Open Cover Insurance

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1 Introduction

1.1 Purpose and Topic

I choose open cover as the topic for the thesis mostly because of my working experience at the freight forwarder company. Part of freight forwarder's work is to arrange cargo insurance on behalf of our clients – cargo owners. During my work, I found that there might be disputes arising from undeclared shipment under Chinese open cover system because of its incomplete legislation. The dispute becomes a major problem facing the assured.

Open cover insurance is widely used in cargo insurance in international trade. In particular for the long-term and large-volume export-import trade, open cover insurance is almost the inevitable choice. This is because, on the one hand, from the assured's point of view, open cover insurance can relieve him from repetitive negotiations on the terms and conditions of the cargo insurance for the same kind of trade, and meanwhile provide some other advantages such as simplified procedures and lower premiums; on the other hand, from the insurer's point of view, he can benefit from simplified procedures and fixed premium income.

This thesis includes two parts: part I is general information about open cover insurance and part II is discussion of specific issues on declaration obligation under open cover insurance system. For the purpose of this thesis, the term "open cover insurance" only refers to the open cover insurance in cargo insurance. It does not, therefore, include open cover insurance in other fields of insurance, i.e. liability insurance, although there is a British case on liability open cover insurance will be referred to in this thesis.

This thesis begins with a general introduction to open cover insurance system as such, including the identification of, comparison and interaction between relevant definitions of and documents used in open cover system (Chapter 2). And then the thesis will go on introducing four main and characteristic clauses used in the open cover system, including the rationale behind the clauses (Chapter 3).

The declaration obligation has certain significance in the whole open cover insurance system, the flaw of which may result in the loss of coverage of concerned shipment(s). Therefore, the second half of this thesis will deliberate on issues regarding declaration obligation. The source, nature, function and practice of declaration will be considered in detail in Chapter 4. Chapter 5 will concentrate on the issues revolving around non-declaration by the assured.

1.2 Methodology

Unlike many other areas of maritime law, there is no international convention harmonizing the marine insurance (including cargo insurance). In other words, cargo insurance is still regulated by each nation's domestic legislation.

This thesis will adopt the comparative method by comparing the legislation of British, Norwegian and Chinese open cover system. The British and Scandinavian insurance markets are the two main insurance markets in the world.[1] China is one of the fast growing shipping countries and its cargo insurance market is also gaining more and more importance in the world market. This thesis will present the different open cover system of the three chosen countries as well as discuss the merits and demerits of the respective open cover system.

With regard to the issues on declaration obligation, the method for analyzing the issues under English and Norwegian open cover system would be *de lege lata*. And since the regulation for Chinese open cover system is incomplete, the method for this part would be *de lege ferenda*.

[1] In respect of the Scandinavian insurance market, although the Scandinavian countries have different legal frameworks for cargo insurance, the main legal principles and solutions remain the same. Thus, this thesis chooses Norwegian open cover system as the representative.

1.3 Sources of Law

1.3.1 Sources of British Open Cover System

The most important legislation for British marine insurance is Marine Insurance Act 1906. The main clauses to be discussed in Chapter 3 are the mostly used Institute Standard Conditions for Cargo Contracts.

The thesis will refer to some old but important cases from Lloyd's report. Some of the points in the judgment were later incorporated into MIA 1906 as law. In particular, the thesis will use a recent case from Lloyd's report.[2] Although the open cover insurance concerned in this case was not about cargo insurance, the judgment of this case can be used analogically to illustrate the same possible problem existing in the cargo open cover insurance.

In addition, the thesis will make reference to some British literature on cargo insurance, including John J. Novitt, Marine Insurance Vol. 2: Cargo Practice 4th ed. and Robert H Brown, Witherby's Encyclopaedic Dictionary of Marine Insurance, 6th ed.

1.3.2 Sources of Norwegian Open Cover System

The legal sources for Norwegian open cover system mainly come from Norwegian Cargo Clauses: Conditions relating to insurance for the Carriage of Goods of 1995 (CICG 1995) and its commentaries. When issues can not be solved by reference only to CICG 1995, the thesis will make reference to the Act relating to Insurance Contracts (16 June 1989 No. 69) and Contract Act (LOV 1918-05-31 nr 04: Avtaleloven).

[2] [2001] EWCA Civ 2051

1.3.3 Sources of Chinese Open Cover System

The legal sources for Chinese open cover system come from the Chinese Maritime Code and Insurance Law of The People's Republic of China (2002) and one of the main open policies used in Chinese cargo insurance market: Standard form for Open cover of Ping An of China.

Two recent cases will be referred to in the last chapter of the thesis to show the attitude of the Chinese court towards the non-declaration problem: Tianjin Foreign Trade Company v. the People’s Insurance Company of China Tianjin Branch (1996) and Changchun Dacheng Corn Development Co Ltd v. the People’s Insurance Company of China Jilin Branch (2001).

Some of the articles written by Chinese scholars will be quoted to support the point proposed in this thesis. The articles include Prof. Pengnan Wang: Theory and Practice of Modern Marine Insurance and Dr. Shaochun Yuan: On the Legal Issues of Open Cover.

2 General Introduction of Open Cover System

Open cover insurance is regulated by each nation's domestic legislation, thus its system being different in various countries, though the main body remaining the same. The presentation of this chapter is based on the UK open cover system; although special reference will be made where Norwegian and Chinese open cover systems indicate different regulations.

2.1 The Framework of Cargo Insurance

Cargo insurance can be effected either on facultative basis or on open cover basis. First we can see the respective concepts and features of these two different forms of cargo insurance.

2.1.1 Facultative Insurance

"Facultative" according to the dictionary means the "right of option" as opposed to "obligation". It is used in marine insurance practice in regard to a proposal for insurance where the insurer has the option to accept or reject the proposal by the assured. Generally, the term "facultative" is applied to the effect of a specified insurance, sometimes called a "named risk", wherein the name of the carrying vessel, the goods to be insured and the voyage are all clearly defined in the insurance contract.

The main feature of facultative insurance lies in the option of the insurer either to accept or reject the proposed insurance contract by the assured. Thus, for every facultative insurance contract, the assured and the insurer have to negotiate the specific terms, conditions and rates for every single shipment. This form of cargo insurance suits appropriately the situation where the seller and the buyer enter into a contract to sell a certain amount of goods through only one shipment and thus need only one insurance contract to cover the concerning shipment. However, in reality the situation is also likely that the seller and the buyer decide to sell the same amount of goods but through several shipments during quite a long period and consequently need several insurance contracts to cover each following shipment. If the party in charge of arranging for insurance chooses to effect the cargo insurance on the facultative basis, he has to negotiate the terms, conditions and rates with the insurer for every shipment despite the fact that the terms, conditions and rates for different shipments are actually much the same.

2.1.2 Open Cover Insurance

As a contrast, open cover insurance is an obligatory contract binding both parties to its terms, rates and conditions. It is a form of long term marine insurance contract whereby the subscribing insurers guarantee to accept risks that are declared by the assured as they arise during the currency of the contract. The assured agrees to declare under the open cover every risk coming within its scope in chronological order and not to place any of these risks elsewhere should he find it advantageous so to do[3]. Open cover insurance is mainly used in cargo insurance, but it can also be used in hull insurance and liability insurance.

From the concept of open cover insurance, two main features are noticeable. Firstly, the terms, rates and conditions are fixed in open cover contract and binding on every shipment coming under its scope. Therefore the insurer and the assured are no longer obliged to negotiate for respective terms, conditions and rates for different shipments under the same open cover insurance contract. This form solves the problem of the above-mentioned situation where the seller and the buyer enter into contract to sell the goods through several shipments during a long period. Secondly, the obligatory nature of open cover contract decides that on the one hand the assured does not have the option to choose whether and which shipment coming under the open cover insurance contract will be declared to the insurer, and on the other hand the insurer does not have the option to accept or reject the declaration of any shipment coming into the scope of open cover insurance. The first feature is to a large extent dependent on the second one. In other words, the second feature

[3] Robert H Brown, Witherby’s Encyclopaedic Dictionary of Marine Insurance, 6th ed. 2005 London at [532]

guarantees the existence of the first feature. Later, we will see that declaration plays an important role in the second feature of open cover insurance system.

2.2 The Framework of Open Cover Insurance

In most countries' open cover systems, there are two forms of open cover insurance, namely, floating policy and open cover[4]. Both of them have the two features of open cover insurance and a lot of other aspects in common. In some countries' open cover insurance system, e.g. the UK, there exists a third form, namely, facultative/obligatory insurance, which does not have the second feature of open cover insurance. [5]

2.2.1 Floating Policy

MIA 1906 Section 29 Sub. 1 defines a floating policy as "a policy describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declarations". It covers all such property as the merchant expects to have at risk, up to a certain amount, within stated limits of space and time. Floating policy is exhausted when the aggregate value of shipments under it reach its limited amount. It follows, that the life of a floating policy depends not on a period of time, but on the number and size of declarations made on it.

2.2.2 Open Cover

Open cover is a document by which the insurer undertakes subsequently to issue duly executed floating or facultative policies, at the request of the assured, within the terms of the cover. It is an alternative to floating policy of effecting cargo insurance for recurring

[4] Hereunder, the word "open cover" refers to its narrow sense and the word "open cover insurance" refers to its wide sense.

[5] Facultative/Obligatory insurance will be introduced below in Section 2.2.3.

shipments. Like floating policy, the details of open cover are unknown when the insurance is taken out. Unlike floating policy, open cover does not have a certain amount and thus it is exhausted when the time limit expires. Of course when open cover is effected on an "always open" basis, it has not time limit and the open cover remains in force until either party uses the cancellation clause to terminate it.

2.2.3 Facultative/Obligatory Insurance

As mentioned above, in some countries' cargo insurance system, there exists a third form -- facultative/obligatory insurance contract. This insurance allows the assured to have the freedom to choose which risks he wants to declare under the insurance contract while the insurer is obliged to accept all the declarations made by the assured. Since the obligation for the assured and the insurer is not equivalent, usually this type of insurance contract is restricted by insurers to broker's covers and binding authorities.[6]

Below we will look at floating policy system and open cover system in detail.

