Dictionary of
INSURANCE LAW

E. R. Hardy Ivamy

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DICTIONARY OF INSURANCE LAW

by

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Preface

This is the first of a series of legal dictionaries on various branches of the law. Others to be published include a 'Dictionary of Company Law' and a 'Dictionary of Taxation Law'. It is also, I believe, the first ever legal dictionary to be devoted exclusively to Insurance Law. I hope that it will be found useful by lawyers dealing with insurance matters, by those working in the insurance industry and by students of insurance law for whom it should serve as a work of reference and revision.

This Dictionary contains terms in general use in marine as well as in non-marine insurance which have been legally defined either in statute or case law. It excludes general legal terms which have application outside the field of insurance and general insurance terms which the legislative and the courts have not defined. Whenever possible there are detailed extracts from the relevant legal decisions supporting the meanings given. Some of the entries refer to other terms used elsewhere in the book, so a copious cross-reference system has been employed to assist the reader in finding his way around.

I am grateful to Butterworth & Co (Publishers) Ltd (the publishers of 'The All England Law Reports') and to 'Lloyds Law Reports' for giving me permission to quote the extracts from the reports concerned.

Finally, I should like to thank the staff of Butterworths for seeing the book through to press.

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E. R. HARDY IVAMY

A

Abandonment, effect of. *See* EFFECT OF ABANDONMENT.

Abandonment, notice of. *See* NOTICE OF ABANDONMENT.

'Accessories', in a motor vehicle insurance policy, do not include the engine of the vehicle for that is an essential part of it: *Seaton v London General Insurance Co Ltd* (1937) 43 Ll L Rep 398 at 400 (per Du Parcq J). In the case of a taxi, the term includes a taximeter: *Rowan v Universal Insurance Co Ltd* (1939) 64 Ll L Rep 288 at 289, CA (per Scott LJ).

'Accident'. A term involving the idea of something fortuitous and unexpected. 'It is difficult to define the term "accident" as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident, and injury or death from natural causes; such as shall be of universal application. At the same time, we may safely assume that, in the term "accident" as so used, some violence, casualty or *vis major*, is necessarily involved. We cannot think disease produced by the action of a known cause can be considered as accidental': *Sinclair v Maritime Passengers' Assurance Co* (1861) 3 E & E 478 at 485 (per Cockburn CJ).

An injury is caused by accident where it is the natural result of a fortuitous and unexpected cause e.g. where the insured is run over by a train (*Lawrence v Accidental Insurance Co Ltd* (1881) 7 QBD 216), or is thrown from his horse while hunting (*Re Etherington and Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591, CA), drinks poison by mistake (*Cole v Accident Insurance Co Ltd* (1889) 61 LT 227), is suffocated by an escape of gas (*Re United London and Scottish Insurance Co Ltd, Brown's Claim* [1915] 2 Ch 167, CA), or is drowned whilst bathing (*Trew v Railway Passengers' Assurance Co* (1861) 6 H & N 839, Ex Ch).

The injury is also caused by 'accident' where it is the fortuitous and unexpected result of a natural cause e.g. where the insured lifts a heavy burden in the ordinary course of business and injures his spine (*Martin v Travellers' Insurance Co* (1859) 1 F & F 505), or stoops down to pick up a marble and tears a ligament in his knee (*Hamlyn v Crown Accidental Insurance Co* [1893] 1 QB 750, CA).

The injury may be 'accidental' where it is caused by the act of a third person who through lack of skill or want of care does something which he ought not to have done or omits to do what he ought to have done. From the insured's point of view the injury is caused by

'accident' even though it is the result of an intentional act on the part of the third party: *Hardy v Motor Insurers Bureau* [1964] 2 All ER 742, CA.

The injury may be caused by 'accident' even though it is due to the insured's own act e.g. where he carelessly crosses a railway line in front of a train whose approach he fails to observe: *Cornish v Accident Insurance Co* (1889) 23 QBD 453. But it is not caused by 'accident' where for the purpose of making a claim against the insurers he places his leg across a railway line and allows it to be cut off by a passing train: cf. *Shaw v Robberds* (1837) 6 Ad & El 75 at 84 (per Lord Denman CJ).

