CARGO PERILS INSURANCE AND CARGO EXCLUSIONS.[1]

It may not be out of place to attempt the definition of cargo perils and cargo marine insurance at the onset for an easy understanding of the discussion of this topic. Cargo perils of the sea are such maritime perils[2] as cargoes are exposed to during the course of a maritime adventure[3] whilst cargo marine insurance may be defined as a cover taken out by an owner of cargo or a holder of some commercial interest in cargo, to ensure that the assured is indemnified for such loss or damage as his cargoes are exposed to during a maritime adventure thereby transferring risk of damage or loss of his cargo to the insurer in consideration of his payment of the agreed premium. However, the principle of proximate cause is applied to an insured peril or risk in order to determine whether the loss or damage is recoverable or not but the loss would be recoverable as long as the actual risk is covered by the insurance and as long as the insurance cover is still current at the time of the occurrence of the hazard or peril insured against and the damage or loss is not due to fraud or deliberate act.

It is also noteworthy that cargo insurance is one of the three main subdivisions of marine insurance whilst the other two are, hull and freight. Cargo is often divided into two namely, under-deck cargoes and on-deck cargoes. The latter is cargo which is loaded on the ship's main deck and may either be covered or uncovered, whilst the former is cargo kept under the main deck.

Historical perspective of cargo perils insurance.

Historically, there was the Lloyd's Ship and Goods (or SG) Policy that had over the years had its archaic English expressions being interpreted and illustrated by cases decided by courts. In respect of cargo risks, the Memorandum to the SG Policy was substantially replaced by clause and specific clause concerning particular trades and commodities e.g.

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[1] Written by Mr. Michael Igbokwe, 2002.

[2] Under section 5[3] of the Marine Insurance Act, cap. 216 of the Laws of the Federation of Nigeria, 1990, "maritime perils" are "perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the sea, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples, jettisons, barratry, and other perils, either of the like kind or which may be designated by the policy."

[3] A maritime adventure includes where any cargoes or other moveables are exposed to maritime perils: section 5[2] cap. 216.

Timber Trade Federation Clauses 1/1/62. However, the Memorandum[4] had limitation due to the extent of the losses that would be paid for under it because of the lack of capacity of the then insurance market, a desire to exclude small or contentious claims and the practical problem of proving loss by insured perils. By the Memorandum, in respect of goods like corn, fish, salt, fruit and seed which are easily damaged by sea water, the insurers paid no partial loss and in respect of the other commodities, losses under 5% or 3% in the given cases were taken to be normal incidents of the voyage and not perils of the sea and indemnities irrespective of percentage were only paid where damage or loss was due to stranding or in the case of general average. Two categories of perils namely; *Acts of God* (within the context of perils of the seas only) and *Acts of men* (restricted to acts performed maliciously, fraudulently or with hostile intent) such as enemies, pirates, rovers and master and crew when in fraud of their employers and violation of their duties and General Average acts were covered by insurers under the SG Policy.

Consequently, the SG Policy was deficient to the extent that acts of men like master or crew whilst performing their duties for example, negligent navigation of the ship, stranding or collision were not covered because when the Lloyd's form of policy was developed, the carrier of the goods was fully responsible and answerable for all losses occasioned to the goods except when they were by acts of God, acts of men or general average acts. The risks that the owner of the goods or merchant was exposed to due to the above deficiency of the SG Policy and against which he needed to be protected, induced the development of the *policy of insurance*.

In the 19th century, the above problems were dealt with by the doctrine of *proximate cause* developed by the English courts in holding the underwriter liable if the loss or damage to the cargo was caused *"proximately"* by the stranding or collision [as the case may be], even though the stranding or collision was as a result of the negligence of the master or crew; and also by the doctrine of *subrogation* which enabled the underwriter who had paid for the loss to step into the assured's shoes and sue the carrier for the result of his breach of the contract of affreightment it entered into with the assured. Subsequently in the 19th century, as a result of increased commerce and improved legal

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[4] The Memorandum reads: "N.B.--- Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides ad skins are warranted free from average, under five pounds per cent; and all other goods, also the ship and freight, are warranted free from average, under there pounds per cent, unless general, or the ship be stranded, sunk or burnt."

machinery, shipowners capitalised on the freedom of contract to insert wide exclusion clauses in their bills of lading [standard forms] so as to widely disclaim all responsibility for the cargo under their custody and also formed associations or clubs for their better indemnity and protection. So in the 20th century, despite the international cargo conventions[5], the merchant adventurer or cargo owner was in a position where he required better protection by wider and more refined insurance covers.

Later on there came into existence, Institute Cargo Clauses "with average" [W.A.] and Institute Cargo Clauses "free from particular average" [F.P.A.] which forms included the "Memorandum" limitations with less severity than in the S.G. form. This is because it gave the assured an opportunity to choose between bearing all the risk of partial loss (under the F.P.A. clause), or the risk of small partial losses below 3% or 5% (the W.A. Clause), except where severity was reduced by the average clause. Consequent to the average clause in the W.A. form and the F.P.A. clause in the F.P.A. form, the underwriters agreed to pay certain classes of claim outside the average warranty including packages lost during loading, transhipment or discharge, loss or damage caused by fire, explosion, collision or contact with external substance, or caused by discharging at a port of refuge or distress. Some of these exceptions have now been moved to the named risk sections of the new (B) and (C) clauses.

