



Liberty Mutual.

INSURANCE

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Marine Insurance & Carriage

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BACKGROUND AND PURPOSE

- Three essential contracts
 - Sales Contract
 - Transportation Contract
 - Insurance Contract
- The applicable federal law strikes a public policy balance between the interests of vessel owners and those of the cargo interests.
- This is done by granting vessel owners a series of immunities and a limitation of liability and cargo interests the ability to claims damages for the vessel owner's negligence handling of the cargo.

COGSA Rights and Immunities

"Sec. 4.

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

COGSA Rights and Immunities

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from-

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

"(b) Fire, unless caused by the actual fault or privity of the carrier;

"(c) Perils, dangers, and accidents of the sea or other navigable waters;

"(d) Act of God;

COGSA Rights and Immunities

"(e) Act of war;

"(f) Act of public enemies;

"(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

"(h) Quarantine restrictions;

COGSA Rights and Immunities

"(i) Act or omission of the shipper or owner of the goods, his agent or representative;

"(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: Provided, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

"(k) Riots and civil commotions;

"(l) Saving or attempting to save life or property at sea;

COGSA Rights and Immunities

"(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

"(n) Insufficiency of packing;

"(o) Insufficiency or inadequacy of marks;

"(p) Latent defects not discoverable by due diligence; and

COGSA Rights and Immunities

- "(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.
- This is often referred to as the "catch all" immunity clause.

- The burden of not being able fully recover from the vessel owner is transferred to the cargo interests' insurers since they are in a better position to spread the loss.

Types of Marine Insurance



Hull and Machinery
(H&M)



Protection and
Indemnity (P&I)



Cargo

Purpose

- Anyone who has an insurable interest in a cargo shipment has a need for an ocean cargo policy. The cargo insurance policy indemnifies the exporter or importer in the event of loss or damage to goods due to a peril insured against while at risk under the policy.

Multimodal carriage of goods

- The age of multimodalism: door-to-door transport based on efficient use of all available modes of transportation by air, water, and land.
- Carriers have transformed into total transportation companies offering global door to door multimodal service to customers.
- NVOCC's and freight forwarders also procure intermodal service to their customers.
- Thus, it is more difficult to distinguish between the various modes of transport.
- Intermodal transport is the result of the container revolution.
- A container can easily move from a truck to a ship, on to train, or aboard an airplane.

Statutory regulations carrier liabilities

- Carriage of Goods by Sea Act (COGSA): ocean common carriage to and from the United States; applies tackle to tackle.
- Harter Act: in the absence of an agreement, governs the liability of the carrier before loading and after discharge from the vessel.
- Carmack Amendment: rail and truck transportation.
- Montreal Convention: governs carriage of goods by air carriers.

**UNDERWRITING
CARGO
INSURANCE**

Some factors to appraise the risk

Desired average clauses: from the most limited to the most comprehensive.

Destination or origin

Ocean carrier: class-certified vessels

Shipping routes

Time of shipping: seasons

Packing: degree of protection provided

Shipping practices: experience in the field

The consignee: mitigation of damages through repair and promptly taking delivery

Salvage

Underwriting experience: loss history

OPEN POLICIES

Open Policies

- Most 'open' policies are, in reality, usually forms of time policies, as they generally cover all goods (as defined in the policy) for a stipulated period of time shipped on specified conveyances.
- The usual practice under an open policy is to issue the primary policy to the assured and then grant to him the right to issue 'certificates' thereunder, describing in abbreviated form the extent of coverage and naming the parties insured or to be insured. The certificate (which is not itself a policy), must be read with the policy which it only overrules were inconsistent.

**NAMED PERILS
AND ALL RISK
COVERAGE**

Named Perils

- The standard marine insurance policy gives protection against a wide variety of perils.
- The “**named perils**” clause sets out the principal risks actually insured against under the policy.
- The burden of proving the loss was caused by a peril insured against is on the assured.