Actual total loss. A term in marine insurance describing the situation 'where the subject-matter is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof': Marine Insurance Act 1906, s. 57 (1). In the case of an actual total loss no notice of abandonment (*qv*) need be given: ibid., s. 57 (2).

Ademption of loss. A term used in marine insurance to describe the rule that if in the interval between the notice of abandonment (*qv*) and the time when legal proceedings are commenced there has been a change of circumstances reducing the loss from a total to a partial one, or, in other words if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss: *Sailing Ship Blairmore v Macredie* (1898) AC 593 at 610, HL (per Lord Herschell). The theory of ademption of loss is that restoration precludes recovery, not because in such a case there never was a constructive total loss, but because an assured cannot, under a contract of indemnity, although he may at one time have suffered a loss, recover in respect of such loss, if before action it has already been made good to him: *Roura and Fougas v Townend* (1918) 24 Com Cas 71 at 81 (per Roche J). In modern practice, however, when notice of abandonment is sent, the insurers are asked in case they refuse to accept the abandonment to put the assured in the same position as if a writ had been issued; in nine cases out of ten, and probably a much larger proportion the insurers agree to do so, and, if they do not, the consequence is that the assured issues his writ immediately: *Polurrian SS Co v Young* (1913) 19 Com Cas 143 at 153 (per Pickford J). *See also* TOTAL LOSS; CONSTRUCTIVE TOTAL LOSS.

Advance freight. Freight payable to a shipowner on the signing of the bills of lading or on shipment instead of on the delivery of the goods. Such freight is usually not returnable even in the event of the ship or the goods being lost before she starts on her voyage.

'Alarm system in operation', in a jewellers' all risk insurance policy means 'switched on', and so far as the person using the alarm system

knows, fully operative, even though unknown to him the contact switch is subject to a fault of an intermittent character. The words do not mean 'fully operative' in fact, subject to a possible qualification if the alarm system was rendered inoperative by an act of a third party in contemplation of, or in preparation for the commission of the act which eventually leads to a loss under the policy: *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd and Coronet Insurance Co Ltd* [1967] 2 Lloyd's Rep 550 at 559 (per Donaldson J).

All other perils. An expression in a marine insurance policy immediately following a list of the perils insured against. The term 'all other perils' includes only perils similar in kind to the perils specifically mentioned in the policy: Marine Insurance Act 1906, Schedule, Rules for Construction of Policy, r. 12.

The loss was held to fall within the words 'all other perils' (i) where fire broke out on a quay and to prevent it spreading to the insured cargo the port authorities jettisoned part of the cargo and saturated other parts with sea water, for the loss was similar to a loss by 'jettison' or by 'fire' (*Symington & Co v Union Insurance Society of Canton Ltd* (1928) 97 LJ KB 646, CA); (ii) where a yacht, which was placed in a tidal dock to have her bottom cleaned and lay along a number of blocks of wood, was damaged by her stem and stern being allowed to overhang without support, for the loss was similar to a 'peril of the sea' i.e. stranding (*Baxendale v Fane: The Lapwing* (1940) 66 Ll L Rep 174); where a cargo of rice overheated due to the closing of the vessel's ventilators and hatches in heavy weather to prevent the incursion of sea water, for the loss was due to perils of the sea and in any event was a loss similar to one due to that peril (*Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* [1940] 4 All ER 169, PC); and (iv) where a cargo was pledged by the master to secure a loan granted to the shipowners by a third party, for the loss was similar to a 'taking at sea': *Nishina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd* [1969] 1 Lloyd's Rep 293 at 301, CA (per Phillimore LJ).