2.3 Floating Policy

2.3.1 Evolvement of Floating Policy

It was realized during the nineteenth century in the British insurance market that both the broker and the insurer were spending a great deal of time on repetitive cargo insurance on a facultative basis with constant use of the same guide slips and thus using the same market on each occasion. The more regular the orders became, the more often the broker had to negotiate much the same contract. The repetition was time consuming and it was obvious

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[6] The broker's cover is in the name of the broker rather than any particular client of the broker and the cover has a much wider scope than that of normal client's open cover. The broker's cover and binding authority indicates considerable trust between insurer and the assured.

that before long the insurers would agree to automatic forward cover, subject to certain limitations. It was from this need to avoid the repetitive work that grew the practice of issuing floating policies.

2.3.2 Operation Practice

Normally, a firm of merchants will at the beginning of their business year, take out a floating policy upon all goods to be shipped on their account up to an aggregate value of, suppose 1,000,000 USD within the ensuing 12 months for carriage between a scope of destinations.

Batches of consecutively numbered and pre-signed insurance certificates are issued, in blank, off the floating policy to be held by the merchants. As each shipment goes forward, the merchant fills in the details of the shipment in the next numbered certificate and countersigns it before using it in the documentary credit procedure. At the same time, the merchants send a copy of the certificate to broker and/or insurer as a declaration under the floating policy.

As each declaration is made the sum insured is reduced by the insured value so declared and the outstanding balance of the sum insured is carried forward. When the amount insured is exhausted by such declarations, the policy is said to be “fully declared” or “written off”.

2.3.3 Problem with Floating Policy

A major problem with floating policy is that the cover could expire suddenly even without notice by the assured due to the exhaustion of the sum insured. For this reason, the assured or his broker must keep a wary eye on the dwindling floating policy all the time. However, there is still constant fear that once the monitoring system does not work, the assured is immediately exposed to the risk of having goods transit without any cover. How to deal with the sudden exhaustion problem with floating policy motivated the invention of open cover.

2.4 Open Cover

2.4.1 Evolvement of Open Cover

Brokers of the British insurance market firstly began to effect long-term slip contracts, usually for a period of 12 months, off which the various succeeding floating policies could be issued. This method can minimize the monitoring procedure to a diary entry to ensure the continuation of the long-term slip as the annual expiry date approaches. The slip contract provided an agreement by the insurer to provide cover even if the assured or broker failed to effect a succeeding floating policy in time. This slip system became known as "open cover" in British insurance market. The open cover under Norwegian and Chinese insurance system evolved almost in the same way as that of British system with the only difference that the open cover under Norwegian and Chinese is an insurance contract rather than a slip contract.

2.4.2 Operation Practice

An open cover could be effected for a relatively short period, e.g. 12 months, but in most cases, it is "always open", which is to say it remains open for as long as the parties require its continuance. Usually, the insurer will, at the request of the assured, grant an open policy to evidence the contents of the open cover.

The operation practice under open cover for each single shipment is much the same as that of floating policy; therefore it is not repeated here.

When the open cover is on an "always open" basis, it will remain in force until either party relies on the "cancellation clause" in the open cover to terminate the contract. In all other cases, the open cover will expire when exceeding the stated time limit. Alternatively, on expiry of the open cover, the parties can choose to extend the open cover by negotiating on some new terms.

2.4.3 Problem with Open Cover

The problem discussed in this sub-section is unique to British system and its similar system. As introduced above, the open cover under British system is just a slip contract and therefore confronted with the problem of deficiency in its legal value. Pursuant to MIA 1906 Section 22, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy. For this reason, until now the open cover alone is still not accepted as evidence of a formal contract by the British court in the event of dispute. In order to resolve this problem, the assured may either request insurer to produce a formal policy for each shipment under the open cover or use floating policy in conjunction with open cover.

Since open cover under Norwegian and Chinese is regarded as insurance contract, the above problem would not happen under these two open cover systems.

Having known about the respective concepts of floating policy and open cover, we turn to look at the comparison and conjunction of them in order to have a whole picture of open cover system.

2.5 Comparison between Floating Policy and Open Cover

As have seen from above text, there are similarities between floating policy and open cover. For this reason, Institute Standard Conditions for Open Covers are so similar in wording to Institute Standard Conditions for Floating Policies, except that they use the words “open cover” instead of “floating policies”. Nevertheless, there are three main differences between floating policy and open cover.

Firstly, the sum insured in a floating policy is reduced by the value of each shipment declared until the sum insured is exhausted while an open cover is not usually subject to any aggregate limit of liability, but subject to a maximum limit of the insurer’s liability for any one vessel (per bottom) or any single shipment.

Secondly, the floating policy is normally limited to twelve months while the open cover may be limited in time or may be permanent (“always open”). When the open cover is permanent, a clause is inserted enabling either party to give notice of cancellation of the cover within a stated time, e.g. thirty days.

Thirdly, in the case of a floating policy the assured receives a formal policy document. In case of an open cover under British system, no formal policy is issued and the arrangement is relatively informal. As a matter of fact, an open cover has no more legal validity than a slip. But the assured is entitled to demand a policy for the open cover if he requires so, e.g. if dispute ensues later.

2.6 Conjunction Use of Floating Policy and Open cover

Today open cover, combined with the issuance of insurance certificates, has become the most common and popular form of cargo insurance used in international sale of goods business. Nevertheless, as pointed out in section 2.4.2, the open cover under British system suffers disadvantage of legal invalidity. Whenever there is a dispute between the parties, the open cover alone cannot be produced as the insurance contract in front of the British court. It is a contract which is binding in honour only. Although the preservation of "honour" in the business of marine insurance is so important that, from a practical point of view, the legal invalidity of the contract itself is not disadvantage to the parties concerned.[7] This problem, however, can be resolved by the issuance of floating policy off the open cover. For instance, a firm of merchants may effect an open cover with the insurer, e.g. 12 months and then successive floating polices can be issued off this open cover in chronological order, each of which is limited to a certain amount and the later floating policy succeeds to its previous one. For each single shipment, there will further be a certificate issued off the floating policies. By this method a formal policy (floating policy) exists and certificates can be issued as evidence of its existence.

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[7] John J. Novitt, F.C.I.I. *Marine Insurance Vol. 2: Cargo Practice*, 4th ed. 1985, London at [72]

As a matter of fact, due to their respective disadvantages, floating policy and open cover are seldom used alone in British insurance market today. It is more common for them to be used in conjunction with each other to achieve the best effect.

2.7 The Effective Period and the Insurance Period

The effective period for floating policy and open cover refers to the time period from when the insurance contract comes into effect until when the contract terminates. Normally, the effective period of the insurance contract will be agreed by the parties and inserted into the insurance contract, e.g. 12 months. During this effective period, the insurer is obliged to accept all the shipments declared by the assured while the assured is also obliged to declare under the floating policy or open cover every shipment coming into its terms. More often than not, open cover is effected on an “always open” basis, and consequently there is no definite effective period for this kind of insurance contract. In this case, the parties are bound by their respective obligation until either party relies on the cancellation clause to cancel the open cover.

The insurance period of floating policy and open cover refers to the period during which the insurer is held liable for each shipment declared under the floating policy or open cover. In facultative cargo insurance, the insurance period commences from the time when the insurer issues the insurance certificate for the shipment insured or any other time as agreed by the parties in the insurance contract. While in floating policy and open cover, unless otherwise agreed, the coverage automatically attaches to every shipment answering the terms of floating policy or open cover once it has been shipped. That is to say, the insurance period for floating policy and open cover commences from the actual time when the shipment falling into the scope of the insurance has been shipped.

2.8 Documents Used in Open Cover System

2.8.1 Open Policy

As defined in Witherby’s Encyclopaedic Dictionary of Marine Insurance, open policy refers to “a formal policy document giving legal validity to a long term marine insurance contract such as a cargo open cover, reinsurance treaty, etc. Under British system, in the absence of such formal document, a court may refuse to recognize an open cover contract; even though certificates are issued against it. In other words, under the British system, open policy is the only and exclusive evidence to prove the existence and contents of an open cover contract.

Under Chinese system, there is no direct definition of “open policy” can be referred to. CMC Section 231 provides “The open cover shall be evidenced by an open policy to be issued by the insurer.” However, it does not indicate that open cover can only be evidenced by open policy, and thus it indirectly accepts that the insurance contract can also be evidenced by other forms. Hence under the Chinese open cover system, open policy is just strong evidence of an open cover contract, but not necessarily the only one.

Under Norwegian system, there is no concept of “open policy” or any other special terminology for the policy issued to evidence an open cover.

2.8.2 Certificate

In commercial sense, there are two links that may require the use of the policy: firstly, the requirement of a bank that a policy be deposited with the bank as collateral security for an advance of payment for the goods; secondly, the need of the consignee to see the evidence of insurance which the consignee has paid or will pay the premium for. However, the floating policy and open cover or open policy are intended to be the legal instrument, acting as a vehicle for the declaration of many shipments and usually held by the assured or broker on behalf of the assured for the purpose of closing and claiming. That is to say, neither of these two situations can be satisfied by the production of the policy where a floating policy or open policy is used because (a) the policy must be retained by the assured or broker, and (b) the policy covers many shipments which may not be the subject of an advance from a bank nor the concern or a particular consignee.

The above problems can be solved by the use of a certificate of insurance. A certificate is a printed document which bears all the details of the insurance contract leaving spaces for the insertion of details of a particular shipment.

With regard to the legal validity of certificate, relevant British regulation differs from Chinese and Norwegian counterparts. In Britain, pursuant to MIA 1906 Section 22, it is still believed that the certificate would not be accepted as a valid insurance contract by a court of law.

