



THE ONLY GLOBAL ASSOCIATION OF YOUNG LAWYERS

53RD ANNUAL CONGRESS IN LONDON
2-5 SEPTEMBER 2015

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 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?

Articles 595 up to article 615 of the Commercial Code contain provisions about insurance covering risks at sea. Articles 616 up to 625 of the Commercial Code contain provisions about the abandonment of the insured object to the insurers. Decree-law 72/2008 of 16 April has enacted the Insurance Act.

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?

Yes.

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.

Statutory warranties

All voluntary and caused by the assured deviation or change of route or change of voyage where there is an H&M insurance in place will cancel the insurer's obligations and allow the insurer to deny full coverage.

All voluntary and caused by the assured change of ship, where there is an insurance covering freight, will cancel the insurer's obligations and allow the insurer to deny full coverage.

If the assured sends the ship to a location more distant than the location mentioned in the contract the insurers shall not cover the risks of the subject matter insured as from the moment the ship has passed the covered area.

Save clause to the contrary, the insurer is not bound to provide coverage where the damage has arisen by barratry of the Captain.

Save clause to the contrary but that can not be contrary to public order or save statutory provision to the contrary, the insurer is not bound to provide coverage where the damage has arisen by wilful misconduct of the assured. However, coverage may stand when the assured has acted wilfully but under *inter alia* duress or force majeure.

Contractual warranties

The parties may agree to extend contractually other causes that can allow the insurer to deny wholly or partial coverage such as in cases of unseaworthiness and / or violation of safety rules and / or breach of navigational regulations.

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.

The breach of the statutory warranties mentioned in answer 2 leads to loss of coverage in full.

There is a presumption that in case the insured objects are lost due to dubious or uncertain causes that they have been lost due to sea perils and thus the insurer is liable. The insurer will have the burden of proof to shift the presumption.

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 appears that all warranties are not mandatory and can be deviated by contract.

Yes, the insurer is 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. We have seen incorporation of foreign insurance standard clauses into Portuguese law policies being upheld by the courts.

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, provided the clause respects the conditions stated in the Rome I regulation.

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?

Yes, there is case law confirming absence of coverage in cases of barratry of the Captain; wilful misconduct of the insured and also violation of navigation rules such as the Colregs in collision cases when this was stated in the insurance policy for an H&M policy.

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.