On the other hand, the loss was held not to fall within the 'all other perils' clause where (i) a donkey engine, which was used to pump water into a vessel's main boilers, was damaged when a valve, which ought to have been kept open was left closed and had become salted up (*Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co* (1887) 12 App Cas 484, HL); and (ii) where damage was caused to the hold of a ship when a crane's tackle broke as it was lowering a boiler into it (*Stott (Baltic) Steamers Ltd v Marten* [1916] 1 AC 304, HL). *See* EJUSDEM GENERIS RULE; 'INCHMAREE' CLAUSE.

'All risks' insurance. A type of insurance designed to protect the insured against loss or damage however caused. Policies of this type are used in marine insurance, jewellery insurance, contractors'

insurance and cash or goods in transit policies. 'The expression [i.e. all risks] does not cover inherent vice or mere wear and tear, or British capture. It covers a risk, not a certainty; it is something which happens to the subject-matter, being what it is, in the circumstances in which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself': *British and Foreign Marine Insurance Co v Gaunt* (1921) 26 Com Cas 247 at 259, HL (per Lord Sumner). Similarly cl. 5 of the Institute Cargo Clauses (All Risks) states: 'This insurance is against all risks of loss of or damage to the subject-matter insured but shall in no case be deemed to extend to cover loss, damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured.' The burden of proving the loss lies upon the insured. It is sufficient if he proves that the loss was due to accident. He need not prove the exact nature of the accident: *British and Foreign Marine Insurance Co v Gaunt*, supra. *See also* CONTRACTORS' ALL RISKS INSURANCE.

Alteration of policy. A policy may be altered (i) by the insertion of words into any part of the policy, whether by filling in blanks (*Langhorn v Cologan* (1812) 4 Taunt 330) or by interlineation (*Fairlie v Christie* (1817) 7 Taunt 416); (ii) by striking out words with or without the substitution of different words (*Fairlie v Christie*, supra); or (iii) by defacing the policy, or, if it is under seal, by tearing off the seal (*Langhorn v Cologan*, supra, per Mansfield CJ at 332). The insurers may avoid liability if (a) the alteration is material: and (b) the alteration has been made by the insured or by a stranger whilst the policy is in the possession or control of the insured. The alteration is material if its effect is to make it a different instrument from what it was when executed by the insurers: *Forshaw v Chabert* (1821) 3 Brod & Bing 158 at 163 (per Dallas CJ). A correction of an obvious mistake is not a material alteration: *Stephens v Australasian Insurance Co* (1872) LR 8 CP 18. It is not a material alteration if it consists of the insertion of a term implied from the words actually used: *Clapham v Cologan* (1813) 3 Camp 382. In considering whether an alteration is material, its effect must be considered as at the time when it was made; if it was material then, the fact that it afterwards became immaterial is to be disregarded: *Forshaw v Chabert*, supra. If the alteration, although material, is made by the insurers themselves without the insured's consent, the validity of the policy is not affected: *Pattinson v Luckley* (1875) LR 10 Exch 330. Similarly, the insured can enforce the policy according to its original tenor if the alteration, although material, is made by a stranger whilst the policy is not in the possession or control of the insured: *Henfree v Bromley* (1805) 6 East 309.

Alteration of port of departure from that specified in the policy

results in the risk not attaching: Marine Insurance Act 1906, s. 43.

Alteration of risk. An alteration made during the currency of the policy affecting the subject-matter insured or its circumstances as described in the policy. There is no alteration of the risk where the alteration is not a real one but such an alteration as, on the true construction of the policy, might be taken to have been made within the contemplation of the parties at the time when they entered into the contract: *Law Guarantee Trust and Accident Society Ltd v Munich Reinsurance Co* [1912] 1 Ch 138. 'The defendant company rests its case upon the general principle applicable in all cases of insurance that the obligation of the insurer is confined to the particular risk insured, and that if the risk in respect of which the claim is made against the insurer differs from the risk he has insured, he is not liable to make good that claim . . . It is hardly necessary to enlarge upon that principle, but I take it that it involves this. The alteration, if there is an alteration, must be a real alteration of the risk; if what appears to be an alteration of the conditions is only such an alteration as, on the true construction of the contract of insurance, might be taken to have been within the contemplation of the parties at the time they entered into the contract; then, of course, though apparently an alteration, it is no real alteration at all, because the fact that such an alteration might take place was an element in the contract itself': ibid., at 153 (per Warrington J).

