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“ALL RISKS” COVER AND INSURANCE  
OF NON-EXISTENT GOODS AFTER THE DECISION  
IN *ENGELHART CTP (US) LLC V LLOYD’S SYNDICATE 1221*

**Abstract**

The aim of this study is to examine the importance of the decision in *Engelhart CTP (US) LLC v Lloyd’s Syndicate 1221* with regard to the insurance of economic losses and non-existent goods in the context of all-risks cover. It also strives to analyse to what extent the principles of construction described in this decision are applicable to the interpretation of all risks cover in marine insurance disputes subject to Polish law. Assureds and beneficiaries of cargo policies are defrauded into taking up false documents for non-existent goods yet Polish law fails to address the questions which arise in such situations. It is thus important not only to investigate and evaluate the answers provided by English law but also to explore if and how Polish law may employ them. It follows from this study that *Engelhart* may be used in construction of all-risks policies subject to Polish law in most scenarios.

**Keywords:** cargo insurance, interpretation of insurance policy, open cover, “all risks” cover, Institute Cargo Clauses (A), paper losses, error in measurement, loss and damage to subject-matter insured, economic loss, fraud, non-existent goods.

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## INTRODUCTION

It is striking, given the sheer volume of cargo transported in and out of this country<sup>1</sup>, how little attention the Polish Maritime Code<sup>2</sup> (hereinafter referred to as the “PMC”) pays to cargo insurance. The words “cargo” and “goods” appear in the Title VIII: Marine Insurance of the PMC only 22 times, scattered merely across eight Articles dealing with:

- the subject matter of the insurance contract (Article 293 of the PMC);
- the insurable value (Article 300 of the PMC);
- the open cover (Articles 311 and 312 of the PMC);
- the exclusions of liability in hull insurance (Article 322 of the PMC);
- the exclusions of liability in cargo insurance (Article 323 of the PMC);
- the abandonment (Articles 330 and 331 of the PMC);

which leaves in fact only 7 Articles devoted exclusively to cargo insurance. This is less than the English Marine Insurance Act 1906<sup>3</sup>, which is astounding given that these two pieces of legislation are 95 years apart and that the Polish regulation is not rooted in centuries of case law, unlike its English counterpart.

All the seven Articles are very general. The PMC goes into some detail only in respect of the open cover and the abandonment of cargo, i.e. topics not covered in the Institute Cargo Clauses. The rest of the regulation is just bare bones.

The reason for such a modest approach is the universal use in the Polish market of the Institute Cargo Clauses<sup>4</sup> and the Polish Maritime Law Codification Commission’s apparent belief that this type of insurance is best left to the market itself to regulate, which, one must admit, it does quite well.

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<sup>1</sup> According to the Polish Ministry of Maritime Economy and Inland Navigation (Ministerstwo Gospodarki Morskiej i Żegluga Śródlądowej) in 2018 Polish main ports – Gdynia, Gdańsk and Szczecin – handled over 100 mln tons of cargo – source (date of access 2019-11-03): <https://www.gov.pl/web/gospodarkamorska/rada-ministrow-przyjela-uchwale-program-rozwoju-polskich-portow-morskich-do-2030-roku2>.

<sup>2</sup> The Act of 18 September 2001, Journal of Laws of 2001 No 138, item 1545 as amended; consolidated text Journal of Laws of 2018 item 2175.

<sup>3</sup> 1906 CHAPTER 41 6 Edw 7, hereinafter referred to as the “MIA 1906”; The words “goods” and “cargo” are used in the MIA 1906 exactly 32 times across 16 Articles, excluding the Schedules.

<sup>4</sup> See J. Łopuski, Chapter XX in: J. Łopuski (ed.), *Prawo Morskie tom II Część trzecia Prawo Żegluga Morskiej 2*, Bydgoszcz–Toruń 2000, p. 298.

## 1. THE PROBLEM OF INTERPRETATION OF CARGO POLICIES UNDER POLISH LAW

Cargo insurance signed by Polish marine insurers is often subject to Polish law and jurisdiction<sup>5</sup>, irrespective of how rarely are the Institute Cargo Clauses reviewed by the Polish judiciary<sup>6</sup>. This begs a question how to interpret them despite the lack of Polish authorities.