Whereas, pursuant to CMC Section 232, “the insurer shall, at the request of the insured, issue insurance certificates separately for the cargo shipped in batches according to the open cover. Where the contents of the insurance certificates issued by the insurer separately differ from those of the open policy, the insurance certificates issued separately shall prevail. ” The provision means that a certificate is in fact simplified policy for each shipment under floating policy or open cover and stands for an independent insurance contract. Following from the second sentence of CMC Section 232, under Chinese open cover system, a certificate can be accepted as a valid insurance contract by a court of law. This is also the case under Norwegian open cover system.[8]

Because of the large volume business, from a practical point of view, it is very impractical to expect the insurer to issue a certificate for each declaration because the assured will require the certificate without delay as soon as he is aware of the name of the carrying overseas vessel. If the assured has to wait for the insurer to issue each certificate, it would impair the assureds’ commercial processes, in particular to the documentary credit procedure. Thus, in practice, it is more practical for blank certificates to be supplied in advance to the assured to complete the shipment details as each shipment goes forward. These certificates are pre-signed by or on behalf of the subscribing insurers; countersigned

8 CICG 1995—Appendix: Contractual terms relating to open cover and floating policies for the carriage of goods, Section 3 (Certificate of Insurance) “… the insurer shall on demand issue a certificate of insurance for each individual shipment covered by the Insurance Contract…”

by the assured before he passes them on to the buyer or other interested parties, i.e. the bank that advances payment for the goods.

However, this practice is not necessarily always the situation for the operation of certificate. When there is provision, either from legislation[9] or from the contractual terms of floating policy or open cover itself, that the insurer has the right to hold the certificate until the premium has been paid, then the assured has to count on the insurer to issue individual certificate for each shipment.

2.8.3 Open Slip

Under British system, open slip is another kind of cargo insurance document which is very similar to floating policy and open cover no matter in name or usage and thus may be easily confused with floating policy and open cover. It is worthwhile here to introduce this document in order to distinguish it from floating policy and open cover under British system.

Open slip is a form of original cargo slip used by a broker when the proposer has a large contract to fulfil which demands several shipments to be made to a specific destination or to specific destinations. The total contract sale price has been agreed with the buyer but the proposer does not know, in advance, the amount or value of any particular shipment. [10] In other words, an open slip is designed to cover a number of specified shipments.

In practice the slip is effected for a sum insured sufficient to cover all the shipments concerned, in much the same way as a floating policy. As each shipment is declared, the

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[9] i.e. CICG 1995—Appendix: Contractual terms relating to open cover and floating policies for the carriage of goods, Section 3 (Certificate of Insurance) "… The insurer is not obliged to hand over any such certificate until all due premiums have been paid."

[10] Robert H Brown, Witherby's Encyclopaedic Dictionary of Marine Insurance, 6th ed. 2005 London, at [534]

aggregate sum insured by the slip is reduced by the amount declared and the life of the open slip terminates when the sum insured has been exhausted. In many other aspects, the open slip also share the same features as floating policy and open cover e.g. there is a limit per bottom and the carrying vessels may be subject to the classification clause.

This type of slip is mainly used for insurance on materials being sent by sea for the construction of a power station or for similar contracts. As it is designed to cover several specific shipments, no cancellation clause appears in the contract like that in the floating policy or open cover.

There is no such concept under Norwegian system and Chinese system. Thus, under these two systems the parties would use floating policy instead in situations where under British system the open slip is used.

3 The Main Clauses Used in Open Cover System

As a long-term insurance contract providing cover automatically to single shipments coming into its terms at agreed rates and conditions, open cover system has its own features which distinguish it from facultative insurance. This chapter will focus on analyzing and comparing four kinds of characteristic clauses in Institute Standard Clauses, CICG and Standard Form for Open Cover of Ping An of China, namely: (1) valuation of declaration clause; (2) cancellation clause; (3) classification and age limitation clause; (4) limit on any one vessel, limit any shipment or limit any location clause.

3.1 Valuation of Declaration Clause

In nature, insurance contract is an indemnity contract, which means that in case of loss the assured will be given, as nearly as possible, a complete indemnity against the consequences of such loss. In respect of cargo insurance, in order to put the merchant in the same situation as though no loss on his goods had taken place, it is clear that the value of the goods should be estimated, for the purpose of insurance, at the price which they would actually have produced had they arrived undamaged at their destination. That is to say, the assured would like to be covered for C.I.F. plus a percentage for profit he expects to make from the safe arrival of the goods. Regarding how to achieve this purpose, different legal systems have different methods.

MIA 1906 differentiates between “valued” policies and “unvalued” policies. According to Section 27, a “valued” policy is a policy which specifies the agreed value of the subject-matter insured and the assured can include the anticipated profit into the value fixed in the policy. In case of loss, pursuant to Section 67, the assured can recover to the full extent of the value fixed by the policy. On the contrary, if a policy does not specify the value of the subject-matter (“unvalued”) policy, the assured can only recover his loss to the full extent of the insurable value, which according to Section 16(3) is C.I.F. (cost, insurance and freight), excluding the anticipated profit.

When connected with floating policy or open cover, it is impractical to specify in advance a fixed value for each shipment coming into the terms of the floating policy or open cover; rather it only becomes practical to incorporate a “basis of valuation” clause. For instance, Institute Provisional Value Clause for Cargo Contracts provides that “In the event of loss accident or arrival before declaration of value it is agreed that the basis of valuation shall be the prime cost of the goods or merchandise plus the expenses of and incidental to shipping, the freight for which the Assured are liable, the charges for insurance and ……..%.” By inserting such a clause, the parties agree that the insured value for each declaration shall be calculated in accordance with the formula laid down in the clause and thus each declaration can be deemed as “valued”.

This “basis of valuation” clause becomes significant when the declaration is made after of the goods has occurred loss [11]. Pursuant to MIA 1906 Section 29(4), unless the policy otherwise provides, the policy must be treated as an unvalued policy as regards the subject-matter of a declaration where the declaration of value is not made until after the loss or arrival of goods. In other words, the assured is not entitled to recover the anticipated profit from shipment declared after loss when there is no “basis of valuation” clause included in floating policy or open cover.

CMC has a different resolution in respect of how the assured can recover his anticipated profit. Pursuant to its Section 219, the insurable value of the subject matter insured shall be agreed upon between the insurer and the insured. Where no insurable value has been agreed upon, the insurable value of goods shall be calculated as C.I.F. Thus, under CMC, the anticipated profit can be directly included into the insurable value provided the agreed insurable value is inserted in the policy.

[11] See the MIA 1906 Section 29(3), regarding the assureds’ right to make a declaration after loss of the goods.

When related to floating policy or open cover, the same question as that under MIA 1906 occurs: it is impractical to specify the insurable value of ensuing declarations in advance. Therefore, a "basis of valuation" clause is needed to demonstrate that the parties have agreed on the insurable value of each ensuing declaration to be calculated as such. Standard Form for Open Cover of Ping An of China provides that the insurable value shall be … (100%-130%) of the invoice value of the goods. The clause allows the parties to agree on the anticipated profit ranging from 0%- 30%. In the event of loss, the assured is entitled to recover the stated profit in the clause together with the invoice value of the goods.

CMC has no explicit provisions regarding the issue whether the assured is entitled to make a declaration after the loss of the goods. Here it is assumed that the declaration is allowed to be made after the loss of the goods[12]. In this case, if the assured wants to recover the anticipated profit, there first must be such a "basis of valuation" clause in floating policy or open cover. Otherwise, the assured can only recover the C.I.F. value of the lost shipment from the insurer.

CICG Section 29 allows the insurable value to directly include the anticipated value, but it goes one step further by expressly stipulating that "unless otherwise agreed, the insurable value of such anticipated profit shall be 10% of insurable value of the goods as such." That is to say, if the policy does not specify any other amount of the anticipated profit, according to CICG Section 29, the valuation of each declaration under floating policy or open cover has automatically included 10% anticipated profit. Certainly, if the parties are not satisfied with this amount, they can change it through explicit stipulation in the policy. Otherwise, the assured is only entitled to recover 10% anticipated profit in case of loss.

[12] This assumption will be proved true in later text, see 5.1

With regard to the declaration made after loss, CICG Appendix Section 4 provides that the insurer is not liable for undeclared shipments, and as a result "basis of valuation" clause is not relevant in this situation. Thus, it is not necessary under Norwegian system for floating policy or open cover to contain such a "basis of valuation" clause.

3.2 Cancellation Clause

A cancellation clause is a clause in the contract that entitles either party to cancel the contract by giving a period of notice to the other party. Cancellation clauses play an important role in open cover system, especially to open cover on "always open" basis.

Most open covers today are on an "always open" basis, which means that once the cover attaches, it continues forever until one of the parties cancels it. This feature of open cover may give rise to one problem. Since the terms and premium rates are fixed, for as long as the open cover continues, the fixed terms and rates will continue to apply to all the shipments falling within the scope of the open cover. From the insurer's point of view, he may be bound to cover the assureds' risk for ever at the agreed terms and rates. For this reason, no insurer would grant an "always open" cover without a suitable cancellation clause which can enable him to escape from the insurance contract when it becomes unfair to him.

Theoretically, even in a floating policy or fixed-period open cover, one might also find a cancellation clause to ensure that the insurer may cancel his commitment in the event that there are so few declarations that the balance of the sum insured remains outstanding, with the policy still active, but with the rating structure already outdated. [13]

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[13] John J. Novitt, F.C.I.I. *Marine Insurance Vol. 2: Cargo Practice*, 4th ed. 1985, London, at [51]

The cancellation clause for open cover is special compared to that of facultative insurance. The latter is relatively stricter on the insurer and can only be invoked when certain preconditions are met. However, the former gives equal cancellation rights to both parties and the parties do not have to wait until certain precondition are satisfied in order to use their cancellation right.

A typical cancellation clause for open cover would look like that of Standard Form for Open Cover of Ping An of China, which provides that the insurance contract can be cancelled or amended by either party subject to a 30-days' notice in advance to the other party.

