Shipping

September 2014

MARINE INSURANCE BULLETIN

Welcome to the September edition of our Marine Insurance Bulletin.

The Insurance Bill has recently been introduced into the UK parliament and, if passed, will make some major changes to the English law of marine insurance. The new legislation would constitute the most significant statutory change to English marine insurance law in over a century and we analyse the key provisions of the Bill.

A recent English Commercial Court case has emphasised the significance of follow clauses in marine policies. We set out the implications of the judgment, which demonstrates that following underwriters agreeing to be bound by a 'follow clause' will generally be required to follow the leading underwriters' decisions, even where the leading underwriter and the following underwriter are parties to two entirely separate insurance policies with different policy terms.

We then turn to sanctions and provide an update on what insurers need to know in light of the latest sanctions imposed on Russia. We look at the key risks, how policy terms can protect underwriters from sanctions exposure and what must be considered before providing security or paying claims.

Finally, we once again include our regular Marine Insurance Case Update, which highlights the major recent marine insurance cases.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

James Gosling, Partner, james.gosling@hfw.com
Jonathan Bruce, Partner, jonathan.bruce@hfw.com
Craig Neame, Partner, craig.neame@hfw.com

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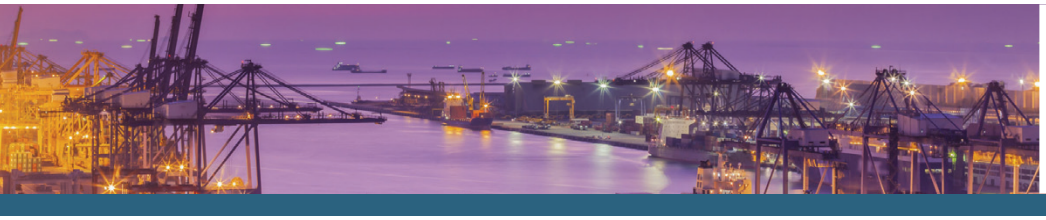

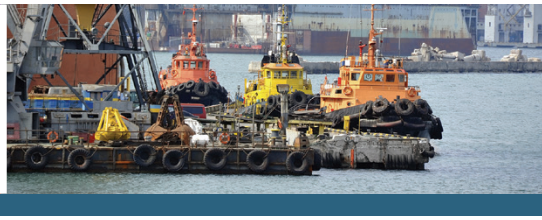

The Insurance Bill

On 17 July 2014, the Insurance Bill (the Bill) was introduced into the UK Parliament. The Bill was prepared as part of the second stage of the joint review of insurance contract law by the Law Commission and the Scottish Law Commission (the Commissions). The first stage of the joint review resulted in the Consumer Insurance (Disclosure and Representations) Act 2012. The Insurance Bill will be the most significant statutory change to marine insurance law in over a century and, if enacted in its current form, will make major changes to some aspects of the English law of marine insurance.

Proposals for reform

The Bill will introduce new law (replacing the existing common law) and will also amend parts of the Marine Insurance Act 1906 (the MIA 1906). The Bill contains proposals for reforms in areas such as:

- **Disclosure in business insurance**
  Clause 3 of the Bill replaces the duties regarding disclosure and representations that are contained in the MIA 1906. It introduces a new requirement for the insured to make a "fair presentation of the risk" before the parties enter into the insurance contract.

- **Warranties**
  Clause 9 prohibits provisions which purport to convert all representations in either the proposal or the policy into warranties. The principal purpose of this clause is to prohibit "basis of the contract" clauses. However, the insurer is still permitted to incorporate specific warranties into the policy.

Clause 10 repeals the provisions of the MIA 1906 and common law which completely discharge the insurer's liability from the time of breach of the warranty. Instead, the insurer's liability will be suspended from the time of a breach of warranty until the breach is remedied.

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- **An insurer's remedies for fraudulent claims**
  Clause 11 states that the insurer is not liable to pay a fraudulent claim, may recover any sums paid to the insured in respect of that claim and may treat the contract as having been terminated with effect from the time of the fraudulent act. Where the insurer terminates the contract, it is permitted to retain all premiums that the insured has paid and will not be liable for any events which occur after the time of the fraudulent act. However, the insurer will still be liable for events that occurred before the time of the fraudulent act.

In June and July 2014, the Commissions and HM Treasury (the sponsor of the Bill) consulted on a draft version of the Bill. The Bill that was introduced to Parliament is largely the same as the draft Bill.

Certain provisions that the Commissions had originally intended to include in the Bill, such as a reform of section 53 of the MIA 1906 (a broker's liability for marine insurance premium), proved controversial amongst stakeholders and were left out of both the draft Bill and the Bill that was introduced to Parliament.

Next steps

To enable the Bill to complete its passage through Parliament before the general election in May 2015, a simplified Parliamentary procedure will be used. The procedure is available only for Bills that attract a broad consensus of support. If the Bill receives Royal Assent before the current Parliamentary session ends on or around 30 March 2015, we expect the new Act to enter into force in the first half of 2016.