Alterations of the risk are of 3 types: (i) alterations in the subject-matter of insurance; (ii) changes of locality; and (iii) changes of circumstances e.g. in the use of the subject-matter in the trade or business carried on by the insured.

If the risk is altered, the policy may cease to apply or it may be merely suspended. Thus, if the insured car is sold, an insured is no longer covered whilst driving another vehicle even though the policy contains an extension clause: *Rogerson v Scottish Automobile and General Insurance Co Ltd* (1931) 41 Ll L Rep 1, HL. *See* EXTENSION CLAUSES. A change in the constitution of a firm (*Solvency Mutual Guarantee Co v Freeman* (1861) 7 H & N 17) or a change of business (*Smellie v British General Insurance Co* [1918] WC & Ins 233) may deprive the insured of his protection.

But the alteration may merely suspend the operation of the policy and the policy will re-attach e.g. where the subject-matter is removed from its described locality and is then returned to it: *Gorman v Hand-in-Hand Insurance Co* (1877) IR 11 CL 224.

Conditions preventing the alteration of the risk may be implied or expressly stated in the policy. *See* CONDITION.

'Anything inhaled causing injury or death' is not confined to something voluntarily inhaled: *Re United London and Scottish Insurance Co Ltd, Brown's Claim* (1915) 113 LT 397, CA.

'Approved alarm systems', in a jewellers' all risk insurance policy, do not mean alarm systems 'approved by the underwriters' but mean systems of a type which have the approval of underwriters generally: *De Maurier (Jewels) Ltd v Bastion Insurance Co Ltd and Coronet Insurance Co Ltd* [1967] 2 Lloyd's Rep 550 at 551 (per Donaldson J).

Arbitration clause. A clause stating that any dispute arising under the policy is to be referred to arbitration. The British Insurance and Lloyd's have agreed that their members will refrain from insisting on the enforcement of an arbitration clause if the insured seeks to have a question of liability, as distinct from the amount of a claim, determined by a court in the United Kingdom. The agreement does not apply to a contract of reinsurance, a contract of marine insurance, a contract of insurance against certain aviation risks, a contract of credit insurance or where the terms of the insurance are set out in a contract or policy which is specially negotiated and in which an arbitration clause has been specially agreed: 107 L Jo 61; Fifth Report of the Law Reform Committee (Cmnd. 62), para. 13. The arbitration clause may provide that an arbitrator's award is to be a condition precedent (*qv*) to the liability of the insurers: *Scott v Avery* (1856) 5 HL Cas 811.

Arrests, restraints and detainments of all kings, princes and people. A peril insured against under a marine insurance policy. 'The term "arrests etc. of kings, princes and people" refers to political or executive acts and does not include a loss caused by riot or by ordinary judicial process': Marine Insurance Act 1906, Schedule, Rules for Construction of Policy, r. 10. 'Restraint of princes, I should conceive, comprehends every case of interruption by lawful authority': *Russell v Niemann* (1864) 17 CBNS 163 at 163 (per Byles J). 'The word "people" means the supreme power of a country and the detention of a ship by a mob is not a loss by arrests, restraints and detainments of people': *Nesbitt v Lushington* (1792) 4 Term Rep 783.