In the Polish market there is a practice which seeks to address this question by allowing the Institute Cargo Clauses to be construed by reference to English law and practice in relation to foreign beneficiaries<sup>7</sup>. Even in insurance contracts subject to Polish law, Polish courts allow the interpretation of the matters covered in the Institute Cargo Clauses according to English law and practice<sup>8</sup>, provided the relevant clause referencing them had not be deleted or modified<sup>9</sup>. Finally, one may employ Article 65 § 1 of the Polish Civil Code<sup>10</sup>, which reads:

*"A declaration of intent should be interpreted as required, in view of the circumstances in which it is made, by the principles of community life and established customs."*

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<sup>5</sup> The open cover issued to a Polish importer would in most cases provide for Polish law and jurisdiction.

<sup>6</sup> A search in the Database of the Common Courts' Judgments (Portal Orzeczeń Sądów Powszechnych available at <http://orzeczenia.ms.gov.pl/search/advanced>) under the keyword "Institute Cargo Clauses" reveals only 1 result: The Judgment of the Court of Appeal in Szczecin of 29.09.2014 case no. I ACa 455/14, which in fact deals with the Institute Frozen Food Clauses. This database does not contain all judgments of Polish courts – in 2018 the courts published 40 187 judgments, which is only a small fraction of the total judgments given in Poland in 2018. A search in a commercial legal research database (Legalis) reveals 4 judgments under this keyword and all four cases concerned international carriage by road.

<sup>7</sup> If the insurance certificate is intended for a foreign beneficiary the reference to English law and jurisdiction in the relevant cargo clauses (e.g. cl. 19 of the Institute Cargo Clauses (A)) is left intact and is regarded by the insurers as binding. If the insurance contract or certificate is intended for a Polish beneficiary the reference to English law and practice in the relevant cargo clauses is often deleted by a special typed clause and substituted with Polish law and practice.

<sup>8</sup> See the Judgment of the Court of Appeal in Szczecin of 29.09.2014 case no. I ACa 455/14.

<sup>9</sup> E.g. the clause 19 of the Institute Cargo Clauses A, B and C, as well as Institute Commodity Clauses A, B and C and the Institute Frozen Food Clauses (excluding meat) A, B and C which provides: "This insurance is subject to English law and practice."

<sup>10</sup> The Act of 23 April 1964 Journal of Laws of 1964 No 16, item 93 as amended; consolidated text Journal of Laws of 2019 item 1145.

to assert that the English law interpretation is an established custom which should be taken into account in the process of construction of the Institute Cargo Clauses or other similar insurance clauses or forms.

Such approach to the interpretation of the Institute Cargo Clauses is certainly in line with the universal character of the Institute Cargo Clauses and the fact that both the insurance certificates and the cargoes covered are intended for international trade. It does, however, create a number of problems. First and foremost, English precedents are certainly less accessible to the Polish insurers and assureds than the provisions of Polish legislation would be, had it regulated cargo insurance in a more comprehensive manner. The lack of access may lead to uncertainty as to the meaning of particular clauses and improper drafting, which, in turn, may trigger the application of Article 15 Section 5 of the Act of 11 September 2015 on Insurance and Reinsurance Activity<sup>11</sup> which provides:

*“Terms of insurance contract, standard terms and conditions of insurance and other contract forms formulated ambiguously shall be interpreted in favour of the assured, insured or the beneficiary of an insurance contract.”*

This may result in surprising and unwelcome consequences for insurers.

## 2. RISKS COVERED UNDER AN “ALL RISKS” POLICY

Reference to English law and practice is certainly necessary in determination of the scope of the risks covered under an “all risk” insurance such as the Institute Cargo Clauses (A). Clause 1 of the Institute Cargo Clauses (A) provides as follows:

*“This insurance covers all risks of loss of or damage to the subject-matter insured except as excluded by the provisions of Clauses 4, 5, 6 and 7 below.”*

The clause itself thus does not give much guidance on what the risks contemplated in this clause could be. The Polish Maritime Code is equally uninformative as in Article 292 it merely states that:

*“By the contract of marine insurance the insurer undertakes against an insurance premium to pay indemnity for losses incurred by perils to which the subject of insurance is exposed in connection with the maritime shipping.”*

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<sup>11</sup> Journal of Laws of 2015 item 1844 as amended, consolidated text Journal of Laws of 2019 item 381.

