
53RD ANNUAL CONGRESS IN LONDON

2-5 SEPTEMBER 2015

# MARINE INSURANCE

## *DENYING COVER AS A MARINE INSURER: PLAIN SAILING OR DEAD IN THE WATER?*

## NATIONAL REPORT OF ESTONIA

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A WORKSHOP ORGANIZED BY

THE TRANSPORT LAW COMMISSION

## QUESTIONNAIRE

Traditionally, marine insurance may cover a broad range of perils, damage and losses related to ships and watercrafts sailing on the high seas or inland waterways, and the cargoes they carry.

For vessel owners and charterers, marine insurance covers risks, which allows them to avoid losses and run their business with the certainty that their exposure to the risks insured is covered. However, marine insurance is not meant to cover all risks, and there are obligations which the insured must fulfil to be able to make a claim. Accordingly, certain express or implied warranties or other terms limit the scope of exposure for marine insurers, and a breach of such warranties or terms may allow the insurers to escape liability.

In continuation of the pre-congress seminar ñMarine Insurance: Covering the Vesselôs Life from Cradle to Graveò, the Transport Law Commission will organize a workshop at the 53rd annual congress in London on 2-5 September 2015, which will focus on of hull & machinery (H&M) and protection & indemnity (P&I) insurersô grounds for denying coverage, in the event of a breach of an express or implied warranty in the policy, or other objectionable conduct by the insured.

This questionnaire will form the basis for the national reports, which are to be prepared by each national reporter in accordance with the laws of her or his country in preparation for the workshop.

## REGULATION IN ESTONIA

Thereôs no specific regulation in Estonia to govern marine insurance contracts. It used to be regulated in the **Merchant Shipping Code** which contained notion of marine insurance contract and terms under which the insurer was released from the performance of an obligation.[1] Valid **Merchant Shipping Act** only foresees an obligation of ship owners to have liability insurance without regulating its terms.[2] Marine Insurance contracts are regulated by the **Law of Obligations Act** (hereinafter ñ**LOA**ò) as a general act applicable to all contracts. However, its provisions regulating insurance contracts do not contain any maritime insurance specific terms either. By way of background, legislator did not consider it necessary to have specific regulation of the marine insurance contracts. At the time being (2002), it had no practical importance since the ship owners used international insurance undertakings whose general terms and conditions fully covered marine insurance issues. Local undertakings often apply international clauses (e.g. Marine Insurance Clauses of Institute London

[1] Respective part of the Merchant Shipping Code which covered marine insurance contracts was declared invalid in 2002.
[2] Chapter 7[1] of the Merchant Shipping Act https://www.riigiteataja.ee/en/eli/507112013010/consolide

Underwriters). Other than that, it is possible to apply general regulation of insurance contracts stipulated in the LOA to marine insurance contracts. As a result, most of the ship owners (except small ships) do not have marine insurance contracts which are subject to Estonian law. Similarly, we do not have any Supreme Court practice which explicitly deals with an H&M insurers or P&I clubôs right to deny or limit coverage.

Therefore, my answers to the questions will be more of a general and theoretical nature to give an overview of the legislation applicable to marine contracts.

## ANSWERS TO THE QUESTIONNAIRE

The answers to the questionnaire have been prepared for the use at the AIJA 53rd Annual Congress in London for a workshop organized by the transport law commission.

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

Thereôs no specific regulation in Estonia to govern H&M or P&I insurance. Insurance contracts are regulated by LOA which applies also to marine insurance contracts.[3] H&M and P&I contracts may be considered as the non-life insurance and liability insurance contracts.

Valid **Merchant Shipping Act** foresees an obligation of the ship owners to have liability insurance for maritime claims. Itôs based on the Directive 2009/20/EC of the European Parliament and of the council of 23 April 2009 on the insurance of ship owners for maritime claims.

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.***

LOA (or its respective part regulating insurance contracts) do not contain any marine insurance specific conditions. However, there are some general rules which may have relevance to maritime specific warranties described above.

[3] Part 4 INSURANCE CONTRACT https://www.riigiteataja.ee/en/eli/516092014001/consolide

First of all, an insurer shall be released from the performance obligation if the insured wilfully (intentionally) caused the occurrence of the insured event. Any agreement which derogates from this requirement is void (§ 452 (1) of the LOA).

