# Analyzing the New Institute Cargo Insurance Clauses of 2009 and its Harmonization with the Arabic Marine Insurance Legislations

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## Abstract:

**The aim of this paper is to discuss in details the new changes in the marine cargo insurance in particular and the new editions of the Institute Cargo Clauses of 2009 known as (l.C.C clauses) in comparison with the old editions of the 1982 clauses. The old clauses at that time were a radical change in the world of marine cargo insurance. The paper examines briefly the reasons behind the change that occurred in 1982 to better understand the recent changes of 2009. The paper also investigates the aims behind the 2009 changes carried out by the Institute of London Underwriters. This paper will also discuss whether the new changes came in favor of the insurers or the insureds. The method adopted by the researcher to tackle with the subject is the analytical and comparison study. The paper considers this matter and the effect of the clauses and harmonization of their wordings compression with the provisions of the English marine insurance ACT of 1906 and the Jordanian Maritime Commercial Law of 1972, which is very similar to other Arab concerned legislations. Finally, the paper will evaluate arrived at the following conclusions; 1- the changes in the marine insurance clauses designed to keep up with the new developments in the international trade and politics. 2- The intention of the draftsman was to create self-standing clauses, stating clearly the terms of the marine insurance contract. A**

**new balance between the insurers and the insured has been achieved, and in general the changes was in favor of the assureds. 4- the new versions of the I.C.Clauses may applied in the Arab marine insurance market without any contradiction the Arab marine insurance legislations.**

## 1. Introduction

The contract of insurance has not been mentioned neither in Islamic Sharia law nor in the judicial provisions magazine referred to as ''Al-Majallatu''(1). Thus, the contract of insurance is a new and demanding issue in the Arab legal regime(2). The origins of insurance and its primitive seeds can be dated back to the Latin and Anglo-Saxon legal regimes(3). The contracts of insurance, which have particularly been known in the Maritime commercial business and marine insurance were the basic of the insurance before they have been divided into the Insurance against Fire, the Properties Insurance, Life insurance, and other types of insurance.

Discussing the starting of the Maritime insurance could take us to even far further eras in the old history as some of the insurance types had been known in old civilizations for instance Mesopotamia (i.e. The Code of Hammurabi) and later of course to the Greeks and the Romans(4). Added to that, Insurance had become very well known to the Italian Lombardi merchants in Italy, who immigrated to the United Kingdom

(1) Al-Majallatu, is the first comprehensive civil and commercial law enacted by the ottoman government in 1877 and imposed as the civil law on the territories of the Ottoman Empire; see M Kalani, the commercial and banking encyclopedia Vol 1, Amman 2008, p 25.

(2) Insurance in its evaluated way was practiced in the Arab world in mid-Seventeenth centaury. It was parasitized by foreign commercial agents, and the first legislation concerning maritime commerce was issued by the Ottoman government in 1883 and was named the Ottoman maritime commercial law, which later was adopted by Egypt and kept in force until 1990. The first person to elaborate about insurance in the Islamic sharia was Imam Hanafi Ibin Abdeen who died in 1252.See Mustafa Kamal Taha, and Anwar Bondq, Marine Insurance, Dar Alfaker Aljamai, Alxandria 2005 P 14

(3) The origin of the marine insurance referred to the (Bottomary-foeus Nautcum) where some investor lend the charter or the ship-owner money to execute the marine voyage and the right of lender to restore his money depend on the succession of the voyage. See Mustafa Kamal Taha, and Anwar Bondq op.cit, p12.

(4) انظر: د. محمود سمير الشرقاوي، القانون البحري، دار النهضة العربية، القاهرة، ١٩٩٣، ص٩.

under commercial circumstances and worked in the Maritime insurance industry(5).

In England, the Maritime Insurance developed in the Lloyds Coffee House on the banks of the Tigers River, which was then an assembly for traders and ship-owners, where the endorsement of insurance subscriptions on the incoming and out leaving ships to and from Britain took place(6). Out of this coffee house, the industry of insurance has been evolved where traders gathered in the Lloyd association, which was really considered the biggest market for the Maritime insurance and the use of the policy of Lloyd's (ship and goods), known as (S. &G), to insure the ship and cargo together. This form of policy serviced and lasted for hundreds of years(7).

The English Maritime insurance act issued in 1906. Work continued in the Maritime insurance according to the historical Maritime insurance policy on the (S.G), but because of the short coming in the (S.G) in particular, the London market for Maritime insurance formed extra conditions to fill in the gaps that appeared in the insurance policy. These conditions were known as the institute clauses formed by the institute of London underwriters ILU(8).

In order to improve these conditions they were subjected to amendments for example the amendment which took place in 1963 to help working along with the old complex policy(9). The next appeal to change the marine insurance documents came in the form of issuing new conditions by London Institute in 1982, which included all Maritime insurance principles. The changes of 1982 were a radical change,

(5) Some of the specialized English books point that the German Hanza parasitized maritime Insurance, and that some of them immigrated to the U.K in the similar manner as to the Italian Lombardi merchants. See Cockerell, Lloyds of London- A portrait, 1985 p 21.

(6) See Carter and Falush,, The London Insurance Market, July [2007]. P.9.

(7) See.. Cockerell, Lloyds of London - a portrait, [1985]p.68

(8) The institute was established in 1882 to gather a large number of insurance company as a members. The institute aims to provide services for these companies and coordinating facilities for the wording of the clauses and conditions. Furthermore, the institute co-operates with Lloyds syndicates in problem affecting the insurance market in general. See Lloyd's key Facts, online 2010.

(9) The old insurance (S&G) policy with its complicated language and form evoked many problems and complaints particularly for those who were insured in the third world countries. See the Unctad Report of 1978. Infra, Section One.

attempting to create self-sufficient clauses and the use of the historical policy dropped out.

Taking into consideration the particular leading role of London market for insurance, as it has been followed by most of the world insurance markets in applying these clauses, many European countries have applied these conditions such as Sweden and Norway, as well as the Arab insurance markets which literary implemented the English formula of these conditions(10).

Recently in 2009, a very important amendments were applied to these clauses, which acquired an international character and spouse to be used in the Arabic marine insurance markets. Henceforth, the need to revise the amended conditions became urgent to see why and how these changes were accomplished and its effect on the Arab insurance legal framework.

## Questions of the study

1 - How can we evaluate the implementation of the old clauses?
2 - What are the reasons behind the modifications of I.C.C of 1982?
3 - What are the changes carried out in the new I.I.C of 2009?
4 - Which of the contracting parties benefit from each change in the whole structure of the clauses?.
5 - Do the provisions of the clauses contradict with Arabic marine insurance legislations?
6 - What is the researcher's final judgment of the new provisions of the 2009 clauses?.

## Hypothesis of the study

As a result of the English marine insurance market dominance, the MAR insurance policy of Lloyds and the attached I.I.C became as a lingua franca all over the world of marine insurance. Unfortunately, the marine insurance industry in the Arab world still does not have self-

(10) This can be evidenced from the traulation of clauses by the Arab federation of insurance of 1982, and the practical use of the clause by insurance company in many Arab countries such as Jordan,Egypt, Syria, Lebanon, Iraq, Kuwait, Bahrain and many other countries.
انظر أيضاً تاكيد استادنا د. مصطفى كمال طه وأنور بندق، التأمين البحري، دار الفكر الجامعي، الإسكندرية، عام ٢٠٠٥، صفحة ١٥.

sufficient documents(11). The Arab marine insurance market still adopts literally the Institute Cargo Clauses and there is a need to investigate the new versions of these clauses in order to see how much they are co insist with to Arab marine legislations, it also need to assess their future effect in the market in the view of some Arab insurance companies who still favored the old versions of 1982(12).

## Review of literature

The contract of marine cargo insurance based in the quality of institute cargo clauses choosed and attached to the policy which become not less than a cover with short guidance provisions(13). In the Arab world the estimated marine insurance expert Jaml Alhkeem was the first pioneer to discuss the version of the 1963 clauses to introduce it to the Arab marine insurance world. Unfortunately, the researcher did not find a new edition of his book dealing with the next version of the clauses(14).