When the use of the SG Form was abandoned, the Memorandum was dispensed with in the policy of insurance and Institute Clauses. Even though particular average warranties are now provided for in Section 77 of Marine Insurance Act[6] of Nigeria, cargo insurance covers which are warranted to be "free from particular average" [FPA] are now out of use whilst the Institute Cargo Clauses [FPA] introduced in 1912 had gone through several different changes since then to date. The disuses of the SG Policy, 'General Words" and Memorandum, and the high number of litigation which the decisions on the extent to and overlap in the cover between W.A. and F.PA in the context of the SG Policy became difficult to predict, induced the need to formulate the insurance cover in modern and clarified terms.

[5] The Hague Rules, the Hague-Visby Rules and the Hamburg Rules.
[6] Chapter 216 Laws of the Federation of Nigeria.

As a result of displacement of wood by iron and steel in the construction of the hulls of ships in the 20th century and safer carriage of goods by sea, underwriters willingly extended the area of cover they granted to the assured. Today, three types of Institute Cargo Clauses namely (A), (B) and (C) Clauses have replaced the Institute Cargo Clauses (All Risks) 1/1/63, Institute Cargo Clauses [F.P.A] 1/1/53 and Institute Cargo Clauses (W.A.) 1/1/63 respectively. However, it should be noted that Institute Cargo Clauses (B) and (C) are not the exact reproduction of the Institute Cargo Clauses [F.P.A] 1/1/53 and Institute Cargo Clauses (W.A.) 1/1/63 respectively because the aim of the former was to escape from and avoid the complexities of the latter which had become highly connected with an accumulated number of decided cases and to abolish the franchise and express the insurance covers in modern language. Moreover, each type of Institute Clauses starts with a group of [three clauses of] risks it covers of which the second and third are the General Average Clause and "Both to Blame" Clause respectively.

INSTITUE CARGO CLAUSES [A], [B] and [C].

THE RISKS UNDER INSTITUTE CARGO CLAUSES [A] Clause 1.

The [A] Clause 1 gives 'all risks" cover in respect of loss of or damage to the subject-matter insured except as provided in clauses 4,5,6 and 7 thereof. The [B] Institute Clauses are to give *intermediate standard cover* whilst the [C] Institute Clauses are to provide a basic standard cover against major casualties in respect of the subject-matter insured although both mainly differ in that [C] does not cover three of the risks covered by the [B] Clauses (*even though an assured under [C] can always purchase more coverage than [C] provides*), and in that there is a lower premium charge by insurers for [C] Clauses[7] than for [B] clauses." One significant observation in clause 1 of both [B] and [C] Clauses, is that in indicating the loss or damage covered, it refers to loss or damage 'reasonably attributable to" in clause 1.1. whilst in clause 1.2 it refers to loss or damage 'caused by" [8] specified risks or perils. Secondly, clause 1 of [A], [B] and [C] Clauses are subject to the limitations in their clauses 4,5,6 and 7[9] whereas [B] and [C] covers are restricted covers.

Clause 1 "All" Risks.

[7] References to Clauses mean Institute Clauses.

[8] The expression "caused by" means "proximately caused" whilst "reasonably attributable to" is retained because of its historical usage and significance but does not go beyond the implication of causation.

This is the "All Risks" cover and though recent[10], it is the most commonly used form of cargo insurance out of the three forms [A, B, C] already mentioned. However, because it is in reality not covering all risks to which cargo is exposed especially because it has exclusions or limitations[11] and as such may be misleading, it is better known as the [A] Clauses. It is noteworthy that the Institute Cargo Clauses [All Risks] was introduced into the cargo insurance world as a result of the need to have standardised "all risks" clauses after the World War II when such all risks covers became very popular amongst merchants and bankers albeit not without initial opposition by conservative insurers. Courts played a major role in developing the principles governing the application and interpretation of "All risks" clauses.

Judicial Interpretation of "All risks" clauses.

Before the standardised clauses came into usage, courts had through their decisions and constructions of policies of cargo insurance, thrown light on what kind of cargo risk is within or outside 'all risks" cover. The first reported case on this was ***Schloss –v- Stevens***[12] where goods insured to cover "all risks by land or water by any conveyance" were left uncovered during an abnormal delay and got damaged by damp atmosphere. The High Court [whose decision was approved on appeal], held that the assured could recover despite the delay since all losses by accidental cause of any kind happening during the insured transit were covered including damage caused by exposure of the cargo to damp caused by an abnormal delay in its transportation.