Loss by arrests, restraints and detainments has been held to have occurred where (i) goods were detained in a city in a state of siege so that nothing could be brought in or out (*Rodoconachi v Elliott* (1874) LR 9 CP 518); (ii) goods and vessels were detained in a blockaded port (*Robinson Gold Mining Co v Alliance Insurance Co* [1902] 2 KB 489); (iii) the import of cattle from certain infected countries was prohibited (*Miller v Law Accident Insurance Co* [1903] 1 KB 712); (iv) there was an embargo on goods and vessels leaving a port (*Aubert v Gray* (1862) 3 B & S 169); (v) property was confiscated in the Spanish Civil War by a committee composed of the Popular Executive Committee, which was the *de facto* and the *de jure* Government of Valencia at the time (*Société Belge des Betons SA v London and Lancashire Insurance Co Ltd* (1938) 60 Ll L Rep 225); (vi) all shipping under the control of the German Government was ordered to take refuge in neutral ports or to

return to Germany on the outbreak of the Second World War (*Rickards v Forestal Land, Timber and Rlys Co Ltd* [1941] 3 All ER 62, HL); and (vii) where a vessel was confiscated by an extraordinary military tribunal outside the ordinary judicial system of Vietnam (*Panamanian Oriental Steamship Corpn v Wright* [1970] 2 Lloyd's Rep 365).

It is usual for the insurers to exempt themselves from liability for loss by arrests, restraints and detainments by incorporating the FC & S clause (*qv*) into the policy.

Assignment of policy. A transfer of the policy by the insured (assignor) to a third party (assignee). To enable the assignee to enforce the policy in his own name the policy must be validly assigned to him. 'The contract of insurance is a mere personal contract. It is not a contract which runs with the land . . . ; it is a mere personal contract and unless it is assigned no suit or action can be maintained upon it except between the original parties to it': *Rayner v Preston* (1881) 18 Ch D 1 at 11, CA (per Brett LJ). To constitute a valid assignment two requirements must be fulfilled: (i) where necessary, the consent of the insurers must be obtained; (ii) the assignment of the policy must be contemporaneous with the assignment of the subject-matter. The prohibition against assignment of a policy without consent may be express or implied. 'A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned before or after loss': Marine Insurance Act 1906, s. 50 (1). 'Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name': ibid, s. 50 (2). 'Any person or corporation now being or hereafter becoming entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge to the insurance company liable under such policy for monies thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such monies': Policies of Assurance Act 1867, s. 1. Where the consent of the insured is required, an assignment of the policy renders the policy voidable, and it remains in force until they elect to avoid it: *Doe d. Pitt v Laming* (1814) 4 Camp 73 at 75 (per Lord Campbell).

The assignment must accompany a transfer of interest in the subject-matter. 'An attempted transfer of the beneficial interest in the subject-matter is inoperative': *Lloyd v Fleming* (1872) LR 7 QB 299 at 302 (per Blackburn J). The assignment of the policy can be made at the same time as the assignment of the subject-matter or in pursuance of a contemporaneous agreement: *North of England Pure Oil-Cake Co v Archangel Insurance Co* (1875) LR 10 QB 249 at 253 (per Cockburn CJ).

A transfer to any person other than such assignee would be a transfer to a person without an insurable interest and the policy would therefore become void: *Lloyd v Fleming*, supra, at 302 (per Blackburn J). 'Where the assured has parted with or lost his interest in the subject-matter insured and has not before or at the time of so doing expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative': Marine Insurance Act 1906, s. 51. No particular form of assignment is necessary in the case of non-marine policies. 'A marine policy may be assigned by endorsement thereon or in other customary manner': Marine Insurance Act 1906, s. 50 (3).

In the event of a loss taking place the assignee can retain for his own benefit the whole amount received from the insurers under the policy and cannot be compelled, where the amount received exceeds his own loss, to hand over the surplus to the original assured unless there is an agreement to that effect: *Landauer v Asser* [1905] 2 KB 184. The assignee becomes liable to fulfil the conditions of the policy, and his failure to do so avoids the policy or prevents him recovering according to the nature of the condition (*qv*). 'Where a marine policy has been assigned so as to pass the beneficial interest in such policy . . . the [insurer] is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected': Marine Insurance Act 1906, s. 50 (2). Thus, the insurer can avoid a policy as against the assignee if the assured has been guilty of non-disclosure of a material fact: *William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 614.