Common perils insured include perils of the

Sea

Fire

Violent
Theft

Jettison

Piracy

Arrest by
government

Barratry

War

Salvage

Collision

Explosions

All Risks



- Cargo insurance is usually written on an “all risks” basis.
- Channel Fabrics, Inc. v. Hartford Fire Ins. Co., 2012 AMC 2519, 2527 (S.D.N.Y. 2012)
- Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd’s of London, No. 10-1122 (1st Cir. 2011)

Channel Fabrics, Inc. v. Hartford Fire Ins. Co., 2012 AMC 2519, 2527 (S.D.N.Y. 2012)

- “All risk coverage covers all losses which are fortuitous no matter what caused the loss, including the insured's negligence, unless the insured expressly advises otherwise. A loss is fortuitous unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured.”
- An insured making a claim under an all-risk policy has the initial burden to establish a prima facie case for recovery.
- “An insured meets this burden by showing:
 - (1) the existence of an all-risk policy,
 - (2) an insurable interest in the subject of the insurance contract, and
 - (3) the fortuitous loss of the covered property.” Id.
- “This burden has been characterized as ‘relatively light.’” Id.

Channel Fabrics, Inc. v. Hartford Fire Ins. Co., 2012 AMC 2519, 2527 (S.D.N.Y. 2012)

- “All risk coverage covers all losses which are fortuitous no matter what caused the loss, including the insured’s negligence, unless the insured expressly advises otherwise. A loss is fortuitous unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured. An insured satisfies its burden of proving that its loss resulted from an insured peril if the cargo was damaged while the policy was in force and the loss was fortuitous. . . . All risk open cargo policies . . . provide broad coverage for shippers.” *Id.* at 2528, quoting Ingersoll Milling Machine Co. v. M/V Bodena, 829 F.2d 293, 307-08, 1988 AMC 223, 245-46 (2d Cir. 1987).

Channel Fabrics, Inc. v. Hartford Fire Ins. Co., 2012 AMC 2519, 2527 (S.D.N.Y. 2012)

- Thus, an insured need only show fortuitous loss, and “need not explain the precise cause of the loss.” Channel Fabrics, 2012 AMC at 2528.
- Once an insured has met its burden of establishing a prima facie case, the burden shifts to the insurer to establish that an exclusion or exception to coverage applies. The insurer’s burden is a ‘heavy one.’” Id.
- To “negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case and that its interpretation of the exclusion is the only construction that [could] fairly be placed thereon.” Id.
- “And as with other provisions of an insurance contract, ambiguities must be resolved in favor of the insured and against the insurer.” Id.

**Tropigas de Puerto Rico, Inc. v.
Certain Underwriters at Lloyd's of London,
No. 10-1122 (1st Cir. 2011)**

- The insured bears the burden of establishing that the policy was in force and effect at the relevant time and that the loss was covered. See Fajardo Shopping Ctr., S.E. v. Sun Alliance Ins. Co., 167 F.3d 1, 7 (1st Cir. 1999). The coverage at issue attached prior to loading in Houston and ceased when the transporting barge docked in San Juan.
- Here, then, the plaintiff bears the burden of showing, at a minimum, that a genuine issue of material fact exists as to whether the damage to the tanks occurred during that period. To meet this standard, it must present "definite, competent evidence," Pagano v. Frank, 983 F.2d 343, 347 (1st Cir. 1993) that the tanks were damaged during loading and not during off-loading, ground carriage, or installation.

Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd's of London, No. 10-1122 (1st Cir. 2011)



The Certificate states “Coverage ceases upon berthing of the barge at the destination port. **No coverage is provided for unloading operations from the barge.**”



Destination port was designated as San Juan, Puerto Rico.



Thus, the coverage period expired at the moment of the berthing of the vessel and, by the moment the discharge commenced, there was already no effective insurance coverage.