Moreover, in the locus classicus case on "all risks" of *British and Foreign Marine Insurance Co. Ltd –v- Gaunt*[13]*,* bales of wool which were insured against *all risks* "from sheeps' back and/or station, while awaiting shipment and/or forwarding and until safely delivered". The insurers wanted to repudiate the claim on the ground that freshwater wetting could not be avoided since the journey for the transportation of the cargo started

[9] Popularly known as the Exclusions Clauses of cargo insurance.
[10] The Institute Cargo Clauses [All Risks] were first introduced in 1951.
[11] The [A] Clauses state that "This insurance covers all risks of loss of or damage to the subject matter insured except as provided in Clauses 4,5,6 and 7 below."
[12] [1906] 2KB 665.
[13] [1921] AC 41 at 57.

during the rainy season even though evidence showed that the taupulins provided were not used. In this case the House of Lords held inter alia that:

i. "All risks" has the same effect as if all insurable risks were separately enumerated, including the risk that when the wool ought to have been covered with taupulin when it started raining, the carrier's agents/servants neglected their duty,

ii. "All risks" cannot be held to cover all damages however caused, because damage that is unavoidable due to ordinary wear and tear and depreciation are not covered,

iii. The type of damage covered by "all risks" must be due to *fortuitous circumstances or casualty,* or the risk must involve a fortuitous accident or casualty,

iv. Where "all risks" [and not merely risks of a specified class or classes] are covered by the policy, the plaintiff discharges the onus on him to prove that the risk attached when he has shown that the loss was caused by some event covered by the general expression and is not bound to further prove the exact nature of the accident or casualty which is the actual cause of the loss,

v. "All risks" does not alter the general law and can cover only risks which are lawful to be covered,

vi. "All risks" has limitations in that it does not cover inherent vice or wear and tear or British capture and it covers risks and not certainties. In this regard, "all risk" is *something which is occasioned to the subject-matter from outside* and *not from within or the general behaviour of the subject-matter*, being what it is, *in the circumstances under which it is carried* and is not *a loss which the assured causes by his own act* for then he has exposed his goods to the chance of injury and has himself injured them.

It is observed and submitted that the Gaunt case is "fully loaded" with guidelines in determining what "all risks" consists of, its limitations including the fact that one can easily be misled by the expression in concluding that *all risks* to which the subject-matter of insurance is exposed to during the carriage, are covered by "all risks" cargo insurance. It must also be stated that the "risk" of the damage occurring differs from the occurrence of the 'damage' itself and either or both of them must be expressly shown to be covered.

It is also noteworthy that section *56 of the Marine Insurance Act*[14] in showing the included and excluded losses follows the decision of the House of Lords in the Gaunt case in that section 56(1)[a] of the Act excludes from recoverable losses, any loss occasioned by the wilful misconduct of the assured whilst Section 56[2](c) of the Act excludes from recoverable losses, such losses due to ordinary tear and tear,[ordinary breakage or leakage], inherent vice or nature of the subject-matter insured, [or for any loss proximately caused by rats or vemin, or for any injury to machinery not proximately caused by maritime perils, unless the policy otherwise provides for the loss expressly or by necessary implication. Moreover, from the meaning given by clause 7 of the Rules of Construction of Policy in the Act to "perils of the seas" as a reference to *fortuitous accidents or casualties of the seas* which, excludes the ordinary action of the winds and waves, it is arguable that the House of Lords meant that "all risks" must come within *perils of the seas* in order to be recoverable. It is also submitted that if examined from the point that the Nigerian Federal Legislature in drafting cap. 216 merely followed and adopted provisions which are in *pari materia* with the English Marine Insurance Act of 1906, it may be argued that the court in the Gaunt case which was decided in 1921 followed or interpreted the provisions of the English Marine Insurance Act of 1906 and that cap 216 was not influenced by the Gaunt case but by the Marine Insurance Act, 1906.

Learned authors have also made useful contributions to the proper understanding of "all risks" clauses. For instance, the learned authors of Marine Insurance[15] hold the following views about recoverable "all risks", namely:

i. The primary requirement being proof of a casualty or fortuity and not certainty, the assured need only show the happening of a casualty during the period insured so as to establish exactly how the loss was caused and not proceed to identify the particular risk out of the many risks covered,

ii. In practice, the very nature of the damage may be the only proof of "casualty" if it is shown to have occurred during the transportation insured,

iii. An exceptional damage not known to arise under normal conditions of such transportation may be enough proof of a casualty or something accidental,

[14] Cap. 216 of 1990, but which was originally an Act of 1961.

[15] Donald O' May and Julia and Hill, Butterworths [1993] at pages 166 and 167.

iv. Where the nature of damage is due to inherent vice or wear and tear, the assured must reasonably prove that the loss was due to a casualty and not to a certainty or inherent vice or wear and tear or depreciation[16], So, ordinary wear and tear or unavoidable depreciation or insufficient packing are not covered under "all risks".

v. Where as it is usual in practice, the damage is consistent with an external cause or inherent vice, the assured must give evidence reasonably showing that the damage is not due to inherent vice, otherwise he would have failed to prove a casualty,

vi. To succeed under "all risks" cover, the assured should prove that the casualty or risk operated during the currency of the policy[17], which proof he may in practice proffer by showing that the cargo was sound at the beginning of the insured transportation but was found damaged at the point the insurance terminated, but the assured may not be able to show that the damage occurred during the currency of the transit insurance in a warehouse to warehouse insurance of cargo where the damage claimed may have occurred prior to warehouse at port of shipment or after discharge into warehouse at destination.

vii. "Country damage" will not be indemnified for under a policy covering the good from port of shipment.[18]

It is now necessary to look at the position of "all risks" under the Institute Clauses.

