MEMORANDUM

TO Organizing Committee

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SUBJECT AIJA London Conference 2015 - Questionnaire TLC

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

The Netherlands has a civil law system. Dutch civil law on insurance contracts is laid down in Book 7 of the Civil Code ('CC'). Article 925 (1) of Book 7 CC defines the contract of insurance as:

"Insurance is a contract whereby one party, the insurer, undertakes towards the other party, the policyholder, in consideration of a premium to make one or more payments, when, at the time the contract is concluded, there is no certainty for the parties whether, when or up to what amount any payment must be made, or even how long payment of the agreed payment of premium will last. Insurance is either an indemnity insurance or a benefit insurance."

Insurance contracts like H&M and P&I qualify as indemnity insurance and are governed by articles 925 – 963 of Book 7 CC, if Dutch law applies. Articles 943 and 963 Book 7 CC stipulate whether the provisions are mandatory or not.

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.

Dutch insurance law imposes various post-inception obligations on the insured which may allow the insurer to deny or limit coverage if breached by the insured.

a. *Obligation to notify the insurer of the materialization of the risk*

Pursuant to article 941 (1) Book 7 CC the policyholder or the person entitled to payment is or ought to be aware of the materialization of the risk, and must notify the insurer of such materialization. This must be done as soon as reasonably possible. In addition, the insured must provide the insurer within a reasonable period with all information and documents of importance for the insurer to be able to consider his payment obligation (article 941 (2) Book 7 CC).

b. *Obligation to take preventive measures*

Article 957 (1) Book 7 CC stipulates that as soon as a policyholder or the insured is or ought to be aware of the materialization of the risk or it being imminent, each must take, within reasonable bounds and to the extent each is in a position to do so, such measures as may result in prevention or in minimizing the loss or damage.

c. *Prohibition to acknowledge liability towards third parties*

Article 953 Book 7 CC provides that if an insurance against liability prohibits specific acknowledgement by the insured, a transgression of such a prohibition will not have any effect insofar as such acknowledgement is correct. A prohibition against any acknowledgment of facts never has any effect.

d. *Gross negligence and wilful misconduct*

The insurer shall not indemnify the insured for a loss caused by him with intent or recklessly (article 952 Book 7 CC). The term 'recklessly' displaced the old term gross negligence ('grove schuld') although it does not contain a substantive change.[1] In *Codam/Merwede* the Supreme Court held that gross negligence comprehends a degree of negligence which borders, in terms of blameworthiness, on intent.[2] Recklessness includes both wilful and non-wilful negligence by the insured.

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[1] *Parliamentarian History Book 7 CC, 1986, MvT, p. 25 and Asser-Wansink-Van Tiggele-van der Velde-Salomons IX*, Bijzondere overeenkomsten, Verzekering, Kluwer: Deventer 2012, p. 408.*

[2] *Supreme Court 12 March 1954, NJ 1954/386 (Codam/Merwede).*

This clause only applies in the event that the loss or damage was caused intentionally or recklessly by the insured itself. This means that only the acts and omissions of the insured itself fall within the scope of this clause. Only those persons considered to represent the insured (i.e. the legal entity) fall within the scope of article 952 Book 7 CC.[3] So if the owner of the vessel is a legal entity, then acts or omissions of the crew of the vessel do not fall within the scope of this clause. Insurers must show that the management of the company itself was involved in an incident causing the damage or that the management of the company was aware that the crew on board the vessel systematically breached the safety rules or regularly sailed undermanned without taking any precautions or measures.

The circumstances named under (i) – (iii) will in general not trigger the statutory post-inception obligations of the insured enumerated under a – c. However, as article 952 Book 7 CC is non-mandatory, the insurer can deviate within the insurance policy from its terms and from the related case law. In this way, stricter rules setting out the required degree of negligence or the attribution of the behaviour of certain people within the insured company could be included in the insurance policy. In general there are three options for the insurer:

- The insurer is allowed to narrow coverage by the inclusion in the policy of a wording specifying that 'this insurance is not in force if the vessel is unseaworthy';

- The insurer is allowed to exclude damage caused under particular circumstances, for example, 'this insurance does not provide coverage if the insured vessel deviates from the agreed trading area', or damage caused by excluded events,such as 'this insurance does not cover damage caused by fire';

- The insurer may include certain warranties, for example, 'the insured warrants that safety rules will not be violated'.

It depends on the policy wording whether (i) – (iii) will impact coverage.

Meanwhile, under Dutch law, there only exists an obligation of disclosure prior to conclusion of a policy. In other words, there is no ongoing duty of disclosure for the insured. A policy may nevertheless provide for an obligation of disclosure if there is an increased risk to the insured property (*risicoverzwaring*).

