

CAN YOU IGNORE INCOTERMS AND INSURABLE INTEREST?

Presentation by Mike Posemann

1. Policy Wording

- 1.1 ***"DURATION OF COVERAGE CLAUSE (Irrespective of terms of purchase or sale)***
 - ***NOTWITHSTANDING THE INSURED'S TERMS OF PURCHASE AND/OR SALE AND NOTWITHSTANDING PLACES NAMED IN THE CERTIFICATE OR DECLARATION, AND PROVIDED THAT THE INSURED WISHES TO INSURE SHIPMENTS HEREUNDER, THE POLICY SHALL COVER THE SUBJECT MATTER INSURED FROM THE ORIGINAL WAREHOUSE AND/OR PLACE WHERE TRANSIT IS INTENDED TO COMMENCE UNTIL FINAL WAREHOUSE AND/OR PLACE WHERE TRANSIT IS INTENDED TO TERMINATE, IN ACCORDANCE WITH THE CLAUSES CONTAINED HEREIN OR ENDORSED HEREON.***
 - ***IN THE EVENT OF A CLAIM HEREUNDER, THE INSURED AGREES TO SUB ROGATE TO UNDERWRITERS ALL RIGHTS OF RECOVERY FROM THE IMPORTER/EXPORTER, IMPORTERS' / EXPORTERS' INSURANCE POLICY/ POLICIES OR OTHER RESPONSIBLE PARTY/PARTIES.***
 - ***THIS INSURANCE IS NOT TO BE DEEMED A DOUBLE INSURANCE".***

Policy Wording cont.

- 1.2 *"NOTWITHSTANDING THE TERMS OF THE CONTRACT OF SALE, ALL IMPORTED GOODS SHALL BE COVERED AS THOUGH THE TERMS OF THE SALE WERE "EX WORKS".*
- *"IT IS A CONDITION OF THE INSURED'S RIGHT OF RECOVERY HEREUNDER THAT THEY SHALL TAKE ALL REASONABLE STEPS TO RECOVER FROM THE SELLER AND THAT THE EXISTENCE OF THIS EXTENSION WILL NOT BE REVEALED TO THE SELLER, FAILING WHICH IT SHALL BE VOID AND OF NO FORCE AND EFFECT.*
- *THIS CLAUSE SHALL BE INTERPRETED AS AN HONOURABLE AGREEMENT BINDING BETWEEN THE INSURED AND THE INSURERS WITHOUT REFERENCE TO INSURABLE INTEREST OR LEGAL OBLIGATIONS".*

Policy Wording cont.

- 1.3 *"IT IS HEREBY UNDERSTOOD AND AGREED THAT THE GOODS ARE AT THE UNDERWRITERS RISK AND THAT THEIR LIABILITY TO THE ASSURED COMMENCES FROM THE TIME THE GOODS LEAVE THE SUPPLIER'S FACTORY, WAREHOUSE, STORE OR MILL AS IF THE CONTRACT OF SALE IS EX SUPPLIERS PREMISES NOTWITHSTANDING THAT THE GOODS AND/OR INTEREST MAY HAVE BEEN PURCHASED ON FOB, CFR, OR SIMILAR TERMS".*

2. Two Contracts

- 2.1 Contract of Sale
- 2.2 Contract of Insurance

3. Incoterms

- 3.1 Misconception with regard to passing of title
- 3.2 Passing of risk and responsibility to arrange carriage
- 3.3 2010 version
- 3.4 Group 1
- 3.5 Group 2
- 3.6 When risk passes – ex works, F group and D group
- 3.7 No reference to passing of risk in sale contract

4. Duration of Cover Clause

- 4.1 Ignore terms of contract of sale
- 4.2 Commencement and termination of risk
- 4.3 Not double insurance

5. Ex Works Clause

- 5.1 Ignore terms of sale
- 5.2 Honourable agreement

6. Is Insurable Interest a Requirement?

- 6.1 One of the oldest and most fundamental concepts of insurance law
- 6.2 Reinecke et al
- *"The modern approach in English law is still to require an insurable interest for a contract of indemnity insurance, but this interest need only exist when the event insured against takes place. The interest does not have to be specified in the contract, as long as it can be proved that there was an insurable interest on occurrence of the insured event. In accordance with this approach, it has been decided that a contract containing a "policy proof of interest" clause is a wager only if the insured in fact had no insurable interest at the crucial time".*

Is Insurable Interest a Requirement? cont.

- 6.3 Gordon & Getz
- "For this reason the test for the contract of insurance should be a more extensive interpretation of the approach adopted in Littlejohn's case, namely that if the insured can show that he can lose something of appreciable commercial value by the loss, destruction or damage to the thing insured, he will have an insurable interest therein".
- 6.4 English Marine Insurance Act of 1906
- *"Every contract of marine insurance by way of gaming or wagering is void;*
- *The contract of marine insurance is deemed to be a gaming or wagering contract – where the assured has not an insurable interest as defined by this Act"*
- 6.5 Honourable agreements

Is Insurable Interest a Requirement? cont.

➤ 6.6 Gordon & Getz

- *"Despite the prohibition against insurance without interest, such insurance is still effected, particularly in regard to disbursements and commissions in marine commerce. These policies are really gaming and wagering policies and they usually contain a clause as follows:*
- *"In the event of loss the production of the policy is to be deemed as sufficient proof of interest"*
- *This is known as the PPI clause (policy proof of interest). Such policies are "honour policies" as they are unenforceable at law; the insured must rely entirely on the insurers honour that he will pay"*

7. Clause 11 – Insurable Interest Clause

- 11.1 *"In order to recover under this insurance the Assured must have an insurable interest in the subject – matter insured at the time of the loss.*
- 11.2 *Subject to 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Underwriters were not".*

8. Where Does This Then Leave Us?

- 8.1 Period of time when purchaser has no insurable interest
- 8.2 Policy wording requires payment in terms of "honourable agreement"
- 8.3 Double insurance

9. Difficulties Facing Insurers

- 9.1 Estoppel
- 9.2 Misrepresentation
- 9.3 Recoveries – no ownership or risk therefore no title to sue
- 9.4 Recoveries – falling between two stools – no title to sue
- 10. Legal Liability Policy

11. Valued and Unvalued Policies

- 11.1 Unvalued
- 11.2 Valued
- 11.3 Agreed value can be challenged by insurers

12. When Does Risk Attach and Terminate?

- 12.1 Clause 8 – transit clause