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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?

Contracts of insurance in France are governed by the *Code des assurances* ("*Insurance Code*").

Marine insurance is governed by Title VII of this code:

- H&M insurance is governed by articles L173-1 to L 173-16,
- Liability insurance is governed by articles L173-23 to L 173-26.

Apart from these legal provisions the French market has established insurance forms. These forms contain the core rules which govern marine insurance.

- The latest version of the French H&M policy was issued on 1st January 2012.
- The latest version of the French liability policy was issued on 20th December 1990.

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.

Yes.

Upon the inception of the insurance policy, the first requirement is that the assured must pay the insurance premium. Thereafter the Assured must :

- comply with all statutory requirements of the flag state
- preserve all rights of recovery for the insurers against third parties
- take all reasonable care to ensure the safety of the insured Vessel and take all reasonable measures to safeguard the insured Vessel from an insured risk or to minimise the consequences of such a risk.
- not engage in any blockade running, smuggling, unlawful, prohibited or clandestine trade
- ensure that the Vessel insured is classed with a Classification Society agreed by the Insurers at inception and is maintained in class throughout the duration of the policy
- not sail outside the trading limits provided for by the insurance policy.
- ensure that the Vessel insured holds the various certificates required by the SOLAS Convention 1974
- disclose to the insurers any marine mortgages on the insured vessel.

Moreover the French H&M policy does not cover any act or omission committed by the assured or by any senior onshore officers to whom he has delegated his powers with intent to cause damage, or recklessly and knowing that such damage would probably result.

The French liability insurance form contains similar provisions.

The Insurance Code excludes damage resulting from :

- failure by the assured to take reasonable care to safeguard the property insured from risk
- defects in the vessel
- gross negligence or wilful misconduct by the assured.

All of the above warranties are the result of the following important provision at article L172-3 of the Insurance Code :

"*Any modification during the course of the contract, whether in respect of the terms agreed at the time when it was made or in respect of the property insured, resulting in a significant aggravation of the risk, shall give rise to termination of the cover if it was not declared to the Insurer within three days of the Assured becoming aware thereof … unless he can prove his good faith*". (office translation)

Whilst (i) unseaworthiness, (ii) deviation from the agreed trading area or route, and (iii) violation of safety rules *per se* will not necessarily result in cover being lost or limited, this can happen if they amount to a breach of the above warranties. Likewise under (iv) negligence and gross negligence are unlikely to result in loss of cover, but wilful misconduct or any deliberate act or omission by the Assured or his servants or agents will result in loss of cover.

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.

Article L172-3 states that if the significant aggravation of the risk is not declared to the Insurer within 3 days of knowledge thereof the cover shall be terminated, unless the Assured can prove his good faith as provided by the second paragraph of article L 172-2.

The first paragraph of article L 172-2 deals with the inaccurate declaration of risks upon the inception of the insurance policy :

"*Any omission or inaccurate declaration by the Assured which might significantly reduce the Insurer's evaluation of the risk, regardless of any influence it may have on the damage to or on the loss of the property insured, renders the insurance void at the request of the Insurer.*".

However the second paragraph provides that:

"*If the Assured produces evidence of his good faith, the Insurer is bound, subject to any stipulation more favourable to the Assured, to guarantee the risk in proportion to the premium paid rather than to the premium which should have been paid, except in cases where it establishes that it would not have covered the risks if it had known of them.*"

Thus under article L. 172-3 failure to disclose a material fact arising during the life of the contract which might significantly aggravate the risk will entitle the Insurer to terminate the contract unless the Assured can prove that he acted in good faith. Where good faith is proved, under article L 172-2 the Insurer cannot terminate but can only reduce the cover in proportion to the premium which should have been paid.

The burden of proof is allocated as follows:

- the Insurer must prove both that a material fact arose which significantly affected the cover and that the Assured failed to declare it
- the Assured must show that he acted in good faith.

Thus the Insurer can only terminate and refuse cover if the Assured is unable to prove that he acted in good faith, otherwise it can only reduce the cover proportionately.

The same rule applies if the Assured fails to satisfy the warranties given under the insurance policy.

What is the definition of "good faith" for this purpose? The French Supreme Court has held that in order to prove that he acted in good faith the Assured must show that he "*did not know either of the existence of the circumstance omitted or of the influence it might have on the opinion of the Insurer*".

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?

Most of the warranties provided in the French insurance forms or in the Insurance Code are not mandatory and the parties may agree to different conditions in favour of either or both parties.

However there are certain mandatory provisions from which the parties cannot derogate because they are matters of public policy :

- the Insurer can never cover wilful misconduct by the Assured
- the Insurer cannot exclude articles L 172-2 or L172-3 nor derogate from them except on terms more favourable to the Assured. For example the parties may agree that in the event of an unintentional error or omission in the declarations made by the Assured the Insurer will not impose a proportionate reduction of the indemnity provided the Assured proves that it was made in good faith.
- the Insurer cannot cover an unlawful act or illegal activity.

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?

Yes. Our courts will enforce a choice of law clause together with the warranties and conditions provided for by the chosen foreign law. However the law chosen cannot be

used to bypass the above-mentioned public policy provisions which are mandatory under French law. Thus a foreign law cannot be used to cover wilful misconduct or illegal acts by the Assured, or to exclude articles L 172-2 or L 172-3, or to amend these provisions to the disadvantage of the Assured.

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?

As mentioned above unseaworthiness is not of itself a ground to exclude cover, but it can lead to refusal of cover if it was caused through wilful misconduct by the Assured.

For example in the case *Irrintzina* (5 January 1999) the French Supreme Court held that the underwriters were entitled to decline cover because the poor condition of the vessel was due to wilful misconduct by the Assured. In this case the vessel was constantly taking in water and was liable to suffer electrical breakdowns at any moment. It is important to note that this decision was not based on the seaworthiness or otherwise of the vessel but on wilful misconduct by the Assured.

Wilful misconduct and reckless behaviour by the Assured were also taken into account in the case *Korhogho* (6 July 1999) in which our Supreme Court held that the Assured's decision to deliberately sink his fishing trawler deprived him of cover. Likewise, in the case *Lightning v. MMA* (15 December 2007) the skipper of a sailing boat participating in a race was deprived of insurance cover because he had decided to follow a route very close to shore without any justification such as heavy weather or proper racing tactics.

There are also some more recent decisions.

In the recent case *l'Assunta II* a dispute arose between the owner of a fishing trawler and his H&M insurer. The insurer declined cover, in particular because the ship's navigation and ship safety certificates had not been renewed prior to the accident. The insurer argued that the owner's reckless conduct deprived him of cover. This argument was rejected both by the Montpellier Court of Appeal and subsequently by our Supreme Court in a decision dated 13 May 2014.

In the case *Generali v. 3D* (*the Sainte Florence*) a vessel was damaged by fire. The Insurer declined cover on the ground that the Assured had failed to declare a mortgage on the vessel. Although this argument was accepted by the Montpellier Court of Appeal, the decision was later quashed by the Supreme Court on 31 January 2012 on other grounds.

Sébastien Lootgieter