The PMC does not enumerate or describe the risks and only requires that the risks be incident to shipping and capable of causing any type of "losses". Consequently, any insight into what the "loss" in an "all risks" insurance policies really is must be gleaned from the English authorities.

### 3. ANALYSIS OF THE SCOPE OF "ALL RISKS" POLICIES UNDER ENGLISH LAW

#### 3.1. CASE-LAW PRIOR TO *ENGELHART*

The relatively recent decision in *Engelhart CTP (US) LLC v Lloyd's Syndicate 1221*<sup>12</sup> gives a useful and an up-to-date guidance on what amounts to a "loss" under an all risks policy. This case must however be first put into context of there English authorities of particular relevance to this question which were relied upon in *Engelhart*.

In chronological order, first is the decision in *Fuerst Day Lawson Ltd v Orion Insurance Co Ltd*<sup>13</sup>. This was the case of an all risks policy covering the cargo of oil drums purchased by the claimant on c&f basis and carried from Jakarta to Great Britain. The oil drums were to hold essential oils used in the production of perfumes. Instead, the drums contained water with just a thin film of oil on the surface for deception had the drums been opened for inspection. The oil drums or the oil inside had not been substituted over the course of the insured adventure and thus it was up the claimant to show that the goods insured had actually been loaded. The claimant was unable to do so and the court ruled for the defendant insurers.

Even though the case has been cited as authority for the proposition that an all risks cargo policy extends only to physical damage<sup>14</sup>, it was in fact decided on the basis of the burden of proof<sup>15</sup> as the claimant simply did not demonstrate that the goods had ever come on risk.

Next is the decision in *Coven SpA v Hong Kong Chinese Insurance Co*<sup>16</sup> in which a cargo of broad beans was insured under an open cover incorporating

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<sup>12</sup> *Engelhart CTP (US) LLC v Lloyd's Syndicate 1221 (for the 2014 Year of account & 6 others)* [2018] EWHC 900 (Comm).

<sup>13</sup> [1980] 1 Lloyd's Rep. 656.

<sup>14</sup> See J. Dunt (ed.), *International Cargo Insurance*, 2012, Informa, First edition, at para 11.33, p. 384, footnote 75.

<sup>15</sup> See S. Hodges, *Cases and Materials on Marine Insurance Law*, 2006, Cavendish Publishing Limited, p. 418.

<sup>16</sup> [1999] Lloyd's Rep IR 565 (CA).

the Institute Commodity Trades Clauses (A)<sup>17</sup>. The policy included the wording: “Covering All Risks, War Risks including shortage in weight but subject to an excess of 1% in the whole shipment”. The seller Wah Sang Development Company sold 5,000 MT +/- 5% of broad beans to Coven SpA CIFFO Crotone and Ancona. Two sets of bills of lading were issued – one for the carriage from Xingang to Crotone and another for the carriage from Xingang to Ancona. The bill of lading for the shipment to Ancona stated that the weight of the broad beans was 2,787.298 metric tonnes and the same weight was included in the insurance policy. In fact only 2,401.581 metric tonnes of cargo were loaded in Xingang. It was common ground that the phrase “Covering All Risks” in the policy stood for all risks of loss or damage to the subject matter insured. Coven SpA as the buyer and the assignee of the insurance policy demanded payment of USD 85,819.09 from the insurers. Initially, Coven claimed for loss by an unspecified marine peril since there was less cargo on discharge than according to the bill of lading had been loaded, but the judge in the first instance found that the difference of 385.717 metric tonnes resulted from an error in measurement at Xingang and the claim failed. On appeal the counsel for the plaintiff buyer acquiesced that there had been no physical loss of the cargo and that the “All Risks” part of the policy could not apply, but asserted that the “shortage in weight” mentioned in the policy was in itself an insured peril. The Court of Appeal rejected that argument. Clarke LJ said:

*“When construed in their context, the words were not, in my opinion, intended to provide cover for a measurement error in circumstances where there is no loss of the cargo. In short, they were not intended to provide cover against paper losses which it is conceived would not ordinarily be covered in a policy of this kind.(...) There must be physical loss of existing beans and not a paper loss of non-existent beans.”*<sup>18</sup>

The third decision – *Glencore v Alpina*<sup>19</sup> – was a claim for a loss of crude oil insured on an open cover against all risks of loss and damage. Glencore, one of the largest independent traders in crude oil and products, entered into contracts

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<sup>17</sup> Clause 1 of the Institute Commodity Trades Clauses (A) incorporates the same wording as the Institute Cargo Clauses (A) which reads: “This insurance covers all risks of loss of or damage to the subject-matter insured except as excluded by the provisions of Clauses 4, 5, 6 and 7 below.”.

<sup>18</sup> [1999] Lloyd’s Rep IR 565, per Clarke LJ, p. 569.

<sup>19</sup> *Glencore International A.G. v Alpina Insurance Company Limited and others* [2003] EWHC 2792 (Comm); [2004] 1 Lloyd’s Rep. 111.

with Metro Trading International Inc. ("MTI") for the storage of various grades of oil at a floating oil storage facility in the waters off Fujairah operated by MTI as well as with Metro Oil Corporation ("MOC") for the processing of crude oil at MOC's refinery and oil storage facilities at Fujairah. Glencore would also sell parcels of stored oil to MTI. When MTI and MOC, collectively known as the Metro Group, became insolvent in February 1998, Glencore and the other depositors of oil discovered that the quantity of oil held in the floating storage facility was far smaller than ought to have been the case. The value of the Glencore's missing oil was asserted by Glencore in excess of USD 250,000,000.

The insurance contract was worded in very broad and flexible terms:

*"Cover to attach from the time the Assured becomes at risk or assumes interest and continues in transit and/or store (other than as below) or wherever located and until finally delivered to final destination as required (...)."*<sup>20</sup>

The insurers, Alpina Insurance Co. Ltd ("Alpina") and certain other insurers in the Swiss market, declined payment on a number of grounds<sup>21</sup>, one of them being that the misappropriation of oil by MTI which Glencore subsequently sold to MTI as a part of an undivided bulk and for which MTI failed to pay constituted not a loss of the subject matter insured but a loss by an uninsured credit risk.<sup>22</sup> Moore-Bick J did not agree. Despite the very broad and flexible cover, he found that the insurance was against the risk of physical loss or damage to oil, not against conversion in law<sup>23</sup>, and that the loss was not a consequence of "credit risk", that is the risk that MTI might not pay the price, but of physical loss of the oil as it had been stolen by MTI<sup>24</sup>.

It is against this legal matrix that Sir Ross Cranston, sitting as a judge of the High Court, had to give judgment in *Engelhart*.

### 3.2. THE FACTS OF *ENGELHART*

It was the case of an open cover incorporating Institute Cargo Clauses (A) for a range of commodities, including metals, which the claimant – Engelhart CTP (US) LLC – traded.

<sup>20</sup> *Ibidem*, pp. 10–13.

<sup>21</sup> Including fraud as well as non-disclosure and misrepresentation; *ibidem*, pp. 26–31.

<sup>22</sup> *Ibidem*, pp. 204–224.

<sup>23</sup> *Ibidem*, p. 207.

<sup>24</sup> *Ibidem*, pp. 223–224.

This was a construction summons<sup>25</sup> on agreed facts which were as follows:<sup>26</sup>

