53RD ANNUAL CONGRESS IN LONDON
2-5 SEPTEMBER 2015

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

NORWAY

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?*

   Insurance in Norway is regulated by the Insurance Contract Act 16 June 1989 no. 69 ("ICA"). The provisions of the ICA are in principle mandatory in so far as the rights of the insured is concerned, however, there are several exceptions for the insurance of commercial activity, including large risks, insurance of ships and offshore units, as well as international transportation of goods. The legal provisions in ICA section 7-8, pertaining to the right to direct action, apply as a mandatory rule of law for liability insurance regardless of the nature of the insurance. Marine insurance will for all practical purpose be subject to terms and conditions which deviate from the ICA. With the exception of ICA section 7-8, the provisions of ICA will therefore have limited applicability in practice.

   Norwegian marine insurance is commonly written on the basis of the Nordic Marine Insurance Plan 2013 (the "Plan") which replaced the Norwegian Marine Insurance Plan 1996 Version 2010. With its comprehensive commentaries, the Plan represents the main source of law in Norwegian marine insurance. The Plan is an agreed document jointly drafter by representatives of the insurers and insured. It contains insurance conditions pertaining to various marine insurances, including H&M, loss of hire, war risks and builders' risks, as well as the insurance of mobile offshore units ("MOU"), and must be presumed to reflect general Norwegian marine insurance law.

The Plan does not cover P&I insurance, which, apart from the mandatory provisions in the ICA section 7-8, is regulated by the Rules of the club with which the insurance is placed, as well as general principles on contract and insurance law.

For cargo insurance conditions have been drafted on the same principles as the Plan in the Conditions relating to Insurance for the Carriage of Goods 1995 Version 2004 ("CICG").

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.

Both the ICA and the standardized terms and conditions for insurance contain terms which will limit coverage if breached by the insured. The limitations will vary in scope. For the purpose of answering this question, I will first and foremost consider the terms contained in the Plan.

The Plan Chapter 3 contains rules pertaining to the duties of the person effecting the insurance, and the effects of such breaches. The rules cover the duty of disclosure (Section 1), alteration of risk (Section 2), safety regulations (Section 3), the duty to avert and minimise loss (Section 4), as well as casualties caused intentionally or negligently by the insured (Section 5).

The scope of the duty of disclosure is set out in Clause 3-1, stating that the insurer shall at the conclusion of the contract make a full and correct disclosure of all the circumstances that are material to the insurer when considering whether to accept the insurance. Moreover, the insured has an obligation to notify the insurer immediately if he becomes aware that incorrect or incomplete information has been provided.

The Plan also contains provisions concerning alteration of risks, which state that if the insured has intentionally caused or agreed to an alteration of the risk, the insurer is free from liability provided that it may be assumed that he would not have accepted the insurance if he had known the alteration would take place. Moreover, if it can be assumed that the insurer would have accepted the insurance, but on other conditions, the insurer is only liable to the extent that the loss is proved not to be attributable to the alteration of the risk, cf. Clause 3-9.

As to the particular circumstances referred to in the question, the following will apply;

(i) unseaworthiness

The Plan no longer contains a rule which specifically concerns unseaworthiness. The former rule was revoked in the 2007 version of the Norwegian Marine Insurance Plan, on the basis that developments in the ship safety legislation, in particular the Ship Safety Act of 2006 replacing, i.a., the Seaworthiness Act of 1903, had made the concept of seaworthiness less important and unnecessary as a parallel rule to the system of safety regulations. The flag state requirements pertaining to seaworthiness, means that it is covered by the definition of safety regulations in Clause 3-22, see (iii) below.

The Norwegian P&I clubs maintain exclusions for liability and loss resulting from a member knowingly sending the vessel to sea in an unseaworthy condition, see e.g. Skuld Rule 30.1.7.

(ii) deviation

The Plan contains rules on trading areas, see the Plan Clause 3-15.

(iii) safety regulations

The Plan Section 3 contains rules pertaining to safety regulations. The term is defined in Clause 3-22 as "rules concerning measures for the prevention of loss" issued by public authorities, stipulated in the insurance contract, prescribed by the insurer pursuant to the insurance contract, or issued by the classification society. The definition corresponds to the definition in ICA Section 1-2 (e).

It is specifically stated that periodic survey required by public authorities or class constitute a safety regulation.

(iv) negligence, gross negligence or wilful misconduct

The rules pertaining to casualties caused intentionally or negligently by the insured are set out in the Plan Chapter 3 Section 5.

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 general the burden of proof is with the insurer to substantiate that the insured has breach any of the provisions which affect the liability of the insurer. However, the individual provision may be worded so as to allow the insurer to substantiate that there are certain circumstances present which means that the insurer remains liable regardless of fact that a certain provision has been breached.

(i) duty of disclosure

For breaches of duties of disclosure, the Plan states that coverage can be denied if the insured would not have accepted the insurance if he had the full and correct information, cf. Clause 3-3. The contract is automatically not binding on the insurer if the insured fraudulently has failed to fulfil his duty of disclosure, cf.