The above cancellation clause has two features. Firstly, instead of leaving the notice period to be agreed upon by the parties, the clause directly specifies that the notice period is 30 days. In practice, although 30 days is the most often seen notice period, it is still better to leave the notice period open, ensuring the flexibility of the open cover. Secondly, the clause entitles either party to send an amendment notice besides the cancellation notice. In fact, sometimes when one party (mainly the insurer) sends out the cancellation notice, he does not intend to cancel the insurance contract, rather he just wants to use the cancellation clause as a device to renegotiate the terms and rates of the insurance contract. In this case, when the other party can satisfy the party in respect of any changes in terms and rates, etc prior to the expiry of the stated notice periods, the party most likely will withdraw the cancellation notice. Certainly, when the parties cannot reach agreement on the amendment to the terms or rates, the cancellation notice will come into force after the expiry of the stated notice period. However, by using the above clause, either party can distinguish his intention between to merely amend the insurance contract and to totally cancel it. Even when one party has already sent out an amendment notice, but later the parties can not reach consensus on amendment, the parties may still send out a cancellation notice.

Institute Cancellation Clause is a comprehensive cancellation clause. According to its stipulation, the period of notice is left open for most situations to be agreed by the parties at the time the contract is effected. Furthermore, the clause also takes into account several special situations where the notice period is fixed. The risks covered by Institute Strikes Clauses may be cancelled at seven days notice, leaving the marine risk coverage still active. When related to strikes risks on shipments to or from USA, the notice period may be further reduced to 48 hours.

The reason why the Institute Cancellation Clause is more extensive and detailed is because the English judges tend to interpret the clause very literally and they are unwilling to consider the situations not included in the clause. Thus, if the clause does not specify the different notice periods for special situations, the agreed notice period in the cancellation clause will apply to all situations. A detailed clause also has its advantage: the more detailed it is, the highly operative it has. Once the special situation(s) happens, either party can rely on the different notice periods to cancel the insurance contract. Without the explicit provision, it seems very difficult to cancel the insurance contract within 48 hours when the strikes breakout in USA.

Under both Chinese and British open cover insurance system, all shipments that have commenced transit prior to the expiry of the notice period remain covered. In contrast, any shipment that has not commenced transit prior to the notice period expires is not covered, unless the notice is withdrawn before expiry.

A cancellation clause in an open cover applies to any insurance effected off such cover.[14] So that when there are floating policies issued off the open cover, and the cancellation notice is given under the open cover, the notice would apply to the floating policies as well. As regards the shipments declared under the floating policy, they will be treated in the same way as if they are declared under the open cover.

Despite the importance of a cancellation clause, CICG does not contain such a special cancellation clause for open cover. CICG Section 56-58 regulate the cancellation right for the insurer concerning respectively in the event of fraud, incorrect information and the

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[14] John J. Novitt, F.C.I.I. *Marine Insurance Vol. 2: Cargo Practice*, 4th ed. 1985, London, at [52]

assureds' action or omission. Obviously, these cancellation right clauses are not the ones we are discussing here which are unique to open cover, entitling either party to cancel the insurance contract as they see appropriate. Since there is no explicit clause regarding the cancellation right in CICG, we will have to refer back to the rules and principles of law.

Pursuant to ICA Section 3-2 para. 2, the assured may cancel the insurance contract if (1) the need for cover ceases to exist or (2) there are specific reasons or (3) when the assured want to move his insurance contract from one insurer to another insurer. These three conditions for cancellation right are wide-ranged and thus include most situations where the assured will cancel the insurance contract. This rule guarantees that the assured almost enjoy same cancellation right under Norwegian open cover system as that under British and Chinese open cover system. However, according to ICA Section 3-3 para. 1, the insurer's cancellation right is more restricted: the insurer may only cancel an insurance contract when warranted by a particular circumstance as stated explicitly in the terms of cover (CICG Section 56-58) and termination is reasonable. Therefore if the terms of the open cover become unfair or the rates become out-dated, the insurer cannot rely on the rules in ICA to cancel the open cover. In that case, the insurer has to refer further back to the rules in Contract Act[15], which deals with entry into contracts, validity of contracts, power of attorney, etc. While the rules of the Contract Act governing entry into contracts may be dispensed with by agreement, the rules on contracts' invalidity cannot be departed from. According to section 36, an agreement may be wholly or partially set aside or amended if it would be unreasonable or conflict with generally accepted business practice to invoke it. Therefore flowing from this rule, an open cover contract may be cancelled if enforcing it would appear unreasonable.

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[15] Contract Act: Conclusions of agreements, the right to deposit an item of debt, limitation of claims. (LOV 1918-05-31 nr 04: Avtaleloven)

To sum up the cancellation right under Norwegian open cover system, either party is allowed to cancel the contract when there is unreasonable situation, thus guaranteeing the possibility of issuing “always open” open cover. However, unlike the explicit cancellation clause in Institute Standard Conditions and Standard Form for Open Cover of Ping An of China, the cancellation right under Norwegian system is stricter. It cannot be invoked whenever either party sees appropriate; rather it can only be invoked when there appears unreasonable situation.

3.3 The Carrying Vessel (the Classification Clause and the Age Limitation Clause)

It is customary for both floating policies and open covers to have clauses setting limitations on the carrying vessel. The rationale is that under facultative insurance, the carrying vessel is one of the major elements for the insurer to consider before he accepts or rejects each shipment; while under open cover system, the insurer is agreeing to automatic cover in advance for all the subsequent shipments coming into its terms. The insurers’ risk is certainly increased when an old, sub-standard or poorly managed vessel is used for the carriage of goods. Thus the insurer must seek his own remedy to discourage the assured from increasing his risk.

In theory, three factors in the carrying vessel are of concern to cargo insurers:
The age of the ship
The class, type and fitness of the ship
The flag, ownership and management of the ship
The last of these three factors can not directly be controlled by the use of the classification clause or age limitation clauses due to its complicate situations, such as it is not mandatory for ships to be registered in the country where its owners are nationals. It would be very difficult, if not impossible, to draft a general registration clause to limit the insurer’s risk. Thus, if the insurer has special requirements on the flag, ownership and management of the

ship, he will insert a clause specifying his requirements (any special exception) on a case-by-case basis when he concludes the contract.[16] Therefore, the insurer's remedy concentrates on the first two factors in order to limit the carriage of the insured goods, at the agreed rate, to certain types of vessels. Usually, it takes the form of a classification clause and/or an age limitation clause.

We can firstly look at Institute Classification Clause.

The sub-clause (1) of Institute Classification Clause is dealing with the classification of the carrying vessel. Basically only vessels classed with the IACS members and Associate members are regarded as qualifying vessels. But the restriction is relaxed on vessels engaged exclusively in the coastal trading by permitting these vessels to be classed with its national flag society. In the event of vessels coming outside of the qualifying classification societies, the clause provides that the assured should send notice to the insurer immediately for agreement on new premium rates and conditions. Failure of sending this prompt notice will cause the goods carried on such disqualifying vessels to transit without cover. And then the clause further provides that when the loss happens prior to agreement on new rates and conditions for the cargo on disqualifying vessels, the cover may be provided but only if it would have been available at a reasonable commercial market rate on reasonable commercial market terms.

Although the clause explicitly requires the carrying vessel to be classed by a member of IACS, the third paragraph allows certain flexibility to this requirement. According to the third paragraph, on the one hand, the assured is bound to give notice to the insurer immediately he becomes aware that the goods will be carried by vessels not classed by a member of IACS, otherwise the goods will not be covered. On the other hand, the insurer

[16] John J. Novitt, F.C.I.I. *Marine Insurance Vol. 2: Cargo Practice*, 4th ed. 1985, London, at [55]

receiving notice is bound to give cover at the new rates and terms agreed by the parties. [17] Then the third paragraph deals with a special situation ---- when the loss occurs prior to any new rates and terms can be agreed. In this situation, the insurer can provide cover to the lost goods provided that the cover would have been available at reasonable rate and terms. In other words, the insurer is not bound to provide cover to the assured if the lost goods would not have been covered at reasonable rate and terms on the market. There is another point worth mentioning: since the assureds' right to coverage is all dependent upon his prompt notice, the goods are not covered if the loss occurs prior to any notice is sent to the insurer.

The sub-clause (2) is an age limitation clause, which refers to the age limits for the carrying vessels and states that goods carried by vessels outside the expressed limitations shall attract an additional premium. The limitations are:

Bulk cargo carriers and combination carriers over 10 years of age;

Other vessels over 15 years;

Vessels which have established a regular pattern for carrying general cargo between a range of specified ports over 25 years of age. Generally, these vessels refer to "liners". The reason why the age limitation for liners can be relaxed is that in order to keep its schedule, the liner must be properly maintained and operated. However, since the clause does not require the vessels to be continuously used as liners previously, it can also refer to the vessels chartered in to engage in liner trading which most likely do not have the same fitness as the vessels continuously used as liners.

Vessels constructed as containerships, vehicle carriers and open hatch gantry crane vessels which have been continuously used as such on an established and regular pattern of trading between a range of specified ports over 30 years of age. The reasons for these vessels to have most relaxed age limitation are: firstly, these vessels are built with advanced

[17] Robert H Brown, Witherby's Encyclopaedic Dictionary of Marine Insurance, 6th ed. 2005 London at [295]

technique and correspondingly their fitness is better; secondly, they have been continuously used as liners, thus their maintenance is guaranteed.

Since the clause does not set any upper limit on the age, the assured is allowed to choose vessel of any age as long as he pays the corresponding additional premium. In theory, this may cause very high risk for the insurer if the assured decides to use a very old vessel, say 40-year-old vessel. The insurer can not reject to provide cover for the goods carried on such vessel if the assured pays the additional premium. However, in reality, a high additional premium will more often than not discourage the assured from using a very old vessel.

In order to assist the assured to calculate the possible additional premium by himself in advance before he chooses a carrying vessel, the broker and the insurer of London cargo insurance market has agreed on an advisory scale of additional premiums. This scale applies to the insured goods carried by vessels that are below the standard imposed by the classification clause. Despite the fact that the scale is advisory rather than mandatory, it is customary for the insurers in the London market to charge the minimum additional premium as shown in the scale and only to increase this in exceptional circumstances.[18]

CICG 1995 Appendix Section 2 para. 3 (e) also sets a limitation on the carrying vessel. It directly excludes coverage of goods carried wholly or partly on chartered vessels over 16 years, unless otherwise agreed by he parties. But it does not impose any age limitation on liners, with the reservation that the vessels are not chartered in to engage in liner business but are owned by the operator.