The Arab estimated scholars(15), were also pioneers to explain the marine insurance principles and the legislation concerned. They also discussed the version of the clauses of 1963, and the next version of 1982 in their valuable books, but up to the researcher's best knowledge there is no new edition that discusses the new version of the cargo clauses. Nonetheless their valuable literature gave us great benefits and enabled the researcher to compare and analyze English scholars who discussed the marine insurance contract. Here, it is imperative to confess that the

(11) The Issue of not having an Unified Arabic Insurance was debatable issue at many of the Insurance seminars and workshops. Mustafa Kamal Taha Talked about the necessity of having our Arab own marine policy by saying " it is time to put a new maritime Insurance policy and Probably it is best to put this as a document module contract that is agreed upon by Insurance Companies and Insurance commotions in the Arab world. See Mustafa kamal Taha and Anwer Bondg, Op cit p 15. See also a paper discussed during the Arab Insurance and Maritime Transport held in Aqaba in 2007.Jordan Insurance Federation Library.

(12) The writer acquired information from the Jordan insurance Federation about the application of the new clause in the Marine insurance contract on goods carried by Sea.

(13) Lloyds policy usually contains the jurisdiction clause, the survey clause and requests to read the document and return it if it is incorrect.

(14) The last copy for Mr. Jamal Al Hakeem's book about maritime insurance in insurance companies Unions library is dated back to 1979.

(15) Such as Alsanhoury, Baheg Shookry Dr Ali Jamal Alden Awad, Dr Samir Sharkawy, Dr Ahmad Hosni, Dr Mustafa Kamal Taha, Dr. Hussin Ganaim, Dr. Tharwat Abdel Rahem, Dr Yakoup Sarko,Dr Hesham Farown and others.

English authors play in their court-yard as they are the innovators of the subject matter of this research(16).

The best English reference in marine insurance is Arnold (2010). In the 17th edition of 1 supplement, the Authors; Jonathan Gilman Qc and Professor Robert M Merkin discussed the marine insurance contract in the view of the new versions but referred to the marine insurance Act of 1906.

Our The estimated professor Rhidian Thomas in his new edition book - The modern Law of Marine Insurance Volume 3 (2010)- highlight the changes in the clauses. He said that the clauses have to be looked after from time to time, to respond to the developed needs of the market and enable the London market in the forefront of marine insurance world(17).

Some short articles that were written by British insurance practioners appear in the internet search comment on the in the linguistic change of the clauses in a way of introducing the clauses to their customers, without any depth in literature or indication to old authorities of marine insurance contract.

## Significance of the study

Recently in 2009, very important amendments were applied to these clauses, which acquired an international character and spouse to be used in the Arab marine insurance markets. Henceforth, the need to revise the amended conditions became urgent to see why and how these changes were accomplished and its future effect on the Arab insurance legal framework.

Since the application of these clauses in the Arab countries and because of the dominance of the British Maritime insurance market over the Arab insurance markets(18), the researcher found it very important to study these new changes in the maritime insurance documents in

(16) Most of the principles of marine insurance were codified upon the old cases and how it resolved by the British judiciary. see also Brown, Marine cargo claims (Vol 2) cargo practice London 14th ed 1993. p 19.

(17) Rhidian Thomas and others, The Modern Law of Marine Insurance, Vol (3) 2010 p.99

(18) انظر: عبد القادر العطير، الوسيط في شرح قانون التجارة البحرية . دارسة مقارنة . دار الثقافة، ص ٥٩٩.

compresion with old clauses of 1982. Also the researcher, tried to highlight the efficiency of the adjustment and revision made to the wording of the new clauses and whether the changes were in favor of the assureds or the insurers. Moreover it focused on whether the provisions of clauses contradict with Arab marine insurance legislations.

This problem under investigation has never been discussed in the Arab world before- to the best available knowledge. This makes the study significant, because it may fill a gap in the literture of marine insurance. It also may benefit other future researchers in Jordan or in the Arab countries in general.

## Method and procedures

Jordanian marine Insurance legislations are regarded as a model of the Arabic legislations and as a reference of applying the clauses when forming the marine insurance contract. Also the researcher has to confess that the principles of marine insurance encapsulated in the clauses had been built over hindered of years upon the judgments of English courts in general. To achieve the purpose of the study, which is the investigation of the new modificated I.C.C of 2009 according to the questions said before, the researcher adopted the analytical and comparative method between the old and the new clauses together with reference to the old judicial authorities in one hand and between the provisions of the clauses with some of the Arab marine insurance legislations in the other hand.

This research was divided into three following sections:-

The first section provided a short introduction of the London Maritime Insurance market which is considered the real producer and overseers of the I.C.C and a review of their historical developments as well as the changes applied to them.

The second section aimed at introducing the reasons behind the clauses change issued in 1982, and the circumstances, which led to the amendments that have been applied to it, and the emergence of 2009 clauses.

The third section meant to show the changes that took place to marine cargo insurance and illustrate its direct results. This section also

refers to the relation of the Arab marine insurance statue provisions with the clauses of 2009. The section ends with the final outline.

## SECTION ONE

### 1.1 London marine insurance market as producer of the clauses.

The city of London still leads the world with one commercial activity, which is the marine insurance business(19). The long-standing of marine insurance practice, which has grown over a period of more than 300 years with emergence of Lloyds of London, played the central role in enabling the London marine insurance market to gain a worldwide dominance and still have growing reputation in the world of marine insurance and re-insurance business(20). The major feature of the London insurance Market is its international scope in operating marine insurance(21). This is because the underwriters of Lloyds are national and international investors who practice insurance and re-insurance through specialized syndicates. Most of the syndicates are specialized in certain classes of risks or in particular types of Insurance(22).

Although the Lloyds market is considered the largest marine insurance market in the world, there are many national and foreign companies practicing insurance side by side with the Lloyds syndicate. In

(19) The London market is the only place in the world where 20 of the worlds largest insurers and reinsurers are represented. Gross premiums on the market were estimated at 22 billion in 2004. Between 10 percent and 15 percent of the worlds large industrial insurance is placed on the market and, in certain key classes of business, such as marine, it is reported much higher. See www.jua.co.uk/and London market key facts. 1 October 2006. Published jointly by Lloyds Market association and the International underwriting Association (available at www.Imal-loyds.com/).

(20) In the case of Queen Ins Co. v Globe & Rutgers Five In-co. where the deciding judge Holmes said " There are special reason for keeping in harmony with the marine Insurance Law of England, the great field of this business " See Bugloss, marine Insurance and general average in the united states, merry land 1991 p.4.Lloyds is licensed to underwrite business in 79 territories and can accept risks from over 200 countries and territories. Read the latest news on Lloyds at www.lloyds.com/newscentre.

(21) A major feature of the London insurances Market is its international scope in operating Foreign non-life insurance and reinsurance. There quarters of insurance companies are foreign owned. See Carter and Flush The London insurance, op, cit p.24.

(22) For example there are syndicates which specials in covering war risks, or in Cargoes forwarded to middle East Area, or kind of goods such as livestock or fruit etc. See Cockerel, Lloyds of London- portrait, [1985].p.68. See also Lloyds key facts 2010 at: www Lloyds.com- online only.

addition to the Lloyds' and companies the Mutual Indemnity Association, which was founded over 100 years ago, was developed into the so-called protection and indemnity clubs. The rules of the P&I club define the cover on cargo and the indemnity for loss or damage to or responsibility for a cargo transported(23).

Cargo insurance in the London market is affected by two main methods; either "facultative or under an "open cover system. The difference between these two methods is that, in the first one the risk of insurance transactions, especially those effected at Lloyds conclude by accredited Lloyds brokers. The essential instrument to cover the risks insured is the marine insurance policy together with Institute Cargo Clauses. It is discussed separately and the underwriter, weighing his judgment and options decide whether or not to accept the risk proposed by the brokers. Brokers in London insurance market play a vital role in effecting marine insurance contract(24).

Conversely, open cover has a compulsory character by which the merchant must declare all relevant shipments and underwriter undertakes to cover all shipments declared to him(25).

