



# Common Marine Exclusions

## Critical Concepts and Interpretation

**W. Harry Thurlow**  
Presented to CBMU  
Annual Conference  
December 1, 2015

coxandpalmerlaw.com  
@coxandpalmer

COX & PALMER

# Critical Concepts and Interpretation

- 5 Common Exclusions:
  - *Wilful Misconduct;*
  - *Delay;*
  - *Ordinary Wear and Tear;*
  - *Inherent Vice or nature of subject matter insured;*
  - *Lack of Due Diligence (an exception to the exception to the statutory exception);*

# Critical Concepts and Interpretation

- Framework:
  - Legislation
  - Coverages
  - Forms
- General Principles Applicable to Exclusions

# Framework

Marine Insurance Act, S.C. 1993, c.22,  
(hereinafter *MIA*):

**53.** (1) Subject to this Act and unless a marine policy otherwise provides, an insurer is liable only for a loss that is proximately caused by a peril insured against, including a loss that would not have occurred but for the misconduct or negligence of the master or crew.

# Framework

*MIA* s. 53(2):

Insurer not responsible for loss caused by:

- Wilful Misconduct;
- Delay;
- Ordinary wear and tear, ordinary leakage or breakage;
- Inherent vice or nature of the subject-matter insured;
- Vermin; or
- Loss or damage to machinery not proximately caused by maritime perils.

Follows *Marine Insurance Act, 1906* (U.K.), 6 Edw. 7, c. 41, s.55

# Coverages

- Applicable to all marine policies unless otherwise provided (*MIA*, s. 6)
  - Cargo – often explicit
  - Hull – typically implied
  - P&I – typically implied (except willful misconduct which is typically explicit)

# Forms

- Many sources of forms available. Watch for variance, however these common exclusions tend to be similar.
- Common sources are: CBMU; International Underwriting Association (“The Institute”); American Institute of Marine Underwriters; Marine Association of BC; and many others.
- See attached appendices for a few examples; See websites of each for a vast spectrum of clauses.

# General Principles

## *Perils of the Sea*

- ““perils of the seas” means fortuitous accidents or casualties of the seas, but does not include ordinary action of the wind and waves.” (Schedule to the *MIA*, s. 2(d))
- Losses which would not have occurred in an accident on land – even if cause of loss could occur as easily on land.  
(*C.C.R. Fishing Ltd. v Tomenson Inc.*, [1990] SCR 814)

# General Principles

## *Fortuity*

- Neither intentional, nor inevitable.
- Excludes the natural and inevitable action of wind and waves, ordinary wear and tear, inherent defects and intentionally caused losses.

*(C.C.R. Fishing Ltd. v Tomenson Inc., [1990] SCR 814)*

# General Principles

## *Proximate Cause*

- Formerly coverage avoided if two or more dependent causes of which one was an excluded cause.
- Modern approach is to look at all circumstances and determine whether loss was fortuitous (unexpected) and would not have occurred without a covered cause.

*(C.C.R. Fishing Ltd. v Tomenson Inc., [1990] SCR 814)*

# General Principles

## *Burden of Proof*

- Insured must show that loss was caused by an insured peril;
- Insurer must show that the loss falls within an exclusion;
- Both on the “balance of probabilities” standard\*

\*Subject to contra proferentem and other rules of interpretation which tend to favour insured.

# Common Exclusions: Wilful Misconduct

## Institute Marine Cargo Clauses, A, B and C:

“In no case shall this insurance cover loss damage or expense attributable to **wilful misconduct** of the Assured.”

## Common Exclusions: Wilful Misconduct

- Intended the specific loss; or
- So reckless in approaching a foreseeable loss as to be a “marked departure” from what is expected of an ordinary person in the circumstances; and
- Knowledge of a risk, but proceed with no care whatsoever in the face of a clear duty to take care.