Compared to the Institute Classification Clause, the stipulation of CICG is relatively simpler, but it has its own advantages: firstly, it imposes upper limits of age on chartered

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[18] John J. Novitt, F.C.I.I. *Marine Insurance Vol. 2: Cargo Practice*, 4th ed. 1985, London, at [58]

carrying vessels. In other words, the assured is not allowed to use chartered vessels over 16 years. If he decides to do so, the insurance for goods carried by such a vessel becomes facultative insurance which needs to be agreed by the insurer. Secondly, it does not have age limitation on liners, because usually the assured is not in the position to control the choice of vessel in liner transportation and liners are normally properly maintained. However, the clause excludes the vessels which are chartered in to engage in liner trading (which will be subject to the 16 years limit) from the vessels owned by the liner operator (which have no age limit). If there is any disadvantage of this clause, it fails to set any requirements on the class of the vessels. A good class can represent good fitness of a vessel. Thus even the fitness of vessels of the same age may be very different if their classes are different. It is therefore advisable to incorporate the regulation on class into the clause.

In comparison, the clause in Standard Form for Open Cover of Ping An of China is even simpler and accordingly has more problems. Like CICG clause, it directly forbids the use of vessels over 25 years and has no requirement on the class of vessels. However, unlike CICG, it does not make any difference between the liners and the chartered vessels. As have been seen, the fitness of these two types of vessels could vary greatly. And the clause also provides that the insurer is entitled to charge additional premium on vessels over 20 years as far as the actual situation requires. Instead of explicitly stipulating the situations which will attract additional premium, the clause leaves the discretion to the insurer. And there is no advisory schedule of additional premium to be referred to by the assured as that of British system. The assured will not be able to predict whether the carrying vessel (over 20 years) which he decides to use will invite additional premium. If he knows that there will be high additional premium, he may choose other carrying vessel.

3.4 Limit Any One Vessel, Limit Any One Shipment and Limit Any One Location Clause

The insurer will easily be prejudiced by an accumulation of shipments on one vessel or one location or when the sum insured for one single shipment is too high. In order to avoid these situations and spread his risk, under some domestic system the insurer may require floating policy and open cover to have limit to any one vessel, limit to any one shipment and limit to any one location clause to that effect.

Due to the special practice adopted in British insurance market, a limit to any one vessel clause is more or less unique to British floating policy and/or open cover. In British insurance market, when the insurer writes a line facultatively, he will base his acceptance on the maximum amount at risk on the particular overseas carrying vessel. When writing a line on a floating policy, it is impractical to base the acceptance entirely on the total sum insured by the policy. This is even more the case for open cover since there is no aggregate limit in the open cover as that in the floating policy. Accordingly, all floating policies and open covers are subject to an agreed limit of cover in respect of any one overseas vessel.[19] The clause provides that in general, the assured may declare any amount under the policy or contract, but shipments in excess of the cover limit will be insured only up to the agreed limit on any one vessel.

On top of the limit on any one vessel, there is still a possibility of accumulation of shipments in any location prior to loading and/or after discharge. Thus the “limit to any one vessel” is often supplemented by a “limit to any one location” clause by which the insurer restricts his liability for accumulation of covered risks to a fixed maximum sum in one locality. As a result, if the goods accumulated in one warehouse prior to shipment are destroyed by fire, the insurers are only liable to the sum stated in the location clause although the aggregate insurable value of the goods may far exceed that limit.

Because the assured is unable to control delays once the goods are in the hands of carriers and personnel at the discharge port or a place of transhipment, it is common for the limit any one location provision to apply only to goods prior to shipment.[20] However, if Institute Location Clause is used, the limit any one location clause will apply to any location during transit.[21]

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[19] John J. Novitt, F.C.I.I. *Marine Insurance Vol. 2: Cargo Practice*, 4th ed. 1985, London, at [49]

[20] Robert H Brown, Witherby’s Encyclopaedic Dictionary of Marine Insurance, 6th ed. 2005 London at [456]

[21] John J. Novitt, F.C.I.I. *Marine Insurance Vol. 2: Cargo Practice*, 4th ed. 1985, London, at [50]

Institute limit any one vessel clause and limit any one location clause are friendly to the insurer since they focus more on how the insurer can spread his risk. While in reality, the assured may have little or no control over whether the goods may be carried by the same vessel or whether there would be an accumulation of the goods in one location after discharge from vessel. A limit to any shipment clause can help the assured to avoid huge loss when there is a large accumulation of the goods on one vessel or one location.

According to the limit to any one shipment clause in Standard Form for Open Cover of Ping An of China, the amount declared for each shipment shall not exceed one million USD. If the assured wants to declare an amount exceeding that limit, he shall send notice to the insurer in advance and the exceeding part can only be covered when the insurer accepts it in writing. In other words, the insurance for the exceeding part of limit is facultative and thus the insurer can choose to accept or reject to provide cover for it.

Under CICG, there is neither a limit to any one vessel clause or a location clause nor a limit to any one shipment clause. Therefore, the insurer can not rely on any device to spread his risk and once there is an accumulation, he has to bear all the liabilities to the full extent of the sum insured.

4 Declaration Obligation under Open Cover Insurance System

This chapter is going to concentrate on one specific issue under open cover insurance system---- declaration. Declaration is a unique obligation imposed on the assured under open cover insurance system. The first step of this chapter is to make clear what the declaration is and where the declaration obligation flows from. The next step is to see how to make the declaration, or to be exact, how to make it properly, which will cover further questions including the scope of declaration, the point of time to make declaration and the method to make declaration.

Through the chapter, wherever the requirements for declaration vary under British, Chinese and Norwegian open cover insurance systems, the thesis will point out the difference. In all other situations, the requirements shall be deemed to be the same under all the three open cover insurance systems.

4.1 The Objective and Function of Declaration

Because of the nature of volume business, it is almost inevitable that the insurers would not have the risks declared to them in advance, but only by means of declarations. And from the previous chapters, it has already been known that floating policy and open cover automatically give cover to all shipments falling within its term, thus declaration is not a condition precedent to the insurer’s liability but a notification of the true position under the cover without creating any rights and obligations.

What Lord Justice Tuckey said in Glencore International A.G. v. Ryan[22] can best describe the function of the declaration obligation: "…in the floating policy type of cover, where only subsequent declaration is required. Here the declaration does not bind the underwriter. He is bound automatically when, for example, goods are shipped. The declaration, however, is an essential part of the contractual machinery since it informs the underwriter of what risks have attached to the cover and enables him to calculate as necessary and collect the premium due." From this passage we can know that the main function of declaration is to enable the insurer to acquire the information of the quantity and the insurable value of the shipments, to determine the premium as well as to ascertain the risks he has taken on in order to decide in time whether reinsurance is necessary.

On the other hand, the declaration obligation is also important from the assured's point of view. Although declaration does not affect the commencement of the insurer's liability for each shipment under floating policy or open cover, it may affect the assured's right to recover his loss thereunder. One obvious example would be that if the assured fails to make declaration of one shipment within the time limit explicitly stated in the floating policy or open cover, he will be deprived of the right to claim recovery for loss in the event that the shipment is lost. Therefore, in order to protect his own interest, the assured shall see to it that he has complied with his declaration obligation under floating policy or open cover.

4.2 The Statutory and Contractual Requirements for Making Declaration

The declaration obligation can flow either from statute or from the terms of the insurance contract itself. MIA 1906 Section 29 provides that:

> *29.-(1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship pr ships and other particulars to be defined by subsequent declaration.*

[22] [2001] EWCA Civ 2051

(2) The subsequent declaration or declarations may be made by endorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission r erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

And CMC Article 233 provides that:

CMC Article 233---- The insured shall notify the insurer immediately on learning that the cargo insured under the open cover has been shipped or has arrived. The terms to be notified of shall include the name of the carrying ship, the voyage, the value of the cargo and the insured amount.

MIA 1906 makes no reference to declarations made under open cover and the reverse situation is found in CMC, however the provisions are assumed to be equally applied to both floating policy and open cover.

Moreover, the floating policy and open cover themselves contain relevant clauses regarding the declaration obligation:

Institute Standard Conditions for Cargo Contracts----

2 It is a condition of this contract that the Assured are bound to declare hereunder every consignment without exception, Underwriters being bound to accept up to but not exceeding the amount specified in clause 3 below.

3.1 This contract is for an open amount but the amount declarable may not exceed the sum of …….in respect of any one vessel, aircraft or conveyance.

3.2 Should this contract be expressed in the form of a floating policy the total amount declarable hereunder may not exceed…….subject always to the provisions of clause 3.1 above.

CICG 1995: contractual terms relating to open cover and floating policies for the carriage of goods, Section 4----The duty of the person effecting the insurance to declare shipments:

> *The person effecting the insurance shall submit to the Insurer a statement showing shipments covered by the Insurance Contract, and indicating the full insurable value of the goods and whether the goods are to be shipped as deck cargo.*
>
> *The Insurer shall not be liable for undeclared shipments.*

Ping an of China, Standard Form for Open Cover, Declaration Clause----

> *The assured shall make declarations to the insurer of all the shipments coming within the scope of the open cover immediately after learning the shipment has been shipped or has arrived.*

The flexible nature of open cover insurance system allows the parties to make any arrangements as they see appropriate concerning the forms of declarations. They need not to follow the procedures laid down for floating policies or open cover, nor the provisions of Institute Standard conditions or CICG 1995. When the arrangements between the parties are inconsistent with the statutory provisions, normally, the arrangements can prevail over the provisions by law with the reservation that they do not lower the minimum declaration requirements by law. In other words, the parties can decide the declaration obligation for their own purpose in the contract, but the statutory declaration obligation is the minimum and compulsory requirement which cannot be derogated through contract. This point can be illustrated by Davies v. National Fire and Marine Insurance Co. of New Zealand (1891)[23].