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[3] *Supreme Court 6 April 1979, NJ 1980, 34 (Kleuterschool Babbel).*

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.

a. Obligation to notify the insurer of the materialization of the risk

If the insured fails to notify the insurer of the materialization of the risk and/or to provide the insurer with all information and documents of importance, the insurer may reduce payment by the amount of the loss which he suffers as a result thereof. The burden of proof is on the insurer to prove that the insured failed to fulfil its obligation to timely notify the insurer as well as to show that the insurer suffered losses as a result thereof.

Article 941 (4)(5) Book 7 CC further provides that the insurer may only stipulate that the right to payment will lapse on failure to perform the obligation of notification and provision of documents if a reasonable interest is prejudiced. The right to payment will in any event lapse if the policyholder intentionally misleads the insurer by failing to timely notify, unless the lapse of the right to payment is not justified. It is up to the insured to prove that – despite the fact that it did not meet its obligation to timely notify the insurer – the interests of the insurer are not prejudiced. The burden of proof regarding the intentional misleading of the insurer by the insured is on the insurer.

b. Obligation to take preventive measures

If the insured fails to take preventive measures in order to prevent or minimize loss or damage, the insurer may reduce the payment by the amount of the loss the insurer suffers as a result (article 957 (3) Book 7 CC). The burden of proof is on the insurer to i) prove that the insured failed to take preventive measures despite the duty to do so and to ii) prove the loss he suffered as a result thereof.[4]

c. Prohibition to acknowledge liability towards third parties

If the insured breaches its obligation to acknowledge liability, the insured has to prove that the acknowledgement was correct and that it did not prejudice the insurer's position.

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[4] N. Van Tiggele – Van der Velde, Bewijsrechtelijke verhoudingen in het verzekeringsrecht, Kluwer, Deventer 2008, p. 176.

d. Gross negligence and wilful misconduct

The burden of proof rests with the insurer. In order to successfully deny coverage the insurer should on the balance of probabilities prove that the loss or damage was caused by the insured with intent or by recklessness. The burden of proof is onerous and difficult to meet. The wording of the H&M and/or P&I insurance may provide that coverage is excluded for a lower degree of fault and it is thereby easier to meet the burden of proof.

There is some case law in the Netherlands under H&M insurance in which the insurer denied coverage, maintaining that the insured intentionally caused fire on board a vessel. In order to successfully deny coverage the insurer has to prove that the insured set the vessel on fire and that a technical cause of the damage was unlikely. In BENE EST, insurers argued that a technical cause of the damage could actually be excluded – a technical cause was in their view only a theoretical option.[5] The Leeuwarden Court however held that the burden of proof that the insured set the vessel on fire rests with insurers. The fact that the cause of the fire was not identified by experts was at the risk of insurers.

In ALL-WAYS, the Supreme Court held that insurers were allowed to deny coverage as the collision in whichthe ALL-WAYS was involved was caused by the gross negligence of the insured.[6] Lack of experience and inability of the crew caused an incorrect manoeuvre as a result of which the collision occurred. As the insured Van de Graaf provided inadequately qualified crew on board the vessel, insurers could successfully refuse to pay the damage.

In TARZAN and HELL OF HOORN – both sailing yachts – the insurers successfully denied coverage by proving that the damage was caused by negligence of the insured.[7] In TARZAN, the Hague Court of Appeal held that a fire was caused by the insured, mainly based on the fact that the insured provided an unreliable statement of the incident and had removed an expensive radar installation from the vessel just before the incident.[8] In HELL OF HOORN the court of appeal ruled that the presumption that the insured intentionally set his vessel on fire was justified by expert evidence and also by the fact that the insured increased the insured value during wintertime when risks are rather low, as opposed to the

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[5] Court of Leeuwarden 16 May 2007, ECLI:NL:RBLEE:2007:BA9073.

[6] Supreme Court 26 April 2002, S&S 2002/96 (ALL-WAYS).

[7] Both cases are ruled under the former Code of Commerce which provided for a lower decree of fault ('merkelijke schuld') than article 952 Book 7 CC. However, given the fact that article 952 Book 7 CC is non-mandatory, insurers would be allowed to exclude damages caused by negligence of the insured.

[8] The Hague Court of Appeal 6 June 1991, S&S 1992/87 (TARZAN).

start of the boating season.[9]

In DEO VOLENTE / ALEIDA insurers also successfully denied coverage.[10] The DEO VOLENTE and ALEIDA collided on the Schelde-Rijn canal while the master of the ALEIDA was drunk and alone on the vessel. Insurers refuse to provide cover for the damage, stating that the damage was caused by gross negligence.

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.

The terms mentioned under a, b and c are mandatory and may not be deviated from to the disadvantage of the insured.

The provision mentioned under d is not mandatory. The insurer may provide that even lower degrees of fault are excluded from coverage.

