THE ONLY GLOBAL ASSOCIATION OF YOUNG LAWYERS

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

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 "Marine Insurance: Covering the Vessel's Life from Cradle to Grave", 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) insurers' 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.

The questions are:

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

In general, the Insurance Contracts Act (543/1994, as amended) regulates insurance contracts under Finnish law. However, this act is not for example applied to statutory insurance (with certain exceptions) or to reinsurance.

Further, for example in respect of marine insurance taken out by companies this act is, when applicable, non-mandatory. In such cases it is up to the insurer and the policyholder to negotiate and agree the terms of the insurance. For example, in respect of H&M insurance there are certain general terms of contract that are often used, such as, "Finnish Marine Hull Insurance Conditions 2001" (FHC 2001) and "The Nordic Marine Insurance Plan of 2013".

As Finland is an EU member state, EU regulations such as Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents and Directive 2009/20/ EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims are applicable in Finland or have been implemented into Finnish law (with certain adjustments where applicable).

Finland has also ratified certain international conventions that relate to marine insurances. Related provisions on P&I insurances can be found, inter alia, in the Finnish Maritime Code (674/1994, as amended).

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.

Under the Finnish Insurance Contracts Act there are certain actions which if carried out by the insured may cause the insurer to limit or deny cover. These include, inter alia, if the insured has caused the damage, not followed safety regulations, not mitigated the damage or failed to comply with the duty of disclosure, as more closely stipulated in the said act. Not only willful misconduct or gross negligence, but also negligence which cannot be considered minor may in some cases cause loss or limitation of coverage.

However, the situations are often agreed upon more specifically in the insurance contracts.

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.

Aspects that usually need to be considered are, for example, how the actions or lack of actions by the insured has contributed to the occurrence of the damage or loss, the level and nature of possible negligence, and the circumstances in general.

In principle, an insurer which declines or limits coverage of an insured event has the burden of proof to show that there are grounds for loss or limitation of coverage.

However, the insurance conditions often regulate burden of proof in respect of certain issues more precisely.

For example, under the Nordic Marine Insurance Plan of 2013, Clause 3-25, sub-clause 3:

> "*The insurer has the burden of proving that a safety regulation has been breached, unless the vessel springs a leak whilst afloat. The assured has the burden of proving that he did not breach the safety regulation through negligence, and that there is no causal connection between the breach of safety regulation and the casualty.*"

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?

In respect of marine insurances taken out by companies the parties usually have a rather wide margin of discretion to agree on warranties or other contract terms a breach of which may cause loss or limitation of coverage.

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?

In principle parties to a contract may agree on the applicable law in accordance with 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).

However, there are certain specific national regulations for example in respect of compulsory insurances in this respect. For example according to the Act on the Law Applicable to Certain Insurance Contracts of International Character (91/1993, as amended), Section 8, law applicable to compulsory insurance is the law of the state that imposes the obligation to take out insurance, as more closely stipulated in the said act.

As a whole issues concerning applicable law are rather complex and also related issues must naturally be considered case by case.

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?

The Finnish Supreme Court case KKO:1993:165 concerns H&M insurance.

The case concerns a matter where a commercial vessel capsized while sailing at the Gulf of Bothnia in 1987. The waves were hitting deck of the vessel during voyage and due to leaking hatches water was getting into the hold of the vessel. There was also certain deficiency in the functioning of the extraction equipment of the vessel. The vessel had then black-out and was eventually overturned at sea.

According to the H&M insurance conditions that were applicable in the case the insurance did not cover loss or damage that was a consequence of the vessel having been in an unseaworthy condition if the assured knew or should have known about the vessel's defects at such time that it would have been possible for it to do something about it. According to the insurance conditions the assured had the burden of proof to

show that it neither knew nor should have known about the vessel's unseaworthiness. In case the vessel had sprung a leak whilst afloat, the assured had the further burden of proving that the loss or damage was not attributable to unseaworthiness.

In the case damage/loss was partly caused by leaking hatches and partly by a malfunction of the extraction equipment. It was held by the Supreme Court that the insurer did not have to pay compensation in relation to part of the damage/loss that was due to the leaking hatches because the shipowner was aware of the leaks and had not repaired the leaks even though it could have done so. The insurer was, however, ordered to pay compensation in relation to part of the damage/loss that was caused by the malfunction in the extraction equipment as the assured had not been aware of this malfunction.

National reporter are requested to complete their reports and submit them to the President of the Transport Law Commission, Niels Jørn Friborg, e-mail njf@hafnialaw.com, in accordance with the instructions given in the cover e-mail.