*Société Telus Communications v Peracomo Inc.*, 2014 SCC 29

# Common Exclusions: Wilful Misconduct

Fact scenario 1:

- Insured operating fishing vessel at night, without lookout and while impaired. Collides with anchored and lighted third party vessel.

*Excluded?*

# Common Exclusions: Wilful Misconduct

Answer: No; covered!

- No evidence that impairment affected ability to control the vessel
- No intention
- Possibly different if captain aware other vessel in the vicinity?

Conohan v. Cooperators, [2001] 2 FCR 238

# Common Exclusions: Delay

## Institute Marine Cargo Clauses, A, B and C:

“loss damage or expense **proximately caused by delay**, even though the delay be caused by a risk insured against”

- Loss must be caused by delay only. If insured peril also intervenes, coverage is still available. (*Continental Insurance Co. v Almassa International Inc.*, [2003] OJ No 1125)

# Common Exclusions: Delay

## Fact Scenario 2:

- Shipment of lumber in transit by sea when ship's engine fails. Insured advises that cargo will be ruined if kept in hold of ship without ventilation for extended period. 4 month delay and cargo ruined.

*Excluded?*

# Common Exclusions: Delay

Answer: No; Covered

- Lack of ventilation, not delay, found to be cause. If hold properly ventilated, lumber could have withstood delay indefinitely.

*Continental Insurance Co. v Almassa International Inc.*,  
[2003] OJ No 1125

# Common Exclusions: Ordinary Wear and Tear

## American Institute Cargo Clauses 2004:

“This policy does not cover:

(1) Ordinary leakage, ordinary loss in weight or volume, or **ordinary wear and tear.**”

- The result of ordinary service conditions (*C.C.R. Fishing*)
- **Inevitable** (*566935 B.C. Ltd. v Allianz Insurance Co. of Canada*, 2006 BCCA 469)

## Common Exclusions: Ordinary Wear and Tear

### Fact scenario 3:

- Wooden 1930s era barge sinks. Hull had deteriorated over the years such that seams pulled apart allowing infestation of worms. Result could have been avoided with anti-fouling paint. Shortly before loss, electricity to a pump failed.

*Excluded?*

## Common Exclusions: Ordinary Wear and Tear

Answer: Yes; Excluded

- Although failure of pump unexpected, it was not operative in the ingress of water.
- Crew negligence only exacerbated an existing and progressing problem. The barge was “all the time in the grip of the casualty”.

(*566935 B.C. Ltd. v Allianz Insurance Co. of Canada*, 2006 BCCA 469)

# Common Exclusions: Inherent Vice

## **American Institute Cargo Clauses 2004:**

“This policy does not cover:

...

(2) Loss, damage, or expense:

...

(b) caused by **inherent vice** or nature of the insured property;”

# Common Exclusions: Inherent Vice

- Loss must be fortuitous; not simply the effect of the ordinary incidents of transit because of an inherent susceptibility. The nature of the thing itself is root of cause – whether inevitable or not.

*(Nelson Marketing International Inc. v. Royal & SunAlliance Insurance Co. of Canada, 2006 BCCA 327 )*

# Common Exclusions: Inherent Vice

## Fact Scenario 4:

- Shipment of gloves absorbed moisture prior to transit. When the container entered a substantially colder environment, the moisture condensed and then settled causing stains.

*Excluded?*

# Common Exclusions: Inherent Vice

Answer: Yes; Excluded

- The loss arose from the natural behaviour of the goods as shipped in the ordinary course of the contemplated voyage (Calcutta to Rotterdam). (*T.M. Noten B.V. v. Harding*, [1990] 2 Lloyd's Rep. 283 (Eng. C.A.))
- But see *Global Process Systems Inc. & Anr v. Syarikat Takaful Malaysia Berhad*, [2011] UKSC 5: even a highly susceptible cargo (oil rig with faulty legs) can avoid this exclusion if an unexpected event (large wave) intervenes.