### 1.2 The old (ship & goods) policy

The form of the policy used through the history of marine Insurance market in London called (ship & goods) policy known as (S&G). It is set out in first schedule in marine Insurance Act 1906, and it was adopted in its final form by Lloyds in 1779(26). The S&G policy form consisted of three interrelated standards; though distinct subjects; the insurance or risk insured against; sue and labor clause including the waiver clause; and

(23) Hill, Robertson, and Hazelwood, Introduction to P&1, 2 ed 1996 p.85.

(24) Broker in the London market could be, either, Lloyds Brokers and non Lloyds Brokers. Both are members of the British insurances Brokers association see Merkin (The Duties of marine insurance brokers, in the modern law of marine insurance (BIBA), [1996] by Rhidian Thomas. P.277.

(25) Most of the insurance transactions, especially those effected at Lloyds are concluded by accredited Lloyds brokers. The essential instrument to cover the risks insured is the marine insurance policy together with Institute Cargo Clauses. See The Duties of Marine Insurance Brokers By Professor Robert M. Merkin-The Modern Law of Marine Insurance, Edited by Dr Rhidian Thomas. 2010 p 294

(26) Howard N. Bennett, The law of marine insurance, Oxford 1996. p.3: see Goodacre K, Goodbye to the Memorandum. 1st ed [1988]p.13

the memorandum. It also provided the attachment and duration of the risk. As far as the memorandum is concerned, it purported to relieve the insurers from having to deal with partial loss claim below a certain percentage except in some cases as provided in the policy of marine insurance.

The form of ship and Cargo (S.G) policy drafted by underwriters for both ship and cargo insurance reflected the commercial background in the eighteenth Century. However, the continuous development of international commerce and the shipping industry towards the end of the eighteenth century requested demands for various types of cover to cope with modern perils with which the S.G policy was not capable of dealing.

The inefficiency of the S.G policy has been revealed in many cases and was severely criticized by judges and been described as "a very strange document as we all know and feel"[27]. As ship and cargo remained in service until the end of 1981 together with I.C.C clauses Issued in 1963, the criticism of marine insurance increased all over the world.

### 1.3 Historical Development of I.C.C Clauses.

Despite those harsh judicial criticisms, which focused on the linguistic structure of the S.G policy, the underwriters were unwilling to change the time honored policy or even to simplify its sonorous phrases[28]. The underwriters were afraid that any attempt at radical revision would initiate a flood of litigations to clarify the concept of the new phrases and terms. The earliest attempt to revise the clauses was made by sir. Douglas Owen, who in 1882 published a selection of marine "insurance Notes and Clauses[29]". Two years later the Institute of London Underwriter was established for the purpose of systematizing

(27) The comment referred to Lord Mansfield who is considered the founder of commercial law, see [1812]4T aunt 367.380.

(28) This cause was confirmed by Chris Hewer, A climate by compromise [1983] [June] policy market 12, " It is unlikely that the London market would have changed so much as comma in the old clauses if left to its own devices, but with the entire Third World breathing down its neck, it may eventually have been a case of change or go under".

(29) Arnould, Law of Marine insurance and Average, 1st supplement to the17th edition Robert,Merkin, JonathanGilman,Joseph Arnould, 2010 p 21.

and publishing a different standard set of clauses to meet the need of the market. The task of drafting was assigned to the Technical and Clauses Committee.

The first Institute cargo Clauses (which took their names from the institute of London underwriters) were introduced in 1912. The I.C.C of 1912 was produced in three different forms of cover: Institute Cargo Clauses "All risks "the I.C.C with Average (hereinafter F.P.A) These three forms remained in force up to 1963, and were identical in form except for clause number 5[30].

Accordingly, instead of updating a structure of (S.G) policy; the underwriters adopted a policy of temporary treatment, whenever circumstances revealed the inefficiency of the (S.G) policy form. In fact they designed a series of standard clauses for particular types of risk[31].

This treatment accomplished through lengthy amended clauses were designed on a separate slip attached to the S.G policy form or printed in the original policy itself. Hence, it became customary for additional clauses to be affixed by gum to the S.G policy form, with the result that both documents had to be looked into in order to ascertain the extent of the cover intended and to clarify the liability of the parties[32]. Example of these clauses are inchmaree clause, Ranging down clause, and free of capture & Seizure clause hereinafter (FC&C)[33]. However, the result of this approach in dealing with new incidents was not satisfactory. The document turned into some complexity and became more difficult to be understood[34].

In 1963, the London market produced a new edition of I. C. C with the same title. No doubt that the I.CC clauses of 1963, (The I.C.C of 1963) were advancement in that they brought greater clarity because they

(30) See also Brown, Marine cargo claims (Vol 2) cargo practice, op. cit p. 98-99.

(31) Howard N. Bennett. Op.cit, p.103.

(32) Ibid. at 100-102.

(33) The above series of clauses was designed as result of unusual cases, or of circumstances where the failure of S.G policy had been revealed. the inchmaree clause was adopted following the decision of the case of Thomes Mersey marine Ins.co.Ltd v. Hamilton in 1887.

(34) In the leading case (The Salem 1981), May L.J criticized the language of the policy as " the mystique which the subject matter of insurance has acquired".See Arnould Vol 111, 17 edition, Published by Sweet& Maxwell 15 Dec 2010.

were worded in contemporary language, and they extended the scope of the cover. For instance, the transit clause (Cl 1)of 1963 clauses provided for extended warehouse-to-warehouse cover(35). Also the free capture and seizure clause (Cl 12) and the strikes, riots and civil commotion clause (Cl 13), greatly affected the list of perils insured against.

The "all risk" form of 1963 extended the cover by embracing all accidental loss irrespective of percentage, except where it was proximately caused by delay or inherent vice or by the nature of the subject-matter insured(36). However despite these improvements, the cargo insurance package did not offer enough solutions to the inadequacies of the old cover in that the assured had to refer to various over-complicated documents. The basic one was the (SG) policy form with its complexity and its antiquated terminology, especially for those who were not familiar with practice of London marine insurance market(37).

**1.4 The I.C.C of 1982 and the radical change.**

The structure and condition of S.G policy with the frequent confusion borne by the assured provoked a growing stream of complaints and demands, with a wide-spread international dissatisfaction coupled with critical view of the English judiciary toward the S.G policy. It had been described as an obscure, incoherent and a strange document(38).

All of these reasons, found their way to the London insurance market. It became clear that some efforts should be made toward a simpler and more comprehensive marine insurance package(39).At the time of these circumstances, the hard shock to change was delivered in 1978 by the UNCTAD legal secretariat report(40).

(35) Brown, Marine Insurance (Vol 2) cargo practice- London [1985]. P. 107.

(36) See clause 5 of I.C.C. of [1963].

(37) See Omay, o p. Cit, at p. As he said "the international debate which took place in the working Group of Experts acted as a catalyst with regard to the timing of the abandonment of S.G form.

(38) As Mocatta J. In the case of Anita stated "The present method certainly as regards war risks is " tortuous and complex " to the extreme.

(39) Anthony George, The new Institute cargo clauses 1986 L.M.C.L.Q. p438.

(40) The UNCTAD Report commented on the fear of change as follows: "Although the argument merits consideration the immortalization of an antiquated and obscurely worded document as being immune from any improvement is excessive and unnecessary, the unyielding resistance to any change of the SG form is unfounded".

Criticism of the de facto marine insurance system from all over the world especially the developing countries(41), and the conference of the UNCTAD in Geneva came up with its remarkable report(42). (Free Particular Average Clause) and (with Average clause) were criticized for their complex structure and S.G policy was criticized for its complexity and its obscure terminology and antiquated wording such as ''letter of mart'' and ''counter mart'' and ''rovers''.

There is no doubt that the UNCTAD Report put more pressure on the London marine insurance market. In fact, the London marine insurance market swiftly considered these arguments for change(43). The task of reviewing the English marine institute legal regime was given to joint working party under the auspices of the institute of London underwriters.

By January 1982, a new policy form coupled with new standard had been introduced, the achieved work reflected in a very constructive marine insurance package free from obscurity and verbiage. The draftsmen tried their best to create simple modern language and self-evidence clauses(44).