The insurer is allowed to incorporate additional warranties and/or exclusions in contracts of H&M and P&I insurance (see also question 2 and 3). For example, the Dutch Bourse Policy for Inland Hull 2011 provides that the vessel should always possess the required certificates. In hull policies for fishing vessels generally a provision is included stipulating the number of crew members, depending on the fishing area.

If such warranties are included, the question invariably arises of whether insurers should be allowed to rely on the warranty in case there is no causal link between the event giving rise to the damage and a potential breach of the warranty by the insured. If, for instance, a fishing vessel is undermanned – five crew members instead of six as stipulated in the policy – and is involved in a collision just after leaving port for a week of fishing, could insurers rely on the warranty and deny cover?

In *Bicak/Aegon* the Supreme Court pointed out that it could be contrary to the principles of reasonableness and fairness to rely on a warranty if the causal link between the breach of the warranty and the event resulting in damage lacks.[11]

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[9] *The Hague Court of Appeal 7 April 1983, S&S 1983/102 (HELL OF HOORN).*

[10] *The Hague Court of Appeal 15 July 2014, S&S 2015/35 (DEO VOLENTE / ALEIDA).*

Bicak/Aegon relates to a fire in a bar. Insurers refused to pay the damage because plastic dustbins were used despite a warranty providing for metal bins. However, the insured was able to prove that the cause of the fire had nothing to do with the plastic dustbins, but instead started in the cupboard of the bar. The Supreme Court held that insurers were not allowed to rely on the breached warranty as this would go against the principles of reasonableness and fairness. So under Dutch law it would be necessary to establish a causal link between the non-fulfilment of the warranty by the insured and the damage.[12] Here Dutch law appears to differ from, for instance, English law, where the sole breach of the warranty seems sufficient for insurers to deny cover. In TWENTY ONE the Amsterdam Court of Appeal ruled that insurers were allowed to deny cover for the total loss of a yacht which sailed single-handed from Europe to the Caribbean.[13] In the policy conditions it was provided that at least three crew members should be on board while crossing the Atlantic. The appeal court stated that English law does not require a causal link between the breach of the warranty and the damage; the damage was caused by an explosion and subsequent fire on board the TWENTY ONE which probably had nothing to do with the single-handed voyage.

In the CHARLOTTE the policy conditions provided that no payment would be made for damage caused by the carriage of dangerous goods without full compliance with the statutory provisions on the carriage of dangerous goods ('ADNR').[14] Afterdischarging a cargo of naphtha, the CHARLOTTE exploded. Insurers refuse to pay owner's claim as they did not fully comply with the ADNR. The Hague Court of Appeal confirmed that, in order to successfully rely on the exclusion in the policy, insurers had to establish the causal link between the damage and the non-compliance with the ADNR by the insured. The causal link was accepted by the appeal court although the exact ignition source of the explosion could not have been determined.

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 choice of law clause in the H&M policy or P&I club's rules will normally be

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[11] Supreme Court 27 October 2000, NJ 2001/120 (Bicak/Aegon).

[12] Asser-Wansink-Van Tiggele-van der Velde-Salomons IX, Bijzondere overeenkomsten, Verzekering, Kluwer: Deventer 2012, p. 460-462.*

[13] The Amsterdam Court of Appeal 16 April 1992, S&S 1992/123 (TWENTY ONE).

[14] The Hague Court of Appeal 20 December 2011, S&S 2012/117 (CHARLOTTE).

recognised in the Netherlands. The courts in the Netherlands are familiar with the application of foreign law, mainly on the basis of legal opinions provided by the parties.

In ZWANET the Hague Appeal Court applied English law to the question of whether the owners of the ZWANET breached the implied warranty of legality.[15] The Appeal Court held that, given the particular circumstances of the case, it should have become clear to the owners that it concerned an illegal voyage. Also, on the question of whether the master of the ZWANET could qualify as the 'alter ego' of the owners, English law was applied.

In WIJMERS the Hague Appeal Court applied English law to the question of whether damage to the vessel caused by SRB bacteria would qualify as a 'peril of the sea'.[16] It was held that a peril of the sea requires a 'fortuitous cause or event' with a maritime character. The court of appeal was of the view that rust on vessels is quite common. For that reason it was ruled that the damage to the hull of the WIJMERS did not have an external cause – a peril of the sea – but must have been internal – for instance, the result of a lack of maintenance by the owners. It held that the serious rust due to the SRB bacteria was a direct and foreseeable consequence of the SRB-friendly environment on board the WIJMERS, which was not a fortuitous cause or event. Although this decision does not relate to a warranty or other term as mentioned in question 2, it does show that the courts in the Netherlands follow the interpretation of the chosen law.

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?

Reference is made to questions 1 to 5.

AKD
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[15] *The Hague Court of Appeal 23 October 2001, S&S 2003/11 (ZWANET).*

[16] *The Hague Court of Appeal 15 March 2011, S&S 2011/118 (WIJMERS).*