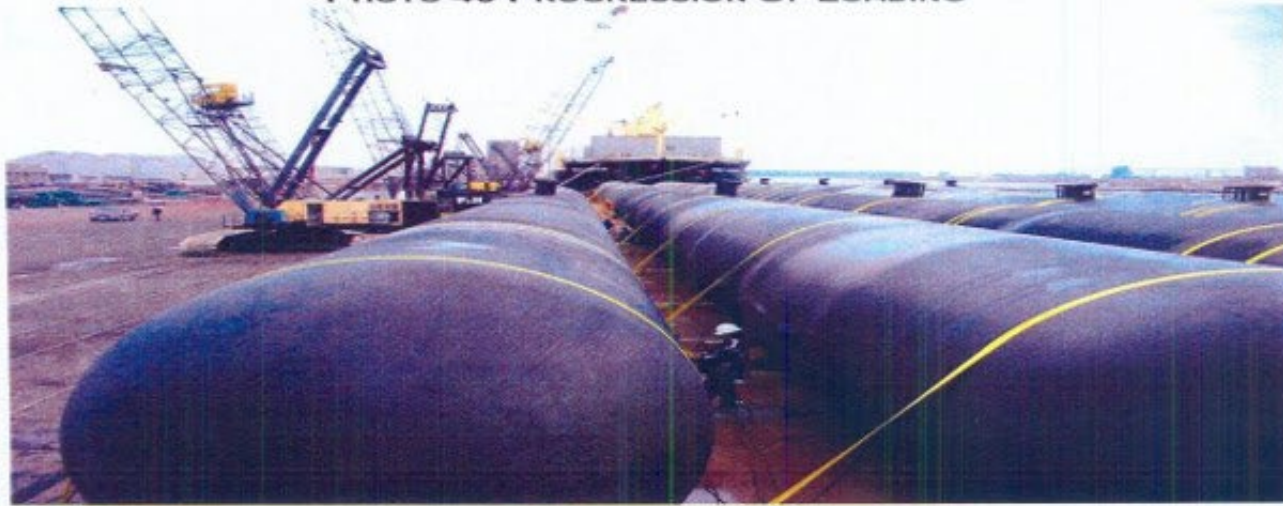


The dispositive issue raised in this case is whether the plaintiff has made out a genuine issue of material fact that the damage occurred during the coverage period. The plaintiff has adduced no significantly probative evidence to that effect.

PHOTO 45 PROGRESSION OF LOADING



PHOTO 46 PROGRESSION OF LOADING



CARGO CLAUSES

Cargo Clauses

- Institute Cargo Clauses are labeled by the letters (A), (B) and (C).
 - (A) corresponds to the “All Risks” form.
 - (B) and (C) correspond to restricted or enumerated perils forms.

See 2 THOMAS J. SCHOENBAUM, ADMIRALTY and MARITIME LAW § 19-11 (5th ed. 2011, actualized 2015-16); see also 1 ALEX PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE at 85 (1987).

- “[I]t is quite common for cargo policies to be written on an all risks basis. Such coverage is considerably more expanded than that found in the old Lloyd S.G. policy or in the usual American policies.” Id. at 351 (1987).
- The intention of the (A) form of the Institute Cargo Clauses “is to cover physical loss or damage and not economic loss or consequential loss, however those terms may be defined.” Id. at 85.
- “Frequently, policies expressly mention the exceptions, and, of course, perils insured against under the perils clause are often expressly excluded by such clauses as the F.C. & S. Clause.” Id.

A blue-tinted photograph of a shipping yard. In the foreground, a truck is parked, and a large stack of shipping containers is visible on the right. The background shows more containers and a building. The text "Institute Cargo Clause (A)" is overlaid in white at the bottom.