HFW have also published a Briefing on the Bill which explains some of the proposals in greater detail. The Briefing can be found at: http://www.hfw.com/The-Insurance-Contracts-Bill-July-2014

For more information, please contact Will Reddie, Associate, on +44 (0)20 7264 8758 or william.reddie@hfw.com, or your usual contact at HFW. Will is the secretary of the Insurance Law Committee of the City of London Law Society.

Sanctions: ensuring compliance

The ongoing crisis in Ukraine, and escalating sanctions imposed by the EU, US and other national governments, including restrictions relating to energy, defence and financial markets, mean that sanctions are now front page news. Huge penalties imposed on banks such as BNP Paribas and Bank of America mean that sanctions are on the business pages as well. But away from the headlines, what should marine insurers actually be doing in order to ensure compliance?

Stage 1 is to understand the risk. As ever, this comes down to understanding who you are insuring, for what risks and where in the world.

The sanctions position is constantly changing and insurers need to ensure that they are up to speed with the latest developments. By way of example, recent EU and US sanctions against Russia have targeted the ability of certain Russian enterprises to access EU and US debt and capital markets, and measures have also been introduced which restrict the supply of certain oil and gas equipment to Russian businesses and/or for use in Russia. In addition, further individuals and entities have been added to the EU sanctions list by 12 September 2014.

At the same time that additional restrictions are imposed under one sanctions programme, restrictions are being relaxed under another programme, with the limited suspension of certain sanctions against Iran being extended until November 2014, meaning that insurers may be asked to consider insuring certain voyages that were previously completely forbidden.

Insurers need to educate the brokers, local agents and anyone else who brings business through the door, so that they can ask the right questions and not expose insurers. Once you have carried out your due diligence, you need to make sure that you keep a paper trail to show the checks you carried out and why you decided it was safe to proceed.

Stage 2 is to write the policy on the correct terms. This will include warranties from the assured, as well as a robust sanctions exclusion clause.

The market sanctions clause is a useful starting point, but you should also consider specifically excluding any particular risks which you know cannot be written without violating the sanctions. You need to think about whether the policy should terminate in the event that the sanctions position changes, or merely be suspended. Likewise, you need to consider what will happen if the insurance is not affected by a change in sanctions, but the policy of reinsurance is affected (for example because the reinsurer is a US company).

Stage 3 is to deal with claims. You need to find out as much information as you can before you provide security or pay any claims. Again, this boils down to the who, what, where and when of the claim. The beneficiary may be a third party you were not previously aware of, or a subrogated insurer, and they need to be checked. You also need to work closely with your bank to check that you can make the necessary payments, put up security, etc.

Given all of the focus on them, sanctions are clearly here to stay, at least for the short term, and insurers need to ensure that they have in place a process to ensure compliance.

For more information, please contact Daniel Martin, Partner, on +44 (0)20 7264 8189 or daniel.martin@hfw.com, or your usual contact at HFW.

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>
> DANIEL MARTIN, PARTNER



Follow my leader? The *ST EFREM*

The English Commercial Court recently considered[1] whether a follow clause obliged an overseas underwriter to follow the London market in the settlement of a claim and, if so, whether a clause in the settlement agreement between the London market and the assured purporting not to bind "any other insurer" meant that the overseas underwriter was not obliged to follow the settlement.

The background

The *ST EFREM* suffered generator damage. 50% of the hull and machinery interest was insured in London by Catlin, Ark and Brit (the Lead Policy) and 30% by Aigaion in Greece under a separate insurance policy (the Aigaion Policy).

The Aigaion Policy contained a 'follow clause' which read:

"Agreed to follow London's Catlin and Brit Syndicate in claims excluding ex-gratia payments".

The assured made claims under both policies. A settlement was reached under the Lead Policy in which the London underwriters agreed to settle for US$779,500. The settlement agreement included a provision at clause 7 as follows:

"The settlement and release pursuant to the terms of this Agreement is made by each Underwriter for their respective participations in the Policy only and none of the Underwriters that are party to this Agreement participate in the capacity of a Leading Underwriter under the Policy and do not bind any other insurer providing hull and machinery cover in respect of the St Efrem".

This decision is a stark reminder that following underwriters who agree to be bound by a 'follow clause' will be obliged to follow leading underwriters' decisions, within the remit of the follow obligations in the clause in question.

The assured argued that Aigaion was obliged to follow that settlement.

The judgment

The Court first considered whether the follow clause in the Aigaion Policy required Aigaion to follow any settlement by Catlin and Brit under the Lead Policy.

The Court noted that it is necessary in each case to examine the terms of the follow clause in question. This follow clause was an agreement between the assured and Aigaion that Aigaion would follow the settlement of claims by Catlin and Brit. The Judge considered that effect could be given to the simple language of the follow clause in this case without the need to introduce the concept of agency (on which the law remained unclear).

The Court then had to consider whether clause 7 of the settlement agreement amounted to an agreement by the assured that the settlement agreement would not bind Aigaion.