> *The insurer granted an open policy to the assured on goods shipped from Melbourne to London, per one set of specified steamers to Sydney and thence to London per another set, covering risk while in a specified factory at Sydney under the condition "declarations to be made within 48 hours after departure of steamer from Sydney". Yet not all part of the goods shipped from Melbourne to Sydney would be intended for London, some of which would be sold in Sydney through a retail shop. In other words, only certain part of the goods from Melbourne could properly fall within the scope of the open policy.*
>
> *A fire occurred in Oct. 1887 and the declaration was filed on 7th Mach. 1888, alleging that the goods insured were destroyed by fire when in the factory. The insurer rejected the requirement of the assured to recover the loss. The insurer insisted that according to the true construction of this contract, two declarations must be made by the assured. The first one is as incident to every contract of an open policy and necessary by law to make the policy operative, in this case to identify the shipments at Melbourne to which the policy was to attach. The other one is under the express terms of the open policy, giving particulars relating to such shipment as had already been brought within the policy by the first declaration and had been actually shipped for London. Without the former declaration electing to apply the policy to goods shipped at Melbourne, the insurers had no security that they had not been charged with the value of goods never intended for London at all.*

[23] Davies and Another Plaintiffs; v. National Fire and Marine Insurance Company of New Zealand Defendants [1891] PC

The judge held in favour of the insurer, and agreed that the declarations stipulated by the express terms of their written contract would not meet the requirements of the case. It is quite reasonable to require two declarations as the insurer did. One, far the most important one, would earmark the shipments at Melbourne to which the policy was to attach, and would be accompanied by payment of due premium. This is the ordinary declaration incident to the ordinary contract of an open policy and necessary to make it operative. The other would enable the insurers to know how much of the goods was actually shipped for London, that they travelled by the stipulated class of ship, with the names of the ships and other particulars which for the purpose of reinsurance or otherwise, would be valuable to the insurer.

In this case, although the parties agreed on their own special declaration requirements in the open policy, the court still insisted that the declaration required by the express terms of open policy could not replace the minimum declaration obligation by law. The parties shall see to it that their special arrangements on declaration obligation must at least fulfil the basic function of the declaration required by law, which is to earmark the shipments to which the policy was to attach. In comparison, the second declaration required by the express terms of the open policy is not indispensable in every open policy. Without such an express term in the open policy, the assured would be deemed to have fulfilled his declaration obligation after he has made the declaration required by law.

Nevertheless, when there is an express term on special arrangements of declaration obligation, the assured has to comply with the declaration obligation required by the open policy. Since the special arrangements are not the same required by law, they would be the proper subject of express stipulation. Especially in the case of open cover under MIA 1906, the arrangements shall be embodied in a formal insurance contract in the form of a policy so as to be qualified as evidence for any possibly ensuing dispute.

4.3 The Scope of Declaration

Since the premium rates and general terms and conditions have already been agreed and inserted in the floating policy or open cover, the subjects of each declaration are the details of every single shipment coming within the scope of floating policy or open cover. Generally speaking, the parties are free to agree on the scope of declaration at the time the contract is concluded.

However, if the law has mandatory requirements as regards the scope of declaration, these requirements are the minimum requirements which can not be dispensed with in the declaration. The CMC Article 233 provides that "…The items to be notified of shall include the name of the carrying ship, the voyage, the value of the cargo and the insured amount." [24] In contrast, both MIA 1906 and CICG do not have any requirements as regards the scope of declaration, and thus the parties can make full use of contractual freedom to decide their scope of declaration.

4.4 The Point of Time to Make Declaration

Generally speaking, the point of time to make the declaration can be one of the subjects agreed by the parties in the open cover or floating policies. In the absence of such agreement, the point of time to make the declaration shall be deemed to be that regulated by law. Below, we will look at the respective regulation on point of time to make the declaration under different systems.

4.4.1 Under MIA 1906

MIA 1906 is silent on the question of when is the point of time to make the declaration. Therefore, it can be assumed that under MIA 1906, the assured bears the implied obligation to make declaration within a reasonable time. In other words, only when the assured makes declaration too late and far beyond the extent of "reasonableness", the

[24] Under the CMC, all the non-mandatory articles or chapters will be subject to the statement "The provision shall apply only when there are neither stipulations nor different stipulations in this regard." The provisions of CMC Chapter 12 regarding "Contract of Marine Insurance" are all mandatory.

declaration might be regarded as not “in good faith” and consequently be rejected by the insurer. However, the standard of “reasonableness” itself is upon the judge’s discretion. Thus we may find that the concept “reasonable time” vary greatly from case to case. An extraordinary case would be Glencore International A.G. v. Ryan (The “Beursgracht”) (2001).[25]

> *The claimant (Glencore International A.G.) were insured by the defendant underwriter (Ryan) under an open cover in respect of inter alias their liabilities: …to the owners of chartered vessels by way of reimbursement for claims brought against them by third parties…. On Oct. 13, 1987 the claimant chartered Beursgracht, a vessel within the terms of the open cover. By reason of the chartering of the said vessel and said performance of the charter, the defendants were obliged to indemnify the claimants in respect of any sums for which the claimant might as charterers become liable to the owners of the Berusgracht and for any costs and/or expenses that they might incur in defending or settling such liability.*
>
> *On or about Oct. 21, 1987 an accident occurred on the vessel whereby it was said that a stevedore was killed in circumstances which gave rise to the claimant becoming legally liable to the owners of Beursgracht. But due to the claimant’s omission, there was no declaration made until May 23, 1993, over five years after the charter and the accident.*
>
> *Lord Justice Tuckey held in the judgment that since there was no express term in the open cover requiring the assured to make declaration within a particular time, the assured only have an implied obligation to make the declaration within*

[25] Although this case is not on cargo open cover, the standard of “reasonableness” is applied to all kinds of open cover. Thus the illustration of the extent of “reasonableness” in this case can be applied analogically to cargo open cover.

a reasonable time. Moreover, the implied term is an innominate term, thus only when the assured had seriously breached it, the insurer was entitled to avoid liability for that risk. In the current case, the failure to make the declaration was due to a good faith mistake and the commercial consequences for this failure have been minimal. Therefore, the assured' breach was not serious and thus the insurer could not avoid his liability.

This case has its speciality where the assured was able to recover his loss even when he made the declaration five years late. This was mainly because the insurer failed to prove the delay of declaration was in bad faith. However, the approach which Lord Tuckey used to decide whether the breach was serious enough for the insurer to reject the declaration is an advisable method. This approach consists of two aspects: as to the quality of the breach, can it be said that the delay was so long or inordinate that it would offend common sense to say that the insurer might be bound; as to the effect, can it be said that the lateness of the declaration was such as to be liable to cause real or serious prejudice to the insurer? This approach provides guidance for the court to determine whether the implied obligation of "reasonableness" under MIA 1906 has been breached when judging any other cases regarding the point of time to make the declaration.

4.4.2 Under CMC

CMC Article 233 provides that the assured shall notify the insurer immediately on learning that the cargo insured under the open cover has been shipped or has arrived. According to its wording, the assured under CMC takes on a more burdensome declaration obligation than that under MIA 1906. The requirement of "to do something immediately" is higher than "to do something within a reasonable time". The standard of "within a reasonable time" does not necessarily make time of the essence, while "to do something immediately" does. Therefore, if the delay in the above case (Glencore International A.G. v. Ryan) happens under CMC, there was no need to inquire about either the quality or effect of the late declaration, the assured would be deemed to have breached the statutory obligation and accordingly the insurer would be absolved from his liabilities.

4.4.3 Under CICG

CICG also has no express provision regarding the time point to make declaration, thus the assured is assumed to have the same implied obligation to make declaration within a reasonable time.

4.4.4 In Floating Policy or Open Cover

In comparison, when open cover or floating policy expressly provides the point of time to make the declaration, then it constitutes a warranty which must be exactly complied with. Provided the warranty is breached, the insurer is entitled to be absolved from his liabilities or to terminate the contract, according to the different provisions of different systems.

Regarding the result of breaching a warranty under different systems, MIA 1906 Section 33 enacts that a warranty, as therein defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If the warranty is not so complied with, then subject to any express provision in the policy, the insurer is discharged from his liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

Both CMC Article 235 and CICG Section 3-3 provide that when the assured has not complied with the warranties, the insurer may terminate an existing insurance. Under CICG, the termination is further required to be reasonable. In other words, when the warranty is not exactly complied with under CMC or CICG, the insurer has the option to terminate the insurance contract for that shipment, and only when he chooses to do so, he is absolved from his liabilities.

4.5 The Method to Make Declaration

As regards the method to make the declaration by law, only MIA 1906 Section 29, sub-section (2) provides that the subsequent declaration or declarations may be made by endorsement on the policy, or in other customary manner. We can see from this provision that the method of declaration is quite flexible and subject to the "customary manner" between the parties. As introduced in previous chapters[26], it would be common for the assured to make the declaration by submitting a copy of the relevant certificates to the insurer. The policy endorsements are only made when the policy is closed by adjustment of the premium, except where it is necessary to collect a claim on the policy.

MIA 1906 Section 29 further provides in sub-section (3) that unless the policy otherwise provides, the declarations must be made according to the order of shipments. Although CMC and CICG have no similar express provision, it is commonly understood that the declarations shall be made in accordance with the order of shipments. This requirement could become one of the criteria to determine whether the omission or delay of declaration is "in good faith".[27] In case by oversight or in the event that the declaration of the goods is inconsistent with the order of shipments, the assured is bound to rectify the declarations and make them correspond with the actual order of shipments. The insurers would require

[26] See 2.2.2 Operation practice for floating policy

[27] See 5.2 The conditions to rectify the insurance contract under open cover for undeclared shipments

to see bill of lading and could insist on the declarations being made to follow the actual sequences of the bills of lading.

5 Legal Effect of Undeclared Shipments under Open Cover System

In this chapter, the topic will be further narrowed down to issues revolving around undeclared shipments. Normally, the assured should make declarations immediately on learning the goods insured under open cover or floating policy have been shipped or in compliance with other point of time to make the declaration agreed by the parties. When declaration is made after the arrival or even loss of the goods, that shipment which the declaration attaches to should be deemed as undeclared shipment. The first issue concerns the question of the insurer's liabilities for undeclared shipments, where MIA 1906 and CICG give out explicit, albeit opposite, provisions, while CMC leaves a total blank on this issue. This chapter will try to explore the insurer's liabilities under Chinese open cover insurance system by drawing reference to two recent Chinese cases and borrowing the principles of MIA 1906 and British case law.