"All Risks" under Institute Cargo Clauses [A] Clause 1.

[16] In Berk [F.W.] & Co Ltd-v-Style [1956]1 Q.B 180, where goods in bags which were insured against "all risks of loss or damage from whatever cause" arrived with many of the bags having burst in transit due to weakness of the bags or insufficiency of packing, the insurers were not held liable. C/F Theodorou –v-Chester [1951] 1Lloyd's Rep. 204 where sponges packed in cases wrapped in hessian were insured against "all risks of loss and/or damage however arising, irrespective of percentage" were damaged by water, dirt, paint which went into the hessian and the court held the damage recoverable notwithstanding the underwriters' claim that they were normal transit-induced damage.

[17] This rule was also confirmed by N. Geoffrey Hudson nad J.C. Allen in their book, The Institute Clauses 3rd Edition, LLP [1999] at page 13

[18] See, Fuerst Day Lawson Ltd-v-Orion Insurance Co. Ltd [1980]1Lloyd's Rep. 656, where drums of oil insured against "all risks" were upon being found to contain water with small traces of oil, held not to be recoverable because it was probable that the drums contained water with small traces of oil for deception purposes.

In practice, insurance brokers try to formulate terms which are usually by typewritten attachments to and Institute Clauses to, the policy for their assured which would extend the extent of "all risks" to include risks that from judicial interpretations, are not covered by "all risks" like inherent vice or other types of loss or damage which may not be fortuitous. For instance, they are worded like 'this insurance is to cover all loss or damage however caused" or purport to cover all loss or damage and not just all risks of loss or damage. Even though by virtue of the rule of interpretation, such attachments will prevail over the terms in the standard form of insurance where there is a conflict between the attachments and the terms of the insurance policy, the question arises whether such wordings are wide enough to cover inherent vice or inevitable loss due to the nature of the subject-matter insured despite the exclusion in Section 56[2][c] of cap. 216 and the specific exclusion in the Institute Clauses.[19] It has been argued by authors that since the provisions of *Section 56 of cap. 216* would "apply unless the policy otherwise provides" words can be used to *include inherent vice* as one of the risks insured against and such terms would be given their plain meaning and applied accordingly. In ***Overseas Commodities –v- Style***[20], the policy covered "all risks of whatsoever nature and kind… including inherent vice and hidden defect. Condemnation by authorities to take place within three months of arrival…" and it was held that the assured would have been entitled to recover for the inherent vice which caused the damage if not for the breach of warranty.

Secondly, it has been observed that amendments are made by way of modification or introduction of new clause to take care of situations hitherto not covered as soon as courts' interpretation of any of the clauses shows its inadequacy or as soon as there is a new situation needing to be covered. However, the expression, " all risks of loss or damage from whatsoever cause arising" is not in itself enough to cover inherent vice.[21]

Moreover, whilst the case of ***Traders & General Insurance Association Ltd –v- Bankers and General Insurance Co. Ltd***[22] shows that inherent vice can be covered without express words, the case of ***Gee & Garnham –v- Whittall***[23] show that 'all loss or damage'

[19] Since ordinary meanings of words used in statutes are given to them in their construction, there is bound to be a difference between a clause covering "all damage" and one covering "all risk of damage."
[20] Ibid.
[21] See, Berk [F.W.] & Co Ltd-v- Style, ibid.
[22] [1921] 38 TLR 94.
[23] [1955] 2 Lloyds Rep. 562

will not cover inherent vice. In the face of the conflict in the two High Court decisions, the House of Lord's decision in ***Soya gmbH Kommanditgessellschaft –v- White***[24] upheld the displacement of the prima facie rule that inherent vice was excluded from covered risks or damage or loss when the policy itself expressly included it. The court also indicated that inherent vice as used in Section 55[2][c] of the English Marine Insurance Act of 1906[25] refers to a peril by which a loss is proximately caused and not descriptive of the loss itself and that it means the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any external accident or casualty. To Lord Diplock, prima facie, the risk is excluded from a policy unless the policy otherwise provides either expressly or by necessary implication.

Cargo clauses A is proper for the insurance of highly expensive and valued and easily damaged cargo, clothing, machinery and hi-tech equipment.

RISKS COVERED IN CLAUSE 1 OF [B] AND [C].

1. **Clause 1.1. Perils.**

In order to recover in respect of cargo covered by clause 1 of B and C Clauses, the assured has to prove that the loss or damage to the insured cargo was 'reasonably attributable to" [and not "caused by"] any of the risks discussed hereunder.

[a] "*Fire or explosion"* [1.1.1.]: Loss of cargo by fire due to negligence, accidental or unascertained cause is indemnifiable but the insurers have the onus of proving any of the exclusions if they intend to deny liability. Spontaneous combustion covers loss or damage to the cargo insured due to fire occasioned by the nature and state of the cargo itself. For instance, hemp can spontaneously catch fire when transported in a critical condition and coal can equally catch fire when it usually heats up during carriage.