### 1.5 Basic Features of the 1982 Changes

The abandonment of the SG policy form itself, together with its memorandum may be considered as a tangible step towards modernizing and updating the terms of cover. The persons insured, judges, scholars, Third World Insurance companies will no longer be confused with problems in the interpretation of the meaning of the archaic and obscure words in the SG policy and the complex interpretation of the

(41) The number of the developing countries which completed the questionnaires organized was 45 out of the 68 which articulated.

(42) United Nations Conference on Trade X Development Report No TD/B/C. 4/15/27 (Legal Secretariat)[1978].

(43) May refer to the long survival of the S.G policy form: it was largely familiarity and habit that had sustained the S.G policy for more than two hundred years'' Omay, op. cit, at p.9. See also the modern law of marine insurance [1996], ed by Rhidian Thomas, p. 48.

(44) It has been suggested that most obvious effect of these changes are the disappearance of archaic obscure and in places obsolete wording contained in the old policy. See Arnold, vol 111, Para 9 p.8.

memorandum attached(45). The step was taken when the draftsman of the new clauses used simple language and selected a range insurable risks that were tailored to contemporary words used in the marine insurance industry. Some misleading terms have been omitted such as lost or not lost , others have been replaced, such as sue and labour . At the same time new words for the sake of clarity and slight extension of cover, found their way into the construction of many clauses. For example, stranding was supplemented by grounding , and sinking by capsizing(46). The inclusion of preparation of the subject matter, served to solve the ambiguity meaning between stowage and packing.

The old war and strike exclusion clauses have been subjected to considerable change. For the first time war risks have become an independent insured risk in a policy of marine insurance(47). Piracy as a risk has been transferred to the marine perils covered under the all risk clause in form of the clauses. Totally new clauses have been introduced such as Insolvency or financial default of the ownership. This has almost been achieved by simplifying the terms used and organizing the terms of the cover in one document.

However, nothing is complete. Through the last two decades developments of international trade practice and Law has emerged and demands have been increased to place cargo Insurance, more suitable, and fair for international sellers and buyers(48).

(45) Many developing countries throughout the world adopted marine Insurance policies similar to S.G policy, so that the effect of S.G form become part of common currency of marine insurance world-wide. For example in many Arab marine Insurance markets S.G policy form was used as in Jordan and Kuwait or translated into Arabic. A specific example is the policy form used in Kuwait in the leading case of Amin Rasheed.

(46) This is a welcome addition for no longer has it to be ascertained whether grounding in some cases can be considered as stranding, see Mc DougleS v. Royal Exchange Assurance Co. [1816] 4 cam p 283.

(47) The new reforms and clauses are free from technicalities which require familiarity on the part of the reader with the M.I.A or with the practice of marine Insurance, See Arnould, Vol 111.op.cit. para. 9 p.9.

(48) The incoterms issued in 2000, has been changed and the chamber of commerce issued the new version " Inco terms 2010 which reflect the profound trends and change that have taken place in global trade in international commercial practices since 2000, see International chamber of commerce web-sit at 11-5-2011.

## SECTION TWO

### The New Institute Cargo Clauses of 2009

### 2.1 The Reasons for Change

There is no doubt, that the introduction of the new MAR policy form, and the accompanying of A, B and C clauses of 1982 was an important historical development in London marine insurance market. However, according to the logic of nature nothing remains static. After 27 years of this radical change many modern international trade and transport, have been subjected to a new concept and change(49). In addition to the developments in the world trades in method and innovations, a new unpredictable phenomenon, such as the rise of the terrorist acts, backed by different organization and motives has been raised. Similarly the piracy risk became more common in some areas of the world and the increase of maritime fraud became parallel with the increase of international sales of Goods and their associated commercial credits(50). All yielded a demanding need for adequate change.

The I.C.C clause of 1982 which was in use for more than a quarter of century revealed in its turn some ambiguity in the meaning of some terminology. Some clauses missed the fair balance between the interest of the insured and the interest of the insurer(51).

The attempt to deal with troublesome situations of the insolvency of a carrier and in dealing with increased use of land transport, the unseaworthiness of a vessel or unfitness of the land conveyance exclusion in clause 5 was not successful and market usually adopted the parallel provisions in the trade clauses. The draftsman ignored the position of the innocent assignee who buys under a CIF(52). This issue was the most

(49) The researcher sees the Developments over the last three decades in legislation, case Law and practice, incoterms new verisins2010, development in regard to Bill of lading, the governing Law of the documentary credit version 600, the enactment of the contract (right of third party) Act 1999. All these new innovators designed to combat international fraud call for a new version of the I.C.C. see also John F Wilson, Carriage of goods by sea, Longman 2001. p. 2.

(50) Thomas R (ed) The Modern Law of Marine Insurance, London (1st ed 1996) p. 128.

(51) See R Thomas, The Modern Law of Marine Insurance Vol 2010 p 108. See www.iccwbo.org/incoterms/id3040/index.htm

(52) The international Insurance & Banking Forum, op. cit. paper discussed by Dr Mohmmad Jawad Haded(CO) of the Jordanian Commercial Bank.

unfair application to the insureds in the Arab world who may buy goods while it is carried by sea(53).

Moreover, the London marine Insurance market prepared for overhaul and change in the construction and wording of the provisions of the I.C.C of 1982. The commercial custom and practice in marine insurance and transport by sea developed in courts pointed out the unfair and an increase number of legal disputes between the marine insurance contracting parties(54).

Therefore, and upon these reasons, the London Marine Insurance market in 2006 started to encourage the Lloyds Market Association (LMA) and the joint cargo committee (JCC) to perform a questionnaire to the partners throughout the world(55).55 They obtained data that disclosed demands to follow a more fair policy between sellers and buyers. Also the insurers expressed their concerns against the increase of volumes and methods of the terrorist acts were the religious motive that was beyond the acts especially after 12 September 2002.

The task of reviewing the English marine Insurance legal regime was given to a Lloyds market Association (LMA) and joint cargo committee (JCC) king party) who took the task to analyze the responses of practitioners in marine Insurance from all over the world. The final set of the I.C.C clauses were ready by the end of 2008 and in January 2009 the new I.C.C became available for use in London market and in many countries. The amendments can be regrouped under six heading subjects as the follows.

### 2.2 The last forms of the clauses

The diversity of the clauses designed in order to respond to the needs and choices of the insured regarding the nature of their marine adventures and the quality of their cargoes. The Institute of cargo clause

(53) مؤتمر التامين و النقل البحري المنعقد بالعقبة عام ٢٠٠٧.

(54) In the leading case of The Moonacre [1992] 2 Lloyds Rep 501, the court developed a more flexible interpretation of insurable interest, regardless of the narrow sanitary provision. The same as in the case of the Vasso [1993] 2 Lloyds Rep 309, where it was argued that the effect of the minimizing loss clause (16) had the same effect as section 78 of M.I.A of 1900.See also Fraser River v. Can - Dive Services [2000] Lloyds Rep 199 158, 160.

(55) See institute cargo clause 2009 - Brief comparison of the 1982 and 2009 clause - Lloyds Market Association (LMA)- provides. http://www.Lloyds.com.

of 2009 was divided as the previous version of the 1982 clauses. Their categories come in order to respond to the needs of the insured and the costs of their insurances. Thus, the form of A set of clauses are designed to cover all risks of physical loss or damage to the subject matter insured, whereas B clauses are designed to cover intermediate perils, and the intention of C clauses is to cover major casualties. Each set consists of nineteen clauses Listed under eight general headings(56).

They are identical in content except for the risks clause (cl 1) and general exclusions clause (cl4) the risks covered under the B and C clauses were separated into two main groups according to whether they are reasonably attributable or proximately caused test applies to sub-stantiate claim. The differences in the two clauses reflect the extended capacity of each of them in respect of the ambit of cover provided. The chart bellow provides more data.