Assignment of proceeds of policy does not substitute a new insured but merely a new creditor, who succeeds to the insured's rights in respect of the sum payable under the policy.

Where a loss has already taken place, the right of the insured to recover the sum payable under the policy is an ordinary chose in action, and it may, like other choses in action be assigned by the insured before payment: *Randall v Lithgow* (1884) 12 QBD 525. 'After a loss the policy of insurance and the right of action under it might like any other chose in action be transferred in equity': *Lloyd v Fleming* (1872) LR 7 QB 299 at 302, 303 (per Blackburn J). For such an assignment the consent of the insurers is not necessary: *Brice v Bannister* (1878) 3 QBD 569, CA. Although the assignment is valid as against the insurers, it does not give the assignee an absolute right to payment. Its effect is only to transfer to the assignee the existing rights of the insured, and the insurers may, as against the assignee, make use of any defences which would, at the time when the assignment was completed, have been available against the insured: Law of Property

Act 1925, s. 136. As far as marine insurance is concerned, the Marine Insurance Act 1906, s. 50 (2) states: ' . . . and the defendant [i.e. the insurer] is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.'

Before the loss has taken place the assured may assign the right which he may subsequently acquire to receive the sum payable under the policy. Such an assignment, whether it is absolute or whether it is by way of mortgage or charge only, is not an assignment of the contract contained in the policy but only of the assured's beneficial interest therein. The assignment of the right to receive sums which may become payable under the policy is subject to equities, and the assignee is liable to be defeated not only by the acts or omissions of the insured before the assignment (*William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co Ltd* [1912] 3 KB 614) but also his acts and omissions afterwards (*Central Bank of India v Guardian Assurance Co Ltd* (1936) 54 Ll L Rep 247, PC).

The beneficial interest may be assigned in equity, whether the assignment is before or after loss and whether it is absolute or by way of mortgage or charge, by any form of assignment so long as the intention is clear: *Tailby v Official Receiver* (1888) 13 App Cas 523 at 543, HL (per Lord MacNaughten).

The right to receive the proceeds of the policy may be assigned by way of legal assignment under the Law of Property Act 1925, s. 136, which requires an absolute assignment in writing signed by the assured of which express notice has been given in writing to the insurers.

Assignment of subject-matter insured divests the insured of his interest where there is a transfer of the subject-matter accompanied by the receipt of the agreed price: *Collingridge v Royal Exchange Assurance Corpn* (1877) 3 QBD 173 at 177 (per Lush J). He cannot recover on any policy by which the subject-matter is insured since he has suffered no loss and there is consequently nothing to which the right of indemnity can attach. 'The fact that the insured had parted with all interest in the property insured would be an answer to the claim that the contract is one of indemnity only': *Rayner v Preston* (1881) 18 Ch D 1 at 7, CA (per Cotton LJ). The validity of a policy is not affected by the mere fact that the insured has entered into a contract to convey the subject-matter of insurance even though, as between himself and the purchaser, the risk has passed to the purchaser: *Collingridge v Royal Exchange Assurance Corpn*, supra. The existence of the contract does not in itself divest the insured of his insurable interest (*qv*), which continues by reason of the legal ownership of the subject-matter, and

he acquires a further interest arising out of the possibility of the purchaser refusing to carry out the contract, and thereby throwing the loss on him: *Castellain v Preston* (1883) 11 QBD 380 at 385, CA (per Brett LJ). If the price has been paid, but the conveyance of the property has not been completed, the insured retains an insurable interest by virtue of his legal ownership and the policy remains in force: *Castellain v Preston*, supra. But in the event of loss before completion the insured, not being damnified by the loss, will not be entitled to enforce the policy against the insurers for his own benefit, although, if the conditions of the Law of Property Act 1925, s. 47, are fulfilled, he may enforce it for the benefit of the purchaser.

