English Law Marine Insurance Clauses: Will the UAE Courts Recognise and Apply Them?

Justin Carroll - Senior Associate - Insurance / Sustainable Sourcing
- Dubai International Financial Centre

Adam Gray - Senior Counsel (Consultant) - Shipping, Aviation & Logistics
a.gray@tamimi.com - Dubai International Financial Centre

But how effective are English marine insurance clauses in a UAE litigation context? Are they likely to work as intended?

Before addressing these questions, it is useful to provide a brief overview of the main sources of marine insurance law in the UAE on the one hand and in England and Wales on the other.

UAE Marine Insurance Law

Insurance contracts in the UAE are governed by UAE Federal Law No. 5 of 1985 (the Civil Code) and UAE Federal Law No. 6 of 2007 (the Insurance Law). Also relevant is the Insurance Authority Board of Directors' Resolution No. 3 of 2010 (the 2010 IA Directive).

In addition, Federal Law No. 26 of 1981 (the Maritime Code) includes provisions specifically applicable to marine insurance policies (together UAE Insurance Law).

Except in rare instances where the law expressly provides for contrary agreement by the parties to an insurance contract, UAE Insurance Law applies regardless of contractual agreement.

English Marine Insurance Law

English-law marine insurance policies are principally governed by the Marine Insurance Act 1906 (MIA) and the Insurance Act 2015 (the IA and together English Insurance Law).

Examples of Potential Conflict

Many will be familiar with the INSTITUTE CARGO CLAUSES (A) CL382 01/01/2009 (ICCs). The ICC is a cargo cover designed to indemnify the insured against all risks of loss of or damage to the insured cargo.

The ICCs have been subject to a lot of judicial interpretation by the courts of England and Wales. This has resulted in a high degree of legal certainty for insurers wishing to incorporate the ICCs into their policies. However, incorporation of these clauses into a policy that is governed by UAE law will not benefit from English judicial precedent when they are construed by the UAE Courts. Instead, the UAE Courts will construe the English clauses by reference to the UAE judicial understanding of UAE Insurance Law, not by reference to English case-law. We examine three ICC clauses below and how they may be construed differently by the English and UAE Courts in litigation.

Clause 11.11.1 – Insurable Interest:

ICC clause 11.11.1 provides that "*[i]n order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss*".

English law defines "insurable interest" under section 5 of the MIA as follows:

- *Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.*
- *In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.*

This definition has received substantial consideration before the English courts and the tendency has been to widen its definition.

In *Sharp v Sphere Drake Insurance Plc (The Moonacre)* [1992] 2 Lloyd's Rep. 501 the court held that where the insured owes a duty of reasonable care in respect to the property, the insured has an insurable interest in that property. Subsequently in *Deepak Fertilisers & Petrochemical Corp Ltd v Davy McKee (UK) London Ltd* [1999] the Court of Appeal decided that "insurable interest" extends to a sub-contractor's interest during the construction phase of a plant because loss of the project would deny the subcontractor the entitlement to be remunerated. However, the courts have been reluctant to include a pecuniary interest under the definition of insurable interest.

Under UAE Insurance Law, by contrast, Article 368 of the Maritime Code provides that "[n]*o one may benefit from insurance unless he has a legal interest in the non-occurrence of the peril*". One effect of this clause is that an insurable interest under UAE Insurance Law is defined as an interest in the peril insured against not occurring.

The English courts have developed the definition of insurable interest over many years and at the time of writing the definition is under consideration for possible reform. Insurers hoping to rely on a defence to cover based on insurable interest in a subject-matter based on English law definitions and concepts may be surprised at how divergent the UAE Court's interpretation can be.

Clause 5.1.1 – Exclusions: Unseaworthiness

The ICC clause excludes cover for loss, damage or expense arising from "*unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness of unfitness, at the time the subject-matter insured is loaded therein.*"

In the English case of *F. C. Bradley & Sons, Ltd. v. Federal Steam Navigation Company, Ltd.* (1925) 22 Ll. L. Rep. 424 seaworthiness was defined as a standard by which a "*ship must have the degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it*".