[b] *"Vessel or craft being stranded, grounded, sunk or capsized"* [1.1.2]: Stranding happens when a ship makes contact with the ground or other obstacle and remains stuck there for some time and not a mere *touch and go* or striking of the ground. It is more serious than grounding. Even where the grounding is intentional, the damage or loss of

[24] [1950] 1Lloyds' Rep. 491.
[25] It is in *pari materia* with section 56 of cap. 216.

the insured cargo must be fortuitous in order to be recoverable. “Sunk or capsized” do not mean the same thing. “Sunk” is when the ship can sink no further and a ship can sink without being fully covered by water and may be fully covered by water without actually resting on the sea or river-bed. ‘Capsized” is when the ship is overturned or wholly heeled over and is also applicable to cargo being carried from a ship by a lighter.

[c]”*Overturning or derailment of land conveyance”* [1.1.3]: Land conveyance includes any means of transportation of goods on land like vehicles, wheelbarrow, forklift, rail and road trucks but not platforms, pallets or flats on which goods are placed to assist loading, stowing or discharge. The clause is usually treated as a cover under 1.1.4 but in this clause, there must be an overturning of the means of transportation and not just an overturning of the cargo being carried by the land conveyance.

[d] “*Collision or contact of vessel craft or conveyance with external object other than water”* [1.1.4]: For the loss or damage to be recoverable, the object with which the stated medium of carriage here [carrying ship, or land conveyance], collides or has a contact resulting in the loss or damage, must be external to the carrying medium.

[e] “*Discharge of cargo at port of distress*” [1.1.5] This covers the loss or damage to insured cargo due to discharge of the insured goods at a port of distress and complements the cover under clause 1.2.1 and general average clause 2.

[f] “*Earthquake volcanic eruption or lightning*” [1.1.6]: Though not in [C] Clauses, these risks are called “Acts of God” rather than perils of the sea.

2. **Clause 1.2 Perils**.

In order to succeed in any claim under clause 1.2 perils, the assured has to prove that the loss or damage to the insured cargo “was caused by” any of the risks discussed hereunder.

[a] *“General Average Sacrifice”* [1.2.1] One of the points to take note of here is that this clause recognises the statutory provision[26] that in the case of general average sacrifice,

[26] Section 67[4] cap. 216.

the assured can recover from the underwriter in respect of the whole loss of his cargo even though he has not enforced his right of contribution from the parties liable to contribution in the general average sacrifice. The insurer would upon payment be subrogated to assured's rights and remedies against the other parties to the general average sacrifice.

[b] *"Jettison or washing overboard"* 1.2.2]: Jettison is the throwing of cargo or part of the ship's equipment aboard in order to either lighten the vessel when it is in peril at sea or when ashore in order to refloat her and not when the cargo is thrown overboard because of its inherent vice, say putridity of meat. Jettison is usually a part of general average and can therefore in some cases be recovered under clause 1.2.1. albeit under 1.2.2. jettison does not have to amount to general average sacrifice in order to be recoverable.

[c] *"Entry of sea lake or river water into vessel craft hold conveyance container liftvan or place of storage*" [1.2.3]: This clause appears only in [B] and in [C] clauses. Here, assured is merely to prove that the loss or damage was caused by an entry of sea lake or river water into one or more of the stated means of transportation or storage.

[d*]"Total loss of any package lost overboard or dropped whilst loading on to, or unloading from, vessel or craft."* [1.3]: This clause which is only in [B] Clause, covers sling losses resulting during loading, transhipment or unloading from vessels or crafts whether voluntary or forced discharge. It does not cover sling losses during loading, transhipment or unloading from land conveyances nor due to pilferage or theft.

GENERAL VERAGE CLAUSE 2.

This clause states as follows:

This insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4,5,6 and 7 or elsewhere in this insurance.

One of the things to be noted here is that even though there are statutory provisions in the Marine Insurance Act[27] indicating the liability of the underwriters for salvage charges and general average act, the underwriters and the assured are not directly liable for salvage

[27] Sections 66 and 67 cap. 216.

charges and general average expenditure incurred by the carrier. Salvage charges concern the amount payable to a salvor who is a "volunteer" from outside the maritime adventure, general average concerns the settlement of expenditure incurred and/or money paid for proerty sacrificed, as between the parties to the adventure among themselves. The governing law of the adjustment of general average, unless the contract of affreightment otherwise provides, is that of the country of port of destination or of the place where the ship and the cargo were separated if the voyage was broken up. Although, cargo owners do not determine the contents of bills of lading, those bills or charterparties often contain adjustments based on the York- Rules.

Secondly, even though under the General Average Clause, cargo insurers must recognise any properly stated *adjustment*, another statutory provision in the Marine Insurance Act,[28] frees the insurer from liability for any general average loss[29] or contribution where the loss was not incurred for the purpose of avoiding or in connection with the avoidance of a peril insured against. The adjustment of the general average charges and the determination of the salvage charges are in accordance with English law and practice where insurers will respond to general average contributions and the proportion of salvage charges the insured has a duty to pay. Even though this clause appears not to recognise specifically adjustments of the general average contributions on the basis of the most commonly used York-Antwerp Rules which is often provided for such adjustments in the bill of lading or charterparty, the same result is attained by the expression "according to the contract of affreightment.."