Institute Cargo Clause (A)

Institute Cargo Clause (A)

- “[T]he new Institute Cargo Clauses (A), while stating coverage in rather broad terms, also exclude coverage in equally broad terms.” Id. at 63.
- “Notwithstanding the all-inclusive nature of the words ‘all risks’, not all risks are covered, only those arising from fortuitous accident or casualty resulting in damage or loss attributable to an external cause.” Id.
- “An all risks clause covers risks, not certainties, and purports to cover losses only from extraordinary and fortuitous casualties of the sea; losses occasioned by the ordinary circumstances of a voyage are not indemnified.” Id.

Institute Cargo Clause (A)

- “The expression ‘all risks’ comprehends any loss or damage occasioned fortuitously, but not that which occurs inevitably. In that respect the cover provided is less wide than an insurance to cover, for example, ‘all loss and damage, howsoever caused.’” N. GEOFFREY HUDSON, ET AL., MARINE INSURANCE CLAUSES at 12 (5th ed. 2012).
- For example, “damage caused by moisture in the atmosphere would normally not be considered to be fortuitous.” Id. at 13.
- “[L]oss or damage to” “comprehends all physical loss and damage to the goods. It does not include financial loss unaccompanied by any physical loss or damage, such as loss of market, even though the cause of the financial loss was a peril insured against.” Id.

Packing

- There is some controversy.
- The “rule of thumb” in the London insurance market is that, “unless the description of the subject-matter of the insurance is so clearly worded as to include the packing materials or containers, underwriters will not respond to any claim for damage sustained to the packing materials or containers, even when caused by a peril insured against.” Id. at 14.
- “It has been suggested that, in the absence of clear words to describe the subject-matter of insurance, the packing will not form part of the subject-matter where the goods can, and commonly do, travel unprotected.” Id. at 15.
- “[W]here good commercial practice requires a certain standard of packaging for the transit, such packing does form part of the subject-matter insured, even if not specifically mentioned.” Id.

Brown v. Fleming, 7 Com. Cas. 245 (1902)



The insured objects were “228 cases of whisky.”



At the destination, it was found that in a large number of cases the straw in which the bottles were packed was wet by seawater and the labels on the bottles was discolored. There was nothing wrong with the whisky.



Cargo was sold and insured claimed damages. Underwriters denied the claim on the ground that the damage to the straw and labels was not covered by the policy.



The court held in favor of the insured reasoning that the selling value of the whisky was affected by the damage to the labels.

Lysaght v. Coleman, 7 Asp. M.L.C. 552 (1895)

- The policy insured “galvanized iron” and a claim for damaged packing cases was dismissed.

Exclusions

1. **“attributable to willful misconduct of the Assured”**

- Intentionally wider than “caused by” (the wording in the other exclusions)
- a claim would be excluded if the loss was proximately caused by an insured peril if the willful misconduct of the assured was a remote, but nonetheless effective cause.

2. **“ordinary leakage, ordinary loss of weight or volume, or ordinary wear and tear of the subject-matter insured”**

- “ordinary:” non-fortuitous or inevitable

Exclusions

4.3 insufficiency of packing

- The test is whether the packing was adequate to endure the ordinary contemplated handling and carriage.

4.4 “inherent vice”

- “[T]he risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.” Global Process Sys. Inc. v. Syarikat Takaful Malaysia Berhad, 2011 AMC 305, 311-12 (U.K. Sup. Ct. 2011).

Global Process

- A jack-up rig was shipped on a barge with its three legs sticking up 300 ft., all of which had cracks resulting from metal fatigue, known before shipping and considered by surveyors acceptable for the conditions expected.
- Motion at sea during transit enlarged the cracks and in stormy weather not beyond expectation first one leg and then the other two broke and fell into the sea.
- Rig insured under ICC(A) (“all-risks”), which excludes inherent vice.
- Since there is no implied warranty of seaworthiness of cargo, the issue was whether the loss was proximately caused by peril of the sea, covered by all risks, or by inherent vice, which is excluded.