## Common Exclusions: Lack of Due Diligence

**All Risks cover and Inchmaree clauses (see Appendices):**

“provided such loss or damage has not resulted from **want of due diligence by the Assured**, the Owners or Managers of the Vessel, or any of them. (emphasis added)”

- Reasonable care in the circumstances (ie. negligence standard). (*Secunda Marine Services Ltd. v. Liberty Mutual Insurance Co.*, 2006 NSCA 82; *Charles Goodfellow Lumber Sales Ltd. v. Verreault*, [1971] SCR 522)

# Common Exclusions: Lack of Due Diligence

## Fact Scenario 5:

- Oil production and storage vessel suffers failure of propulsion system and experiences 30 day “off-hire”.
- History of issues with engines. Technical manager advised of potential issue by specialist.
- In compliance with industry inspection standards; advised by other specialists that problem did not require full inspection.

*Excluded?*

# Common Exclusions: Lack of Due Diligence

Answer: No; Covered

- Some due diligence was present. Reasonable to rely on the views of experts with hands on experience with identical motor.

*(The Toisa Pisces Sealion Shipping Ltd & Anor v Valiant Insurance Company, [2012] EWHC 50 Comm. Eng High Crt)*

# Emerging Issues

## Drones/unmanned vessels

- Heightened duty of due diligence on owners?
- Are software issues inherent vices?
- Caught by cyber exclusions?
- Inchmaree – what about AI (master or crew?)

# Emerging Issues

## Cyber Risks

(they're here, but are they excluded?)

- Institute and American cyber risk clauses exclude malicious cyber attacks, but not in case of war, terrorism, nor political motive if otherwise covered.
- Malfunction as opposed to malicious attack?

COX & PALMER

Thank you  
Questions/Comments

This presentation is provided as information only and is a summary of the issues discussed. It is not meant as legal advice or a legal opinion and you are cautioned to seek specific legal advice for your unique circumstances. © Cox & Palmer. All rights reserved. All intellectual property rights, including copyright, in this presentation are owned by Cox & Palmer, except as specifically noted. This presentation may not be reproduced or distributed without the prior written consent of Cox & Palmer.



# Appendix A: Perils Insured

### CBMU Great Lakes Hull Clauses

#### PERILS

Touching the Adventures and Perils which the Underwriters are contented to bear and take upon themselves, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the Vessel, or any part thereof, excepting, however, such of the foregoing perils as may be excluded by provisions elsewhere in the Policy or by endorsement thereon.

## Appendix A

### CBMU Great Lakes Hull Clauses

#### **ADDITIONAL PERILS (INCHMAREE)**

Subject to the conditions of this Policy, this insurance also covers loss of or damage to the Vessel directly caused by the following:

Accidents in loading, discharging or handling cargo, or in bunkering;

Accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons;

Explosions on shipboard or elsewhere;

Breakdown of motor generators or other electrical machinery and electrical connections thereto, **bursting of boilers, breakage of shafts, or any latent defect** in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);

Breakdown of or accidents to nuclear installations or reactors not on board the insured Vessel;

Contact with aircraft, rockets or similar missiles, or with any land conveyance;

Negligence of Charterers and/or Repairers, provided such Charterers and/or Repairers are not an Assured hereunder;

Negligence of Master, Officers, Crew or Pilots;

provided such loss or damage has not resulted from **want of due diligence by the Assured**, the Owners or Managers of the Vessel, or any of them. Masters, Officers, Crew or Pilots are not to be considered Owners within the meaning of this clause should they hold shares in the Vessel. (emphasis added)

**[Form appended to Strathy and Moore, Law and Practice of Marine Insurance in Canada, 2003]**

**Canadian Hulls (Pacific) Clauses (2005)**

1.Touching the Adventures and Perils which we, the Underwriters,  
2. are contented to bear and take upon us, they are of the Seas, Men-of-  
3. War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart  
4. and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and  
5. Detainments of all Kings, Princes and Peoples, of what nation,  
6. condition or quality soever, Barratry of the Master and Mariners and of  
7. all other like Perils, Losses and Misfortunes that have or shall come to  
8. the Hurt, Detriment or Damage of the subject matter insured  
9. (hereafter the "Vessel") or any part thereof; excepting, however, such of  
10. the foregoing Perils as may be excluded by provisions elsewhere in  
11. these clauses or by endorsement.