Thirdly, clause 2 cover is limited by the exclusions in clauses 4,5 6, and 7 of the Institute Clauses [A], [B] and [C] and by any other exclusions which may be in the relevant insurance cover.

"BOTH TO BLAME COLLISION" CLAUSE 3.

This clause provides as follows:

This insurance is extended to indemnify the Assured against such proportion of liability under the contract of affreightment "Both to Blame Collision" Clause as is in respect of

[28] Section 67(6) cap. 216.

[29] Section 67[1] of cap. 216 defines a "general average loss" as loss caused by general average act and includes general average expenditure and a general average sacrifice.

a loss recoverable hereunder. In the event of any claim by the shipowners under the said Clause the Assured agree to notify the Underwriters who shall have the right, at their own cost and expense, to defend the Assured against such claim.

Under the 1910 Brussels Collision Convention, [which was domesticated in England by virtue of the Maritime Convention Act, 1911, where both ships are to blame for a collision, the loss or damage to the ships, their cargo, freight or other property on board them, each ship is liable to the proportion based on its degree of fault but if it is impossible to apportion the different degrees of fault, the liability is apportioned equally. However, where the Hague Rules and the Hague-Visby Rules apply to the contract of affreightment, the carrier's protection therein in respect of errors in navigation or management of the vessel prevents the cargo owner from recovering from the carrier whereas recovery from the colliding ship is limited to the proportion based on its degree of fault. In the US, notwithstanding the contents of the contract of affreightment, the cargo owner may recover *in full* from either the owners of the carrying ship, or if as it is usually the case the owners of the carrying ship are exempted from liability under the carriage of carriage, cargo owners may recover their losses from the owners of the non-carrying colliding vessel which may later recover from the carrying vessel, an amount equal to carrying vessel's degree of fault. Consequently, in the US, the both to blame clause in a bill of lading is invalid for being contrary to public policy[30], although the clause may be valid in charterparties in the USA,[31] whereas parties involved in a collison may agree to the American rules of settlement without invoking the jurisdiction of the USA. The "both to blame" clause 3 was inserted to correct the anomaly. So, as long as the underwriters were given the opportunity to defend their assured against a claim under the "both to blame" clause, by their assureds notifying them, costs of the defence and payments to shipowners made by the assured cargo owners, may be recovered from their insurers. In the US, the clause is applicable in charterparties but inapplicable in bills of lading.

Where the insurers have paid for the loss or damage to the goods due to the collision, they will be subrogated to the rights of the assured against the non-carrying vessel and

[30] See, USA –V- Atlantic Mutual Insurance Co, 1952 AMC 659.
[31] See, American Union Transport Inc. –v- USA, 1976 AMC 1480.

any reduction of their recovery resulting from the owner of the carrying vessel pleading the "both to blame" clause.

It has been suggested that Cargo Clause B is proper for the insurance of goods like rice that could be damaged by seawater but is not really at risk from mishandling whilst Cargo clause C is usually used to cover bulk cargos that could be lost if the ship sinks or if they must be jettisoned at sea to save the ship.[32]

II. CARGO EXCLUSIONS

As noted before in this paper, cargo exclusions are the exclusions to the recoverability by the assured for loss or damage to cargo assured under the three Institute Cargo Clauses [A], [B] and [C]. It is also noteworthy that many of the exclusions are similar to and are a replica of the statutory exceptions and defences in the Marine Insurance Acts of UK and Nigeria because it is assumed that in most cases the assured will not have a copy of the Acts. In particular, clauses 4.1, 4.2, 4.4 and 4.5 encompass the statutory defences in cap. 216 whilst the un-seaworthiness and unfitness exclusions of clause 5 amend the implied warranties of seaworthiness and fitness of the ship under sections 40 and 41 of cap. 216.

The exclusions are stated in clauses 4, 5, 6 and 7 the provisions of which would be considered hereunder.

Clause 4. *In no case shall this insurance cover:*
4.1: "Loss damage or expense attributable to wilful misconduct of the Assured".
This is exactly what is in section 56(2)[a] of cap. 216 and as such cannot be contracted out of by the parties agreeing to something different from it in the insurance policy. Any loss or damage led to by the wilful misconduct of the assured is not recoverable but the insurer is liable for loss or damage caused by a peril insured against which is caused by the misconduct or negligence of the master or crew. Moreover, the expression "attributable to" is wider than "caused by", whereas "wilful misconduct" *is a deliberate act known to be wrongful or reckless act without caring whether or not it is wrongful* and "the Assured" is the person interested in the subject-matter of the insurance or for whose

[32] See page 3 of a paper titled: "Effective Processing of Maritime Claims" presented by Mr. R.O. Falokun of IGI Co Ltd, Lagos at the Seminar on Optimising Benefits of Cargo Insurance held at Muson Centre, Onikan between 20th and 21st March, 2000.

benefit the insurance is made. Cases of wilful misconduct include casting away of a ship by owners and insurance of goods known to be contrabands and which get impounded upon discharge.