Additional case law has established that seaworthiness includes fitness to carry the concerned cargo, competence of crew, cargo holds free of residue, operative heating coils where oil is being carried, functioning machinery and structural soundness. A number of variables will influence the standard of seaworthiness to be applied, such as age of the ship, the cargo to be carried or the type of vessel.

Be that as it may, the English courts have heard many cases on the question of seaworthiness and have refined and extrapolated its definition through a myriad of factual scenarios. A consequence of this is that the insured can have a reasonable degree of confidence that cover will attach if the insured ensures his cargo is carried on a vessel that fulfils certain criteria of seaworthiness for a given shipment.It is against this background that clause 5.1.1 would be construed. Furthermore, it permits insurers to legitimately deny cover where carrying vessels fall short of this criteria and insurers are better better placed to assess the prospects of success of defending a cover position in English litigation.

This position can be contrasted with UAE Insurance Law which does not rely on precedent case law and each case will be considered on its own facts. The UAE court will decide, on a case-by-case basis and usually with the assistance of a court-appointed maritime expert, on whether the carrier of the insured

cargo was seaworthy or not. Since insurance cover does not attach in the instance of unseaworthiness, insurers could be incentivised to deny cover on the ground of unseaworthiness where the facts allow for some support to the argument in the hope that a court would rule in their favour. Insurers do not have precedent to guide them and there is a lack of publicly accessible case precedent to identify a preferred court definition. Therefore, since insurers would not be penalised with a cost order, any hint of unseaworthiness may be worth litigating where insurers seek to deny cover.

Clause 13 – Constructive Total Loss (CTL) & Abandonment

Clause 13 of the ICCs outlines the circumstances in which cover will attach where a cargo is deemed a constructive total loss (CTL). Clause 13 provides that:

"*No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival*".

This provision largely reflects section 60 of the MIA. The courts of England and Wales have commented on and refined the section 60 definition in a number of cases. For example, on the construction of the word "abandoned" the court commented in *Masefield AG v Amlin Corporate Member* [2011] EWCA Civ 24 that abandonment was not simply a notice of abandonment but "*the abandonment of any hope of recovery*".

Further, the abandonment process is elaborated on by sections 61 and 62 of the MIA. These sections flesh out and give contextual guidance to clause 13 of the ICC. This position can be contrasted with UAE Insurance Law because the UAE Court will not consider the MIA for guidance on the procedural steps required for abandoning a cargo.

UAE Insurance Law provides that "*the insured may abandon goods to the insurer in the following circumstances:*

- *Should news not be heard of the ship for a period of three months from the date of the last news thereof, the goods shall be presumed lost upon the date of the last news.*
- *Should the vessel become unseaworthy and operations to transport the goods by any means of transport to the destination have not commenced within a period of three months from the date of notification of the insurer by the insured of the unseaworthiness of the vessel.*
- *Should the goods be lost or damaged to the extent that three quarters at least the value thereof."*

It follows that under UAE Insurance law an insured can abandon cargo if a vessel goes missing for three months or the goods are not transported for a period of three months due to carrier unseaworthiness or where the value of the goods has depreciated by 75% due to damage. This is a significant departure from the English law definition and interpretation of abandonment and demonstrates how Insurers seeking to rely on English definitions of abandonment and CTL would be well advised to re-assess the risk that they are assuming when binding marine policies.

There is also a big difference between abandoning a damaged cargo because of 75% loss of value and abandoning a cargo which cannot be saved for a cost less than its value. The threshold for CTL abandonment is mathematically lower under UAE Insurance Law and thus represents a higher risk to insurers.

Clause 16 – Duty to Mitigate the Insurer's Losses

Insureds under the law of England and under UAE Insurance Law have a duty to mitigate their losses once loss or damage occurs due to an insured event.