**[Marine Insurance Association of British Columbia, 2005]**

### Institute Time Clauses Hulls (1995)

6.1 This insurance covers loss of or damage to the subject-matter insured caused by

6.1.1 **perils of the seas** rivers lakes or other navigable waters

6.1.2 fire, explosion

6.1.3 violent theft by persons from outside the vessel

6.1.4 jettison

6.1.5 piracy

6.1.6 contact with land conveyance, dock or harbour equipment or installation

6.1.7 earthquake volcanic eruption or lightning

6.1.8 accidents in loading discharging or shifting cargo or fuel.

6.2 This insurance covers loss of or damage to the subject-matter insured caused by

6.2.1 **bursting of boilers breakage of shafts or any latent defect** in the machinery or hull

6.2.2 **negligence** of Master Officers Crew or Pilots

6.2.3 negligence of repairers or charterers provided such repairers or charterers are not an Assured hereunder

6.2.4 barratry of Master Officers or Crew

6.2.5 contact with aircraft, helicopters or similar objects, or objects falling therefrom

provided that such loss or damage has not resulted from **want of due diligence by the Assured**, Owners, Managers or Superintendents or any of their onshore management. (emphasis added)

[See <http://www.iaa.co.uk/> for Institute clauses]

coxandpalmerlaw.com  
@coxandpalmer

COX & PALMER

**International Hull Clauses (2003)**

2.1 This insurance covers loss of or damage to the subject-matter insured caused by

2.1.1 perils of the seas, rivers, lakes or other navigable waters

2.1.2 fire, explosion

2.1.3 violent theft by persons from outside the vessel

2.1.4 jettison

2.1.5 piracy

2.1.6 contact with land conveyance, dock or harbour equipment or installation

2.1.7 earthquake, volcanic eruption or lightning

2.1.8 accidents in loading, discharging or shifting cargo, fuel, stores or parts

2.1.9 contact with satellites, aircraft, helicopters or similar objects, or objects falling

therefrom.

### **International Hull Clauses (2003)**

- 2.2 This insurance covers loss of or damage to the subject-matter insured caused by
- 2.2.1 bursting of boilers or breakage of shafts but does not cover any of the costs of repairing or replacing the boiler which bursts or the shaft which breaks
  - 2.2.2 any latent defect in the machinery or hull but does not cover any of the costs of correcting the latent defect
  - 2.2.3 negligence of Master, Officers, Crew or Pilots
  - 2.2.4 negligence of repairers or charterers provided such repairers or charterers are not an Assured under this insurance
  - 2.2.5 barratry of Master, Officers or Crew provided that such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.
- 2.3 Where there is a claim recoverable under Clause 2.2.1, this insurance shall also cover one half of the costs common to the repair of the burst boiler or the broken shaft and to the repair of the loss or damage caused thereby.
- 2.4 Where there is a claim recoverable under Clause 2.2.2, this insurance shall also cover one half of the costs common to the correction of the latent defect and to the repair of the loss or damage caused thereby.
- 2.5 Master, Officers, Crew or Pilots shall not be considered Owners within the meaning of Clause 2.2 should they hold shares in the vessel.