Moreover, this chapter will further elaborate on two other relevant issues, namely whether there are precedent conditions to rectify the insurance contract for undeclared shipments and whether the undeclared shipments would have impact on floating policy or open cover as a whole and other subsequent shipments coming into terms under the same floating policy or open cover.

5.1 The Insurer's Liability for Undeclared Shipments under Open Cover System

5.1.1 Under MIA 1906

Prior to the enactment of MIA 1906, there had already been customary usage on floating policies in British insurance business. When a policy is effected on goods by ship or ships to be thereafter declared, the assured is bound to declare the goods to the insurer as soon as he knows about the particulars of shipment. Declarations should be made in accordance with the order of shipments. In case by oversight or in the event that the declaration of the goods is inconsistent with the order of shipments, the assured is bound to rectify the declarations and make them correspond with the order of shipments. This usage of insurance business was firstly confirmed in the judgment of Stephens v. The Australasian Insurance Company (1872)[28] where the assured was allowed to rectify the insurance contract for the shipment after its loss. And later when MIA 1906 was drafted, this usage was incorporated into Section 29 so as to make it as a statutory right for the assured. Therefore, under MIA 1906, it is clear that the assured is entitled to rectify omission or erroneous declaration even after arrival or loss of a shipment, provided the omission or error was in good faith.

The advantage of such provision lies in that it allows the assured to avoid loss of cover due to some omission or negligence during work in making declarations. Since this rectification right is to the benefit of the assured, he accordingly bears the burden to prove that the omission or erroneous declaration is in good faith. While from the insurer's point of view, if one high-value shipment is declared after its loss and the assured requests to rectify declaration, the insurer will have to accept the assured's rectification. But the insurer has lost the chance to arrange for reinsurance for that shipment. Thus the insurer might suffer loss under the provision of MIA 1906.

[28] Stephens v. The Australasian Insurance Company [1872] CCP

5.1.2 Under CICG

In contractual terms relating to open cover and floating policy for the carriage of goods, CICG Section 4 para. 3 provides that the insurer shall not be liable for undeclared shipments. In other words, the assured is not allowed to rectify the insurance for the shipment which has not been declared before the occurrence of loss. Apparently, CICG is stricter than MIA 1906 in terms of the rectification right of the assured. Therefore, the assured should be more cautious in compliance with his declaration obligation under CICG. From the insurer's point of view, he can avoid the risk of failing to arrange for reinsurance for shipments when they are allowed to be declared after the occurrence of loss.

5.1.3 Under CMC

CMC Sections 231-233 are relevant regulations concerning open cover system. However, these regulations have not touched upon the issue on the insurer's liability for undeclared shipments. In addition, the Insurance Law of the People's Republic of China also has no regulations on open cover system. Therefore, regarding the insurer's liabilities for undeclared shipments, there is no explicit regulation that can be directly drawn upon under Chinese legislation to deal with this problem.

Then we turn to look at the Chinese case law on open cover to see how the court will decide the matter(s) related to the insurer's liability for undeclared shipment. The first case would be Tianjin Foreign Trade Company v. the People's Insurance Company of China Tianjin Branch (1996)[29].

> *In this case, the assured effected an open policy with the insurer, covering the risk against FPA. The open policy especially stipulated that the assured is*

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[29] [1996] Jin Hai Fa Shang Chu Pan Zi Di 185 Hao

entitled to recover the loss of undeclared shipments if the failure of declaration is due to some special reasons and the assured should pay the corresponding premium for the undeclared shipments.

On Feb. 8th, 1996, the assured imported 10,000 ton steel plates and the goods arrived at the destination on Apr. 20th. The goods were found to have extensive rust which was caused by sea water. On Apr. 22nd, the assured faxed the declaration to the insurer, requiring the insurer to antedate the insurance date of the shipment to Mar. 12th and change the covering risk to All Risks. Later, on Apr. 23rd and 24th respectively, the assured faxed two other declarations to the insurer. The shipping dates for these two declarations were Mar. 31st and 16th. The insurer accepted all the three declarations and granted corresponding policies. It was admitted by both parties that during their insurance business, the declarations for imported goods were usually made long after the commencement of transit of the shipment and some of the declarations were made even after the goods had arrived at the destination.

Later, the insurer rejected the assureds' claim for recovery of loss for the damaged shipment on Feb. 8th. The basis of the rejection was that the assured had changed the covering risk to All Risks after having known the fact that the damage was caused by seawater which is outside the scope of FPA. Thus even though the insurer had accepted the declaration, the acceptance should not bind the insurer.

The court held that the open policy was valid and according to the express term in the open policy, the assured was allowed to recover the loss of the shipment even if the declaration was actually made after the occurrence of loss. However, if the assured made declarations after the arrival or loss of goods, the insurer is only liable to the extent of FPA as provided in the open policy. In this case, the rust was caused by seawater, which fell outside the scope of FPA. Therefore the insurer was not liable for the loss sustained by the assured.

From the above case, there are three points worth attention. Firstly, in this case, the court recognized the assureds' right to rectify declaration after the arrival of the goods based on the express term contained in the open policy. Since there is no explicit legislation on the insurer's liability for undeclared shipment under Chinese open cover insurance system, it is always safer for the parties to insert such an express term in the open policy. The contents of such an express term can be similar to MIA 1906 Section 29 (3), ensuring that the assured has the right to rectify omission or erroneous declaration. However, in reality, open policies do not always have such an express term and this problem will be discussed in the following case.

Secondly, whether the change of covering risk in the declaration was in good faith? The assured is allowed to change the terms of floating policy or open cover when making declaration for one shipment answering the terms of the floating policy or open cover. If he wants to do so, he must make the declaration prior to the arrival or loss of goods. Otherwise, the insurer is liable only to the extent of what is agreed in floating policy or open cover. In this case, the court held that although the declaration was made long after the arrival of goods, it was in accordance with their business practice. Thus the declaration was valid but the insurer would only be liable to the agreed cover (FPA) in the open policy. However, the assured changed the covering risk to All Risks on purpose in the hope of bringing the goods under the cover of the open policy. In this situation, even though the insurer had accepted the assureds' declaration, he would not be held liable for any liabilities beyond the coverage scope of FPA. Thus when the assured makes declaration after the arrival or loss of shipment, he is not allowed to make any change to the terms or conditions of floating policy or open cover.

Thirdly, in this case the assured make the declaration in bad faith, but he did not receive specific penalty for his conduNct. The final result for the assured made no difference from the situation had the assured made the declaration in good faith. This result might encourage the assured to run the risk of making fraudulent declaration due to the lack of corresponding penalty. Take this case for example, if the insurer had not discovered the fraud, the assured would have obtained cover for that shipment. Even if the insurer discovered the assured's fraud like the situation in this case, the assured was just left out of cover as he should have been. For that reason, in my opinion, there should be some specific penalty for this kind of situation, for instance, the insurer is relieved from liabilities but can charge the premium for All Risks (the premium shall be whichever is higher between the actual premium and the premium for what the assured declares).

Now we turn to look at another case, Changchun Dacheng Corn Development Co Ltd v. the People's Insurance Company of China Jilin Branch (2001)[30]. The judgment of this case will throw some light on the above-mentioned question on what the insurer's liability would be for undeclared shipments when there is no relevant express term in the open policy.

> *On Apr. 10th 1998, the insurer granted an open cover to the assured on goods shipped from Changchun via rail or sea for the following one year. After the conclusion of the open policy, the assured declared most of the goods answering the terms to the insurer and paid corresponding premium. On Dec. 5th 1998, the goods coming into terms of the open over were lost with the capsizing of carrying vessel. On Dec. 7th, the assured made the declaration for the shipment in question to the insurer and paid the corresponding premium. The insurer accepted the assured's declaration without knowing that the assured actually had not insured all the goods coming into the terms of the open cover with him. Instead the assured insured a lot of goods with two other insurers and did not disclose this information to the insurer. After knowing this fact, the insurer rejected to pay compensation for the lost shipment.*
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> *The High Court of Liaoning Province held that the open policy was valid and both parties should carry out the insurance contract in the principle of honesty. When and only when the assured had complied with his obligation to make all the declarations coming into the terms of the open policy to the insurer, he was entitled to rectify declaration after the loss of goods. In this case, the assured had not abided by his obligation; therefore he had breached the principle of honesty and could not rectify the declaration. From the insurer's point of view,*

[30] [1999] Da Hai Fa Shang Chu Zi Di 484 Hao

when he knows the fact that the assured has not made declarations honestly or not made all the declarations answering the terms of the open policy to him, he is entitled to reject a declaration made after the arrival or loss of the goods. Even when the insurer accepts the declaration without knowledge of the assured's fraud, he is still entitled to reject compensation for the loss after he knows the fact.

In this case, the court decided that the insurer was not liable for the undeclared shipments since the assured has not abided by his declaration obligation under the open policy. However, the judgment confirms an important point that if the assured had complied with his obligation, he is entitled to rectify the insurance contract for the shipment after its loss. To answer the above question, even without an express term regulating the insurer's liability for undeclared shipments, the judgment at least shows a tendency that the court is willing to borrow the rule in MIA 1906 Section 29 (3).

As a matter of fact, this point is also supported by some scholars[31] in China. They propose two reasons to support this point: firstly, one of the main purposes for the assured to effect floating policy or open cover is to guarantee coverage to all ensuing shipments and to avoid loss of coverage due to negligence during work in making declaration. If the assured is not allowed to rectify declaration for such shipments, this main purpose cannot be achieved. Secondly, since MIA 1906 exerts extensive and profound impact on Chinese marine insurance system, acknowledging the assured's rectifying right is in compliance with the relevant provision of MIA 1906[32].

