AIJA's Transport Law Commission Questionnaire on Marine Insurance for a workshop at the 53rd annual congress in London on 2-5 September 2015

ARGENTINA

Reported by

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1. Which laws and rules govern contracts of insurance, including H&M and P&I insurance, in your jurisdiction?

In Argentina, the contracts of insurance are currently governed by the Insurance Act of 1967. Marine insurance, however, is governed by the insurance provisions contained in the Navigation Act of 1973 and the general Insurance Act will only apply where the Navigation Act remains silent and to the extent that the solutions of the Insurance Act are not contrary to the insurance provisions of the Navigation Act. Article 408 of the Navigation Act and article 157 of the Insurance Act.

Since the provisions on marine insurance of the Navigation Act are relatively few and the parties are expressly allowed to deviate from many of those provisions by contract, the policy wording is of vital practical importance.

2. Do the laws and rules governing contracts of H&M and P&I insurance prescribe any post-inception warranties or other terms, which – if breached by the insured – may allow the insurer to deny or limit coverage of an insured event?

If so, please identify such warranties and terms and state specifically whether (i) unseaworthiness, (ii) deviation from the agreed vessel trading area or route, (iii) violation of safety rules and/or (iv) negligence, gross negligence or wilful misconduct of the insured may cause loss or limitation of coverage.

In addition to any post-inception obligations that may be agreed by the parties to the marine insurance contract, the Navigation Act provides certain general dispositions that apply to all types of marine insurance.

For instance, article 418 of the Navigation Act provides that the insured, its dependents and particularly the captain, are obliged to use —to the extent of their possibilities— all possible diligence to avoid or reduce the damage or to save the insured assets. To this end, the insured is required to abide by the instructions received from the insurer or, in lack of instructions, as needed, do what it deems reasonable under the circumstances. The insured is also required to promote all claims, protests and acts stipulated by law to preserve any recovery actions that may be available. This same article 418 also provides that all reasonable costs and sacrifices undertaken by the insured to comply with these obligations will be covered by the insurer.

Under article 419 of the Navigation Act, unless otherwise agreed by the parties, a risk variation performed by the insured entitles the insurer to resolve the contract, when the new status of the risk were such that, had the insurer known it at the time of entering into the contract, it would have not entered into the contract or it would have entered on different conditions. This provision, however, provides a very tight term for the insurer to exercise this right: three days as from the date it became aware of the risk variation.

In connection with H&M insurance, and unless otherwise agreed by the parties, article 433 of the Navigation Act provides that the damages sustained by the vessel arising from any of the following causes are not covered by the insurer (exoneration of liability causes):

a) The acts of the insured or its shore side dependents, made willfully or with gross negligence. While not specifically mentioned in this provision and depending on the circumstances, unseaworthiness could fall under this exoneration cause.

b) Voluntary change of route or voyage without the insurer's knowledge.[1]

c) In covers stipulated for a given term, the risks occurred outside the trading or geographical area covered under the policy.

d) In voyage marine insurance, the risks occurred during the extension of the voyage beyond the last port of call designated in the policy.[2]

e) Unreasonable delay in the voyage.

f) Inherent defect in the vessel, except for its consequences.

g) Wrong stowing.

h) Wear and tear of the vessel or its belongings.

i) Particular average below 3% of the insured value.

j) Willful misconduct of the captain, crew or pilot.

It should be noted that "warranties", as known in English insurance practice, are not commonly used in Argentine insurance policies.

[1] Under article 416 of the Navigation Act, in voyage marine insurance a voluntary deviation in the order of calls, the route or the voyage, that it were not caused by the need to preserve the vessel or the cargo or to save human lives, or that it were not imposed by force majeure reasons, would void the contract. A little deviation, however, will not be deemed sufficient to void the contract.

[2] A shortening of the voyage would not alter the cover provided by the policy provided that the last port of call is one of ports designated in the policy.

3. Under which conditions may a breach of the warranties or other terms identified in reply to question 2 cause loss or limitation of coverage? As part of your answer, please describe how the burden of proof is allocated.