**Risks in B and C under Cargo Clauses of 2009**

| Risk | B clause No | C clause No |
|---|---|---|
| **Loss or damage reasonably attributable to:** | | |
| Fire or explosion | 1.1.1 | 1.1.1 |
| Vessel or craft being stranded, grounded, sunk or capsized. | 1.1.2 | 1.1.2 |
| Overturning or derailment of land conveyance | 1.1.3 | 1.1.3 |
| Collision or contact of vessel. Craft or conveyance with any external object other than water. | 1.1.4 | 1.1.4 |
| Discharge of cargo at a port of distress | 1.1.5 | 1.1.5 |
| Earthquake, volcanic eruption or lightning | 1.1.6 | uncovered |
| **Loss or damage caused by:** | | |
| General average sacrifice | 1.2.1 | 1.2.1 |
| Jettison | 1.2.2 | 1.2.2 |
| Washing overboard | 1.2.2 | uncovered |
| Entries of sea, lake or river water into vessel, craft, hold. Conveyance, container, lift van or place or storage. | 1.2.3 | uncovered |
| Total loss of any package lost overboard or dropped whilst loading on to, or unloading from. Vessel or craft. | 1.3 | uncovered |

(56) See the appendix 1.

### 2.3 Amendments in Language and Terms

It seems that the common use of I.C.C world-wide especially in some parts of the world, where practitioners are not familiar with English language imposed a pressure on the London market to reconsider certain terms which may be subjected to a legal litigation as some term has been acquired precise definition(57). That is what happened when the draftsman replaced the words "goods" and "cargo" by the words "subject-matter insured", as goods and cargo cannot embrace all the types of cargoes insured. The same as to the word (underwriters) in clause 17 which had been derived from the common practice in Lloyds coffee shop. The term did not describe all kind of insurers, where some companies cover the risks completely, rather than to cover a slice of the whole insurance. In fact to satisfy the insurers the draftsman replaced the term (underwriters) by the word insurers, which is more common and clear, especially in the developing countries. The word "insured" has been defined under clause 15 of I.C.C (A) all risk clause to connect the person whom the mean of insurance was affected or assigned. In the same track the word servants Included in clause 4.3 did not express the real linguistic meaning, a part of its uncivilized lateral meaning, it may invoke legal dispute. By replacing it by the term employees " "they gave more accurate meaning.

The same as the term (contract of affreightment) in clause A which had been replaced by the term (contract of carriage). Also, the word "arising" in clause 4.6 replaced by the word "caused by". Some obscure terms such as (proximately caused) (in clause 4.5) were omitted and dropped. On the other hand new terms needed to respond to the new extended risks have been added such as in clause 4.7 dealing with atomic risks, the draftsman added the word "device" in addition to weapon and the term caused by, supplemented by "directly or indirectly"(58). The archaic wording in clause 3 (This insurance is extended to indemnify the insured rewarded with straightforward meaning and become applicable in all three sets of clauses as the following: (This insurance indemnifies the assured...).

(57) New Market Investment Corporation V. Fire mans Fund Insurance company [1989] the term terrorism had not been defined in this case for the benefit of the jury as a matter of law.

(58) See institute cargo clauses 2009, appendix 1.

### 2.3.1 Amendments in the Exclusion Clauses.

It seems that exclusion clause (Cl 4) was subjected to an extensive amendments in all sets of the clauses related to the commercial developments and custom of trade. The responsibility must be determined clearly and fairly, whether be in the interest of the assureds or in the interest of insures.

### 2.3.2 Insufficiency or Unsuitability of Packing or Preparation of the Goods.

The first amendment belongs to the sub-title clause cl 4.3 which dealt with the insufficiency of packing or preparation. In the old clauses of 1982, loss caused by insufficient packing was not covered. Some of the old authorities considered packing as part of the subject matter insured(59), therefore excluded as an inevitable loss and fill under the Inherent vice losses(60). In the introduction of I.C.C 1982, the draftsman solved partially the implications dealing with problems when the draftsman distinguished between loss due to defective packing and loss caused by inherent vice. But it remained part of the problem as to whether the loss, damage or expenses were caused by the unsuitability of packing which has to be defined on the basis of the fact in each case. It necessitates the market, taking into account the nature of the goods, the method of transportation, and how the cargo was described in the policy(61) the charters who in most cases ship the goods without the control of the assureds. This creates an unfair situation for a consignee under a CIF contract as he has no control over stowage matter. ARNOLD refers to the assureds servants, and according to him servants are the servants of the claimant assured(62).

Furthermore the term ''preparation'' in the clause has an independent meaning which is different from packing or stowage as

(59) See Brown V.Fleming [1902] 7 com cas 245. It was held by Bingham J, that insurers were liable to compensate for loss of 228 cases of whisky bottles including the cases in which they were packed, as being part of subject-matter Insured.

(60) F.Brek & co.Ltd v. Style [1955] 2 LIL Rep 382.

(61) Crime, Insurance Cargo in the 1990 p. 120; see also the style V Berk [1955] 2 LIL Rep 382.

(62) Arnould suggests that the provision has a narrow scope in that it will not extend the instances where the packing of containers is done by agents or independent contractors. See Arnold, Vol 111.para 215.p.138.

the clause provides " unsuitability of packing or preparation presumably " preparation for the purpose of clause 4.3 applies to the process before loading and inception of transit.

This is no longer a need to consider the clause now limited only to the case when the goods are packed by the assured or their employees. This change favored the assured, and responded to the assured needs that may buy goods on CFR or FOB terms and arrange insurance rather than letting the seller to arrange it.

### 2.3.3 Insolvency or Financial Default of the Owner.

The reason behind the introduction of (cl. 4.6) in the old clauses of 1982 is to discourage the assured from shipping his goods on a vessel whose operator is in financial difficulties(63). It was applied strictly to any loss suffered to the goods or expense incurred by the assured, arising from the carriers insolvency or financial default of the owner. But in the light that the custom in the international trade is that innocent assignee who buys under a CIF contract must not be responsible as he did not choose the vessel. This implication led the market to compensate the unfair position of the assured by adopting the compensative provision in the Commodity Trades Clauses(64). Accordingly the clause amended to make its operation conditional upon the awareness of assured of the difficult financial position of carrier at the time of Lauding.

Such a "draconian"(65) exclusions clause brought sever criticism from brokers, shippers and innocent assureds. As the amendment of the clause aims to create self-evidence clause, the draftsman limited the effect

(63) The referee to financial default is, probably, aimed a circumstances where the Carrier uses the goods as securely for outstanding financial liabilities, perhaps leaving the goods at an intermediate port so that his vessel may be relapsed from liability for port dues, see also the Mandarin Star [1969] 1 Lloyds Rep.p293. Where a master of a vessel acting on behalf of ship owner had pledged cargo in order to pay the charter hired.

(64) The provision of the Institute commodity clause 4.6 is "Loss damage or expenses caused by insolvency or financial default of the owners managers charters or operators of the insured on board the vessel, where the Assureds are aware, or in the ordinary course of business should be aware that such insolvency or financial default could prevent the normal prosecution of voyage. This exclusion shall not apply where this insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract".

(65) Chris Hewer A climate of compromise Policy Market June 1983 p.12.

of this exclusion to only if the assured was aware, or should have been aware of such insolvency or financial default. Furthermore, the exclusion will not operate where the cargo has been purchased and the policy assigned to buyers acting in a good faith.

### 2.3.4 Nuclear Fission or Fusion.

The third amendment in the exclusion clause belongs to nuclear fission and / or fusion exclusion in sub-title clause (4.7), the new wordings of the clause widened the exclusion and fill in interest of the insurers and go consistently with the increase of nuclear activities and probable political conflict, especially where a new nuclear state joins the nuclear club(66).

The wording widened the effect of the exclusion when the loss, damage or expenses caused or advised directly and indirectly from the use of weapon or device employing atomic or nuclear fusion. The new words directly or indirectly, and the addition of the word'' ''device'' alongside to'' ''weapon'', widened the exclusion, favored the insurers. Obviously the word ''use of ''any weapon of war '' or ''device'' should not be understood as being confined to nuclear or atomic weapons in war time.It is likely that the application of the clause is envisage for peace time, because the use of such weapons in war time is excluded under the war exclusion risk clause. The words directly or indirectly may mean that contamination by radiation or by explosion in a nuclear power station manufacturing these weapons would be excluded by the clause because the words employing atomic or nuclear fusion refer to '' caused by or arise from the use of '' in time of peace(67). Therefore, loss, damage, or

(66) Apart from the great nuclear five states, many other countries conducted nuclear testing including: India, Pakistan, North Korea and Iran. Brazil and Turkey also thought to have nuclear ambitions. See Jayne Lyn Stahl, Huffpost world, The nuclear club, site http:// www.huffingtonpost.com.

