevitability of loss is outside the concept of insurance. See *The Cendor MOPU* [2011] UKSC 5; [2011] 1 Lloyd's 560, [51], where Lord Mance points out the limits of this concept. For the application of the rule in the context of cargo insurance, see *F.W. Berk v Style & Co Ltd* [1955] 2 Lloyd's Rep 382.

25. *Hibernia Foods Plc v McAuslin, General Accident Fire & Life Assurance Corp Plc, Jardine Insurance Brokers International Ltd (The Joint Frost)* [1998] 1 Lloyd's Rep 310. The IMTA Extension Clauses for meat, which are materially the same as the frozen food clauses, were incorporated; the issue of inevitability of loss was not in issue.

26. It is also notable that the exclusion of earthquake in Cl.4.8 of the Institute Frozen/Chilled Meat Clauses (A) CL 425 has been omitted.

27. [1977] 2 Lloyd's Rep 560, 566.

28. The standard packing exclusion in Cl.4.3 of the (A) Clauses with which the Extension Clauses were used.

29. The lack of clarity in this clause was subject to adverse comment: see Hudson, Madge & Sturges, *Marine Insurance Clauses*, 5th edn (2012), 56.

attachment point for frozen and chilled products rather than when the goods are the "first moved" within the warehouse, which is now the commencement point for the attachment of the insurance under Cl.8 of the Institute Cargo Clauses(A)1/1/2009. The standard termination points for transit for frozen food remain largely unchanged, but these are often varied by agreement.[30]

Conclusion

There are other legal and drafting improvements that could have been made to the Clauses, including, in particular, the inherent vice and delay exclusions. However, the revision of the Institute Clauses is a matter of compromise and is dependent upon what is acceptable to the insurance markets, which are reluctant to adopt radical change in standard long-used clauses. Furthermore, the Institute Clauses are a succinct commercial document not designed to take into account every eventuality. As Donald O'May pointed out, "Can it be doubted that clauses drawn up in the Temple would inevitably be longer and more verbose, with supplemental clauses to try to cope with every possible solution or ambiguity?"[31] These revised Institute Clauses admirably fulfil their role of providing a well-designed and drafted platform upon which clauses can be added tailored to the needs of the individual assured. These Clauses will, no doubt, be welcomed by the cargo insurance markets.

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30. See eg *The Joint Frost* [1988] 1 Lloyd's Rep 310.
31. D O'May, "Marine Insurance Law: Can the Lawyers be Trusted?" [1987] LMCLQ 29, 33.

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