4.2: *"Ordinary leakage, ordinary loss in weight or volume or ordinary wear and tear of the subject matter insured".*Save for the omission in the exclusion clause of three heads of covers namely, "ordinary breakage…" or "for any loss proximately caused by rats or vermin" or "for any injury to machinery not proximately caused by maritime perils", the exclusion clauses 4.2 and 4.4 include the risks in the statutory exception in section 56(2)[c] of cap. 216, but for which the insurer shall not be liable unless the policy otherwise provides. *Ordinary breakage* refers to breakages which usually occur to fragile and breakable cargo during transportation, while ordinary leakage occurs due to evaporation during transit but loss or damage due to both can still be specially insured against in which case the underwriter will be liable depending on the terms of the insurance, if cargo is lost or damaged due to any of them. As for loss or damage occasioned by *rats*, the authorities are conflicting as to whether they are perils of the sea which should be recoverable or excluded[33]. There are categories of cargo such as cereals, copra, hides that are susceptible to *vermin* infestation and attacks during voyage. It has been argued that if the infestation by vermin is an inherent vice in the cargo the owner cannot recover but if it is from outside sources, under Risk Clause 1 [All risks], the statutory exclusion in cap.216 for damage or loss caused by rats or vermin is overridden. The ordinary wear and tear is restricted to the subject matter insured and not extended to the carrying vessel, barge or container.

The expression "*or for any injury to machinery not proximately caused by maritime perils*" in the concluding part of section 56(2)[c] of cap. 216 is not all that relevant to cargo insurance but merely gives effect to the principle illustrated by the celebrated case of *The Inchmaree*.[34] . The exclusion of damage or loss due to loss in weight or volume is not one of the defences in section 56 of cap.216 but was included to cover the field so to say and take care of cargo which normally dries up during the voyage and is damaged or lost due to clingage of heavy crude oils during its transportation.

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[33] See: Laveroni-v-Drury [1852] 8Exch. 166 C/F Hamilton, Fraser & Company –v- Pandorf & Co [1887] 12 AC 518.

[34] [1887] 12 AC 484.

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured (for the purpose of this clause 4.3 "packing" shall be deemed to include stowage in a container or liftvan but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants).

The test as to whether the packing is insufficient or unsuitable is as to whether it is adequate to bear the ordinary expected handling and carriage. So, if the type of packing is in line with the custom of the trade, it will be presumed that the packing was adequate. Loss or damage caused by bad stowage in a container or liftvan will not be covered when the stowage is before the attachment of the insurance and when it is the assured or his servant who carries out the stowage.

4.4 loss damage or expense caused by inherent vice or nature of the subject matter insured.

Inherent vice has been defined as "the unfitness of the goods to withstand the ordinary incidents of the voyage, given the degree of care which the shipowner is required by the contract to exercise in relation to the goods."[35] It has also been defined as " a loss … which is proximately caused by the natural behaviour of the subject-matter insured, being what it is, in the circumstances in which it was expected to be carried."[36] In *Noten B.V. –v- Harding*[37] leather gloves shipped in cardboard boxes stuffed in containers were found on out-turn to be wet, stained, mouldy and discoloured due to moisture they had absorbed before shipment. It was held that the loss was proximately caused by the inherent vice of the goods insured and that they deteriorated as a result of their natural behaviour in the ordinary course of the completed voyage, without the intervention of any fortuitous external accidents or casualty. Even under section 56(2)[c] of cap 216, an underwriter will not be liable for inherent vice unless the policy otherwise provides.

4.5 loss damage proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above).

The word "proximately" in this section is assumed to have been lifted from section 56(2)(b) of cap. 216 or rather section 56(2)[b] of UK Marine Insurance of 1906. In *Pink-*

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[35] Scrutton on Charterparties, 19th edition, art. 109.
[36] See British & Foreign Marine Insurance Co. –v- Gaunt ibid.
[37] [1989] 2 Lloyds Rep. 527; [1990] 2 Lloyds Rep. 283.

v-Fleming[38], some of the fruits went bad due to delay caused by repairs of the ship as a result of collision damage. But the US position is different and as such a delay exclusion clause would be necessary in the US for its underwriters to be able to exclude a claim based on delay. The expression *"(except expenses payable under Clause 2 above)"* obliges underwriters to reimburse their assured for cargo's proportion of settled general average including the ship's detention expenses. It is noteworthy though that insurers are to pay for a claim for expenses due to delay if the ship has been detained in circumstances stipulated in Rule XI of the York-Antwerp Rules or similar provision affecting general average.

4.6 loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel.

After the introduction of this clause in 1982, it was a subject of hatred by some stakeholders because it was felt to be onerous on the assured under an "all risks" policy since an unlawful detention of goods amounts to "conversion" and is a basis for a claim upon an all risks policy[39] but due to complaints trailing it, the London Market underwriters agreed to reduce the harshness of the clause in the standard forms negotiated with various trade associations.