- on 11 August 2015 the claimant bought 7,000 metric tonnes of copper ingots on cif China terms from World Gold International Ltd („World Gold”);
- on the same day the claimant also sold 7,000 metric tonnes of copper ingots on cif China terms to receivers in China, Shing Fu (HK) Metal Co Ltd (“Shing Fu”);
- on 21 September 2015, both contracts were amended to increase the quantity to 9,000 metric tonnes;
- the first shipment of 7,000 metric tonnes of copper ingots was shipped and delivered to Shing Fu without incident;
- between 16 and 24 September 2015 a cargo of a further 1,967.898 mt of copper ingots was said to be shipped in 102 containers from New York;
- when the containers arrived in Hong Kong for transhipment to China during November and December 2015, some were found to be leaking;
- the representative of Shing Fu notified the claimant around 24 November 2015;
- all the containers were opened in the presence of cargo surveyors – no copper ingots were in fact shipped in the containers and no such cargo ever existed; the containers only ever contained slag of nominal commercial value; the bills of lading, packing lists and quality certificates were therefore fraudulent;
- the claimant was unaware of the fraud at the time of shipment;
- the claimant paid World Gold for the cargo of 1,967.898 mt over three instalments in late September 2015;
- Shing Fu refused to pay;
- the claimant submitted a claim to the underwriters of the policy, including the defendants, for the loss of the cargo and insured expenses.

The defendant insurers – Lloyd’s Syndicate 1221 – were members of the Lloyd’s of London who wrote a proportion of the cover. While, according to the judgment, the claimant had settled its claim with other of the insurers who wrote the remainder of the cover, including the leader,<sup>27</sup> the defendant refused the claim.

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<sup>25</sup> A procedure where a claimant seeks the court’s decision on a question which is unlikely to involve a substantial dispute of fact under Part 8 of the Civil Procedure Rules used by the Court of Appeal, High Court of Justice, and County Courts in civil cases in England and Wales; in *Engelhart* the claimant sought a declaration from the court as to the correct interpretation of the insurance policy.

<sup>26</sup> See [2018] EWHC 900 (Comm), pp. 5–9.

<sup>27</sup> *Ibidem*, p. 2.

### 3.3. THE TERMS OF THE INSURANCE POLICY IN ENGELHART

The policy contained several clauses of particular importance to the case which were closely examined by the court:

#### "Concealed Damage Clause"

*It is agreed that any loss or damage discovered on removal the final packing shall be deemed to have occurred during the transit insured hereunder (and irrespective of attachment of Assured's interest) and shall be paid for accordingly unless proof conclusive to the contrary be established, it being understood that any containers, cases and/or packages showing signs of damage are to be opened as soon as practicable.*

#### Container Clause

*Notwithstanding anything contained herein to the contrary where Cargo, insured hereunder, is carried in Containers, it is agreed, as between the Assured and Insurers, that the seaworthiness and/or cargoworthiness of the Container is hereby admitted.*

*It is agreed that this Insurance contract is also to pay for shortage of contents (meaning thereby the difference between the number of packages as per shippers and/or suppliers invoice and/or packing list loaded or alleged to have been laden in the container and/or trailer and/or vehicle load and the count of packages removed therefrom by the Assured and / or their agent at time of container emptying) notwithstanding that seals may appear intact, and/or any other loss and/or damage including but not limited to cargo and/or container sweat howsoever arising.*

(...)

#### Fraudulent Documents

*This insurance contract covers physical loss of or damage to goods and/or merchandise insured hereunder through the acceptance by the Assured and/or Shippers of fraudulent documents of title, including but not limited to Bill(s) of Lading and/or Shipping Receipt(s) and/or Messenger Receipt(s) and/or shipping documents and/or Warehouse Receipts and/or other document(s) of title.*

*This insurance contract is also to cover physical loss of or damage to goods insured caused by utilisation of legitimate Bill(s) of lading and/or other documents of title without the authorisation and/or consent of the Assured or their Agents and/or Shippers.<sup>28</sup>*

<sup>28</sup> *Ibidem*, p. 19.

There were also ten sections in the policy which set out specific conditions for different commodities insured which began with the following clause:

*“This insurance is subject to the above Operative Conditions and where applicable the below commodity section insuring conditions. It is noted and agreed that unless otherwise declared to the contrary, the broadest coverage shall apply.”<sup>29</sup>*

It was common ground that the policy was broader than the Institute’s all risks policy<sup>30</sup>, similar to that in *Glencore v Alpina*.