Global Process

- The court held that inherent vice and peril of the seas cannot coexist as causes when properly defined, that a chance wave striking the first leg at a critical place, direction and time had felled it and the effect of its loss on the vessel had precipitated the loss of the other two, and that such an event was a fortuity and peril of the sea, properly considered, negating vice as a cause.
- Perils of the seas as causes do not necessarily involve extraordinary conditions; it is not that the state of the sea must have been fortuitous, but rather that some fortuitous accident or casualty must have been due to a condition or action of the sea.

Exclusions

4.5 "caused by delay"

- The American rule is that the delay must be the proximate cause of the loss for this exclusion to apply. In a case of a stranding, a sea peril insured against, the Supreme Court held that relying on the doctrine of proximate cause, meaning the real efficient cause of the loss, requires the conclusion that, insuring a cargo of bananas against "perils of the sea" covers a loss of the cargo of bananas because they become overripe and rot during a delay resulting from stranding; the stranding being the proximate cause of the loss. Lanasa Fruit S.S. & Importing Co. v. Universal Ins. Co., 302 U.S. 556, 572 (1938).

Exclusions

4.6 “insolvency or financial default”

- The addition of extra wording works to exempt from this exclusion an innocent assured who could not reasonably be expected to know the financial situation of a carrier at the time of loading, or an innocent assignee who has purchased the subject-matter in good faith.

Exclusions

5.1 In no case shall this insurance cover loss damage or expense arising from

- **5.1.1** unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein
- **5.1.2** unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out prior to attachment of this insurance or by the Assured or their employees and they are privy to such unfitness at the time of loading.

Exclusions

5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination.

- The effect of this exclusion in the ICC is not to enforce the implied warranty of seaworthiness of the ship, but to soften their effects on an insured cargo. This is reflected by Clause 5.3.

Exclusions

- **“Privity:”** Actual positive knowledge of something, or the suspicion of the true situation, “turning a blind eye” to it and refraining from enquiry.
- If a cargo superintendent employed by the assured to supervise the loading operation “turns a blind eye” to the condition of the ship, or of a container, the exclusion is triggered.
- However, if the cargo superintendent is employed by the assured’s freight forwarder, then the exclusion is not triggered.

Exclusions

- The exclusion used to be narrower before the addition of the term “employee,” because then assured personally had to be privy in order for the exclusion to be triggered.
- Clause 5.1.1 is not likely to apply very frequently in relation to the unseaworthiness of a vessel, except in those instances where a vessel owner is loading goods for his own account (i.e., supplies v. cargo)
- However, clause 5.1.2 places a heavy obligation on the assured to make sure that the containers into which the goods are loaded prior to the attachment of the insurance are in a fit condition.

Exclusions

- Clause 5.2 makes it clear that the 5.1.1 (unseaworthiness of a vessel) will not apply to an innocent party who has bought the insured goods in good faith from the original assured and to whom the insurance has been assigned.
- However, the innocent assignee is not so protected against the exclusion in 5.1.2

Exclusions

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

- **6.1** war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power
- **6.2** capture **seizure** arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat
- **6.3** derelict mines torpedoes bombs or other derelict weapons of war.

The interpretation of Clause 6.2



In Bayview Motors Ltd v Mitsui Mar. and Fire ICL [2002] 1 Lloyd's Rep. 652, the term '**seizure**' was considered in connection with a shipment of cars.



A consignment of six cars was shipped on 'All Risks' terms from Japan to the Dominican Republic, after which they were intended (under separate cover) to be sent on to the Turks and Caicos Islands. On arrival the cars were taken by the Dominican Customs to a compound and the Assured were unable to obtain their release. It was subsequently found that Customs personnel had removed the cars and misappropriated them for their own use. Insurers argued that this amounted to 'seizure' and the claim was therefore excluded.

The interpretation of Clause 6.2



The court relied upon the well known of the term “seizure” which refers to “every act of taking forcible possession, either by lawful authority or by overpowering force....”. The court concluded that when the customs officers converted the cars by refusing to release them, the cars had already been voluntarily placed in their custody and control in the bonded car park. Misappropriation in this manner did not constitute the taking of forcible possession.