(67) Costain-Blankevoor U.K ltd v. Davenport (The Nassau) [1979] 1 Lloyds Rep.p395 where it was held that total loss of a derdger at the end of the world War II is a marine risks rather than a war risks, because the way in which the ammunition was dumped in the sea was not an act of war or warlike operation. It was a peaceful act covered. See 1 Lloyds Report. p 395. The researcher world expect the a similar case under the new clauses would be decided as a clear exclusion not covered, because the new version of the clauses states that: if the loss arising directly or indirectly.

expense caused by or arising from testing nuclear weapon or device without hostile intent is not covered(68).

### 2.3.5 Amendments in Unseaworthiness and Unfitness Exclusion Clause (cl 5)

One of the general principles of marine insurance is that a ship-owner who contracts to carry goods by sea thereby warrants that the ship in which he proposes to carry them shall be seaworthy in the ordinary sense of the word. That is to say, It is not enough that she shall be tight, staunch, and strong, and reasonably fit to encounter whatever perils may be expected on the voyage-but also that both the ship and the furniture and equipment shall be reasonably fit for receiving the contract cargo and carrying it across the sea. The Latter obligation, which is sometimes referred to as a warranty of seaworthiness for the cargo(69).

Unseaworthiness and Unfitness exclusion clause (CL 5) has been modified in the interest of the assured, because the old the exclusion clause of 1982 applies when the benefit of insurance has been assigned to a new buyer of the subject-matter insured acting in good faith(70).

The clause has been amended to limit the exclusion effect in relation to unfitness of vehicles or containers to cases where the assured or their employees are aware to such unfitness. The clause limits the exclusion in the marine transport section, as the exclusion comes into effect only when the assureds are privy to a vessels Unseawovthiness at the time of loading(71).

### 2.3.6 The Amendment in Terrorism Exclusion Clause (clause 7).

Except the risk related to the act of terrorism all the risks under the war and strikes remained untouched; The reason behind the modifications of this risk is to clarify causes and to make harmony with UK terrorism act

(68) Grime, op. cit. p. 121- See also Hudson and Allen where they suggest that exclusion would apply even where a nuclear device is intended to form the basis of a weapon. Hudson and Allen. op cit p. 20

(69) Elder, Dumpster & co., Ltd v. Paterson, zoc honis & Ltd [1924] all E.R.Rep. 135 where J.Viscunt Cave confirmed the meaning of seaworthy established by lord Ellenborough in 1804 - see EHardY Ivam, Case Book on Carriage by sea. London 4 the ed 1979. P.1

(70) Arnould, Law of Marine insurance and Average, 1st supplement to the17th edition Robert,Merkin, JonathanGilman,Joseph Arnould, 2010 p 298.

(71) The amendment confirm the argument invoked by Arnold, that clause 5 should be clear and understood that the knowledge of ship-owner, of shipping agents, of stevedores, or container operators will not ordinarily effect the assureds rights recovery under the policy.

aftermath the September 11th of the terrorism attack. The new amendment also reflects the political climate and tries to satisfy the concerns of insures. The clause widened the operation of the exclusions as the definition of the terrorist act has been given a wider scope(72). It embraces any act that may be committed by any person acting on behalf of, or in conjunction with any organization which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted. This means that actions of a lone terrorist fill outside the scope of the exclusion. Apart from expanding the definition terrorism term the clause widened the exclusion to embrace, not only act caused by any person acting from a political motive., but also by any person acting from ideological or religious motives. This may coincide with natural linguistic meaning provided by the Oxford English Dictionary(73). The act is not confined to the use of traditional weapon. The concept of terrorism concedes with the American judiciary view point, where the American jury held that the poisoning by cyanide of cargo of grapes shipped to the United states in order to protest about suffering of the poor children and about economic injustice in Chile was an act of terrorism(74).

### 2.3.7 Amendments to the Transit Clause (clause 8).

In the transit clause two points were amended, both of them are in favor of the assured. The first one is connected with commencement of the insurance. The old clauses of 1982 the insurance attaches "once the goods insured leave the warehouse or place of storage", that means the insurance did not come into effect during the loading of goods. By the new transit clause, the insurance attaches "within the warehouse or place of storage when the goods are first moved for the purpose of the

(72) According to the prevention of Terrorism Act of 1980 terrorism means " Terrorism means the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear. The editors of Arnold (Vol 111) consider that such a definition is worthless as the normal meaning must be the only one to be considered.

(73) Oxford English Dictionary defines terrorism as " a policy intended to strike with terror those a against whom it is a adopted, the employment of methods of intimidation" See also Miller who considers that terrorist act may be performed by different sects and extreme religious or Miller, M gives some examples of these groups such as the Baader Meinoff group in Germany. Tamales forces in Seri lanka, Al-Qaada in Afghanistan will be considered the same, where political and religious motive behind the Tragical terror.

(74) New Market Investment Corporation V.Firemans fund Insurance.

immediate loading unto, or into the carrying vehicle or other conveyance for the commencement of transit". The result of this modification is that the subject-matter became covered if any loss occurred in the warehouse at the time of loading of the conveyance to be used for the insured transit.

The second point regarding the termination of insurance, the amendments expanded the duration of cover instead of termination of the insurance once the goods delivered to the final warehouse as the case in the old clause. The new clause extended the duration of cover until a completion of unloading from the carrying vehicle at the final warehouse. Such amendment responded to the need of the brokers who used to work in the wording and try to extend coverage or include loading and unloading operations.

### 2.3.8 Amendment to Change of Voyage Clause (clause 10)

Change of voyage is defined in M.I.A (1906) as: 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(75).

The reasons behind the amendments of the voyage clause has been manifested in two points: The first one is for clarifying purpose when the draftsman removed the misleading term (held cover) which may be borne in the mind of the assured that he still enjoys coverage where it would not be available. By removing the term (held cover), the assured required to know the steps to be taken in order to enjoy coverage. The actions required from the assured in the case where a change in destination occurred, is that the assured has to lodge a prompt notice as soon as he decides to change the a voyage. The time between the determination of change and the time of issuing the prompt notice is covered according to the note. Secondly, the assured would be subject to a new rates and terms. The premium must be reasonable and agreed upon by all parties in the contract. This is a question of fact in each case(76), and premium rates

(75) M.IA 1906, S, 45 (1).

(76) Circumstances considered for fixing reasonable commercial premiums are for example change involving a longer voyage or one which has become more hazardous. See Liberian Insurance Agency Inc v. Mosse [1977] 2 Lloyds Re p 560.

can be agreed upon and if loss has already occurred, the coverage may be possible on reasonable terms- would have been available.

The second point of alteration of the clause achieved for combating maritime fraud, the draftsman dealt with case of "phantom ship". Where vessels with false papers sail to a different destination and sell the goods, that means a destination change by someone other than the assured or by circumstances beyond his control; mostly a dishonest act of the master who may sell the cargo, regain to the original route, and scuttle the vessel(77). The old edition of clause 10 remains silent on this issue. Under the new (sub-clause 10.2), the insurance continue and attached in above case as long as the assured or his employee lack the knowledge of such change of destination. Here, a question may arise with respect to the giving of notice by the assured, namely how quickly such notice should be given.

## SECTION THREE
## The evaluation of the clauses of 2009

### 3.1 Features of the 2009 Changes.

Revision of the change of the encapsulated I.C.C of 2009 shows that the change is not a radical one as much as the changes in the cargo cover which took place in 1982. In fact, this revision could be considered a natural demand for amendment after more than 25 year of practice. The revision was directed to promote clarity and create free standing clauses, up-dated and simply worded.

Apart of simple and clear Language made to the rewording of provisions, the draftsmen enhanced the capability to respond to demands of modern international trade and transport and the international sale of goods contracts as well(78). They also attempted to solve problems thrown up by past market experience along with the international development in economic and political field.

(77) Shell international petroleum Co.v Gibbs (The Salem) [1982], in this case a cargo owner could not claim for loss by barratry because it must committed against the ship owner, or charterer.

(78) Consideration must be given to the terms of the sale contract, this remains one of the most common areas which mistakes and misunderstandings occur.