Secondly, itõs prohibited to increase the probability of insured risk. If an insured person violates this requirement, the insurer may be released from the obligation to perform the insurance contract (§-s 443ï 445 of the LOA).

If the breaches of the warranties mentioned in the question increase the probability of insured risk, it may allow the insurer to limit coverage of an insured event (please see answer to question 3 below). In practice, local insurance undertakings usually consider deviation from the abovementioned warranties as an increase of the probability of insured risk.

***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.***

Intentional bringing about of an insured event leads to loss of coverage. An insurer shall be released from the performance obligation if the insured person intentionally caused the occurrence of the insured event. This is mandatory rule in favour of the insurer.

An insurer may limit his coverage if the policyholder violates a prohibition to increase insurable risk. This obligation is two-fold:

1) the policyholder has an obligation to notify insurer if there is an increase of insurable risk (§ 443 and 445 (1) of the LOA).

If the insurer receives such notice he must decide whether to cancel the insurance contract or request amendment thereof. If a policyholder violates the notification obligation, the insurer shall be released from the obligation to perform the insurance contract if the insured event occurs at least one month after the time when the insurer should have received the notice.

2) the policyholder has an obligation not to increase the probability of the insured risk or allow the risk to be increased by persons for whom the policyholder is responsible (§ 444 and 445 (2) of the LOA).

If a policyholder violates the requirement, the insurer shall be released from the obligation to perform the insurance contract to the extent of the increase in the probability of the insured risk due to the circumstances caused by the policyholder, if the insured event occurs after an increase in the insured risk.

As a general rule, the insurer cannot deny or limit the coverage if the increase of insurable risk had no causation on the occurrence of the insured event. This is mandatory rule in favour of the insured person. Any agreement which derogates from these provisions to the detriment of the policyholder is void.

To be precise, the insurer may not rely on the limitation despite the violation of prohibition to increase insurable risk, if:

1) by the time the insured event occurs, the term for the insurer to cancel the contract due to an increase in the probability of the insured risk or to request amendment thereof has expired without the insurer cancelling the contract or requesting amendment thereof;

2) the increase in the probability of the insured risk had no bearing on the occurrence of the insured event;

3) a higher insured risk would not have affected the validity or scope of the insurer's performance obligation (§ 445 (3) and 452 (2) of the LOA).

As to the burden of proof, the insurer has an obligation to prove how and to what extent the violation of an obligation had effect to the occurrence of the insured event.

4. ***Are the warranties or other terms identified in reply to question 2 mandatory, or may they be deviated form 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?***

There are certain limitations on freedom of contract in favour of the insured person out of which most important is described in answer to question three (please see on the same page above conditions when the insurer may not rely on the limitation). Any agreement which derogates from mandatory provisions to the detriment of the policyholder is void (§ 427 of the LOA).

There are also provisions which protect interests of the insurer. An insurer shall be released from the performance obligation if the insured person intentionally caused the occurrence of the insured event. Any agreement which derogates from this requirement is void. Intentional bringing about of an insured event with the intention of receipt of insurance indemnity from the insurer may be considered as insurance fraud and thus punishable under **Penal Code** (§ 212 of the Penal Code).[4]

[4] Penal Code: https://www.riigiteataja.ee/en/eli/522012015002/consolide.

Other than that parties may agree on the additional terms both to the advantage of the insurer or insured (e.g. parties may agree that gross negligence has the same consequences compared to intent although gross negligence is not a mandatory rule under the law).

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?***

A contract shall be governed by the law chosen by the parties. The parties are free to choose the law governing the contract. If foreign law is to be applied, the court shall apply such law regardless of whether or not application of the law is requested. Foreign law shall be applied pursuant to the interpretation and practice of application of the governing law in the corresponding state.

The choice of law clause will be recognised according to regulation (EC) No 593/2008 of the European Parliament and of the council of 17 June 2008 on the law applicable to contractual obligations (Rome I). If itôs the law of the state other than EU state, respective international treaty (bilateral or multilateral) will be applied. If thereôs no international agreement, **Private International Law Act** applies.[5]

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?***

Thereôs no Supreme Court practice which explicitly deals with H&M insurerôs or P&I clubôs right to deny coverage.

*This document is delivered electronically and therefore is not signed.*

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[5] Private International Law Act: https://www.riigiteataja.ee/en/eli/513112013009/consolide