Also, there was no taking by lawful authority since the customs officers were not acting as organs of the State lawfully or otherwise. They were acting solely in their own interests and in that independent capacity there was no display or threat of overpowering force. The seizure exclusion therefore did not apply.

The interpretation of Clause 6.2

- With piracy being very much a current topic it is worth remembering that only the A Clauses contain the words “(piracy excepted)” in the capture / seizure / arrest etc. exclusion in Clause 6.2. A claim relating to piracy (whether in respect of physical damage or the payment of ransom as General Average) is therefore covered under the A Clauses but not under the B and C Clauses.
- **“Piracy”**: “Forcible robbery at sea, whether committed by marauders from outside the ship or by mariners or passengers within it. The essential element is that they violently dispossess the Master, and afterwards carry away the ship itself, or any of the goods, with a felonious intent.” Republic of Bolivia v. Indemnity Mut. Marine Assurance Co., (1909) Asp. M.L.C. 218.

The interpretation of Clause 6.2

- The intention of most modern so-called pirates is not to steal the property but to extort a ransom from its owners in exchange for its release, and that of the crew, from capture.
- The payment of a ransom in such circumstances is deemed to be general average and an assured under the (A) conditions may recover from its insurers (Clause 2), but not so under the (B) and (C) conditions, where the word “piracy” does not appear in the equivalent exclusion.

Exclusions

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

- 1.caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions
- 2.resulting from strikes, lock-outs, labour disturbances, riots or civil commotions
- 3.caused by any act of terrorism being an act of any person acting on behalf of, or in connection 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
- 4.caused by any person acting from a political, ideological or religious motive.

Exclusions

- This exclusion encompasses both the loss caused, as well as that resulting from, the strike.
- Coverage for the type of loss in clause 7.1 (caused by) is afforded in the Institute Strike Clauses, even though that is not the case for a loss in clause 7.2 (resulting from).

A blue-tinted photograph of a shipping yard. In the foreground, a large truck with a white container is parked. In the background, there are stacks of shipping containers and a building. The text "Institute Cargo Clause (B) & (C)" is overlaid in white at the bottom.

Institute Cargo Clause (B) & (C)

INSTITUTE CARGO CLAUSES (B)

RISKS

1. This insurance covers, except as excluded by the provisions of Clauses 4, 5, 6 and 7 below,

A. loss of or damage to the subject-matter insured reasonably attributable to

- i. fire or explosion
- ii. vessel or craft being stranded grounded sunk or capsized
- iii. overturning or derailment of land conveyance
- iv. collision or contact of vessel craft or conveyance with any external object other than water
- v. discharge of cargo at a port of distress
- vi. earthquake volcanic eruption or lightning



INSTITUTE CARGO CLAUSES (B)

2. **loss of or damage to the subject-matter insured caused by**
 - i. general average sacrifice
 - ii. jettison or washing overboard
 - iii. entry of sea lake or river water into vessel craft hold conveyance container or place of storage

3. **total loss of any package lost overboard or dropped whilst loading on to, or unloading from, vessel or craft.**





INSTITUTE CARGO CLAUSES (C)

RISKS

1. This insurance covers, except as excluded by the provisions of Clauses 4, 5, 6 and 7 below,
 - A. loss of or damage to the subject-matter insured reasonably attributable to
 - i. fire or explosion
 - ii. vessel or craft being stranded grounded sunk or capsized
 - iii. overturning or derailment of land conveyance
 - iv. collision or contact of vessel craft or conveyance with any external object other than water
 - v. discharge of cargo at a port of distress



INSTITUTE CARGO CLAUSES (C)

2. loss of or damage to the subject-matter insured caused by

- i. general average sacrifice
- ii. jettison

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QUESTIONS