The aim of the London market was to keep its prominence in the world of marine Insurance worldwide and introduce flexible and more attractive marine Insurance clauses. This is manifested in both the language and substance of the clauses that produce straightforward Insurance terms.

The draftsman of the new clauses re-considered the balance between the interest of the assureds and the interest of Insurers. While the ambit of the terrorism exclusion clause has been extended to reflect wide range of motives. That would stand behind the terrorist acts, which fill in the interest of the insurers. where as the rewording of the insolvency exclusion clause reduced the ambit of the clause, its effect apply only where the assured is aware, or should have been aware. Financial distress of the vessel owners or charterers, may affect the compilation of voyage(79), such modification fill in the interest of the assured. This is an example, but not limited to many clauses reshaped and reworded to satisfy many related parties mainly the assured.

**3.2 Application of the clauses and the Arab legislations.**

In the clauses of 1982, particularly, under clause 19, which stated, "this Insurance is subject to the English Law and practice", The new version of this clause replaced the term English law and practice by "subject to state issue law and practice".

Although the new clauses of 2009 became available in the market, they were not compulsory. The assured may choose to obtain cover according to these clauses or continue insuring according to the old version of clauses of 1982(80). In both versions of clauses, the old and the new one are subject to English law and practice, except where the use of clauses is outside England, the insurers outside England may alter clause 18 which states; "This insurance is subject to state of issue law and

(79) Such issue had been discussed after the issuing of the 1982 clauses and criticized by Malls, see Mills C, The fether of deviation in law of carriage of Goods. [1983] L.M.C.L.Q

(80) Only five insurance companies -out of 26 insurance companies in Jordan- have applied the new clauses upon the request of their claints, it appeared to the researcher upon discussion with some practioners that the companies did not favor the application of the new version as they realize that the new clauses become more favorable to the assureds. A visit to the Jordanian International insurance company, The Jordanian Union for Insurance Companies at 22-12-2010.

practice. For example, insurance companies in Jordan modify the clause ‘‘as the following: ‘‘this insurance is subject to the Jordanian law and practice, and this applies in most of Arab insurance markets(81).

The question, is whether the new clauses of 1982 contradict with provision of M.I.A 1906 and other international legislations such as the Arab marine insurance laws. Even though the principles of marine insurance has been contemplated in the statutory provisions, the marine insurance contract manifested in the policy is a contract of ‘‘common will'' and the parties can add or exclude which were not perceived when English M.I.A 1906 or the Arab marine insurance legislations when they were issued(82).

As far as the Arab marine insurance legislations are concerned, Jordan as an example(83), the marine risks enumerated in the maritime commercial law are:

‘‘The insurers shall bear the risks of any loss or damage to the subject matter insured as a result of storms, sinking, stranding, collision, restraint of princes, compulsory deviation or compulsory change of the adventure or of the ship, jettison, fire, explosion, robbery, barratry, theft and, in general all sea casualties and accidents’’.The risks of civil and foreign war shall not be borne by the insurers unless otherwise agreed. In which case the insurer shall be liable for any loss of, or damage to the subject matter insured as a result of hostile or retaliatory acts, arrests, restraints and detainments by any government whether friendly or enemy, and whether recognized or not, and, in general, as a result of any compulsory acts or events of war’’(84).

Analyzing the wording of section (329) of Jordanian maritime commercial law which are almost identical to the article 356 and 357 of the Egyptian marine trade law and many other Arab marine

(81) بهيج شكري، التأمين في التطبيق والقانون والقضاء، دار الثقافة، عمان عام ٢٠٠٧ ص١٩.

(82) Although Egypt considered as a leading country in the Arab world especially in the field of legal legislations the Egyptian maritime commercial law enacted 1883 serviced and lasted for more than a hindered year before it had been replaced by the new one No 8 of 1990.

(83) انظر بهيج شكري ص ٣٦ التامين البحري في التشريع والتطبيق، دار الثقافة ٢٠٠٨ حيث يقول أن معظم التشريعات المتعلقة بالتأمين البحري متشابهة إلى حد كبير فيما عدا الصياغة والفهرسة ويؤكد ذلك الدكتور مصطفى كمال طه وأنور بندق، مرجع سابق ص ١٥.

(84) المادة (٣٢٩) من قانون التجارة البحرية الأردني، لعام ١٩٧٢.

insurance[85], we can see that not only recognized risks are covered. Insurance for a new peril could be achieved in two ways. First, the section already indicates one possibility by the phrase: ''and in general all sea casualties and accidents''. The second would be by embracing risks, other than the listed risks provided by section 332 of the Jordanian law or in the mentioned articles of Arab marine insurance legislations. The same would be for the exclusions provided in the same section 332 of the Jordanian Maritime Commercial Law of 1972 and would be made available by general rule prevalence of common will of the parties'' as long as words common will do not contradict the general rules of marine insurance contract. Section 297 in this concern states:

''All the provisions of this part which do not contain on express stipulation to the effect that shall be applicable not withstanding any agreement to the contrary, or to the effect that their violation shall render void any contrary agreement, shall only be regarded as interpreting the will of the contracting parties and be superseded by express provision.''

### 3.3 The legal justification of using the I.C.C.

Except for the Egyptian maritime commercial law[86], the above article is also identical to Qatari, Bahranian, Omani marine insurance legislations according to section 233, 234, 332, irrespectively. The provisions indicate that the authorized contracting parties can add risks to the policy through insuring under to I.C.C clauses unless the subject-matter of insurance or the risk insured contradicts with general rules and the public order or in cases where the law provides avoidance to the contrary of certain article. The same is true in some Arab marine insurance legislation as the theory of contract is the same where by the freedom of contracting means the basic rule in all the Arab civil law legal regime[87]. Therefore it is obvious that the clauses may go in harmony

(85) انظر المادة ٢٤٤ و٢٤٥ من القانون القطري المادة و٢٤٢ و ٢٤٥ من القانون بحريني والمادة ٣٤٣ ٣٤٤ من القانون العماني.

(86) The researcher did not found a similar provision in the Egyptian Maritime Commercial Law of 1990, but at the same time there is no provision prevent the contacting parties to reach an agreement to add a new risks or to exclude others. See also Mr. Baheg Soukry, Marine Insurance in practice and Legislation Op. cit where he commented that where the law stand silent in the marine insurance issue it mean the legislator give the parties an implied legalization.

(87) S.E Rayner, The theory of Contracts in Islamic law -London, 1st ed 1991.

with Arab marine insurance legislations without any contradiction. Moreover the use of clauses either in the London or in Arab marine insurance market serve as supporter to old constant provision of law, for example the clauses of 2009 added a new type of excluded risk when clause 7 provides that "In no case shall this insurance cover loss damage or expense caused by any person acting from political, ideological or religious motive. This term does not exist in the Arab legislations.

The applicability of the Institute Cargo Clauses in the Jordan market is a clear indication of the established international position of the London market. There is no doubt that the assureds and professional practitioners in Jordan and their counterpart of the Arab world have benefited from the simplicity of the new clauses even more than their counterparts in the London market, because Arab practitioners are unfamiliar with the original legal foundation of the clauses(88). No doubt that clauses were in favor of the assureds whoever they are. For example, the difficulties of paying indemnity to the assured party due to the mistake attributed to the servant of the assured no more effected the interest of the assureds. In the case a cargo of frozen chickens imported to Jordan under warehouse to warehouse insurance policy, the cargo transported from Aqabah to the warehouse of the assured in Amman. On the arrival most of chicken was spoilt due to unsuitable temperature in the carrying vehicle frig. The assured claimed indemnity, but the insurer denied liability on the grounds that the insurer or his servants are responsible in mentoring the degree of temperature and the fitness of the carrying fridge vehicle. The action of the assured before the first instance court was dismissed. Jordanian Appeal Court decided in favor of the insurance company. The honorable Judges commented that the insurer or his servants are supposed to guarantee a fit and suitable fridge vehicle or to be aware of the fitness of fridge vehicle of third party contractor(89).

The researcher would like to comment on this Judgment, that if the insurance contacted under the new clauses of 2009 the result of this judgment would be completely different as clause 4.3 consider the land

(88) المحامي بهاء بهيج شكري، التأمين في التطبيق والقانون والقضاء، دار الثقافة، عمان ٢٠٠٧، ص ١٩.