### 3.4. THE DECISION IN *ENGELHART*

The court ruled for the defendant underwriters and rejected the claimant’s argument that the policy covered claims for physical loss where an insured party has been defrauded into taking up documents of title for non-existent goods. First of all, Justice Cranston found there could be no physical loss since on the agreed facts no copper ingots ever existed and were ever shipped, so they could not be physically lost or damaged. The losses alleged by the claimant were in fact economic losses due to acceptance of fraudulent documents of title which did not represent the physical goods<sup>31</sup>. Secondly, despite its broad wording, the policy was an all risks marine cargo insurance as it referred to Institute Cargo Clauses (A) and employed an “all risks” wording. Consequently, he concluded from the authorities that the purpose of all risks marine cargo insurance is to cover loss of or damage to property, that is only losses flowing from physical loss or damage to goods, so there must be clear words indicating a broader intention. The judge said:

*“Thus the commercial context of the construction exercise is that the presumption with an All risks marine cargo policy is to insure for physical losses.”<sup>32</sup>*

The court did not accept that the words in the Concealed Damage clause, the Container clause and the Fraudulent Documents clause relied upon by the claimant<sup>33</sup> had an extended meaning revealing the intention to broaden the cover

<sup>29</sup> *Ibidem*, p. 15.

<sup>30</sup> *Ibidem*, p. 45.

<sup>31</sup> *Ibidem*, p. 39.

<sup>32</sup> *Ibidem*, p. 40.

<sup>33</sup> Such as the phrase “*is also to pay for shortage of contents (...) notwithstanding that seals may appear intact*” from the “Container Clause”.

to include economic losses as each of these three clauses contained language denoting physical loss or damage to the subject matter insured. Most notably, the Fraudulent Documents Clause afforded cover only for "physical loss of or damage to goods" suffered through the acceptance of fraudulent documents of title. In addition, since there was no cargo, there could be no "loss", "damage" or "shortage" discoverable on removal of the final packing, as mentioned in the Concealed Damage clause, or on opening of a container, as provided for in the Container clause. Clearer words would be necessary to displace the presumption that an all risks marine cargo policy is to insure only physical damage or losses.

### 3.5. THE ASSESSMENT OF THE DECISION IN *ENGELHART*

While the facts of the case could be regarded only as an opportunity for a mere restatement of an already recognized principle that all risk policies cover only losses on account of physical damage to the subject matter insured, one must not forget that this did not stop the leader and all other underwriters in this case, except for the defendant, from paying out on the policy. Consequently, there was more to the case than now, in hindsight, may appear.

The facts of *Engelhart* must be distinguished from *Coven SpA v Hong Kong Chinese Insurance Co* where the loss was indeed on paper only as it followed from an error in measurement which led to the weight of the cargo being overstated in the bill of lading by approx. 385 tons. This was 385 tons of cargo which not only had never existed but also which had not represented any real loss to the assured as the consignee. In *Engelhart* the assured actually paid the fraudster for the documents on cargo which should have been shipped to him so his losses were certainly not "on paper" only but rather quite real. At the same time, the facts of *Engelhart* were substantially different from *Glencore v Alpina* in that the latter case the oil clearly did exist and the insurers were on risk when the oil was stored and later misappropriated by MTI.

Secondly, as opposed to *Fuerst Day Lawson Ltd v Orion Insurance Co Ltd*, the case was not decided on the basis of the burden of proof. This was a construction summons on agreed facts in which the claimant asked the court for a declaration as to the true interpretation of the policy. The court had to decide whether the claimant is entitled to the declaration sought rather than simply hold that the claimant failed to prove that the goods had ever embarked upon the insured adventure as was the case in *Fuerst Day Lawson Ltd v Orion Insurance Co Ltd*.

It follows that while the result in *Engelhart* was not wholly unexpected, the decision is not unwelcome as it has provided useful and much needed guidance

on how all risks marine cargo policies on terms broader than the Institute Cargo Clauses (A) should be interpreted with respect to economic losses.

One can only regret that the decision did not explore the issue of insurable interest in non-existent cargo which was already mentioned in *Coven*<sup>34</sup>.

### 3.6. ILLUSTRATION OF THE PRACTICAL IMPORTANCE OF THE PRINCIPLES OF CONSTRUCTION DISCUSSED IN *ENGELHART*

After the decision in *Engelhart* it should be absolutely clear for insurers, assureds and brokers alike that an all risks policy will not afford cover for economic losses in connection with non-existent cargo. Even if the assured suffers a loss having paid for fraudulent transport documents which do not in fact represent the goods they purport to or which do not in fact relate to any existing goods, such a loss will be presumed to be excluded from the ambit of the cover unless clear words expressing intention to the contrary are used in the policy.