In principle, the insured has the burden of proving that a given event is a covered riks under the policy and the insurer has the burden of proof of a breach of an obligation of the insured that may lead to denial or limitation of the insurance cover.

Depending on the nature of the obligation breached it may or may not be required to prove negligence in the insured and a causation link with the damage.

In practice, the policy wording will be very important in assessing the conditions required to deny or limit coverage under H&M or P&I.

4. Are the warranties or other terms identified in reply to question 2 mandatory, or may they be deviated from by contract either to the advantage of the insurer or to the advantage of the insured, or both. Is the insurer allowed to incorporate additional warranties or terms in contracts of H&M and P&I insurance, a breach of which may cause loss or limitation of coverage?

It is generally understood that the rule of freedom of contract has a broader application in marine insurance than in other types of insurance contracts. A number of provisions on marine insurance of the Navigation Act expressly admit deviations by contract.

Therefore, the insurer and the insured should in principle be allowed to agree on additional obligations or terms in contracts of H&M and P&I insurance. In fact, marine insurance policies are much more elaborate than the provisions of the Navigation Act.

In case of doubt, however, Argentine courts will tend to lean in favour of the insured, particularly when it were found that a given clause unreasonably deviates from the nature of marine insurance or from the Insurance Act provisions applicable in case of silence of the Navigation Act.

5. Will a choice of law clause in the H&M policy or P&I club's rules be recognised in your jurisdiction to the effect that the existence of such warranties and terms as are mentioned in question 2 and the consequences of their breach will be governed by the law chosen?

Pursuant to article 609 of the Navigation Act, insurance contracts are governed by the law of the State where the insurer is domiciled.

H&M contracts involving vessels flying the Argentine flag may only be entered into with insurers licensed in Argentina. In effect, article 2 of law 12,988 provides that insurance interests of Argentine jurisdiction must be covered by insurance companies licensed in Argentina. A choice of a foreign law in respect of H&M contracts would not be admitted by Argentine courts.

In respect of P&I contracts, for many years the Argentine insurance regulator has deemed that these do not constitute insurance operations and, thus, many Argentine-

flagged vessels took P&I cover outside Argentina, pursuant to the respective P&I club's rules. Very recently, however, the insurance regulator approved a protection and indemnity plan for a local insurer and it is yet to be seen if P&I cover will continue to be taken abroad or if the duty to take cover over Argentina interests with Argentine-licensed insurers will now be enforced in respect of this type of coverage.

6. Unless covered by your replies above, is there any case law in your jurisdiction which considers an H&M insurer's or P&I club's right to deny coverage, in accordance with the H&M policy or the P&I club's rules or otherwise, as a result of an insurance event having been caused by (i) unseaworthiness, (ii) deviation from the agreed vessel trading area or route, (iii) violation of safety rules or (iv) negligence, gross negligence or wilful misconduct of the insured?

There is relatively little case law on H&M insurer's and P&I club's right to deny coverage.

In the context of H&M, it has been held that the insured has the burden of proving that an event is covered by the marine insurance contract (in re "Hilmesa S.A.", Cam. Fed., Sala Civ. y Com., Feb. 13, 1967, LL 126-681).

It has also been held that the original (or initial) unseaworthiness of a vessel —as opposed to the subsequent unseaworthiness— leading to her sinking, is excluded from coverage even when the navigation and machine certificates were in place ("Pesquera del Sud vs. Minerva Cía. de Seguros", Cam. Fed., Sala Civ. y Com. 1, Aug. 20, 1971, LL 147-24).

In respect of P&I covers, it has been held in a plenary decision that, if due to insolvency the sea carrier were unable to deal with a third party claim, the judicial award against the carrier can be enforced against its P&I insurer ("Compañía de Seguros La Franco Argentina vs. MV Catamarca II", CNCiv.Com.Fed., plenary judgment, Mar. 12, 1996, LL 1996-B-255).

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