### **International Hull Clauses (2003)**

#### **Additional Perils** (*Note modification to Inchmaree clause*)

41.1 If the Underwriters have expressly agreed in writing, this insurance covers

41.1.1 the costs of repairing or replacing any **boiler which bursts or shaft which breaks**, where such bursting or breakage has caused loss of or damage to the subject-matter insured covered by Clause 2.2.1, and that half of the costs common to the repair of the burst boiler or the broken shaft and to the repair of the loss or damage caused thereby which is not covered by Clause 2.3

41.1.2 the costs of correcting a **latent defect** where such latent defect has caused loss of or damage to the subject-matter insured covered by Clause 2.2.2, and that half of the costs common to the correction of the latent defect and to the repair of the loss or damage caused thereby which is not covered by Clause 2.4

41.1.3 loss of or damage to the vessel caused by any **accident or by negligence, incompetence or error of judgment** of any person whatsoever provided that such loss or damage has not resulted from **want of due diligence by the Assured, Owners or Managers.**

41.2 Master, Officers, Crew or Pilots shall not be considered Owners within the meaning of Clause 41.1 should they hold shares in the vessel. (emphasis added)

[See <http://www.iua.co.uk/> for Institute and Joint clauses (amongst many others).]

**AMERICAN INSTITUTE CARGO CLAUSES 2004 ALL RISKS**

A. Unless otherwise specified below, this policy insures against “All Risks” of physical loss or damage from any external cause irrespective of percentage, but excluding nevertheless the risks of War, Strikes, Riots, Seizure, Detention and other risks excluded by the Nuclear/ Radioactive Contamination Exclusions Clause, the F.C & S. (Free of Capture and Seizure) Warranty and the S.R. & C.C. (Strikes, Riots and Civil Commotions) Warranty of this policy, excepting to the extent that such risks are specifically covered by endorsement.

[See [www.aimu.org](http://www.aimu.org) for American Institute clauses.]



# Appendix B: Basic Exclusions (Statutory in Canada)

## Canadian Hulls (Pacific) Clauses 2005

49. 3. This insurance includes loss of or damage to the Vessel directly
50. caused by:-
51. (a) Accidents in loading, discharging or shifting cargo or fuel
52. Explosions on shipboard or elsewhere
53. Breakdown of or accident to nuclear installations or reactors
54. on shipboard or elsewhere
55. Bursting of boilers, breakage of shafts or any latent defect in
56. the machinery or hull
57. Negligence of Master, Charterers other than an Assured,
58. Officers, Crew or Pilots
59. Negligence of repairers provided such repairers are not
60. Assured(s) hereunder, but this exclusion shall not apply to
61. loss or damage resulting from the operation by the Assured of
62. a commercial repair division or facility
63. (b) Contact with aircraft or similar objects, or objects falling
64. therefrom
65. Contact with any land conveyance, dock or harbour
66. equipment or installation
67. Earthquake, volcanic eruption or lightning
68. **Provided such loss or damage has not resulted from want of due**
69. **diligence by the Assured, Owners or Managers.** (emphasis added)

[MIABC 2005]

Institute Marine Cargo Clauses, A

4. - General Exclusion Clause

4 In no case shall this insurance cover

4.1 loss damage or expense attributable to **wilful misconduct** of the Assured

4.2 ordinary leakage, ordinary loss in weight or volume, or **ordinary wear and tear** of the subject-matter insured

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured ...

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

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

...

(emphasis added)

[See <http://www.iaa.co.uk/> for Institute and Joint clauses (amongst many others).]

**AMERICAN INSTITUTE CARGO CLAUSES 2004**

This policy does not cover:

- (1) Ordinary leakage, ordinary loss in weight or volume, or **ordinary wear and tear**.
- (2) Loss, damage, or expense:
  - (a) Attributable to **willful misconduct** of the Assured;
  - (b) caused by **inherent vice or nature** of the insured property;
  - (c) arising from insolvency or financial default of the owners, managers, charterers, or operators of the vessel;
  - (d) resulting from insufficiency or unsuitability of packing or preparation of the insured property for the intended voyage...

...

Warranted free of claim for loss of market or for loss, damage, expense or deterioration arising from **delay**, whether caused by a peril insured against or otherwise. (emphasis added)

[See [www.aimu.org](http://www.aimu.org) for American Institute clauses.]