A comparison of the wordings of the fraudulent documents clauses in two American decisions – *Chemical Bank v Affiliated FM Insurance Company*<sup>35</sup> and *Centennial Insurance Company v Lithotech Sales LLC*<sup>36</sup> illustrates this well. *Chemical Bank* was a claim of three banks against London insurers under an open cover for losses they sustained through extending credit on the basis of fraudulent bills of lading for approx. 200,000 bags of Columbian coffee which did not exist. The plaintiffs relied on a clause labelled “Special Condition”, dealing with fraudulent bills of lading, which read:

*“This policy covers loss or damage occasioned through the acceptance by the Assured and/or their agents or shippers of fraudulent Bills of Lading and/or shipping receipts and/or messenger receipts.”*<sup>37</sup>

Whereas in *Centennial Insurance Company v Lithotech Sales LLC* the plaintiff insurers filed an action against the assured for a declaratory judgment on the issue of coverage they sought to avoid and the defendant counter-claimed for declaratory judgment in its favour. In that case *Centennial* issued an open cover to Lithotech who claimed under the policy once they had been sued by their sub-buyer for failing to deliver the correct commercial printing press that was actually ordered. Lithotech delivered a substitute press instead thereby causing

<sup>34</sup> [1999] Lloyd’s Rep IR 565 (CA), p. 570.

<sup>35</sup> 815 F. Supp. 115 (SDNY 1993).

<sup>36</sup> 187 F Supp. 2d 214 (DNJ 2001).

<sup>37</sup> 815 F. Supp. 115 (SDNY 1993), p. 118.

their sub-buyers the loss of several hundred thousand dollars. There was no evidence that the "correct" printing press had ever existed and had been shipped by the Indonesian seller or that the substitution took place during the course of transit. The "Fraudulent Bills of Lading Clause" provided that:

*"This policy also covers loss of or damage to the property insured occasioned through the acceptance by the Insured or Insured's agent or customers or consignees or others of Fraudulent Bills of Lading or Shipping Receipts."*<sup>38</sup>

In *Chemical Bank* the clause dealing with the fraudulent bills of lading lacked the limiting language present in *Centennial*<sup>39</sup> as there was no reference to "property insured" and so the insurers were liable.

## CONCLUSIONS

After *Engelhart* "all risks" policies are to be presumed in the process of construction to cover only physical loss or damage to cargo, unless clear words in the policy dictate otherwise. It also follows from *Engelhart* and other authorities discussed herein that an all-risks wording of both entry-level insurance policies and of broad open covers would in most cases not accommodate economic losses through acceptance of fraudulent documents covering non-existent goods. Only in *Chemical Bank* was there a cover for such losses and it was afforded to the assured by a special condition dealing with fraudulent bills of lading rather than other clauses referring to physical perils.

These two propositions are fundamental for the proper construction of all risks policies in general and special clauses asserted by the assured as covering economic losses in particular. As the result of *Engelhart* the starting point of the construction process of every all risks policy subject to English law and practice is the presumption that such policy covers only physical loss or damage to cargo. Even if the policy contains special clauses which seek to make the cover broader and more flexible, similar to those in *Engelhart* or *Glencore v Alpina*, the presumption is not displaced as long as these clauses contain references to physical loss, damage or shortage.

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<sup>38</sup> 187 F Supp. 2d 214 (DNJ 2001), p. 216; the assured relied also on an "all risks" coverage but his argument was rejected for reasons very similar to those explored in *Engelhart* – Lithotech failed to show that the defect or loss occurred when the insurer was on risk i.e. in the course of transportation, *ibidem*, p. 219.

<sup>39</sup> *Chemical Bank* was distinguished in *Centennial* for precisely this reason – *ibidem*, p. 220.