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[31] Prof. Pengnan Wang, Theory and Practice of Modern Marine Insurance Law, 2ed, Dalian Maritime University Publication, at [377]

Shaochun Yuan, On the Legal Issues of Open Cover, Annual of China Maritime Law, 2002

[32] The MIA 1906 Section 29, sub-section (3).

5.2 Precedent Conditions for the Assured to Rectify Insurance Contract for Undeclared Shipments under Open Cover Insurance System

In general, there are two precedent conditions that must be satisfied before the assured can rectify the insurance contract for undeclared shipments: firstly, the assured has insured all the goods answering the terms of floating policy or open cover with the insurer. Secondly, all the declarations are made in good faith and in conformity with the actual quantity, quality and value of the goods. The rationale behind these two precedent conditions is as below:

Firstly, it is based on the principle of “utmost good faith” that floating policy and open cover allows the assured to rectify insurance contract even after knowing the goods have been lost or damaged. As concurrent condition, the assured shall make all the declarations falling into scope honestly to the insurer. In practice, the assured sometimes places some of the shipments coming under the scope of floating policy or open cover to other insurers because of lower premium. Or the assured might declare only part of the shipments and then wait and see: if the shipment arrives safely at the destination, the assured would not declare this shipment to the insurer at all or declare the shipment under its value; if the shipment meets risk in transit, the assured would declare immediately in full value to the insurer. This kind of conduct has no difference from fraud. It puts the insurer into an uncertain situation. When the shipment answering the scope of the open cover commences its risk, the insurer has no certainty about whether the shipment will be declared or whether it will be declared to him. Thus the principle of “utmost good faith” has been breached and the basis for rectifying omission or erroneous declaration after the loss of shipment has been lost.

Secondly, the parties regulate their respective right and obligation according to the principle of fairness. From the insurer’s point of view, apart from the simplified business procedures, the insurer can also benefit from stable premium income. Accordingly, the insurer automatically bears the liability for goods once they commence transit. If the assured effects an open policy with the insurer and obtain coverage for all ensuing shipments answering the terms, but does not perform his corresponding obligation to declare all the goods to the insurer, his conduct deprives the insurer of anticipated profit but makes the insurer bear liability for loss of the goods. In other words, the insurer is put into a situation where his obligation overweighs his right. Apparently, the principle of fairness is breached and the purpose for the insurer to grant floating policy or open cover cannot be achieved.

Now we turn to look at a practical question. When the assured wants to rectify omission or erroneous declaration after the arrival or loss of the goods, does he need to prove that he has complied with the precedent conditions at first? Or is the assured automatically allowed to rectify declaration unless the insurer can prove that the assured has not complied with the precedent conditions?

In my opinion, it is the assured who should bear the burden to prove that the declaration after the arrival or loss of the goods is made honestly and in good faith at first place. The reason is because the rectifying right is to the benefit of the assured; accordingly in the principle of fairness, he shall bear the responsibility of proving his entitlement to this right. Moreover, if the burden of proof rests upon the insurer, it would be too difficult (if not impossible) for the insurer to prove whether the intention of the assured is in "good faith" or "bad faith". And if so, the insurer may become reluctant to grant floating policy or open cover. As a result, the healthy operation of cargo insurance market will be hampered.

In practice, it is relatively easier to determine the bad faith of the assured if he declares some of the shipments under the floating policy or open cover to other insurers. It becomes more complicated to determine the situations where the assured choose to declare a part of the shipments under floating policy or open cover, especially when there is no express point of time to make declaration in the insurance contract. The intention of the assured can thus be determined in accordance with the customary practice between the parties. If during the currency of the floating policy and open cover, the assured often makes declaration long after the arrival of goods at the destination, and then when there is a declaration made after loss, it is more likely that the delay of declaration just follows the practice between the parties and thus not on purpose. In contrast, if in accordance with the order of shipments, the following shipment(s) have already been declared but the previous shipment has not been declared, then the assured is more suspicious not to have declared all the shipments under floating policy and open cover.

5.3 The Effect of Undeclared Shipment(s)

From above, we know that when the shipments coming under the scope of floating policy or open cover are not declared by the assured to the insurer, the effect of undeclared shipments can be categorized into two scenarios in terms of the intention of the assured.

The first scenario is when the non-declaration is in bad faith or on purpose. As stated in 5.2, the assured will lose his right to rectify omission or erroneous declaration under the open cover or floating policy.

The second scenario is when the non-declaration is due to negligence or without fraud. As stated in 5.1.3, the insurer cannot be absolved from his liabilities for the undeclared shipments if the assured wants to rectify the insurance contract concerned after its arrival or even loss.

Now, in this section, we are going to ask two further questions to the second scenario: (1) does the undeclared shipment have any impact on the floating policy or open cover as a whole? (2)Or does it have any impact on other subsequent shipments under the same floating policy or open cover?

As a matter of fact, when we discuss the above-mentioned two questions, we should further differentiate between two possible situations. The first situation is in respect of floating policy, when the aggregate amount of the undeclared shipments should have exhausted the amount limit of floating policy. In this case, (1) the floating policy would have run off. (2)And if the assured has not arranged for the insurance for the following shipments after undeclared shipments, the insurer would be absolved from liabilities after the exhaustion of the floating policy.

The second situation is regarding the floating policy where the aggregate amount of undeclared shipments still has not exhausted its amount limit as well as open cover (where there is no amount limit).

(1) The open cover does not have limited amount, thus the policy itself will not be affected by undeclared shipments. The same is true also under the floating policy when the aggregate amount of undeclared shipments still have not exhausted the amount limit of

floating policy, the floating policy will still in force until the following shipments have exhausted the limited amount.

(2) As for other subsequent shipments under floating policy or open cover, since under the open cover insurance system the coverage automatically attaches to every shipment answering the terms of floating policy or open cover once the goods has been shipped, undeclared shipments will not affect other shipments on the condition that they are declared according to the floating policy or the open cover appropriately. In other words, the insurer is still liable for the shipments which are duly declared under floating policy and open cover. However, the assured has already breached his declaration obligation by not declaring all the shipments to the insurer, the precedent condition for rectifying insurance contract is dissatisfied and the assured is no longer entitled to rectify any following omission or erroneous declaration.

6 Conclusion

Floating policy and open cover are two important forms for cargo insurance, and they are attaining more importance with the increase of international trade. However, the fact that CMC lacks relevant explicit provisions on the nature and feature of open cover system, especially on the issue on the insurer's liabilities for undeclared shipments has already caused a lot of disputes in practice. Although the case law shows that there is a tendency for the courts to follow the relevant provisions of the MIA 1906 when dealing with the problem of the insurer's liability for undeclared shipments, it is advisable for CMC to include its own provisions during its revision. For instance, CMC can supplement a sub-section after the current Article 233, and then the new Article would read: "The insured shall notify the insurer immediately on learning that the cargo insured under the open cover has been shipped or has arrived. The items to be notified of shall include the name of the carrying ship, the voyage, the value of the cargo and the insured amount. Omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or erroneous declaration was made in good faith."

In other words, CMC can follow the relevant regulation in MIA 1906. The reason is because open cover and floating policy are involved mostly in the international trade. The large volume of export-import business makes it inconvenient and quite impractical for the assured to make declaration for each shipment prior to its transit. Instead, the assured usually makes declaration at agreed intervals, say every 10 day. Therefore, it is very likely that one shipment has already met loss before the point of time for the shipment to be declared has come. If the assured is not entitled to rectify the insurance contract for undeclared shipment, he will have to make sure that every shipment is declared before its transit. This would impose very heavy declaration burden on the assured when large volume is concerned and then on a broad point of view, impede the development of international trade.

As regards the possible loss for the insurer resulting from the failure to arrange for reinsurance for the lost shipment, the parties can insert a clause into open cover or floating policy. The stipulation could be that when the value of one shipment exceeds certain amount, the assured shall declare that shipment in advance. However, the difficulties in terms of producing evidence to prove the intention of the assured still pose a problem. The court can determine the intention of the assured in light of whether the delay of declaration is in compliance with the customary practice between the parties.

However prior to the revision of CMC, in order to avoid disputes, the parties can agree on terms and conditions regarding the insurer's liabilities for undeclared shipment explicitly in floating policy or open cover. As we can see from the case Tianjin Foreign Trade Company v. the People's Insurance Company of China Tianjin Branch (1996), the court is more willing to respect the express terms and conditions between the parties.

7 References

7.1 List of Judgements/Decisions

- Stephens v. The Australasian Insurance Company [1872] Law Rep. 8 C. P. 18.
- Davies v. National Fire and Marine Insurance Co. of New Zealand [1891] A.C.485.
- Tianjin Foreign Trade Company v. the People’s Insurance Company of China Tianjin Branch [1996] Jin Hai Fa Shang Chu Pan Zi Di 185 Hao
- Changchun Dacheng Corn Development Co Ltd v. the People’s Insurance Company of China Jilin Branch [1999] Da Hai Fa Shang Chu Zi Di 484 Hao
- Glencore International A.G. v. Ryan (The “Beursgracht”) [2001] EWCA Civ 2051

7.2 Treaties/Statutes

- Act relating to Insurance Contracts of 16 June 1989 nr 69
- Maritime Code of the People’s Republic of China 1993
- Contract Act: Conclusions of agreements, the right to deposit an item of debt, limitation of claims of 31 May 1918 nr 04
- Insurance Law of The People's Republic of China 2002
- Marine Insurance Act 1906

7.3 Standard Contracts

- Institute Standard Conditions for Cargo Contracts

- Norwegian Cargo Clauses: Conditions relating to insurance for the Carriage of Goods of 1995
- Standard form for Open cover of Ping An of China

7.4 Secondary Literature

- John J. Novitt, Marine Insurance Vol. 2: Cargo Practice 4th ed. London, 1985
- Pengnan Wang: Theory and Practice of Modern Marine Insurance, Dalian, 2001
- Robert H Brown, Witherby's Encyclopaedic Dictionary of Marine Insurance, 6th ed. London, 2005
- Shaochun Yuan: On the Legal Issues of Open Cover, Annual of China Maritime Law, Dalian, 2002