(89) [2008] Adaleh publictions, A-C, Civil Action Case No 397- 86 A

carrier not within the concept of the assured employees. Also we could imagine that preparation carried out without his control.

### 3.4 Conclusion

The evidence suggests that the old marine cargo insurance in the London market after more than a quarter of century became relatively not the ideal up-dated clauses, some archaic,and obscure terms may cause a confusion such as servants, underwriters, proximately caused, goods.. etc.

The new introductory of 2009 consider the new international trade development, and reviewing the balance between the assureds and the insurers, yet it is worth mentioning that these clauses favored the assureds in general. As far as the exclusions are concerned, loss caused by insufficient packing applies only when the assured or their employees pack goods; this modification is applicable to those cases where cargoes are purchased on CFR or FOB term with insurance concluded by the buyers(90). This provides a great benefit to the Arab insureds as most of them buy goods by FOB and CFR and less by CIF contract of sale.

In the case of a cargo of timber shipped from Holland to Jordan via Aqaba, some shortage and damage to the goods were found upon arrival. The assured filed a claim against the insurance company. The insurers refused to pay any indemnity as they alleged that the loss resulted due to insufficient packing of port of loading, The claim of the assured was dismissed. The cassation court decided that the assured bought under a CIF contract and had delegated the seller to supervise the packing and loading, and in the absence of evidence that the loss caused during the maritime adventure, the claim must be dismissed(91). Unfortunately there was no mention of the I.C.C in the decision. But one would imagine that the new clauses favored the insurers in this case as it is unfair for a consignee under a CIF contract as he has no control over packing and stowage matters and no evidence that he obtained Knowledge of the insufficient packing fact.

(90) 90 [2008] Jordanian Bar Magazine, civil action p 281

(91) 91 [2008] The Jordanian Bar Magazine. civil Action. Case No 1710.

Insolvency and Financial Default exclusion clause (4.6) has always been criticized in the set of the clause of 1982. Now after the modification of the clause, the exclusion applies only when the Assured is privy, or should have been aware that the owner was in distressed financial circumstances, this should relieve the market that usually adopted provision in the Trade clause to compensate for failure of insolvency or/ and financial default clause of 1982. The Arab market also benefits of this clauses particularly as the international fleet of commercial vessels owned by non Arab traders is located in Europe(92).

In the same track where some clauses were amended to the advantage of the assured, the Unseaworthiness exclusion clause (cl.5) no longer applies when the benefit of the insurance assigned to a purchaser of the insured cargo acting in good faith.

On the principle of fair balance between the parties of the insurance contract, Transit clause (cl.8) expands the ambit of cover. The new clause now attaches "when the goods first moved in the warehouse or place of storage for the purpose of immediate loading", the cover will continue until completion of unloading from the carrying vehicle.

Clause (cl.10) was subjected to important amendment and addition, the modification necessitated and coincided with international efforts to combat the maritime fraud cases, where the master changes the destination beyond the control of the assured and sells the goods(93). This change came in harmony with old authorities and decided cases(94). The amendments of clauses consider also the political climate where many countries enter the nuclear club(95).

As the increased waves of terrorism and of extremist group have appeared and were involved in very tragic incidents, it became necessary

(92) د. هاشم رمضان الجزائري، مسؤولية مالك السفينة، بحث منشور في مجلة الخليج العربي، مجلد ١٢، عدد ١، ١٩٨٠، ص ٦٥.

(93) 93 See document discussed in the " The International Insurance & Banking Forum " organized in Amman by General Arab Insurance Fedaration 21-23 February 2005.

(94) 94 Richard v. Forestal Land, Timber and Railway Co ltd [1941] 3 All ER. In world War11 where a German master had obeyed the instruction of his government to seek refuge in a natural port, it was held by the House of Lords that the voyage had not changed within the meaning.

(95) 95 See supra not No (67).

to re-define the terrorism act and reconsider it in the view that the motive is not only a political one, but it may be ideological or religious too, and thus applies to acts conducted by a person in connection with an organization. Unfortunately, terrorism phenomena may be confused with many political disturbance riots or civil commotions, such as the Arab spring nowadays taking place in some Arab countries in the absence of International agreed definition of terrorism; hence, the proper meaning will differ from one country to another(96).

Accordingly, the draftsman expanded the ambit of the exclusion clause related to the terrorist act (cl 7.3). Apparently, the intention of the draftsman in London marine insurance market in 2009 was to produce a new versions of I.C.C, stating clearly the terms of the contract, and override the troublesome situations of some old clause such as the insolvency of a carrier in clause 4.6.

The new version of clauses introduced in 2009 is a great success. The London market succeeded keeping his world-wide dominance in the world of marine insurance business including the Arab marine insurance market. This is manifested in language and substance of the clauses that produce straightforward instance terms with cover re-defined in simple and modern terms to respond to the contemporary commercial needs, although the change was not a radical one, the new clause was not entirely new. However, it is reshaped to meet the needs of the market.

As the application of the clauses in the Arab marine insurance market, the clauses were in favor of the assureds party, This may interpret the hesitation of the insurance companies to apply the new clauses(97).

However, despite these simplification and achievements made in the new clauses, the draftsman intended to introduce self-standing clauses that clearly state the terms of the contract, The researcher would like to comment on the forming of some clauses.

(96) 96 The editors of Arnould (Vo 111) consider the definition of terrorism appeared in pretention of terrorism Act of 1989 is worthless as the normal every day meaning must be considered. This is confirmed by the authors in the new edition p. 298

(97) 97 Upon the investigation of the researcher, it is appear that just five companies started to apply the new versions of the clauses out of 26 insurance companies practicing marine insurance in Jordan. See Supra.

The new exclusion clause (cl 7.3) dealt with terrorist acts may bring up an ambiguous interpretation, as the clause limited the act by any person acting on behalf of or in connection with any organization one would ask whether an act of an activist who is not related to any organization falls within the effect of the clause?

Whereas the practical need of the market requires the insurance to embrace the land sea sections of a transit; this brought about the warehouse-to-warehouse clause- currently the Transit clause. The incompatibility between the concepts embodied in the statutory provisions and I.C.C of 2009 as far duration of insurance and change of destination in relation to the land section as concerned, the result was in a rather ambiguous consideration given to the deviation provision in clause 8 and the change of voyage provision in clause 10. This is because section 45 and 46 of the M.IA deal with deviation and change of voyage(98). These provisions relate to the sea section of the voyage, and according to section 45 of M.IA 1906 that refers to the voluntary change of the terminus ad quem after the risk has been attached where as the nature of the Transit clause expands the cover to the warehouse or place of storage at the stated final destination. This in turn may call to question the proper interpretation of the concept of deviation or change of voyage in the statutory in the M.I.A of 1906 and in the Arab marine insurance legislations(99).

## Recommendation

1 - In view of all above and as far as Arab Insurance Market is concerned, I recommend that the Arab Federation of Insurance, particularly the insurance commission and the federation insurance companies in Jordan to translate and review these changes.

2 - The researcher believes that the full application of the new versions of the clauses in the Arab insurance market is inevitable in coming time, as most of the Arab insurance companies connected with international reinsurance companies. Accordingly we call for the

(98) 98 Gough, Insurance and Delay [1983] Post magazine 2762 See also Mills, The futher of Deviation, op. cit. p 33

(99) 99 See for example an article 355 of the Egyptian Maritime Commercial Law of 1990 and article 348 Jordanian of Maritime Commercial Law of 1972.

immediate implementation of the new clauses, even of its favor the assured interests.

3 - The researcher calls on the Jordanian Insurance Commission to encourage the implementation of new clauses due to their simplicity and clarity in order to avoid any ambiguous meaning of the marine insurance contract terms which may create legal dispute.

4 - It is quite important for better implementation to advocate local lawmakers to make necessary changes in light of the upcoming maritime commercial law under study.

5 - Workshops, seminars, courses are highly recommended in this regard in order to raise the awareness of the recent changes to enable all stakeholders and all those concerned in this field reaching towards proper and correct understanding of all terms of these clauses.

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