Insolvency differs from financial default in that former is when one cannot pay his debts in full and includes where shipowners or operators still manage to continue trading. It is therefore wider than "financial default" .It has therefore been suggested that the intention of the draftsmen was to exclude all types of claims for recovery and forwarding of the goods arising from the abandonment of a voyage by shipowners or operators who run out of money whilst the voyage is still in progress.

4.7 loss damage or expense arising from the use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

This excludes not only the use but also the testing of weapons of warfare including nuclear devices and accidental discharges which contaminate a ship and its cargo. Such loss or damage can be covered and recoverable under an "All risks" insurance.

[38] [1890] 25 QBD 396.

Clause 5: Unseaworthiness and Unfitness Exclusion clause.

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 liftvan 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 un-seaworthiness or unfitness.

Clause 5.1 excludes liability if the assured or his servants are privies to the un-seaworthiness or unfitness of the vessel or craft of conveyance of the cargo at the time of loading the cargo onto the vessel or conveyer. Without the waiver in Clause 5.2 of the implied warranty as to seaworthiness, the assured would have no claim if the cargo is loaded on to an un-seaworthy vessel since the Marine Insurance Act provides that there is an implied warranty as to the seaworthiness or fitness of a ship in a voyage policy at the beginning of the voyage to the destination contemplated by then parties. Clause 5.2 is similar to the statutory warranty in the Insurance Act except that the warranty will not be implied if the cargo owner or his agents are privy to the un-seaworthiness or unfitness of the vessel.

Other exclusion clauses are war exclusion clause 6 and strike exclusion clause 7.

Clause 6-War Exclusion Clause:

6. In no case shall this insurance cover loss damage or expense cause by:

6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power.

6.2 capture, seizure, arrest or detainment [piracy excepted] and the consequences thereof or any attempt thereat

6.3 derelict mines torpedoes bombs or other derelict weapons of war.

[39] London & Provincial Leather Processes –v- Hudson (1939) 64 Ll. Rep. 352.

This clause replaced the old Free of Capture and Seizure [FC&S] Clause. Piracy which is here excepted may be covered under All risks insurance and the doubt earlier expressed as to whether sub-clause 6.3 actually fall within war risks has now been cleared by its inclusion as part of war risks.

Clause 7- Strikes Exclusion Clause.

7. In no case shall this insurance cover loss damage or expense:

7.1 caused by strikes, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

7.2 resulting from strikes, lockouts, labour disturbances, riots or civil commotions

7.3 caused by any terrorist or any person acting from a political motive.

It is worth mentioning that even though claims arising from the activities of terrorists or political activists including agitators and hijackers, which are excluded here have been included in the Strikes Risk cover.

In sum, whatever risk is excluded under clause B and C cannot be taken to have been covered by a cargo owner who takes out cargo clause B and C covers. This is not to say that the assured cannot get such excluded risks insured at all since he can take out such covers under specific insurance policies covering such risks. It is therefore advisable that a prudent Nigerian importer of goods should, based on the nature of risks usually confronted by such goods and the routes from loading port to the discharging port, take the cargo insurance covers that will sufficiently get him indemnified should there be loss or damage to his cargo.

Under Nigerian laws, an importer of cargo into Nigeria must insure the cargo with a Nigerian-based insurance company[40]. However, because of the penchant of Nigerian importers to cut corners, evade payment of full Customs duties, they usually undervalue or under-invoice their imported goods so that they could pay lower import duties, thereby under-insuring the goods. In the event of loss or damage, they either get under-indemnified or are their own insurers in respect of the uninsured value of the imported goods or they lose interest in pursuing indemnity from the insurers. It is also noteworthy that the Nigerian Shippers' Council whose statutory duties include the protection and guidance of Nigerian shippers, has through seminars and publications been creating

[40] Section of the Insurance Act, 1997.

needed awareness on the part of the Nigerian importers and shippers but it seems that there has been only a little change so far. Nigerian importers are either slow to come out and file cargo insurance claims in courts against insurers or do not come out at all because of the fear of the exposure of their illegal under-invoicing and under-valuation of their imported goods.

This is one of the causes of the dearth of decided Nigerian cases on cargo perils insurance and cargo exclusions that this writer discovered whilst writing this paper. This writer searched all well known Nigerian law reports and in particular the Nigerian Shipping Cases, and books on [marine] insurance by learned Nigerian experts/authors including the book recently written by Professor Olusegun Oyerokun[41], for decided cases on the subject-matter of this paper without coming across any relevant decided cases.

Other causes of the dearth of relevant decided Nigerian cases on the topic under discussion may be the ignorance by Nigerian cargo owners of their rights to file insurance claims and failure to seek legal advice or the failure by cargo owners to sue insurers for indemnification. It may also as a result of settlement of such insurance claims by insurers out of court or before the assured may think of going to court. Whilst this may be a sign of good claim settlement record by the Nigerian insurers and is in the interest of the commercial progress of the assured who does not want the settlement of his claim prolonged by court actions, this writer is of the view that it has led to the non-development of Nigerian Marine insurance law through decided cases on cargo insurance perils and cargo exclusion clauses.

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[41] Insurance Law in Nigeria [2001].