Where the assignment of the subject-matter, although in its terms purporting to be absolute, is only a nominal assignment without consideration e.g. in the case of a trust, the validity of the policy is not affected, because the insured remains fully interested in the subject-matter even though his interest is now an equitable one only: *Montreal Assurance Co v McGillivray* (1859) 13 Moo PCC 87 at 98 (per Smith J). Similarly, the creation of a mortgage or charge on the subject-matter by the insured does not, in the absence of an express condition to that effect, affect the validity of the policy because he is not entirely divested of his interest, since he retains an equity of redemption and generally also the possession of the subject-matter. 'Where a man insures property under an absolute covenant to insure, and then assigns and charges the lease to secure a sum of money, he still retains his interest in the property subject to the charge': *Garden v Ingram* (1852) 23 LJ Ch 478 at 479 (per Lord St. Leonards).

Where the assignment takes place by operation of law e.g. on the death or bankruptcy of the insured, the insurable interest (*qv*) of the insured in the subject-matter of insurance is transferred to the personal representatives (*Durrant v Friend* (1852) 5 De G & Sm 343) or trustee in bankruptcy (Bankruptcy Act 1914, ss. 38 (1), 167), and the validity of the policy is not affected.

Association of Average Adjusters. An association founded in 1869, among its objects being 'the promotion of correct principles in the adjustment of Averages and uniformity among Average Adjusters.' The Rules fall into two categories: (i) *rules of practice*, which are rules for the adjustment of averages and the duties of adjusters in connection therewith; and (ii) *uniformity resolutions*, which relate to matters of lesser importance on which uniformity of practice is desirable. Thus, the rules of practice concern (a) general rules, (b) general average, (c) the York-Antwerp Rules 1974 (*qv*), (d) damage to and repairs to ship, and (e) particular average on goods.

Assured. *See* CONTRACT OF INSURANCE.

'At and from', in marine insurance, relates to the time of commencement

of risk under a voyage policy. 'Where the ship is insured "at and from" a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately': Marine Insurance Act 1906, Schedule, Rules for Construction of Policy, r. 3 (a). 'If she be not at that place when the contract is concluded, the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival': ibid., r. 3 (b). 'Where chartered freight is insured "at and from" a particular place, and the ship is at that place in good safety when the contract is concluded, the risk attaches as soon as she arrives there in good safety': ibid., r. 3 (c). 'Where freight, other than chartered freight, is payable without special conditions and is insured "at and from" a particular place, the risk attaches pro rata as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo': ibid., r. 3 (d).

Attachment of risk. A term used in marine insurance to denote the moment from which the insurers are liable. In the case of a time policy the risk will attach when the policy commences. *See* COMMENCEMENT OF POLICY. But in the case of a voyage policy, the risk does not attach when the policy commences. In the case of insurance on ship this will depend on whether she is insured 'from' or 'at and from' a specified port. But in some cases the risk never attaches at all e.g. if the port of departure is altered or if she sails for a different destination. *See* ALTERATION OF PORT OF DEPARTURE; SAILING FOR DIFFERENT DESTINATION.

In the case of goods the risk generally attaches when they are loaded, but may attach earlier if there is a craft clause (*qv*) or a transit clause (*qv*). *See* FROM THE LOADING. In the case of freight, the attachment of the risk depends on whether the freight is or is not chartered freight. *See* AT AND FROM.

Average Adjusters, Association of. *See* ASSOCIATION OF AVERAGE ADJUSTERS.

Average clause. A clause stating that if at the time of the loss the sum insured is less than the value of the subject-matter of insurance, the assured is to be considered as his own insurer for the difference and is to bear a rateable proportion of the loss accordingly. Thus, a clause in a fire policy may state:

'Whenever a sum insured is declared to be subject to average, if the property covered thereby shall at the breaking out of any fire or at the commencement of any fire or damage to the property by any other peril insured against be collectively of greater value than such sum

insured, then the assued shall be considered as being his own insurer for the difference and shall bear a rateable share of the loss accordingly.'

Thus, if a policy containing the condition is for £4,000 on a subject matter of the value of £5,000, and the loss is £1,000, the insurers will pay $\frac{400}{500}$ ths of £1,000 i.e. £800, and the assured will have to bear the balance of the loss i.e. £200 himself.