Clause 16 of the ICC provides that it is"the duty of the Assured and their employees and agents in respect of loss recoverable hereunder

1. *to take such measures as may be reasonable for the purpose of averting or minimizing such loss, and*
2. *to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties."*

Clause 16 closely corresponds with section 78 of the MIA, although with an added obligation upon the insured to ensure that rights to claim against carriers and other third parties are reserved.

The leading English authority in respect of breach of this clause is *Noble Resources v Greenwood (The Vasso)* [1993] 2 Lloyd's Rep. 309. In that case, the Court held that, where there has been a failure to preserve a right of recovery against a third party, the loss to the insurer will be equivalent to the value of that lost right. However, the insurer was only entitled to claim for the equivalent of that loss in damages. It was was not entitled to fully deny cover. In the same ruling, the English Court held that to comply with Clause 16 of the ICC, an insured would be expected to take reasonable steps to obtain security for a cargo claim.

If, by contrast, the UAE Courts were construing Clause 16 of the ICC in UAE litigation, it is uncertain how the clause would be applied and, specifically, what steps the insured would be expected to take to minimize the insurer's losses and to preserve the insurer's rights against third parties.

Article 378(3) of the UAE Maritime Code is similar to ICC Clause 16(1) which stipulates that "*the insurer shall be also liable for costs spent due to an insured risk incurred in avoiding or limiting the loss.*" Article 391(1) also contains a provision similar to Clause 16(2) obligating the insured to "*take all the necessary measures to preserve the rights against liable third parties*".

Nevertheless, it is not certain whether the UAE Court would consider a breach of Clause 16 as a ground for the insured to avoid the policy. While the clause would likely be read by the UAE court with reference to the two cited Maritime Code articles, it is important to note that Article 391(2) indicates that, where an insured breaches Article 391(1), the insured shall be liable to damages, without specifying whether the insurer will also be entitled to avoid the policy.

Overall, where there is an allegation by the insurer against the insured for failure mitigate losses, it is unclear what criteria the UAE Courts will apply to uphold such an allegation or what the consequence of a breach of Clause 16 of the incorporated ICC would be for the insured's cover. Whilst it could be argued that there is some overlap between the UAE Insurance Law and English Insurance Law on the available remedy to an insurer in the event of a breach of Clause 16 of the ICCs (i.e. limited to damages), it remains to be seen whether the application of the UAE Insurance Law would yield a materially different outcome than by the application of English Insurance Law on the same facts.

Additional food for thought

A further word of caution is warranted. The practice and approach of the UAE Courts is not always apparent regarding incorporated clauses that have not been included in the policy itself. For example, we question whether the UAE Court would take notice of a policy wording which provides "*INSTITUTE CARGO CLAUSES (A) CL382 01/01/2009 to apply*". Indeed, it is an open question whether the UAE Courts would even consider it necessary to obtain a copy of the ICCs for review. Our view is that in practice the UAE Courts will apply the UAE Insurance Law without consulting the ICCs at all or any other incorporated standard marine clauses which are not presented, in full wording, in the body of the policy itself.

Lessons to be learned

In our view, insurers would be well advised to:

1. include an English law governed arbitration clause to protect the incorporation of the ICC clauses contained in the policy; or, alternatively
2. adjust their policy terms to accommodate for the application of UAE law and assess the risk accordingly.

The effect of adopting an English law governed arbitration clause is that, while the dispute resolution mechanism can become more expensive than resolving the matter through the local UAE courts, an English arbitration is likely to ensure that incorporated clauses are applied in a manner consistent with established precedent.

The effect of adopting the alternative approach and applying UAE law to the policy is that risks will be better priced by allowing for legal outcomes that are more likely to result under UAE law than under the law of England and Wales when applied to ICC clauses.

As for insureds, it is important to remember that cover may not always be what it seems. For instance, the obligation to disclose material information under English Insurance Law is less stringent than under UAE Insurance Law For that reason, insureds would do well to have in place a proper UAE document management system to ensure full disclosure is made to insurers when placing risks. Additionally, an insured should be aware of the law that is likely to govern a coverage dispute under the policy and should conduct itself in a manner that is compliant with that law.