The judge held that the phrase *"any other insurer"* in clause 7 described insurers of the vessel other than the Lead Policy Lloyd's syndicates, and that it therefore included Aigaion. The intention of that clause was that in settling the insurance claim the Lloyd's syndicates were not purporting to bind Aigaion. However, the follow clause was a contractual agreement between the assured and Aigaion that Aigaion would follow a settlement by Catlin and Brit, whether or not Catlin and Brit purported to bind Aigaion.

The judge found that, in any event, Aigaion would not have been able to rely on clause 7 to avoid their follow obligation because the purpose of clause 7 was not to confer a benefit on non-party Aigaion. There were no clear words sufficient to justify a conclusion that, by clause 7, the assured intended to give up the benefit of the follow clause in the Aigaion Policy.

The follow clause was accordingly triggered by the settlement agreement.

Conclusion

This decision is a stark reminder that following underwriters who agree to be bound by a 'follow clause' will be obliged to follow leading underwriters' decisions, within the remit of the follow obligations in the clause in question. This is the case even where the leading underwriter and the following underwriter are parties to two separate insurance policies containing different policy terms.

We understand that an appeal is due to be heard by the Court of Appeal later this year.

For more information please contact Jenny Salmon, Associate, on +44 (0)20 7264 8401 or jenny.salmon@hfw.com, or your usual contact at HFW.

1 San Evans Maritime Inc and Others v Aigaion Insurance Co SA (The St Efrem)

Quarterly Case Update

1. Sea Glory Maritime Co and Another Company v Al Sagr National Insurance Co[1]
   The nature of an ISM warranty and whether the assured has misrepresented previous port state detentions.

2. In the matter of the *ALEXANDROS T* (No 3)[2]
   First reported in Case Update 2. Supreme Court decision to reverse the Court of Appeal decision that English proceedings should not be stayed because of connected proceedings which had been commenced in Greece allegedly in breach of settlement agreements.

3. Amlin Corporate Member Ltd and Others v Oriental Assurance Corporation[3]
   First reported in Case Update 2 in relation to whether Oriental were entitled to a stay of proceedings. This judgment considers whether Oriental were in breach of the typhoon warranty and therefore whether the reinsurance contract between Amlin and Oriental could be avoided.

4. Venetico Marine SA v International General Insurance Company Limited and Nineteen Others[4]
   Whether a vessel following a grounding was caused by a peril of the seas under section 55(1) of the Marine Insurance Act and therefore a CTL.

5. San Evans Maritime Inc and Others v Aigaion Insurance Co SA (*ST EFREM*)[5]
   Consideration of whether Aigaion were obliged to follow the leaders in a settlement with the assured.

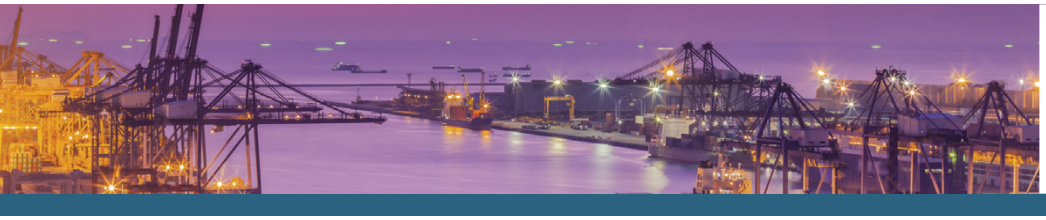
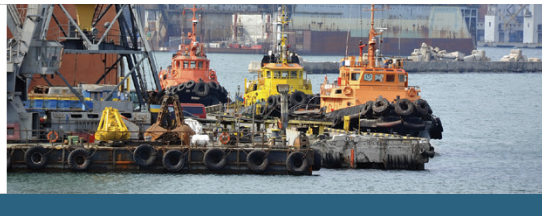
6. Kairos Shipping Limited v Enka & Co LLC (*ATLANTIK CONFIDENCE*)[6]

   Kairos Shipping Limited v Enka & Co. LLC (and Others)[7]
   Whether a limitation fund in England can be constituted by way of a Club LOU.

7. Gard Marine & Energy Limited v China National Chartering Co. Ltd and Others (*OCEAN VICTORY*)[8]
   Charterers attempt to dilute the classic test for an unsafe port.

For full details of the cases covered here, please visit: www.hfw.com/Marine-Insurance-Update-September-2014

1 [2013] EWHC 2116 (Comm)
2 [2013] UKSC 70
3 [2013] EWHC 2380 (Comm)
4 [2013] EWHC 3644 (Comm)
5 [2014] EWHC 163 (Comm)
6 [2013] EWHC 1904 (Comm)
7 [2014] EWCA Civ. 217
8 [2013] EWHC 2199 (Comm)

Conferences and events

C5 Economic Sanctions & Financial Crime Forum for the Financial and Insurance Industries
London
8–9 October 2014
Presenting: Daniel Martin

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