The clause is sometimes known as the 'first condition of average'. Where a Lloyd's policy is declared to be 'subject to average', a condition in similar terms is to be implied, and the effect of the condition is the same although specific portions of the property covered by the Lloyd's policy are also covered by other policies: *Acme Wood Flooring Co Ltd v Marten* (1904) 9 Com Cas 157. The words 'property covered thereby' contained in the average clause mean the property covered by the policy which contains the declaration, and means that the average clause has no relation to any other policy: ibid., at 162 (per Bruce J).

In the case of marine insurance there is no need for an average clause for the Marine Insurance Act 1906, s.81 states: 'Where the assured is insured for an amount less than the insurable value or in the case of a valued policy for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.'

In the absence of an average clause a policy of insurance, other than a policy of marine insurance, is not subject to average, and the insured is entitled to recover the whole amount of his loss up to the sum insured whether the loss is total or only partial: *Fifth Liverpool Starr-Bowkett Building Society v Travellers' Accident Insurance Co* (1893) 9 TLR 221.

Average, first condition of. *See* AVERAGE CLAUSE.

Average, second condition of. *See* SECOND CONDITION OF AVERAGE.

'Average unless general' in marine insurance means a partial loss of the subject-matter insured other than a general average loss, and does not include particular charges: Marine Insurance Act 1906, Schedule, Rules for Construction of Policy, r. 13. *See* PARTIAL LOSS; GENERAL AVERAGE LOSS; PARTICULAR CHARGES.

Aviation insurance. A type of insurance covering (i) loss of or damage to an aircraft; (ii) third party liability; and (iii) liability to passengers.

B

Back of policy usually includes (i) the conditions of the policy; (ii) the procedure to be followed where the consent of the insurers is necessary e.g. in the case of an assignment or the risk being increased. Nothing printed or written on the back of the policy forms part of the contract contained in the policy unless it is incorporated or otherwise made part of the contract of insurance by the intention of the parties. *See* CONDITION; ASSIGNMENT.

Bailee clause. A clause in marine insurance policies stating that it is the duty of the assured and their agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss and to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised.

Barratry. A term used in marine insurance. It includes 'every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or as the case may be, the charterer': Marine Insurance Act 1906, Schedule, Rules for Construction of Policy, r. 11. Barratry cannot be committed against a cargo owner: *Nutt v Bourdieu* (1786) 1 Term Rep 323 at 330 (per Lord Mansfield CJ). Barratry has been held to have occurred where the master (i) has engaged in smuggling: *Cory & Sons v Burr* (1883) 8 App Cas 393; (ii) intentionally breaches an embargo: *Robertson v Ewer* (1786) 1 Term Rep 127; (iii) intentionally breaches a blockade with the result that the ship is seized and condemned: *Goldschmidt v Whitmore* (1811) 3 Taunt 508; (iv) trades with the enemy: *Earle v Rowcroft* (1806) 8 East 126; (v) deviates from the voyage contemplated by the policy in order to trade on his own account: *Mentz, Decker & Co v Maritime Insurance Co Ltd* (1909) 101 LT 808; (vi) scuttles the vessel: *Piermay Shipping Co SA and Brandt's Ltd v Chester: The Michael* [1979] 2 Lloyd's Rep 1, CA; and (vii) changes sides in a civil war e.g. the master of a vessel belonging to the Chinese Nationalist Government running up the Red Flag and holding her for the benefit of the Chinese Communist Government: *Republic of China Merchants Steam Navigation Co Ltd and United States of America v National Union Fire Insurance Co of Pittsburgh, Pennsylvania: The Hai Hsuan* [1958] 1 Lloyd's Rep 351, U.S. Court of Appeals, Fourth Circuit. *See* DEVIATION.

'Basis' clause. A clause at the foot of the proposal form in which the proposer declares that the answers to the questions in the form are true