Such construction retains importance even in cases subject to Polish law. If the special clauses are subject to English law and practice or, at least, may be interpreted according to English law and practice, the construction process should be the same – the presumed cover is for physical loss or damage only. Hence, the assured or the beneficiary would not be in position to assert that the clauses extending the scope of an all risks policy are ambiguous in regard to cover for economic losses and demand to have the cover extended to include such losses by the application of Article 15 section 5 of the Act on Insurance and Reinsurance Activity, unless clear words in the policy indicate that such losses are indeed covered.

The identification of exactly when *Engelhart* is applicable to the construction of clauses modifying the scope of an “all risks” cover poses some difficulty. In the simplest yet the less likely scenario, the clauses are inserted into the Institute Cargo Clauses (A) or other similar clauses or an insurance form from the English market. The special clauses would be then subject to the “English Law and Practice clause” already contained in form<sup>40</sup> and their construction should thus comply with the decision in *Engelhart*.

The result should be the same if an open cover is subject to Polish law but incorporates Institute Cargo Clauses (A) or other similar “all risks” clauses from the English market. Any special provisions contained in the open cover contract which seek to modify or extend the all-risks wording of the Institute Cargo Clauses (A) should also fall under the choice of law clause contained therein<sup>41</sup> and thus be interpreted according to *Engelhart*. If the parties decided to maintain the choice of English law in respect to the main body of the cover, the clauses amending that cover should follow the same legal regime.

Finally, by virtue of Article 65 § 1 of the Polish Civil Code, the principles of construction following from *Engelhart* may also be applied even if the contract of marine insurance lacks any reference to English law and practice, provided it incorporates Institute Cargo Clauses or other similar clauses from the English market. The construction adopted in *Engelhart* could be regarded as an established custom which the parties to the insurance contract ought to have contemplated at its conclusion.

There is no plausible alternative to English law in the search for meaning of the Institute Cargo Clauses. There are almost no reported Polish cases on the Institute Cargo Clauses and the interpretation cannot be gleaned from the intention of the parties only because very often it is simply not there. The Institute Cargo Clauses, just as any other standard contract or form, are used because

<sup>40</sup> See the Judgment of the Court of Appeal in Szczecin of 29.09.2014 case no. I ACa 455/14.

<sup>41</sup> E.g. clause 19 of the Institute Cargo Clauses (A).

the parties do not want to have an opinion about every aspect and detail of the contract and would rather rely on something which is widely recognised and known to work. The choice is therefore either between the vibrant torrents of the English decisions or the bare bones of the Polish regulation.

POLISY „ALL RISKS” I UBEZPIECZENIE ŁADUNKU  
NIEISTNIEJĄCEGO PO WYROKU W SPRAWIE  
*ENGELHART CTP (US) LLC V LLOYD’S SYNDICATE 1221*

**Słowa kluczowe:** ubezpieczenie ładunku, wykładnia polisy ubezpieczeniowej, ubezpieczenie generalne, ubezpieczenie typu „all risks”, Instytutowe Klauzule Ładunkowe (A), starty „na papierze”, błąd rachunkowy, utrata i uszkodzenie przedmiotu ubezpieczenia, szkoda ekonomiczna, oszustwo, ładunek nieistniejący.

### Abstrakt

Celem niniejszego opracowania jest zbadanie znaczenia wyroku w sprawie *Engelhart CTP (US) LLC v Lloyd’s Syndicate 1221* w odniesieniu do ubezpieczenia szkód ekonomicznych i ładunków nieistniejących w kontekście polis „all risks”. Próbuje ono także przeanalizować w jakim zakresie zasady wykładni przedstawione w tym wyroku można zastosować w interpretacji polis „all risks” w sporach ubezpieczeniowych opartych o prawo polskie. Ubezpieczający i ubezpieczeni w zakresie polis ładunkowych w wyniku oszustw przyjmują fałszywe dokumenty na nieistniejące towary, jednak prawo polskie nie odnosi się do wątpliwości, które wówczas powstają. Jest zatem istotne nie tylko, aby zbadać i ocenić rozwiązania oferowane w tym zakresie przez prawo angielskie, ale także aby wyjaśnić czy i jak prawo polskie może je wykorzystać. Niniejsze opracowanie wskazuje, że wyrok w sprawie *Engelhart* może w większości przypadków zostać zastosowany przy wykładni polis „all risks” poddanych prawu polskiemu.