Clause 3-2. If there is no blame on the part of the insured associated with the incorrect or incomplete information, the insurer remains liable (but may elect to cancel the insurance), cf. Clause 3-4.

The insurer may not invoke the provision concerning breach of the duty of disclosure if he knew, or should have known, of the matter at the time the information should have been given, cf. Clause 3-5.

(ii) deviation

If the ship enters into a conditional area with the consent of the insured and without notice to the insurer, a deduction will be made in the insurance claim. If the ship enters into an excluded area, the insurance ceases to be in effect, unless the insurer has given its prior consent or the infringement was not the result of an intentional act of the master of the ship.

The Rules of the Norwegian P&I clubs contain an exclusion of cover for liabilities for cargo loss, shortage etc. arising out of deviation or departure from the contractually agreed voyage which deprives the member of the right to rely on defences or rights of limitations which would otherwise be available, see e.g. Skuld Rule 5.2.11. Additional cover can be arranged to cover deviation liabilities.

(iii) safety regulations

The Plan Clause 3-25 sets out the effects of breaches of safety regulations. First, a breach of the safety regulation must have been a result of negligence. Secondly, there must be a causal link between the loss and the negligence. The foregoing do not apply in cases where the master or crew member is also the shipowner, in which case one would apply the general rules concerning situations where the insured brings about the casualty, see below under (iv).

If the breach relates to a special safety regulation laid down in the insurance contract, negligence by anyone whose duty it is on behalf of the assured to comply with the regulation or to ensure that it is complied with shall be deemed equivalent to negligence by the assured himself. The same applies if periodic surveys are not carried out as required by Cl. 3-22, sub-clause 2.

The insurer has the burden of proving that a safety regulation has been breached, unless the vessel springs a leak whilst afloat. The insured has the burden of proving that he did not breach the safety regulation through negligence, and that there is no causal link between the breach of safety regulation (negligence) and the casualty.

(iv) negligence, gross negligence or wilful misconduct

If the insured intentionally brings about the casualty, the insured will – in accordance with the general Norwegian insurance law principal - have no claim against the insurer, cf. Clause 3-32.

If the casualty is caused by gross negligence, any liability of the insurer shall be determined in accordance with the degree of fault and circumstances generally, cf. Clause 3-33. Gross negligence implies a qualified or more pronounced deviation between the conduct of the insured and the relevant norm.

A progressive reduction in the insurance cover is the applicable system under both the Plan and the ICA.

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?

   Neither the Plan nor the ICA is mandatory, with the exception of the ICA section 7-8.

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 yes, however, certain exceptions may apply, more or less coinciding with the exceptions in the Rome I Convention.

   It could be noted that in the event of a direct action against a P&I insurer, the choice of law in the insurance policy may not be upheld provided that the direct action is deemed as a tort action (non-contractual claim), in which case the applicable substantive law most likely will be the *lex loci delicti*. The warranties and terms may, however, still apply as a matter of the insurance scope of cover.

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 substantial case law pertaining to the Norwegian Marine Insurance Plan 1996 and 1964, on which the Plan is based.

   Case law pertaining to P&I insurance is more limited, first and foremost because disputes between the club and a member is generally subject to arbitration, and the awards are rarely published.

Most of the relevant case-law is collected in Nordiske domme i sjøfartsanliggende, which is a collection of selected maritime law case-law in the Nordic countries.

(i) unseaworthiness

See question 2 (ii) – former cases concerning seaworthiness can be relevant when considering the Plan's provisions concerning safety regulations.

(ii) violation of safety rules

(a) "rules concerning measures for the prevention of loss", see question 2 (iii)

The term "rules concerning measures for the prevention of loss", has been considered in several cases including ND 1973.450 RAMFLØY (Norwegian Supreme Court), ND 1971.350 KARI-BJØRN (Norwegian Supreme Court) and ND 1986.226 SYNØVE (Norwegian Court of first instance)

(b) negligence, see question 3 (iii)

The negligence requirement has been considered in cases such as ND 1982.328 HARDFISK (Norwegian Court of first instance) in which the Supreme Court held that the assured was negligent in respect of outstanding necessary repairs, but not in respect of defective repairs, and ND 190.91 TOTSHOLM (Norwegian Court of Appeal) in which the Court of Appeal held that breaches of safety regulations were irrelevant because they were unknown to the assured.

(c) causation, see question 3 (iii)

The causation issue has been considered in a number of cases, including ND 1971.350 KARI-BJØRN (Norwegian Supreme Court) and ND 190.91 TOTSHOLM (Norwegian Court of Appeal).

(iii) negligence, gross negligence or wilful misconduct of the insured

Cases dealing with wilful misconduct (intent) includes ND 1995.436 TORSON (Norwegian Supreme Court) in which the Supreme Court held on the basis of the evidence that the casualty was a result of the bottom valve having been intentionally opened.

Cases dealing with the issue of the assured's gross negligence include ND 1971.350 KARI-BJØRN (Norwegian Supreme Court), ND 1976.132 TUVA (Norwegian Court of Appeal) and ND 1992.348 SNOOPY (Norwegian Court of Appeal), all of which resulted in reduction of the recoverable insurance amount.

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.

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